IN THE MONTGOMERY COUNTY, OHIO, COURT OF COMMON PLEAS
CIVIL DIVISION

LARRY C. JAMES, *et al.,*	:	
	:	
Plaintiffs,	:	Case No. 2017 CV 00839
	:	
v.	:	
	:	
DAVID HOFFMAN, *et al.,*	:	Judge Timothy N. O'Connell
	:	
Defendants.	:	

AFFIDAVIT OF

LARRY JAMES

and

Exhibits A - E

(PART 1)

In Support Of

PLAINTIFFS' CONSOLIDATED MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND FORUM NON CONVENIENS

IN THE MONTGOMERY COUNTY, OHIO, COURT OF COMMON PLEAS
CIVIL DIVISION

LARRY C. JAMES, et. al.,	:	**CASE NO: 2017 CV 00839**
	:	
Plaintiffs,	:	**Judge Timothy N. O'Connell**
	:	
vs.	:	
	:	
DAVID HOFFMAN, et. al.,	:	
	:	
Defendants	:	
	:	

AFFIDAVIT OF LARRY JAMES

State of Ohio)
) ss:
County of Montgomery)

1. I, Larry James, having been first duly cautioned and sworn, state the following based upon personal knowledge:

2. I am a resident of and licensed to practice psychology in Ohio, and I am a Professor in the School of Professional Psychology at Wright State University in Dayton, Ohio.

3. I was first contacted in Ohio by email by the American Psychological Association (APA) President, Nadine Kaslow, asking for my "complete cooperation" with an independent review being undertaken by APA. [Exhibit A] I was then contacted, also by email received at my home through my employer provided email address at Wright State University, by Mr. David Hoffman of the law firm Sidley Austin LLP asking me to provide information for the independent review. [Exhibit A]

4. Following the initial contact by Mr. Hoffman, he additionally communicated that he would probably want to talk with me both in person and by phone, and he ultimately proposed times for us to meet at my office in Dayton, Ohio. Mr. Hoffman and his team traveled to Dayton to meet with me, and I was interviewed in person at my office on May 1, and then again by telephone on June 22, 2015. During that time period his associate also sent questions to me at my office in Ohio.

5. I had been a subject matter expert member for the Presidential Task Force (Task Force) on Psychological Ethics in National Security (PENS) that was convened in 2005 by then-APA President Ron Levant, also an Ohio resident. It was as a member of that Task Force that I received the email from Nadine Kaslow first requesting my

participation in the independent review. Once selected for the Task Force, I was invited to join a listserv exclusively for discussion among PENS members that was initiated by Dr. Steven Behnke, an APA staff member assigned to the Task Force. The listserv opened on April 22, 2005 and continued until June 26, 2006. With the exception of the three days (June 24-26, 2005) during which time the Task Force met in person, all discussions among Task Force members took place on the listserv by email and members of the Task Force participated from their home or work locations. The final version of the PENS document was sent by email to me when it was completed.

6. I received online, read-only access to the final Report on July 7, 2015, the day before the Report's release to the APA Council of Representatives (Council), of which I was a member at the time, and I accessed the Report from my home. However, I was not provided with any forum for responding to or lodging any objections to the Report's allegations and conclusions prior to it being published to Council. In spite of lodging my objections to the document, I was not given any notice that a Revised Report was being prepared, or given any chance to contribute to the document. That Revised Report was released by APA on September 4, 2015.

7. I was provided no opportunity to respond meaningfully to the Report's allegations against me despite the fact that the Report focused on my actions starting with my involvement on the PENS Task Force in April 2005 and stretching though to discussion of me related to the Leso ethics case, which was closed in December 2013, a longer period of time than any other individual named in the Report.

8. Given the inadequate time I was afforded to respond to the Report's allegations before it was given to all APA Council members, I was particularly surprised to learn from the news media and various posts on the Council listserv that Drs. Steven Reisner and Stephen Soldz were provided with access to a draft of the Report on June 27, and that they subsequently met with the Board to provide recommendations at the Board's July 2-3, 2015 meeting. It was well known that Drs. Soldz and Reisner had previously accused me quite publicly, on numerous occasions of wrongdoing and that they were collaborating with the reporter from *The New York Times*, whose book had sparked the investigation. https://www.nytimes.com/2015/05/01/us/report-says-american-psychological-association-collaborated-on-torture-justification.html

9. Along with Plaintiffs Dunivin, Banks and Newman, I first objected to the contents of the Report in a comment posted to an interactive site on APA's website on July 31, 2015. http://www.apa.org/independent-review/responses.aspx [1] The APA website would not allow us to post a lengthy response and is maintained separately from the prominent site where the Report and the Revised Report are posted. None of my objections were included in the errata or Revised Report. (I also posted my objections as soon as possible

[1] In some instances, we have provided a link to the source material for ease of access when the document as printed out would alter the form of the original. Upon request, we will immediately provide the Court with hard copies of all the linked documents.

to the online Council listserv.) My Ohio colleague, Ron Levant, also posted a comment to this interactive site.

10. When the Report was published, it rekindled questions about my actions that had previously been expressed by my university when ethics complaints were being filed against me and letters were being sent by the same complainants to my university's President, Provost and Board of Trustees. In fact, my Dean emailed me on July 13, 2015 expressing her concern that the Report's finding of improper handling of the ethics complaint against me combined with my membership on the PENS Task Force would reopen old allegations made against me.

11. Shortly after the Report was published, the Ohio Psychological Association (OPA) sent an email to all of its members reporting that it's Executive Committee met on July 17 to discuss the Hoffman Report and encouraging members to go to the APA website and read the Report. [Exhibit B] The Ohio Board of Psychology also discussed the findings of the Report as reflected in its July 30, 2015 meeting minutes. [Exhibit C]

12. The fact that the public Report contained confidential information from my APA ethics complaint case file compounded matters. I had no notice that any of this would be released and it violates the rules of the APA ethics complaint process. The Report had an adverse impact on the students, faculty and the staff that I could not ignore. I was forced to begin having numerous open discussions and forums with all interested members of my school to defend myself and provide the kind of information that was intentionally omitted from the Report by Mr. Hoffman and his colleagues. Several meetings took place among my Dean, the Associate Dean, faculty, students and me. The situation was made all the more difficult by an article repeating the Report's false conclusions about me that appeared in the *National Psychologist*, a psychology trade newspaper published in Ohio, that was put into the mailboxes of each and every faculty member of my school. (http://nationalpsychologist.com/2015/10/hoffman-report-says-ethics-standards-intentionally-loosened/103000.html)

13. The Report contradicted and omitted a lot of information I provided during the interview with Mr. Hoffman (the notes of which he is now refusing to provide to our attorney). For example, I spoke with him about the ethics complaints previously filed against me in connection with my interrogation support work. I informed Mr. Hoffman during our interview that Dr. Trudy Bond, a resident of Toledo, Ohio and four other Ohio residents, have repeatedly filed false allegations against me. Dr. Bond has filed multiple complaints at the state level, including one with the Ohio Board of Psychology [Exhibit D] that was found by the Board to warrant no action against me. [Exhibit E]

14. With the help of an Ohio attorney (Mr. Terry Lodge) and others she has also filed a legal action in the Ohio Court of Common Pleas in an attempt to force the Ohio Board of Psychology to take action against me (as she also did in Louisiana against the LA State Board of Examiners of Psychologists, my childhood home, where I am also licensed). The Ohio Court (as well as the Louisiana Court) dismissed the claims upon the recommendation of the Magistrate. [Exhibit F]

15. Finally, Dr. Bond has also repeatedly submitted information to the United Nations Committee Against Torture, mentioning me specifically in those documents and encouraging war crimes prosecutions. She first submitted her complaint on September 29, 2014. [Exhibit G.]

16. On June 27, 2016, Dr. Bond, relying on the Hoffman Report, again asked the UN Committee to move forward with the prosecutions. [Exhibit H].

17. Human Rights Watch has also submitted the Report to the International Criminal Court for consideration of war crimes prosecutions. That document expressly mentioned Mr. Hoffman's concept of "deliberate avoidance" in a criminal context. [Exhibit I]

18. I have stated on multiple occasions, both in documents reviewed by Mr. Hoffman for his investigation, and in my interview with him, that I worked to prevent abuses and that while I was in both Iraq and Guantanamo, policies were put in place that prohibited the sort of actions that he claims were allowed, and that I, with my colleagues, colluded to allow. (See for example, Complaint ¶ Exhibit B)

19. I have had no adequate forum to respond to Mr. Hoffman's and APA's most recent allegations against me which are completely and entirely false and have been shown to be unsubstantiated on multiple occasions. Mr. Hoffman was well aware of that fact when he published his Report, and his Revised Report, to the Board, including APA Board member Louise Douce, who works at Ohio State University.

20. Shortly after the Report became public, Dr. Douce emailed and phoned me to tell me she knew that I had done nothing wrong and that she hoped I did not feel betrayed by her. Dr. Nadine Kaslow, who also knew about the repeated false allegations made by Dr. Bond, and their dismissal, also admitted to me by email that those named in the Report were immediately deemed "guilty" by everyone. Dr. Kaslow and I have previously discussed the false allegations made against me on numerous occasions, including during her visit to my University at my invitation to speak at the Wright State University graduation in July of 2012. When Dr. Kaslow voted to publish the Report on behalf of APA, she knew that many of its allegations were completely false as did others on the Board, including Drs. Douce and Jennifer Kelly.

21. All of this has generated considerable and highly negative media coverage both locally in Dayton and around the entire state of Ohio over many years, and again recently. [Exhibit J] It has negatively impacted my family and my work on a repeated basis. No matter what a Court, or legislative body holds, Dr. Bond and her colleagues continue to wrongly accuse me of the same allegations. Mr. Hoffman did not put any of this information in his Report, in spite of me giving it all to him during our multiple conversations—he simply repeated her false allegations once again. Then the APA Board, with full knowledge that I have been repeatedly cleared of these charges published them again and repeatedly to the world, including residents of Ohio who are my colleagues and neighbors.

FURTHER AFFIANT SAYETH NOT.

Larry James

Sworn and subscribed to before a notary public in the State of Ohio, this 5th day of May 2017.

TAMRA S CHRISMAN
NOTARY PUBLIC - OHIO
MY COMMISSION EXPIRES
09/11/2019

Notary Public

EXHIBIT A -JAMES AFFIDAVIT

From: "Kaslow, Nadine" <nkaslow@emory.edu>
Date: December 12, 2014 at 2:20:09 PM EST
To: "Kaslow, Nadine" <nkaslow@EMORY.EDU>
Cc: "Jesse Raben (jraben@apa.org)" <jraben@apa.org>
Subject: INDEPENDENT REVIEW: REQUESTING YOUR COOPERATION

To All Former Members of the APA PENS Task Force,

As you may know, the APA Board of Directors has authorized the engagement of David Hoffman of the law firm Sidley Austin to conduct an independent review into the allegations in James Risen's recent book that the APA colluded with the Bush Administration after 9/11 to promote, support, or facilitate the use of enhanced interrogation techniques by the CIA and the Defense Department in the global war on terror.

I have attached a letter from Mr. Hoffman asking for your assistance in his review. The sole objective of the review is to ascertain the truth about these allegations following an independent review of all available evidence, wherever that evidence leads, without regard to whether the evidence or conclusions may be deemed favorable or unfavorable to the APA. **Your complete cooperation and full assistance in the review will be an important part in assuring that all relevant information is available to Mr. Hoffman.**

The APA Board has formed a Special Committee to interact with Mr. Hoffman and provide him with whatever assistance he needs. The resolution and public statement of the APA Board authorizing the independent review and creating the Special Committee are attached to Mr. Hoffman's letter. I am the Chairman of that Special Committee, and you may feel free to contact me if you have any questions about this process that are not answered by the Board's resolution and public statement.

Thank you in advance for your assistance and cooperation in this matter.

Sincerely,
Nadine J. Kaslow, PhD
APA 2014 President

Nadine J Kaslow, PhD, ABPP
Professor, Vice Chair, Chief Psychologist (Grady)
President, American Psychological Association
Editor, *Journal of Family Psychology*
Emory Dept of Psychiatry & Behavioral Sciences, Grady Hospital, 80 Jesse Hill Jr Dr
Atlanta, GA 30303
404-616-4757 (office); 404-547-1957 (cell)

From: "Hoffman, David H."
Date:02/26/2015 15:23 (GMT-05:00)
To: "James, Larry C."
Cc: "Carter, Danielle"
Subject: APA independent review: Request for assistance
Dear Dr. James:

I am following up on the email from Dr. Nadine Kaslow on behalf of the APA (set out below) in which she requested your cooperation and assistance in the independent review we are conducting on behalf of the APA regarding the post-9/11 involvement of psychologists in detainee interrogations, the APA Ethics Code, and related APA ethics pronouncements including the PENS Task Force on which you served. We very much appreciate your willingness to assist us in our review.

Dr. Kaslow's email attached a letter from me (also attached here), which described our independent review in greater detail and requested that all relevant documents be preserved. As I said in my letter, we are conducting the review in a completely independent fashion with the sole objective of ascertaining the truth about the allegations through an independent review of all available evidence, wherever that evidence leads, without regard to whether the evidence or conclusions may be deemed favorable or unfavorable to APA.

I left you a voice mail today to ask for your assistance in our review. As I said in my voice mail, I would like to schedule a meeting with you to discuss any information, observations, or insights you have on this subject matter. For the moment, however, I would like to request that you provide us with any documents or records in your possession – including any notes, emails, or other communications – that may be relevant to the issues of the independent review. Any document or record that would be useful in attempting to understand the APA's actions, decisions, and communications on this subject, especially between 2001 and 2008, is something that we would consider helpful and relevant to our review.

Please consider whether you have both hard copies and electronic documents that would be relevant to us. These documents may include any notes, memos, correspondence of any sort (whether emails, letters, etc.), calendar entries, or drafts of reports or revisions, among other things. If you are planning to search your emails or other electronic records for relevant documents and are not sure how to proceed, we would be happy to discuss this with you and to provide any assistance or share our thoughts about how best to locate such documents.

Some of the specific categories of documents that are relevant to our review are:

1. Any documents related to the PENS Task Force, including documents relating to (a) the idea of creating such a task force, (b) the planning and preparation for the task force, (c) the selection of task force members, (d) the formation of the task force, (e) the meetings of the task force (including meeting notes and agendas), (f) the drafting and dissemination of the task force report (including any drafts or comments on drafts), and (g) subsequent discussions and follow up actions relating to the report.

2. Any documents that pre-date 2009 relating to the role of psychologists in national security interrogations, including any documents (such as notes or emails) relating to any discussions or correspondence on this topic with anyone affiliated with the APA (whether Board

members, management, staff, or otherwise), or with military, CIA, or other government officials;

3. Any documents related to conferences or meetings sponsored, organized, or hosted by APA between 2001 and 2005 where one of the topics to be discussed was interrogations, educing information, or deception detection.

4. Any documents relating to the 2002 revisions to the APA Ethics Code (such as documents relating to the meetings, discussions, and draft revisions of the Ethics Code Task Force) that have any bearing on psychologists' participation in interrogations; and

5. Any documents relating to resolutions, petitions, or referendums considered or acted on by the APA Council of Representatives on this subject matter from 2005 to 2009.

If you have any documents that may be relevant to us, we would very much appreciate your providing us with copies of the documents within the next two weeks. It would be of great assistance to the APA and to our independent review. As I mentioned above, if we can make this process easier for you by being of any assistance, please do not hesitate to let me know. You may send us documents either by mail at the address listed below, or by email either to me or our independent review team's email address, which is apareview@sidley.com.

As Dr. Kaslow said in her email, receiving your full cooperation and assistance is important in ensuring that we are able to gather all relevant information – which is of course critical to our effort to conduct a complete and thorough review of these issues.

Thank you very much in advance for your time, and for your assistance and cooperation in this matter. And please do not hesitate to contact me if you have questions about these requests.

David Hoffman

David H. Hoffman | Sidley Austin LLP
One South Dearborn St. | Chicago, IL 60603
david.hoffman@sidley.com | P: 312-853-2174
Assistant: Carol Graf | cgraf@sidley.com | P: 312-853-7231

From: James, Larry C. [mailto:larry.james@wright.edu]
Sent: Thursday, February 26, 2015 3:11 PM
To: Hoffman, David H.
Cc: Carter, Danielle
Subject: RE: APA independent review: Request for assistance

Hi there and thanks for contacting me. Would you like to talk by phone, in person or both? The best phone number to reach me at is my cell at
937 765 1507.

This Tuesday at 9a.m., 2 or 3 p.m. EST would work. Im open this coming Wednesday from 8 a.m. till about 5 p.m.

From: Hoffman, David H. <david.hoffman@sidley.com>
Sent: Thursday, February 26, 2015 6:55 PM
To: James, Larry C.
Cc: Carter, Danielle
Subject: RE: APA independent review: Request for assistance

Thanks very much for the quick response, Dr. James. We appreciate it. We'll probably want to talk both in person and by phone, although next week is difficult on our end. Can we follow up with you next week to propose some phone and/or in-person times to talk.

Thanks again.
David Hoffman

David H. Hoffman | Sidley Austin LLP
One South Dearborn St. | Chicago, IL 60603
david.hoffman@sidley.com | P: 312-853-2174
Assistant: Carol Graf | cgraf@sidley.com | P: 312-853-7231

From: James, Larry C.
Sent: Tuesday, March 17, 2015 09:29:12 AM
To: Hoffman, David H.
Subject: Re: APA independent review: Request for assistance
hi there Mr Hoffman, I haven't heard back from you so I just wanted to follow-up with you to see if you still need to talk with me?

Larry

From: "Hoffman, David H."
Date:03/17/2015 11:42 (GMT-05:00)
To: "James, Larry C."
Cc: "Carter, Danielle"
Subject: RE: APA independent review: Request for assistance

Larry,
Yes, we are definitely going to follow up and are looking forward to talking with you. Our schedule has been very full the last few weeks so my apologies for the silence on our end, but my guess is we'll be emailing you in the next week to suggest some dates and times. Thanks for your patience, and again, we're looking forward to connecting.
David

From: James, Larry C. [mailto:larry.james@wright.edu]
Sent: Tuesday, March 17, 2015 12:31 PM
To: Hoffman, David H.
Subject: RE: APA independent review: Request for assistance

Super!

From: "Hoffman, David H."
Date:04/08/2015 18:42 (GMT-05:00)
To: "James, Larry C."
Cc: "Latifi, Yasir"
Subject: RE: APA independent review: Request for assistance

Larry,

Thanks for bearing with us regarding our schedule. By any chance are you available next Friday, April 17, for us to meet with you at your office? I'm copying one of my Sidley colleagues, Yasir Latifi, who would join me. That would be a good day on our end and we could meet you just about any time.

Thanks.
David

DAVID HOFFMAN
Partner

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david.hoffman@sidley.com

From: James, Larry C. [mailto:larry.james@wright.edu]
Sent: Wednesday, April 08, 2015 6:09 PM
To: Hoffman, David H.
Cc: Latifi, Yasir
Subject: RE: APA independent review: Request for assistance

Shucks I have patients scheduled all day most of next week because I'm out of town this week.

How about the morning of Tuesday or Wed. The 21st or 22nd?
There is a non stop flight on United to and from Chicago to Dayton

From: Hoffman, David H.
Sent: Wednesday, April 08, 2015 7:15 PM
To: James, Larry C.
Cc: Latifi, Yasir
Subject: RE: APA independent review: Request for assistance

I'm scheduled to be on the east coast those days but let me see if I can rearrange something. Yes, I saw that there are typically a lot of good Chicago-Dayton nonstop options on United and American, so I'm sure we'll be able to make something work.

DAVID HOFFMAN
Partner

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david.hoffman@sidley.com

-------- Original message --------
From: "Latifi, Yasir"
Date:04/15/2015 16:56 (GMT-05:00)
To: "James, Larry C."
Cc: "Hoffman, David H."
Subject: RE: APA independent review: Request for assistance

Dr. James,

Hope you are well. I am following-up on David Hoffman's email regarding alternative interview times. We could potentially meet you in Ohio sometime on May 1st. Would that work for you? If not, please provide us with additional dates/times over the next 2 – 3 weeks for us to meet. Many thanks.

S. YASIR LATIFI
Associate

Sidley Austin LLP
+1.202.736.8537
ylatifi@sidley.com

From: James, Larry C. [mailto:larry.james@wright.edu]
Sent: Wednesday, April 15, 2015 5:53 PM
To: Latifi, Yasir
Subject: RE: APA independent review: Request for assistance

Yes that would work perfectly mm

Sent via the Samsung Galaxy Note® II, an AT&T 4G LTE smartphone

From: "Latifi, Yasir"
Date:04/15/2015 19:16 (GMT-05:00)
To: "James, Larry C."
Cc: "Hoffman, David H."
Subject: RE: APA independent review: Request for assistance

Thanks very much, Dr. James. Let us tentatively plan to meet you on May 1st. Do you have any preference for times that day? We wish to, ideally, chat with you for at least a few hours. We will explore flight timings on our end as well and remain in touch as we finalize the details.

S. YASIR LATIFI
Associate

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From: James, Larry C.
Sent: Wednesday, April 15, 2015 06:29:56 PM
To: Latifi, Yasir
Cc: Hoffman, David H.
Subject: RE: APA independent review: Request for assistance
I would prefer the earlier the better.
Like about starting at 9 or 10 a.m.
I can pick you guys up at the Dayton Airport and head to my office

From: Latifi, Yasir
Sent: Wednesday, April 15, 2015 7:38 PM
To: James, Larry C.
Cc: Hoffman, David H.
Subject: RE: APA independent review: Request for assistance

Great, thanks. We will work on flight times and finalize details with you in the coming days.

From: "Latifi, Yasir"
Date:04/21/2015 21:41 (GMT-05:00)
To: "James, Larry C."
Cc: "Hoffman, David H."
Subject: RE: APA independent review: Request for assistance

Hi again Dr. James,

Looking again at May 1, would it be possible to meet in the afternoon—say, around 2 pm—or is the morning the only time that works best for you? We'd still want to chat with you for a few hours in either case. Many thanks.

S. YASIR LATIFI
Associate

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ylatifi@sidley.com

From: James, Larry C. [mailto:larry.james@wright.edu]
Sent: Tuesday, April 21, 2015 9:53 PM
To: Latifi, Yasir
Cc: Hoffman, David H.
Subject: RE: APA independent review: Request for assistance

Yes. I have marked off the whole day so that will work

From: Latifi, Yasir
Sent: Tuesday, April 21, 2015 09:01:16 PM
To: James, Larry C.
Cc: Hoffman, David H.
Subject: RE: APA independent review: Request for assistance
Great, thanks very much. Let us tentatively plan for 2 pm. We will let you know once we have finalized our flight times.

S. YASIR LATIFI
Associate

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ylatifi@sidley.com

From: "Hoffman, David H."
Date:04/21/2015 22:46 (GMT-05:00)
To: "Latifi, Yasir" ,"James, Larry C."
Subject: RE: APA independent review: Request for assistance

Thanks, Larry, looking forward to meeting you.

David

From: James, Larry C. [mailto:larry.james@wright.edu]
Sent: Monday, April 27, 2015 6:09 AM
To: Hoffman, David H.; Latifi, Yasir
Subject: RE: APA independent review: Request for assistance

Hi guys. Are we set for This Friday (the 1st)?

If so can you tell me what time does your plane arrive/flight number so I can pick you guys up at the airport?

LCJ

From: Hoffman, David H.
Sent: Monday, April 27, 2015 8:57 AM
To: James, Larry C.; Latifi, Yasir
Subject: RE: APA independent review: Request for assistance

Thanks very much Larry. We're happy to take a cab from the airport so please don't feel obligated to pick us up if you have other things to do. But of course if it's convenient for you, we'd be happy to take a ride from you.

We're coming from two different cities so we'll be arriving at somewhat different times. I'm coming from Chicago and I think I arrive second – I land at 1:19pm, on United # 4730. Yasir is coming from DC. Yasir, is that right that you get in before me?

Thanks again.
David

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From: "Latifi, Yasir"

Date:04/27/2015 12:48 (GMT-05:00)

To: "Hoffman, David H."

"James, Larry C."

Subject: RE: APA independent review: Request for assistance

Yes, David, you are correct. I land at 11:55 am, so I can grab a bite to eat at/around the airport before you arrive.

S. YASIR LATIFI
Associate

Sidley Austin LLP
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ylatifi@sidley.com

From: James, Larry C.
Sent: Friday, May 01, 2015 11:43:25 AM
To: Latifi, Yasir; Hoffman, David H.
Subject: RE: APA independent review: Request for assistance

Hi guys I'm here at the airport.

I'll meet you as you come out of the main exit. There is only 1 main exit from the terminal here in Dayton.

Lj

From: Latifi, Yasir
Sent: Friday, May 01, 2015 11:52:18 AM
To: James, Larry C.; Hoffman, David H.
Subject: RE: APA independent review: Request for assistance

Thanks, Dr James. David should be landing in a few minutes, so me and him will come out together thereafter. We'll call your cell once we're out.

Reply all

Fri 5/1/2015, 1:33 PM

Latifi, Yasir <ylatifi@sidley.com>;

James, Larry C.

You forwarded this message on 3/2/2016 9:55 PM

Sorry for the delay. We landed a few minutes ago and I'm walking through the terminal now.

From: "Latifi, Yasir"
Date:06/15/2015 17:05 (GMT-05:00)
To: "James, Larry C."
Cc: "Hoffman, David H."
Subject: Follow-up questions re: 2007 APA Convention

Hi Larry,

We hope this message finds you well. We are heading into the home stretch of our investigation and wanted your help in closing some loose ends about your involvement with the 2007 APA Convention. In particular, we wanted your response to two issues:

- What were your exact dates of deployment to Guantanamo in 2007 and 2008? You informed us that you were stationed at Guantanamo during the August 2007 APA Convention, and your book alludes to being stationed there in 2008, so we wanted to make sure we had the correct dates.

- Do you recall exactly when you were asked to replace Sharon Manne as the Division 38 representative ahead of the August 2007 Council meeting? It would be helpful to share with us any record/recollection of an official communication you have about this issue.

- Did anyone raise concerns about your Division 38 appointment since you were deployed that year? Did you have any concerns (1) about whether you could attend the August 2007 Council meeting, or (2) about whether you could fulfill all your duties as a Council member while deployed?

Thanks very much, Larry. If it is easier to chat over the phone about these issues, please let me know your availability tomorrow or Wednesday to speak. Otherwise, we hope to receive an email response from you mid-week.

All the best,
yasir

S. YASIR LATIFI
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ylatifi@sidley.com
www.sidley.com

From: James, Larry C. [mailto:larry.james@wright.edu]
Sent: Monday, June 15, 2015 7:09 PM
To: Latifi, Yasir
Cc: Hoffman, David H.
Subject: RE: Follow-up questions re: 2007 APA Convention

I didn't have any concerns about being able to perform my CAR duties while deployed.

I don't have any idea about when I replaced her on council.

I was deployed to Cuba from June 2007 to June 2008

-------- Original message --------
From: "Latifi, Yasir"
Date:06/15/2015 22:58 (GMT-05:00)
To: "James, Larry C."
Cc: "Hoffman, David H."
Subject: RE: Follow-up questions re: 2007 APA Convention

Many thanks, Larry.

S. YASIR LATIFI
Associate

Sidley Austin LLP
+1.202.736.8537
ylatifi@sidley.com

From: James, Larry C. [mailto:larry.james@wright.edu]
Sent: Tuesday, June 16, 2015 12:51 PM
To: Latifi, Yasir
Subject: RE: Follow-up questions re: 2007 APA Convention

By the way, with modern technology in Cuba staying connected and getting council work done was never a problem
While I was deployed there.

And Cuba is in the same time zone as Washington DC which was easier than when I was stationed in Honolulu (6 hours behind Washington DC) .

SO i had access to phones and the Internet to do whatever was needed as a council Rep.

Latifi, Yasir <ylatifi@sidley.com>

Reply all

Mon 6/22/2015, 10:31 AM

James, Larry C.

Inbox

Hi again Larry,

Would you have time for a 5-minute call today or tomorrow about one (hopefully) last PENS question we had for you? Let me know what times may work, and I can give you a call at your preferred number. Many thanks, as always.

S. YASIR LATIFI
Associate

Sidley Austin LLP
+1.202.736.8537
ylatifi@sidley.com

Statements from State Psychological Associations Regarding the Hoffman Report

Ohio Psychological Association

Dear OPA members:

As nearly all of you must know by now, the report of the independent reviewer, written by attorney David Hoffman has been publicly released. In it, Hoffman addresses allegations that APA colluded with the Bush administration in facilitating harsh interrogation and torture. Like many of you, we have spent the past week reading the Hoffman Report with a mixture of shock, sadness, anger, confusion and profound disappointment. We have been carefully reading OPA member comments on our listservs and responding to questions and comments that have come through the OPA central office.

Our Executive Committee met on Friday, July 17 and discussed the Hoffman Report and how we can best respond to the issues and concerns of our OPA membership. As you are undoubtedly aware, delving into the details of the report, addressing the widespread implications and determining necessary and appropriate courses of action is an evolving process that will continue over an extended period of time. It is the primary item on the agenda for the APA Council of Representatives at its upcoming meeting at the APA convention early next month.

We want to ensure that you have on-going information about what APA and others are doing to address the ethical malfeasance and abuses of power described in the Hoffman Report. Here are the steps we have identified so far:

• First, so that you remain accurately informed, we recommend that you read the Hoffman Report, or at least the Executive Summary. (The complete, unedited report is available at www.apa.org. Click on "Report of the Independent Reviewer). Reading the report will help you draw your own conclusions rather than relying on secondary resources and opinions. The Hoffman Report itself is the best source of information about what is in the Hoffman Report.

• We have asked our APA Council Representative, Dr. David Hayes, to provide us with regular updates, which will be posted on the OPA listservs. We will continue to monitor the listservs for your questions, comments and ideas. These will be compiled and shared with APA.

• APA has established a portal for psychologists to submit comments and ideas to address issues raised in the Hoffman Report. We urge you to participate in this process in order to create change that is necessary. Comments can be sent to irfeedback@apa.org or by going to http://www.apa.org/independentreview/index.aspx. We want to see your comments and ideas as well so that we can be sure that they are getting through to the

people who need to see them. You can send your comments to mranney@ohpsych.org or hayesdl@sbcglobal.net.

• If you plan to attend the APA convention in Toronto, please consider attending the Town Hall meeting on Saturday, August 8 from 3-4:30 pm. Several OPA leaders will also attend this event to convey the concerns and questions of OPA members.

• Finally, OPA will respond formally to APA to ensure that APA leaders are aware of our concerns arising from the Hoffman Report.

APA must focus on rebuilding trust and making necessary changes to organizational structure and operational processes. All of us must get involved and be a part of making meaningful and effective change happen. It is crucial that we better understand how these ethical breaches occurred and how APA can ensure that they do not happen again. We must make certain that our voices are heard. OPA will continue to work with you and for you to ensure change at APA.

Peg Richards Mosher, Ph.D., President

On behalf of the OPA Executive Committee:

Dr. Bob Stinson, Psy.D., J.D., LICDC-CS, ABPP, President-Elect
Dr. Kathleen Ashton, Ph.D., ABPP, Past-President
Dr. Nathan Tomcik, Ph.D., Finance Officer
Dr. David Hayes, Ph.D., ABPP, Representative to the APA Council of Representatives

OHIO BOARD OF PSYCHOLOGY

MEETING MINUTES
JULY 30, 2015
RIFFE CENTER, ROOM 31 EAST B
77 S. HIGH ST. COLUMBUS, OH 43215

BOARD MEMBERS

President*: Alice Randolph, Ed.D., Licensee Member, 2015
Secretary: Steven Keller, J.D., Consumer Advocate Member, 2018
Victor McCarley, Psy.D., Licensee Member, 2015
Kenneth Drude, Ph.D., Licensee Member, 2016
Amy Hess, Consumer Advocate Member, 2016
Charles Hoffman, MSW, Consumer Advocate Organization Rep. Member, 2017
Douglas Cole, Ph.D., Licensee Member, 2018
Denise Rabold, Ph.D., Licensee Member, 2018
Bradley Hedges, Ph.D., Licensee Member, 2019

STAFF/BOARD LEGAL COUNSEL PRESENT

Ronald Ross, Ph.D., Executive Director; Carolyn Knauss, Investigator; Amanda Danko, Investigator; Roger F. Carroll, Principal Assistant Attorney General and Board Counsel

9:30AM MEETING CALLED TO ORDER BY DR. RANDOLPH

DR. DRUDE CALLED THE ROLL

Dr. Randolph	Present
Mr. Keller	Absent (joined meeting at 9:35AM)
Dr. McCarley	Absent (joined meeting at 10:10AM)
Dr. Drude	Present
Mrs. Hess	Present
Mr. Hoffman	Present
Dr. Cole	Present
Dr. Rabold	Present
Dr. Hedges	Present

A quorum was present.

Dr. Randolph introduced Dr. Brad Hedges, new appointee to the Board. Introductions were made and Dr. Hedges was welcomed.

Dr. Randolph noted that she appreciated the placement of meeting agenda and supporting materials on the Board's website in lieu of receiving multiple email attachments. She encouraged the use of less paper in order to be more conscious of conservation.

APPROVAL OF APRIL 23, 2015 BUSINESS MEETING MINUTES

Dr. Randolph invited comments about the April 23, 2015 draft meeting minutes distributed with the agenda. The minutes were not subject to comment other than correction of a typographical error. Dr. Drude made a motion to approve the minutes as corrected, and Mr. Hoffman seconded the motion.

A vote was taken:*
Aye: Dr. Drude, Dr. Cole, Dr. Rabold, Mr. Hoffman, Mrs. Hess
Nay: None
Abstain: Dr. Hedges

The motion passed.

Mr. Keller joined the meeting.

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[1] Year Board Member term ends (terms expire October 5 or December 4 if not re-appointed or replaced)
* President votes only to break a tie

CONSENT AGENDA

Dr. Ross expressed his thanks to the staff for their assistance in compiling the budget report, enforcement report, and meeting notebooks. The consent agenda included updates to the complaint form and a summary of licensing law changes in the biennial budget bill (HB64). Dr. Randolph noted that the Board was required to pay late fees amounting to $290 for two Financial Disclosure Statement filings with the Ohio Ethics Commission (post-April 15, 2015). She encouraged more careful attention to the deadline in 2016 so the Board does not unnecessarily spend limited funds. Assigning a point-person on staff to foster timely filings was suggested to Dr. Ross.

BUDGET REPORT FY15 Q4
DETAILED STATEMENT OF REVENUE

Description	Revenue Received	# of Receipts
Applications for Psychologist	$ 13,800.00	46
Applications for School Psychologist	$ 300.00	1
Applications for Certified Ohio Behavior Analyst	$ 2,000	16
Applications for 30 Day Permit	$ 150.00	1
Retake Psychology Oral Exam	$ 200.00	4
Retake School Psychology Oral Exam	$ 0.00	0
License Renewal Fee	$ 1,400.00	4
Reinstatement/Late MCE Penalty	$ 200.00	4
Enforcement Public Records Request	$ 0.00	0
Verification of License	$ 840.00	21
Duplicate License Card	$ 20.00	4
Duplicate License Certificate	$50.00	2
Deposit Reversed-Bad Check	$0.00	0
Miscellaneous Reimbursement	$ 0.00	0
Total 4th Quarter FY15 Revenue	**$ 18,960**	
Total Revenue FY 15	**$1,265,610**	

EXPENDITURES
APRIL 1, 2015 – JUNE 30, 2015
FY15 Q4

FY15 QUARTER 4 GENERAL MAINTENANCE ACCOUNT 520

TO CSA	DESCRIPTION	ID	CHARGES
4/2/2015	GREENE INC. 15657	1535	$30.00
4/2/2015	CAPITOL SQUARE REVIEW AND ADV BOARD Q4 #33499	1536	$570.00
4/6/2015	HANNAH NEWS SERVICE 11723 PO #101	1537	$1,050.00
4/14/2015	CENTURYLINK TOLL FREE CHARGES EDI 1335974506	1534	$3.14
4/21/2015	CINCINNATI BELL ANY DISTANCE 574937020150410	1538	$88.24
4/22/2015	TRAVEL RANDOLPH MEETING/EXAMS 4/23-4/24/15	534689	$343.21
4/22/2015	TRAVEL COLE MEETING 4/23/15	534676	$323.24
4/22/2015	TRAVEL DRUDE MEETING/EXAMS 4/23-4/24/15	534681	$308.13
4/22/2015	TRAVEL MCCARLEY MEETING/EXAMS 4/23-4/24/15	534685	$301.66
4/22/2015	TRAVEL RABOLD MEETING 4/23/15	534674	$26.88
4/22/2015	TRAVEL HOFFMAN MEETING 4/23/15 and 4/24/15 INCL. 534668	534666	$63.76
4/30/2015	KING BUSINESS INTERIORS INV 68579 6/30/15	1570	$2,006.23
5/1/2015	GREENE INC 15760	1545	$30.00
5/4/2015	BOEHM INC. SUPPLIES #259473	1548	$346.05
5/4/2015	OBM/OSS TRAVEL VOUCHER CHARGES OSS153PSY Q3	1547	$243.75
5/7/2015	PROFORUM PRO LICENSE REPORT EXTRA TEN LICENSES	1550	$150.00
5/12/2015	PAYCARD-GBEX 41778690/PC0017122 "US BANK"	NA	$15.96
5/12/2015	PAYCARD-BOLINDS 7136029380001/ PO PC0017122	NA	$322.71
5/12/2015	CENTURYLINK EDI 1338471948	1546	$4.61
5/18/2015	TRAVEL RABOLD INVESTIGATION MEETING 5/18/15	534987	$13.36
5/20/2015	OHIO ETHICS COMM 2015 EXTRA FILING FEES PSY51915	1557	$350.00
5/20/2015	CINCINNATI BELL ANY DISTANCE 574937020150510	1553	$89.18
5/21/2015	BOEHM INC. SUPPLIES #259910	1556	$77.10
5/27/2015	TRANSFER TO PO #94		$5,000.00
6/3/2015	GREENE INC 15861	1560	$30.00
6/8/2015	IRON MOUNTAIN STORAGE LLR2669	1559	$30.46
6/11/2015	CENTURYLINK EDI 1341546295	1558	$4.87
6/17/2015	PAYCARD-BOLINDS OFFICE SUPPLIES 7137926379	1561	$1,476.38
7/13/2015	KING BUSINESS INTERIORS INV 68713 7/13/15	1576	$100.00

FY15 QUARTER 4 DAS CHARGES PO #94 FROM ACCOUNT 520

TO CSA	DESCRIPTION	ID	CHARGES
4/20/2015	DAS FLEET MANAGEMENT (2 RENTALS RETREAT) 5TR237	1539	$129.72
4/20/2015	DAS/CSA ASSESSMENT CHARGES Q4 5AC221	1540	$4,586.62
4/21/2015	DAS OFFICE OF FINANCE RENT Q4 5MF111	1541	$5,712.33
4/27/2015	DAS STATE MAIL-POSTAGE 3RD Q 5UN240	1544	$401.60
4/27/2015	DAS STATE MAIL-PRESORT 5UP270	1543	$4.49
5/13/2015	DAS OIT INFRASTRUCTURE 151330882204 Q4	1554	$950.98
6/1/2015	TRANSFER IN FROM 520		
6/9/2015	DAS COST PER COPY PROGRAM Q3 5R3945	1566	$595.20
6/15/2015	DAS OIT ITS DESKTOP JAN 151330882201A	1564	$434.00
6/15/2015	DAS OIT ITS DESKTOP FEB 151330882202A	1565	$434.00
6/23/2015	DAS OIT ITS DESKTOP MARCH 151330882203A	1568	$434.00
6/25/2015	DAS OIT ITS DESKTOP APRIL 151330882204A	1567	$434.00

FY15 QUARTER 4 PAYROLL CHARGES ACCOUNT 500

PAY PERIOD	CHARGES	ADJS	BALANCE
			$ 101,000.00
VOUCHER 15021 FOR PPE 4/4/15	$16,633.35		$ 84,366.65
VOUCHER 15022 FOR PPE 4/18/15	$15,943.99		$ 68,422.66
VOUCHER 15023 FOR PPE 5/2/15	$17,050.33		$ 51,372.33
VOUCHER 15024 FOR PPE 5/16/15	$15,745.84		$ 35,626.49
VOUCHER 15025 FOR PPE 5/30/15	$15,651.49		$ 19,975.00
VOUCHER 15026 FOR PPE 6/13/15	$16,014.79		$ 3,960.21

FY15 QUARTER 4 ACCOUNT 510 PURCHASED SERVICES

No Expenditures

EXPENDITURE OVERVIEW FY15

Account	Budget	Expense	Encumbered	Available
510 PSY 2015	6,836.25	6,760.25	75.00	0.00
520 PSY 2015	118,563.66	112,840.61	5,650.25	0.00
500 PSY 2015Q1	114,847.63	114,847.63	0.00	0.00
500 PSY 2015Q2	100,700.05	100,700.05	0.00	0.00
500 PSY 2015Q3	116,751.65	116,751.65	0.00	0.00
500 PSY 2015Q4	97,040.79	97,040.79	0.00	0.00

Unspent from Allocation of $571,000 $16,336

ENFORCEMENT REPORT
FY15 4th QUARTER
APRIL 1, 2015 THROUGH JUNE 30, 2015

APRIL 2015

Informal Complaint Intakes	8
Formal Complaints Received	3
Closed Complaints	11*
Referred Cases	4

Disposition of APRIL Cases

No Jurisdiction	0
No Basis to Proceed	**4**
No Fault Found	0
Cease and Desist Letter	**1**
Reprimand	**1**
Suspension	**1* (4 complaints addressed in consent agreement))**
Revocation	0
Remedial CE	**1**

MAY 2015

Informal Complaint Intakes	11
Formal Complaints Received	7
Closed Complaints	2
Referred Cases	1

Disposition of MAY Cases

No Jurisdiction	**1**
No Basis to Proceed	0
No Fault Found	**1**
Cease and Desist Letter	0
Practice Restriction	0
Reprimand	0
Suspension	0
Revocation	0

JUNE 2015

Informal Complaint Intakes	5
Formal Complaints Received	5
Closed Complaints	12*
Referred Cases	3

Disposition of JUNE Cases

No Jurisdiction	0
No Basis to Proceed	**3**
No Fault Found	**8* (2 complaints against one licensee)**
Cease and Desist Letter	0
Practice Restriction	0
Reprimand	0
Suspension	0
Revocation	0

Categories of Investigations Currently in Process (as of 7/21/15)

(NOTE: Complaints often reflect alleged violations of rules in more than one general area. These numbers reflect the primary area of alleged misconduct under investigation).

Category	Total
Billing/Improper Financial Arrangement	2
Confidentiality	0
Criminal Act/Conviction	1
Fraud/Deceit/Misrepresentation	0
Impairment	1
Multiple Relationship Dual Sexual Relationship—0 Non-Sexual Dual Relationship—1	1
Negligence/Competence/Standard of Care Domestic Relations—4 Release of Records—3	29
Other	2
Welfare of Client	0
Supervision	3
Unlicensed Practice	1
Sexual Misconduct	1
TOTAL:	**41**

Ohio Psychologist Licensing Law Amended in HB64:
"Institutional Accreditation" Restored as Basis for Doctoral Degree Eligibility
July 2015

Amendments to ORC 4732.10 in HB64 have resulted in an immediate resumption of license eligibility for all individuals with doctoral degrees in psychology or school psychology from institutions accredited or recognized by a national or regional accrediting agency without a requirement for academic program accreditation. Enrollment and graduation deadlines in the previous "grandfather" provision have been eliminated from the law.

The definition of "national or regional accrediting agencies" remains unchanged and means one of the following: Middle States Association of Colleges and Schools - Commission on Higher Education; New England Association of Schools and Colleges; North Central Association of Colleges and Schools;

Northwest Association of Schools and Colleges; Southern Association of Colleges and Schools; Western Association of Schools and Colleges - Accrediting Commission for Senior Colleges.

The definition of "academic program accreditation" remains unchanged and means that the doctoral degree granting program holds "accreditation," "designation," or "approval" by one or more of the following entities: (i) The American Psychological Association, Office of Program Consultation and Accreditation; (ii) The Accreditation Office of the Canadian Psychological Association; (iii) A program listed by the Association of State and Provincial Psychology Boards/National Register Designation Committee; or (iv) The National Association of School Psychologists.

Graduates of non-accredited doctoral programs housed within accredited academic institutions are still required to complete a minimum of 3,600 hours of qualifying supervised training, including no fewer than 1,800 hours of supervised post-doctoral experience [see OAC 4732-9-01 (A)]. The legislative changes do not affect the pre-doctoral and post-doctoral training options available to graduates of programs with academic program accreditation [see OAC 4732-9-01 (B)] or the license eligibility requirements for "senior psychologists" [see OAC 4732-9-01 (C)].

[END OF CONSENT AGENDA]

There were no comments or motions to move any consent agenda items to the regular agenda. By consensus the consent agenda was acknowledged and received.

MEETING AND ORAL EXAMINATION SCHEDULING

Discussion led to agreement to the following updated schedule, in addition to oral examinations scheduled for September 4 and September 11, 2015:

October 15, 2015 Board meeting 9:30AM
October 16, 2015 Oral examinations 9:30AM
December 4, 2015 Oral Examinations 9:30AM
January 14, 2016 Board meeting 9:30AM
January 15, 2016 Oral examinations 9:30AM
March 10-11, 2016 Board meeting/Retreat TBA
April 14, 2016 Board meeting 9:30AM
April 15, 2015 Oral examinations 9:30AM

ASPPB ANNUAL MEETING OF DELGATES OCTOBER 7-11, 2015

Dr. Drude will attend the ASPPB annual meeting in Tempe, AZ as the Board's voting delegate. He has been invited to be a presenter, and travel reimbursement by the Board or ASPPB will be clarified. Mrs. Hess expressed her interest in attending in order to participate in the new member orientation programs. Dr. Hedges was encouraged to consider attending should Mrs. Hess not attend. Dr. Randolph expressed a strong interest in attending should the agenda include discussion about the APA Hoffman Report. Decisions about attendance will be made over the next few weeks.

Dr. Randolph offered remarks about the Hoffman Report, the result of an independent investigation commissioned by APA regarding the relationships among the APA, DoD, and CIA regarding the interrogation and torture of detainees in the aftermath of 9/11. She stated that the report revealed some astounding and troubling findings regarding APA "ethics" policy and conduct of senior staff. She stated that there will likely be significant ongoing conversations.

GUEST PRESENTATION: APPLIED BEHAVIOR ANALYSIS (ABA)

At 10:00AM Dr. Jaqueline Wynn and Dr. Tracy Guiou were introduced with the gratitude of the Board, and they made a one-hour presentation on ABA to assist the Board in understanding the field, board certification (BCBA and BCaBA), state certification, and potential issues related to interpretation of the laws and rules and enforcement (ORC 4783 and OAC 4783).

Dr. McCarley joined the meeting.

BEHAVIOR ANALYSTS AND THE PRACTICE OF ABA

Tracy Gulon, PhD, BCBA-D, CCBA

Jacquie Wynn, PhD, BCBA-D, CCBA

AGENDA

- What is ABA?
- Who are Behavior Analysts?
  - How are they trained?
  - How do they become certified?
  - What are the numbers and trends?
- What do Behavior Analysts do?
  - Frequent applications
    - ABA/EIBI programs for children with autism
    - Behavioral consultation for skill building
    - Assessment/Behavioral consultation for problem behavior reduction

ACKNOWLEDGEMENTS

- Behavior Analyst Certification Board (BACB)
  - Jim Carr
- Association of Professional Behavior Analysts
  - Gina Green

WHAT IS ABA?

- A scientific discipline whose subject matter is individual behavior interacting with environmental events
  - Therefore controllable, observable
- Has theoretical, experimental, and applied branches

WHAT IS ABA?

- Uses scientific principles and procedures discovered through basic and applied research to improve socially significant behavior to a meaningful degree.
- The practice of behavior analysis involves:
  - design, implementation, and evaluation of instructional and environmental modifications
  - produces socially significant improvements in human behavior

WHAT IS ABA?

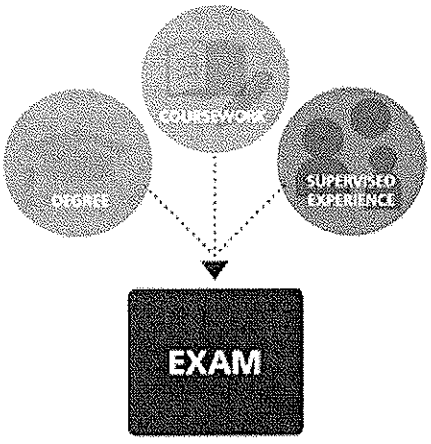
- Includes the empirical identification of functional relations between behavior and environmental factors, known as functional assessment and analysis.
- Interventions based on scientific research and the direct observation and measurement of behavior and environment.
- Utilize contextual factors, establishing operations, antecedent stimuli, positive reinforcement, and other consequences to help people develop new behaviors, increase or decrease existing behaviors, and emit behaviors under specific environmental conditions.

WHAT IS ABA?

- Typical clients include individuals with autism and other developmental disabilities, intellectual disabilities, learning and communication difficulties, brain injuries, physical disabilities, and difficulties associated with aging, as well as typically developing individuals.
- A variety of work settings: private and public clinics, private homes, hospitals, schools, nursing homes, group homes, universities, and business settings.

WHO ARE BEHAVIOR ANALYSTS?

BACB Certification



WHO ARE BEHAVIOR ANALYSTS?

BCBA Eligibility Standards	
Coursework Requirement	270 classroom hours in behavior analysis • Ethics – 45 hours *(stand-alone course)* • Basic concepts & principles – 45 hours • Behavioral methodology – 45 hours • Applied behavior analysis – 105 hours • Discretionary behavioral content - 30 hours
Degree Requirement	A minimum of a master's degree from an accredited university that was (a) conferred in behavior analysis, education, or psychology, or (b) conferred in a degree program in which the candidate completed a BACB approved course sequence.
Experience Requirement	1500 hours of *Supervised Independent Fieldwork (or 750/1000 hours of University practica)*

WHO ARE BEHAVIOR ANALYSTS?

BACB Examinations

- Multiple-choice examinations
  - **BCBA**: 150 questions
  - **BCaBA**: 132 questions
- Based on BACB task lists
  - List of job competencies
  - Ethical standards

Fourth Edition Task List

- Measurement
- Experimental Design
- Behavior-Change Considerations
- Fundamental Elements of Behavior Change
- Specific Behavior-Change Procedures
- Behavior-Change Systems
- Identification of the Problem
- Assessment
- Intervention
- Implementation, Management, & Supervision
- Philosophical Assumptions of Behavior Analysis
- Operant Conditioning
- Respondent Conditioning
- Verbal Behavior

PROFESSIONAL AND ETHICAL COMPLIANCE CODE FOR BEHAVIOR ANALYSTS

A. Responsible Conduct of Behavior Analysts
B. Behavior Analysts' Responsibility to Clients
C. Assessing Behavior
D. Behavior Analysts and the Behavior-Change Program
E. Behavior Analysts as Supervisors
F. Behavior Analysts' Ethical Responsibilities to the Profession of Behavior Analysis
G. Behavior Analysts' Ethical Responsibilities to Colleagues
H. Public Statements
I. Behavior Analysts and Research
J. Behavior Analysts' Ethical Responsibilities to the BACB

WHO ARE BEHAVIOR ANALYSTS?

Some Stats.....

- Behavior Analysts certified by BACB in Ohio:
  - Total: 299
    - BCBA-D (Doctoral level) 26 (re: dissertation focus/not discipline)
    - BCBA (MA level) 228 (includes some PhD level)
    - BCaBA (BA level) 45
- Distribution within Ohio (within 50 miles of following cities:)
  - Columbus: 101
  - Athens: 1
  - Cleveland: 96
  - Cincinnati: 64 52 in-state
  - Toledo: 54 15 in-state
- Distribution across Nearby States:
  - Pennsylvania: 982
  - Michigan: 525
  - Indiana: 306
  - Ohio: 299
  - Kentucky: 165
  - West Virginia: 65

WHO ARE BEHAVIOR ANALYSTS?

Shook, Johnston, & Mellichamp (2004)

- 55% female
- 86% white
- Average age 41

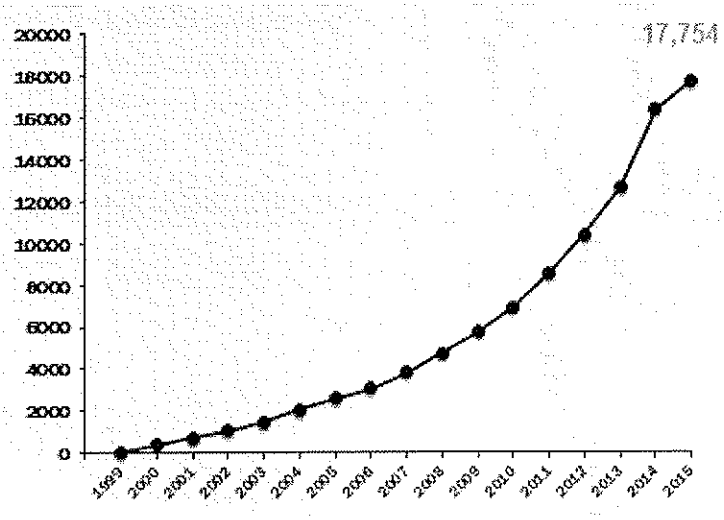
BACB Job Analysis Survey (2011)

- Area of Primary Emphasis:
  - 58% Behavior Analysis/Therapy
  - 20% Education
  - 14% Psychology

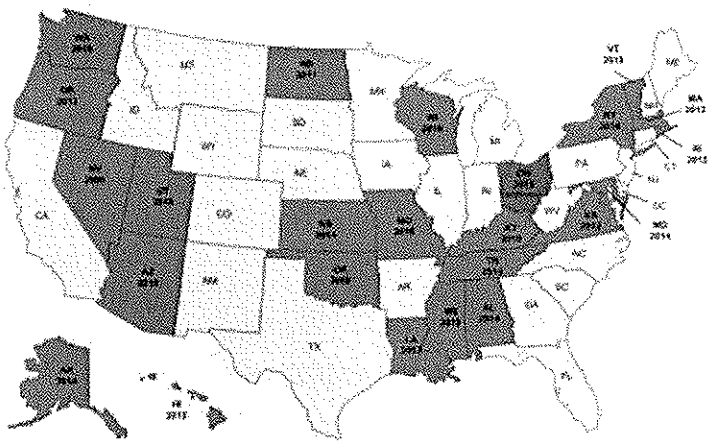
WHO ARE BEHAVIOR ANALYSTS?

- 206 approved University programs in US (4 in OH)
- 42 states now have insurance mandates for ABA coverage
- 24 states regulate professional practice
  - Basing regulation on BACB credentials
    - Cost effective
    - Ensures critical competencies are reviewed/updated by practitioners/researchers
- New Behavioral Treatment CPT codes (T-codes)
  - Many insurance carriers developing ABA/autism benefits
  - Plans demand BCBA or licensed psych over-site

OVERALL # OF BCBAS PER YEAR



STATE REGULATION OF BEHAVIOR ANALYSTS



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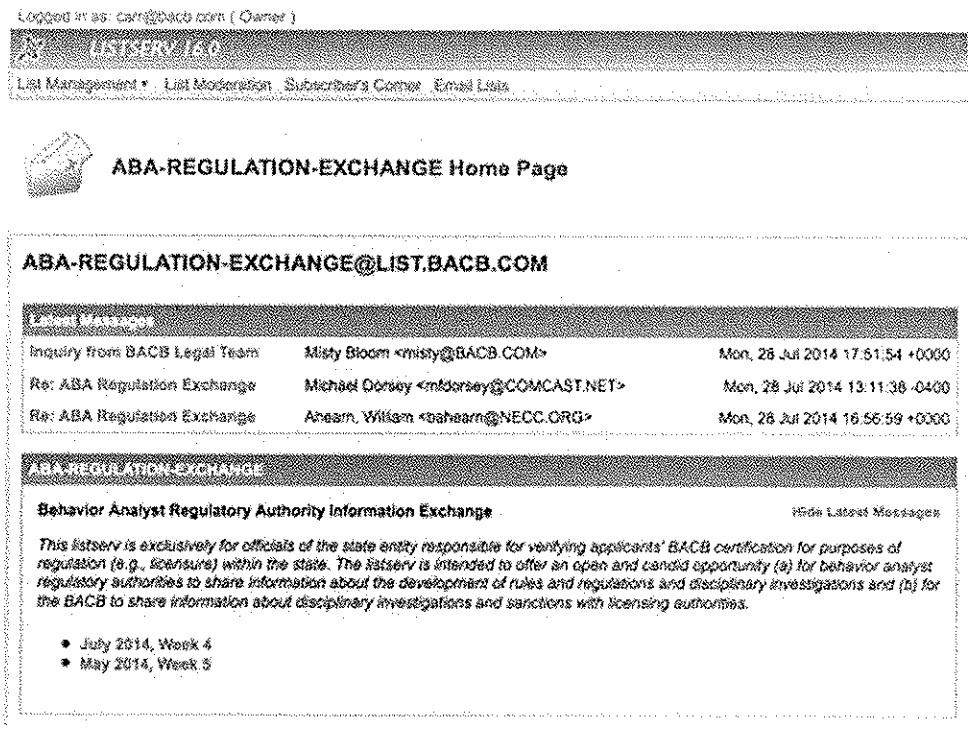
COORDINATION DOMAINS

- BACB staff verify certificant status for licensure boards
- BACB legal department coordinates disciplinary action with licensure boards
- Behavior Analyst Regulatory Listserv



Logged in as: carr@bacb.com (Owner)

LISTSERV 16.0

List Management ▾ List Moderation Subscriber's Corner Email Lists

ABA-REGULATION-EXCHANGE Home Page

ABA-REGULATION-EXCHANGE@LIST.BACB.COM

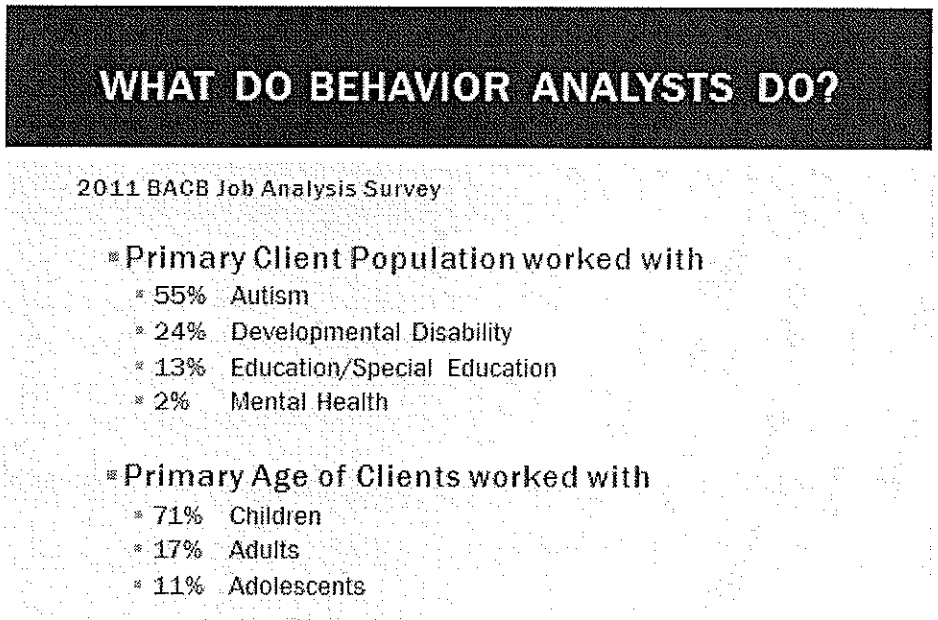
Latest Messages		
Inquiry from BACB Legal Team	Misty Bloom <misty@BACB.COM>	Mon, 28 Jul 2014 17:51:54 +0000
Re: ABA Regulation Exchange	Michael Dorsey <mldorsey@COMCAST.NET>	Mon, 28 Jul 2014 13:11:38 -0400
Re: ABA Regulation Exchange	Ahearn, William <bahearn@NECC.ORG>	Mon, 28 Jul 2014 16:56:59 +0000

ABA-REGULATION-EXCHANGE

Behavior Analyst Regulatory Authority Information Exchange Hide Latest Messages

This listserv is exclusively for officials of the state entity responsible for verifying applicants' BACB certification for purposes of regulation (e.g., licensure) within the state. The listserv is intended to offer an open and candid opportunity (a) for behavior analyst regulatory authorities to share information about the development of rules and regulations and disciplinary investigations and (b) for the BACB to share information about disciplinary investigations and sanctions with licensing authorities.

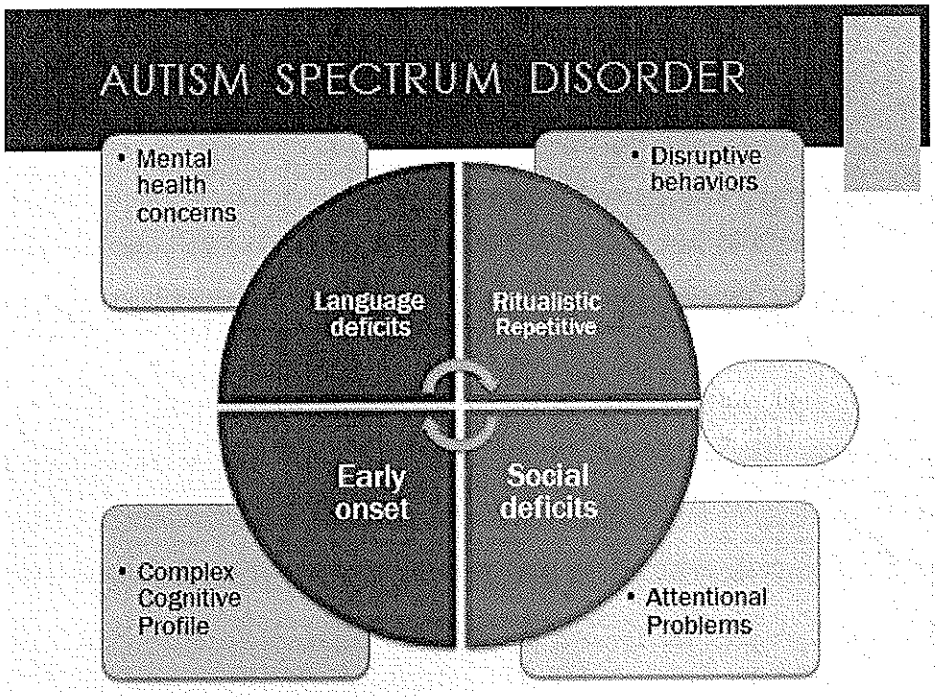
- July 2014, Week 4
- May 2014, Week 5

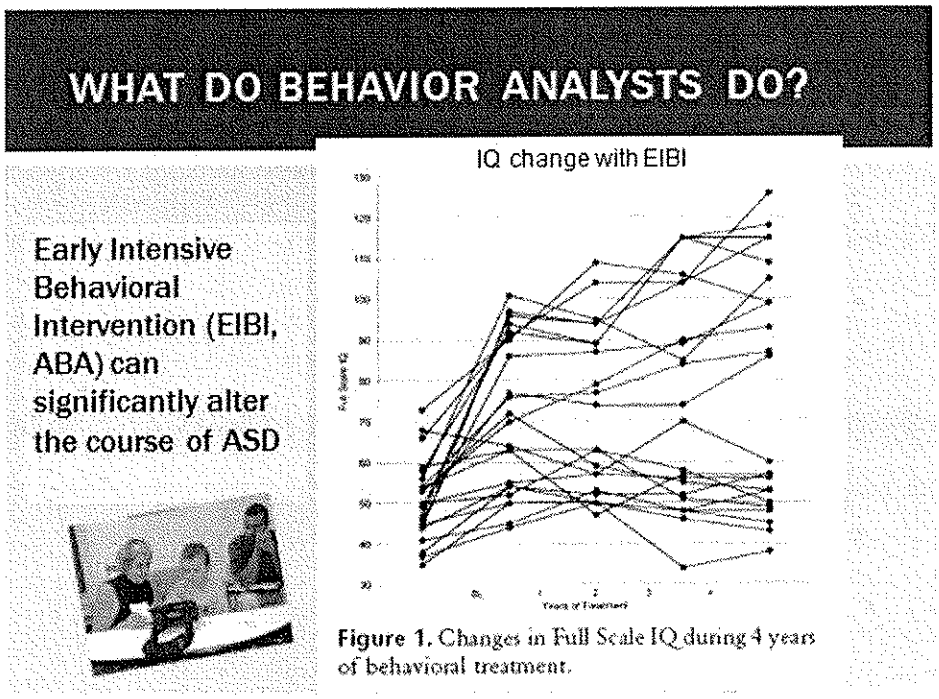


WHAT DO BEHAVIOR ANALYSTS DO?

2011 BACB Job Analysis Survey

- Primary Client Population worked with
  - 55% Autism
  - 24% Developmental Disability
  - 13% Education/Special Education
  - 2% Mental Health
- Primary Age of Clients worked with
  - 71% Children
  - 17% Adults
  - 11% Adolescents


AUTISM SPECTRUM DISORDER
• Mental health concerns
• Disruptive behaviors
Language deficits
Ritualistic Repetitive
Early onset
Social deficits
• Complex Cognitive Profile
• Attentional Problems


WHAT DO BEHAVIOR ANALYSTS DO?
Early Intensive Behavioral Intervention (EIBI, ABA) can significantly alter the course of ASD
IQ change with EIBI
Figure 1. Changes in Full Scale IQ during 4 years of behavioral treatment.

WHAT DO BEHAVIOR ANALYSTS DO?

Behavioral Vs. Eclectic Treatment
[Eikeseth et al. 2002]

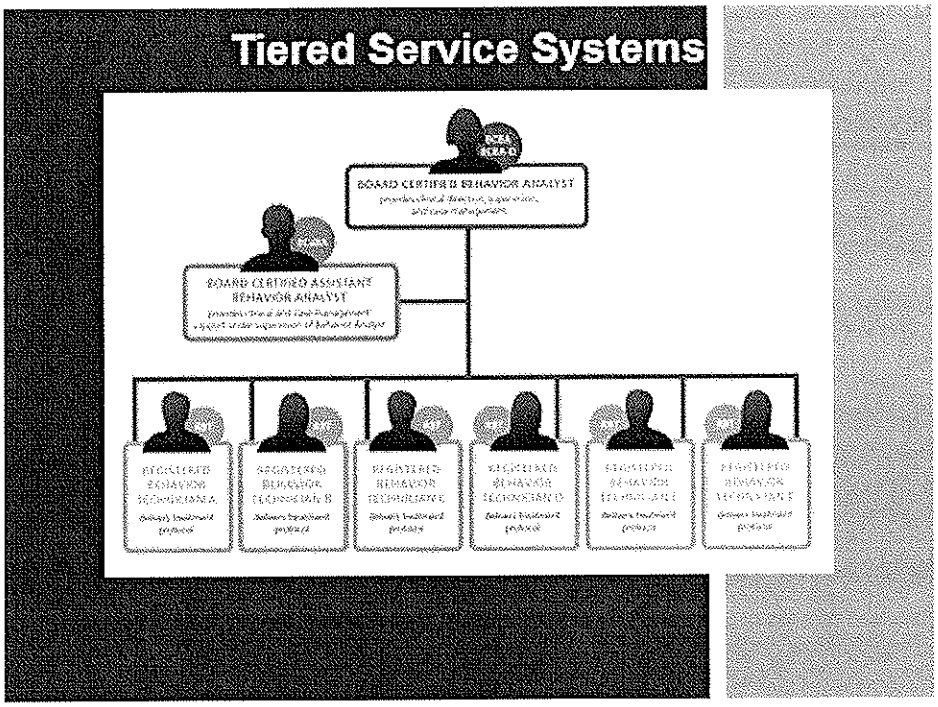
Measure	BEH Group [change in scores]	ECL Group [change in scores]
IQ*	+17.15	+4.33
Perform IQ	+17.46	+8.33
Total Lang*	+27.00	+1.08
VABS C**	+15.69	-1.58
VABS DL	+9.23	+5.50
VABS Comp*	+11.23	+0.17

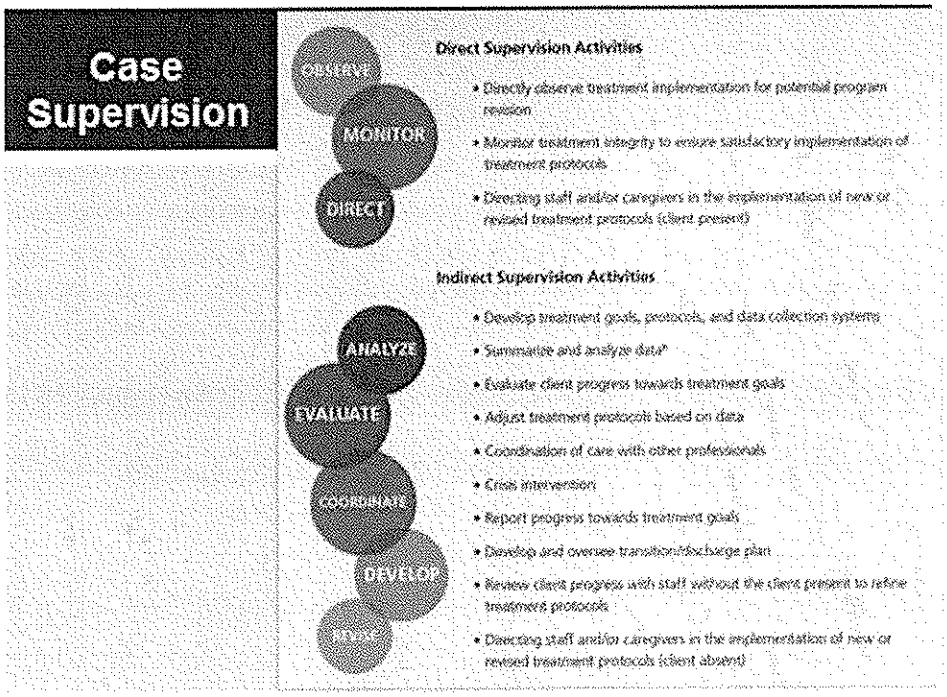
All scores: mean = 100, sd = 15
* = $p < .05$; ** = $p < .01$

WHAT DO BEHAVIOR ANALYSTS DO?

Treatment Team

- Psychologist
  - Clinical Supervision
- BCBA (Clinical Supervisor/Case Supervisor/Behavior Consultant)
  - Program Supervision
- BCaBA (Case Supervisor, Senior Aide)
  - Works under supervision of BCBA to supervise program
- Registered Behavior Technicians
  - Senior Behavioral Intervention Aide
  - Behavioral Intervention Aide


Tiered Service Systems
BOARD CERTIFIED BEHAVIOR ANALYST
BOARD CERTIFIED ASSISTANT BEHAVIOR ANALYST


Case Supervision
OBSERVE
MONITOR
DIRECT
ANALYZE
EVALUATE
COORDINATE
DEVELOP
REVISE
Direct Supervision Activities
• Directly observe treatment implementation for potential program revision
• Monitor treatment integrity to ensure satisfactory implementation of treatment protocols
• Directing staff and/or caregivers in the implementation of new or revised treatment protocols (client present)
Indirect Supervision Activities
• Develop treatment goals, protocols, and data collection systems
• Summarize and analyze data*
• Evaluate client progress towards treatment goals
• Adjust treatment protocols based on data
• Coordination of care with other professionals
• Crisis intervention
• Report progress towards treatment goals
• Develop and oversee transition/discharge plan
• Review client progress with staff without the client present to refine treatment protocols
• Directing staff and/or caregivers in the implementation of new or revised treatment protocols (client absent)

WHAT DO BEHAVIOR ANALYSTS DO?

EIBI Treatment Elements

- Multiple context for treatment
  - 1:1, typical group environment, peer play
- Comprehensive goals
- Intensive levels of hours
- Behavioral teaching strategies
- Team implementation
- Parents at hub of team
- 3-4 years in duration

WHAT DO BEHAVIOR ANALYSTS DO?

Behavioral Consultation Treatment Elements

- Assessment
- Behavior plan development
- Baseline data collection
- Training
- implementation
- On-going data collection
- Generalization and maintenance training
- Transition planning

There was a Q&A session, and discussion was heard regarding the delegation of design and implementation of intervention plans to supervisees and about the role of family members in the delivery of interventions. The requirement in rules that the COBA provide "oversight" of non-supervisees received attention and will be a focus during future pre-certification workshops.

Following a brief break, Dr. Randolph asked for a roll call.

MR. KELLER CALLED THE ROLL

Dr. Randolph	Present
Mr. Keller	Present
Dr. McCarley	Present
Dr. Drude	Present
Mrs. Hess	Present
Mr. Hoffman	Present
Dr. Cole	Present
Dr. Rabold	Present
Dr. Hedges	Present

Dr. Randolph returned to the enforcement report in the Consent Agenda, and praised the work of the staff investigators regarding case management and reducing the caseload of open investigations from 54 in April to fewer than 40 cases currently. Dr. Ross echoed Dr. Randolph's praise and emphasized that Supervising Board Member involvement and responsiveness is also a major factor in the timely investigation of complaints and the reduction of the caseload.

ENTRANCE EXAMINER'S REPORT. Dr. Randolph called attention to the report of Entrance Examiner, Dr. Ross, compiled by Mrs. Chiquana Campbell Hancock.

LICENSURE/CERTIFICATION/REINSTATEMENT/
THIRTY-DAY PRACTICE AUTHORIZATION
4/1/2015 THROUGH 6/30/2015

PSYCHOLOGISTS (All licenses issued under 4732.12)

Christine Fair, Ph.D.	#7294	Issued:	4/29/2015
Rachel Hummel-Sass, Psy.D.	#7295	Issued:	4/29/2015
Meredith Veltri, Ph.D.	#7296	Issued:	4/29/2015
Cassondra Zierk, Ph.D.	#7297	Issued:	4/29/2015
Fadi Tayim, Ph.D.	#7298	Issued:	4/29/2015
Angela Ledgerwood, Ph.D.	#7299	Issued:	4/29/2015
Sarah Barwick, Psy.D.	#7300	Issued:	4/29/2015
James Monroe, Ph.D.	#7301	Issued:	4/29/2015
Caprice-Ann Lambert, Psy.D.	#7302	Issued:	4/29/2015
Erin Cooper, Ph.D.	#7303	Issued:	4/29/2015
Laura Vanderploeg, Psy.D.	#7304	Issued:	4/29/2015
Sarah Francis, Ph.D.	#7305	Issued:	4/29/2015
Lauren Szulczewski, Psy.D.	#7306	Issued:	4/29/2015
Katherine Reid, Psy.D.	#7307	Issued:	4/29/2015
Elizabeth Wood, Psy.D.	#7308	Issued:	6/24/2015
Ashley Holbert, Ph.D.	#7309	Issued:	6/24/2015
Gokce Durmusoglu, Ph.D.	#7310	Issued:	6/24/2015
Amanda Beeman, Psy.D.	#7311	Issued:	6/24/2015
Elizabeth Kryszak, Ph.D.	#7312	Issued:	6/24/2015
Shannon Porter, Psy.D.	#7313	Issued:	6/24/2015
Megan Nichols, Psy.D.	#7314	Issued:	6/24/2015
Alexandra Gee, Psy.D.	#7315	Issued:	6/24/2015
Linda Montagna, Psy.D.	#7316	Issued:	6/24/2015
Taylor Rush, Ph.D.	#7317	Issued:	6/24/2015
Ashley Knipp, Psy.D.	#7318	Issued:	6/24/2015

Cary Jordan, Ph.D.	#7319	Issued:	6/24/2015
Alexandra Zaleta, Ph.D.	#7320	Issued:	6/24/2015

SCHOOL PSYCHOLOGISTS:
None

CERTIFIED OHIO BEHAVIOR ANALYSTS (COBA)

Allison Canterna, M.Ed.	COBA. 121	Issued:	4/02/2015
Beebe Bradford, Ph.D.	COBA. 122	Issued:	4/02/2015
Amanda Suever, M.Ed.	COBA. 123	Issued:	4/02/2015
Jennifer Might, M.A.	COBA. 124	Issued:	4/02/2015
Abby Bartz, M.A.	COBA. 125	Issued:	4/02/2015
Megan Hall, M.Ed.	COBA. 126	Issued:	4/02/2015
Jennifer Aguero, M.A.	COBA. 127	Issued:	4/02/2015
Nancy Kopnick, Ph.D.	COBA. 128	Issued:	4/02/2015
Amy Walker, M.S.	COBA. 129	Issued:	4/02/2015
Abigail Hanlon, M.Ed.	COBA. 130	Issued:	4/02/2015
Laura Garrett, M.A.	COBA. 131	Issued:	4/02/2015
Cecelia Maderitz, M.S.	COBA. 132	Issued:	4/02/2015
Samantha Schaefer, M.S.	COBA. 133	Issued:	4/02/2015
Nathel Lewis, M.A.	COBA. 134	Issued:	4/06/2015
Erin Lombard, M.A.Ed.	COBA. 135	Issued:	4/06/2015
Cristal Ann Bourn, M.Ed.	COBA. 136	Issued:	4/06/2015
Amanda Yuric, Ph.D.	COBA. 137	Issued:	4/06/2015
Mary Katherine Vallinger, M.S.	COBA. 138	Issued:	4/06/2015
Stephan Ray Flora, Ph.D.	COBA. 139	Issued:	4/06/2015
Rachel Miller, M.Ed.	COBA. 140	Issued:	4/06/2015
Samantha Banks, M.S.	COBA. 141	Issued:	4/06/2015
Jennifer Laluzerne, MSW	COBA. 142	Issued:	4/06/2015
Miranda Schehr, M.S.	COBA. 143	Issued:	4/06/2015
Brynne Artim, M.A.	COBA. 144	Issued:	4/06/2015
Susan Crossley, Ed.D.	COBA. 145	Issued:	4/06/2015
Mary Cornell, M.A.	COBA. 146	Issued:	4/06/2015
Christa Homlitas, M.S.	COBA. 147	Issued:	4/09/2015
Jaclynn Bosley, M.Ed.	COBA. 148	Issued:	4/09/2015
Michelle Lamarche, M.A.	COBA. 149	Issued:	4/09/2015
Angela O'Brien, M.A.	COBA. 150	Issued:	4/09/2015
Courtney Fleming, Ph.D.	COBA. 151	Issued:	4/09/2015
Catherine Shaffer, M.A.	COBA. 152	Issued:	4/09/2015
Samantha Evans, M.S.	COBA. 153	Issued:	4/09/2015
Tammy Dahlgren, M.Ed.	COBA. 154	Issued:	4/09/2015
Lizbeth Ann Anderson, M.S.	COBA. 155	Issued:	4/14/2015
Amanda Swisher Krisby, M.Ed.	COBA. 156	Issued:	4/14/2015
Noelle Rita Wian, M.S.	COBA. 157	Issued:	4/14/2015
Amanda Hills, M.A.	COBA. 158	Issued:	4/14/2015
Maria Livingston, M.A.	COBA. 159	Issued:	4/14/2015
Tracy Guiou, Ph.D.	COBA. 160	Issued:	4/14/2015
Gwen Dwiggins, Ph.D.	COBA. 161	Issued:	4/14/2015
Diandra Stevens, M.S.	COBA. 162	Issued:	4/14/2015
Druana Perren, M.S.	COBA. 163	Issued:	4/14/2015
Brittany Maurer, M.Ed.	COBA. 164	Issued:	4/14/2015
Anthony Menendez, Ph.D.	COBA. 165	Issued:	4/14/2015
Ellen Fellows, M.S.	COBA. 166	Issued:	4/14/2015
Sarah Prochak, M.A.	COBA. 167	Issued:	4/14/2015
Robin Ludwig, M.A.	COBA. 168	Issued:	4/14/2015
Dustin Watkins, M.A.	COBA. 169	Issued:	4/14/2015
Jennifer Loudon, Ph.D.	COBA. 170	Issued:	4/14/2015

Laura Grant, M.A.	COBA. 171	Issued: 4/14/2015
Michela Buss, M.S.	COBA. 172	Issued: 4/14/2015
Jacqueline Wynn, Ph.D.	COBA. 173	Issued: 4/14/2015
Carrie Yasenosky, M.Ed.	COBA. 174	Issued: 4/14/2015
Rachel Wolf, M.A.	COBA. 175	Issued: 4/14/2015
Tonya Marie Freeman, M.A.	COBA. 176	Issued: 4/14/2015
Natalie Andzik, M.A.	COBA. 177	Issued: 4/14/2015
Jamie O'Rourke, M.A.	COBA. 178	Issued: 4/14/2015
Laura Bierkan, M.S.	COBA. 179	Issued: 4/14/2015
Shridhevi Veerappan, M.S.	COBA. 180	Issued: 4/14/2015
Lauren Keller, Ed.S.	COBA. 181	Issued: 4/14/2015
Nora Coyle, M.Ed.	COBA. 182	Issued: 4/14/2015
Jennifer Gonda, M.S.Ed.	COBA. 183	Issued: 4/20/2015
Darlene Kuhen, M.A.	COBA. 184	Issued: 4/21/2015
Dimitrios Makridis, M.A.	COBA. 185	Issued: 4/27/2015
Rachel Seaman, M.Ed.	COBA. 186	Issued: 4/27/2015
Monica Jones, M.Ed.	COBA. 187	Issued: 4/28/2015
Mary Deskins-Lemaster, Ph.D.	COBA. 188	Issued: 4/28/2015
Megan Henning, M.S.	COBA. 189	Issued: 5/07/2015
Rachel Torrance, M.Ed.	COBA. 190	Issued: 5/07/2015
Kelly Sheehan, M.Ed.	COBA. 191	Issued: 5/07/2015
E. Justin Page, M.A.	COBA. 192	Issued: 5/12/2015
Paula Chan, MA.	COBA. 193	Issued: 5/12/2015
Latosha Lafferty, M.S.	COBA. 194	Issued: 5/12/2015
Ashley Overton, M.A.	COBA. 195	Issued: 5/12/2015
Heather Beam, M.Ed.	COBA. 196	Issued: 5/27/2015
Joel Vidovic, M.A.	COBA. 197	Issued: 6/05/2015
Ashley Shier, M.Ed.	COBA. 198	Issued: 6/10/2015
Anya Froelich, Psy.D.	COBA. 199	Issued: 6/10/2015
Ashley Clement, M.Ed.	COBA. 200	Issued: 6/29/2015
Leigh Herrmann, M.S.	COBA. 201	Issued: 6/29/2015
Brigitte McMillan, M.A.	COBA. 202	Issued: 6/29/2015
Rebecca Owens, M.A.	COBA. 203	Issued: 6/29/2015
Aletta Sinoff, Ph.D.	COBA. 204	Issued: 6/29/2015
Brittany Smith, M.Ed.	COBA. 205	Issued: 6/29/2015
Allyson Vaughn, M.A.	COBA. 206	Issued: 6/29/2015
Melanie Yoder, M.Ed.	COBA. 207	Issued: 6/29/2015
Brianne Knighton, M.Ed.	COBA. 208	Issued: 6/23/2015
Kathryn Ziegler, M.Ed.	COBA. 209	Issued: 6/23/2015
Colleen Larned, M.S.	COBA. 210	Issued: 6/29/2015

REINSTATEMENTS:

John Regis McNamara, Ph.D.	#402	Reinstated: 4/30/2015
Daniel R. Strunk, Ph.D.	#6354	Reinstated: 6/04/2015
Sipra Guha, Ph.D.	#4270	Reinstated: 6/15/2015
Joseph J. Gavin, Ph.D.	#1957	Reinstated: 6/29/2015

THIRTY-DAY PRACTICE [4732.22(B)]

Adam Joseph Feiner, Psy.D. (**Entering in Ohio)** Pennsylvania	Issued: 4/02/2015
Debbie M. Warman, Psy.D. **(Telepsychology)** Indiana	Issued: 4/02/2015
Kristin Tolbert, Psy.D. (**Entering in Ohio)** Florida	Issued: 4/15/2015
Jonathan W. Gould, Ph.D. (**Entering in Ohio)** North Carolina	Issued: 5/15/2015
Donna Christine Wicher, Ph.D. (**Entering in Ohio)** Oregon	Issued: 6/03/2015

Dr. McCarley stated that he would abstain from voting on the licensure of Caprice-Ann Lambert, Psy.D. #7302 and Gokce Durmusoglu, Ph.D. #7310. Mrs. Hess stated that she would abstain from voting on: psychologist Elizabeth Kryszak, Ph.D. #7312; and, COBA's Catherine Shaffer, M.A. COBA.152; Samantha

Evans, M.S. COBA.153; Tracy Guiou, Ph.D. COBA.160; Jacqueline Wynn, Ph.D. COBA.173; Rachel Wolf, M.A. COBA.175; Jamie O'Rourke, M.A. COBA.178; Anya Froelich, Psy.D. COBA.199; and, Ashley Clement, M.Ed. COBA.200.

Dr. McCarley made a motion that the Entrance Examiner's Report shall be approved with the abstentions noted; Dr. Cole second.

A vote was taken:
Aye: Dr. Drude, Mr. Keller, Dr. Cole, Dr. Rabold, Mr. Hoffman, Mrs. Hess, Dr. McCarley, Dr. Hedges
Nay: None
Abstain: As noted above

The motion passed.

SB74/HB247 PROHIBITING SEXUAL ORIENTATION CHANGE EFFORTS

The Board engaged in discussion on SB74 and the companion house bill, which would prohibit psychologists, applicants, and certain other professionals from engaging in "sexual orientation change efforts," which in the bill means "the practice of seeking to change a person's sexual orientation, including efforts to change behaviors, gender identity, or gender expressions, or to reduce or eliminate sexual or romantic attractions or feelings toward a person of the same gender."

There have been no hearings on the bills yet, although Dr. Ross encouraged the Board to be aware of the bills and consider them. Michael Ranney, Executive Director of the Ohio Psychological Association (OPA), reported that OPA and others, including the National Association of Social Workers, are in support of the bills. There was discussion about current authority in rules to address allegations of trying to change the sexual orientation of a minor. Dr. Ross reported that it's not clear if there is statutory authority or precedence to adopt a rule that would prohibit a specific intervention per se, as egregious as it might be. Dr. McCarley asked Mr. Carroll to provide feedback in October regarding the current statutory authority to write rules prohibiting sexual orientation change efforts.

Dr. Randolph stated that there is a delicate balance at play because of the evolving and unclear context within which psychologists often work. There was consensus that the acceptance and understanding of one's sexual orientation can be the result of a fluid and confusing process for the individual, and that there must be careful use of language and definitions. The context and circumstances of a minor discussing sexuality can vary greatly, and all ethical decision-making occurs within a specific context. Regulation must serve to protect not only individuals, (e.g., from the imposition of values and beliefs) but also to must serve to provide clear "notice" to a regulated community. Dr. Ross noted that the definition's concepts of "sexual orientation," "gender identity," and "gender expression" appear to be three distinct and potentially unrelated concepts. Concern about being prohibited from intervening ("efforts to change behaviors") with sexual offenders, including adolescent pedophiles, was also noted. There was consensus that additional study and stakeholder discussions would be helpful to address this in the best way.

A consensus statement was agreed to: *The Ohio Board of Psychology strongly opposes any efforts to change the sexual orientation of minors, continues to study SB74 and HB247 specific to definitions and regulatory clarity, and will partner with stakeholders to continue a dialogue in this area.*

Mr. Ranney invited Dr. Ross to participate in an upcoming stakeholder conference call, and Dr. Randolph strongly supported Dr. Ross' proposal to meet with the legislative sponsors.

ASPPB TELPSYCHOLOGY COMPACT (PsyPact)

Dr. Drude called attention to the PsyPact released by ASPPB, which requires seven states to adopt it via statutory changes prior to implementation. The compact has not been adopted yet by any state. Dr. Drude emphasized the importance of being informed about the compact and preparing to stake steps to work on a legislative proposal as soon as feasible. Eventually, participating states will give permission to other compact state psychologists to practice telepsychology across state lines.

The PsyPact is intended to address interjurisdictional practice that is already occurring, and would therefore be in the interest of the public be providing for professional oversight. The way that mental health services are being provided is changing rapidly as more people look to the Internet for solutions to life problems, including psychological services. There was agreement that interjurisdictional practice of telepsychology is prevalent and it is not going away, so there needs to be some orchestrated efforts to regulate it.

Current interjurisdictional practice is generally prohibited, and a compact will be protective of the public by increasing access to specialized services, defining the practice as regulated in the "licensing" state, the "receiving" state, and defining rules and requirements. There were questions and discussion. Dr. Randolph described the process as a "heavy lift" legislatively. Dr. Drude strongly encouraged the Board to study the PsyPact, and emphasized that the language would need to be adopted "as is," so that legislation is consistent from state to state.

Mr. Hoffman noted a concern about a possible federal role in regard to the regulation of interstate commerce. Dr. Drude echoed this, noting that there is legislation intended to provide for national solutions in this area specific to Medicare, as an example.

It was agreed that the Board would take this up via formal action on October 15, 2015. Dr. Drude reported that additional materials would be disseminated as they are received.

ASPPB COMMITTEE ON COMPETENCY ASSESSMENT SURVEY

Dr. Ross called attention to the survey distributed with the agenda. Dr. Drude provided some background on the issue of "competence assessment" in regard to both pre-licensure issues and ongoing evaluation of and maintenance of professional competencies (as compared to models that rely on continuing education). In the survey at issue ASPPB seeks feedback on the prospective development of a pre-licensure "competency based" skills assessment that would supplement the EPPP. The Board went through the 17-item survey and reached consensus on the responses for Dr. Ross to enter prior to the August 24, 2015 deadline.

A 30-minute lunch break was taken.

At 1:20PM, **MR. KELLER CALLED THE ROLL:**

Dr. Randolph	Present
Mr. Keller	Present
Dr. McCarley	Present
Dr. Drude	Present
Mrs. Hess	Present
Mr. Hoffman	Present
Dr. Cole	Present
Dr. Rabold	Present
Dr. Hedges	Present

OHIO YOUTH CONCUSSION GUIDELINES DRAFT RULE FOR APPROVAL

Dr. Rabold and Dr. Ross reviewed the rule draft distributed with the agenda and summarized the context of the mandate to file a rule in this area.

4732-17-01.1 Youth sports concussion assessment and clearance.

(A) For purposes of this rule:

(1) "Interscholastic athletics" means an interscholastic extracurricular activity that a school district sponsors or participates in that includes participants from more than one school or school district.

(2) "Youth sports organization" has the same meaning as in section 3707.51 of the Revised Code and means a public or nonpublic entity that organizes an athletic activity in which the athletes are not more than nineteen years of age and are required to pay a fee to participate in the athletic activity or whose cost to participate is sponsored by a business or nonprofit organization.

(3) "Youth" means an individual between the ages of four and nineteen who participated in interscholastic athletics or in a youth sports organization activity and was removed from practice or competition under division (D) of section 3707.511 of the Revised Code or division (D) of section 3313.539 of the Revised Code, based on exhibiting signs, symptoms, or behaviors consistent with having sustained a concussion or other brain injury while participating in practice or competition.

(4) "Physician" means a person authorized under Chapter 4731. of the Revised Code to practice medicine and surgery or osteopathic medicine and surgery.

(5) "Zurich guidelines" means the consensus statement on concussion in sport: The 4th international conference on concussion in sport held in Zurich, November 2012.

(B) Psychologists may assess and clear a youth to return to practice or competition if the following requirements are met:

(1) The psychologist has education, training and experience specific to concussion identification, the clinical features of concussion, assessment including neuropsychological testing and test interpretation, sports concussion management, and the principles of safe return to play protocols consistent with the Zurich guidelines or subsequent updated consensus statements published following future meetings of the international conference on concussion in sport; and

(2) The psychologist maintains competence to assess and clear youth in accordance with this rule through consultation, peer supervision and/or continuing education activities in the areas of concussion identification, the clinical features of concussion, assessment including neuropsychological testing and test interpretation, sports concussion management, and the principles of safe return to play protocols consistent with the Zurich guidelines or subsequent updated consensus statements published following future meetings of the international conference on concussion in sport; and

(3) Pursuant to sections 3313.539 and 3707.511 of the Revised Code, assessments and clearances are done pursuant to a referral from or in consultation or collaboration with a physician.

(C) The board recommends that psychologists who conduct concussion assessments and return-to-play clearances of youth in accordance with this rule do both of the following:

(1) Ensure that a portion of the continuing education requirements for biennial license registration enumerated in section 4732.141 of the Revised Code include instruction in one or more of the areas listed in paragraph (B)(1) of this rule.

(2) Use the medical return to play after suspected concussion form located on the Ohio department of health website at http://healthy.ohio.gov.vipp/concussion.aspx (March 2015).

Dr. McCarley moved that the Board direct Dr. Ross to file the rule as presented; Dr. Drude second.

A vote was taken:
Aye: Dr. Drude, Mr. Keller, Dr. Cole, Dr. Rabold, Mr. Hoffman, Mrs. Hess, Dr. McCarley, Dr. Hedges
Nay: None
Abstain: None

The motion passed.

At 1:30PM Dr. Randolph called a recess for the conduct of a public rules hearing on proposed amendments to OAC 4732-1-04, 4732-5-01 and 4732-5-02.

At 1:35PM the hearing concluded, the Board remained in public session, and Dr. Randolph gaveled the meeting back to order.

MR. KELLER CALLED THE ROLL:

Dr. Randolph	Present
Mr. Keller	Present
Dr. McCarley	Present
Dr. Drude	Present
Mrs. Hess	Present
Mr. Hoffman	Present
Dr. Cole	Present
Dr. Rabold	Present
Dr. Hedges	Present

CE PROCESSES AND STAKEHOLDER MEETING SUMMARY

Dr. Randolph reported on activity related to an annual meeting with OPA-MCE and OSPA-MCE representatives and the need to negotiate biennial procedural contracts regarding MCE tracking and reporting. The current biennial contracts will be signed by Dr. Ross and the next contract will be brought to the Board for approval in January 2016 (for 2016-18 biennium). Dr. Randolph expressed thanks to OPA-MCE and OSPA-MCE for meeting recently and for a willingness to collaborate more generally on issues related to continuing education. There is also a need to approve a course on domestic violence and its relationship to child abuse, which shall be available for license holders but not mandated.

Dr. Ross reviewed the Governor's Human Trafficking Awareness initiative, and a need to support the program by offering and giving MCE credit to license holders for completing continuing education on human trafficking awareness. He described a 30-minute video on human trafficking produced by the Ohio Department of Public Safety and available on the Internet. Dr. Ross reported that it is an excellent overview of the prevalence and traumatic effects of human trafficking in Ohio, and asked that the Board support efforts to provide CE to license holders who would be given access to a minimum 1-hour program that could include the video. Discussion resulted in a decision to conduct a workshop at the OPA spring convention in 2016 and to partner with OPA and OSPA to produce a webinar utilizing the video and adding material linking the issue of human trafficking to the practice of psychology. The Board expressed its desire to support the Governor's Office initiative by providing continuing education in this area.

Dr. Randolph revisited the issue of a "consumer bill of rights" discussed during previous meetings, and Dr. Cole agreed to pick up the thread with Dr. Ross and report back to the Board about possibilities during the October 15, 2015 meeting.

EXECUTIVE SESSION

Dr. Cole made a motion to enter executive session for the purpose of considering an investigation or complaint against a board license pursuant to ORC 121.22 (G)(1); Mr. Keller second.

DR. DRUDE CONDUCTED A ROLL CALL VOTE TO ENTER EXECUTIVE SESSION

Dr. Randolph	Yes
Mr. Keller	Yes
Dr. McCarley	Yes
Dr. Drude	Yes
Mrs. Hess	Yes
Mr. Hoffman	Yes
Dr. Cole	Yes
Dr. Rabold	Yes

Dr. Hedges Yes

EXECUTIVE SESSION BEGAN AT 1:50PM

2:00PM Dr. Randolph called the Board back into public session.

DR. DRUDE CALLED THE ROLL

Dr. Randolph	Present
Mr. Keller	Present
Dr. McCarley	Present
Dr. Drude	Present
Mrs. Hess	Present
Mr. Hoffman	Present
Dr. Cole	Present
Dr. Rabold	Present
Dr. Hedges	Present

Dr. Randolph sought a motion relative to "Consent Agreement #1" presented in executive session. Dr. McCarley made a motion to approve "Consent Agreement #1"; Dr. Drude second.

A vote was taken:

Aye: Dr. McCarley, Mrs. Hess, Dr. Drude, Dr. Rabold, Mr. Hoffman, Mr. Keller, Dr. Hedges
Nay: None
Abstain: Dr. Cole

The motion passed.

Dr. Randolph sought a motion relative to "Consent Agreement #2" presented in executive session. Dr. McCarley made a motion to approve "Consent Agreement #2"; Dr. Cole second.

A vote was taken:

Aye: Dr. McCarley, Mrs. Hess, Dr. Cole, Dr. Rabold, Mr. Hoffman, Mr. Keller, Dr. Hedges
Nay: None
Abstain: Dr. Drude

The motion passed.

Ms. Knauss announced the identities of the subjects of the consent agreements approved:

Consent Agreement #1: Charles Gerlach, Ph.D., Columbus
Consent Agreement #2: Sylvia Rimm, Ph.D., Sheffield Lake

Dr. Randolph asked Dr. Ross to begin his report.

EXECUTIVE DIRECTOR'S REPORT

1) **Annual Ohio Ethics Law Training**. Dr. Ross reminded everyone to complete annual training on the Ohio Ethics Law required by the Office of the Governor, and agreed to send an email that includes instructions for completion of in-person training or self-study training.

2) **Rule Updates re: Legislation in re 4732.10: Eligibility for licensure/non-accredited programs.** The Board reviewed the following proposed rule changes required in response to HB64:

4732-9-01 Requirements for admission to the examination for a psychologist license.

...For applicants seeking admission to examination under division (B)(3)(b) or (B)(3)~~(d)~~(c) of section 4732.10 of the Revised Code, at least one year of the two years of supervised experience shall be post-doctoral. In addition, graduates of doctoral programs accredited by one of the entities listed in divisions (B)(3)(a)(i) to (B)(3)(a)(iv) of section 4732.10 of the Revised Code within two years of when the applicant was awarded the doctoral degree shall be considered graduates of an accredited or designated program. With regard to such requirements, the board hereby further prescribes that:

(A) For persons seeking admission to examination under division (B)(3)~~(d)~~(b) of section 4732.10 of the Revised Code, the two years of supervised professional experience in psychological work of a type satisfactory to the board, at least one year of which shall be subsequent to attainment of the doctoral degree required by this rule, shall comply with all of the following requirements:...

4732-9-01.2 Requirements for degrees earned from institutions outside of the U.S.

A doctoral degree in psychology or any other field from an educational institution outside the United States shall be evaluated for equivalence to a doctoral degree in psychology from a fully accredited educational institution in the United States. The board prescribes that for any degree earned from an institution outside of the U.S.:

...(C) Prior to admission to examination, applicants judged to have a qualifying degree pursuant to this rule shall evidence compliance with the same training and experience requirements prescribed in paragraph ~~(H)~~(A) of rule 4732-9-01 of the Administrative Code, including at least two years of supervised experience of a type satisfactory to the board.

4732-9-03 Computation and attainment of experience.

(A) When the application pertains to licensure as a psychologist under division (B)(3)~~(d)~~(b) of section 4732.10 of the Revised Code, each year of supervised professional experience in psychological work of a type satisfactory to the board, as described in paragraph ~~(H)~~(A) of rule 4732-9-01 of the Administrative Code, shall include at least eighteen hundred hours of work within one calendar year or at least eighteen hundred hours of part-time work within a period not to exceed three calendar years. In no event shall any applicant under division (B) of section 4732.10 of the Revised Code receive credit for more than one year of such supervised professional training experience for activities performed over any twelve-month period, with forty hours per week being the maximum credited...

By consensus, the Board directed Dr. Ross to file the rule changes as presented.

3) COBA certification updates—Rule changes required 4783-1-01. Because the statute ORC 4783.04 does not reference educational or experience requirements, but instead focuses on the BCBA, Dr. Ross recommended that the rules be amended to eliminate requirements for notarized statements of supervised training and for an academic transcript.

4783-1-01 Application for certification.

(A) All applicants for certification as a certified Ohio behavior analyst shall file an application with the board, under oath and duly notarized, on a form prescribed by the board and accompanied by the appropriate fee.

(B) In accord with division (A) of section 4783.04 of the Revised Code, all applications for certification shall include:

(1) Written verification from the "Behavior Analyst Certification Board" or its successor organization that the person holds a current, valid certificate as a board certified behavior analyst or determination by the board that the applicant has met the equivalent requirements pursuant to criteria set forth in paragraph (B)(1)(a) of rule 4783-4-01 of the Administrative Code;

~~(2) The grade transcript, bearing official seal, sent directly to the board office by each graduate university or college attended by the applicant;~~

~~(3) Notarized statements from those persons who have supervised the applicant's professional work experience in applied behavior analysis shall be submitted on a form prescribed by the board, incorporated herein by reference as form PSY COBA-SUP-1 and available on the board's website www.psychology.ohio.gov. Said statements shall set forth the supervisor's own qualifications, familiarity with the applicant, the extent of the supervision over such applicant, the inclusive dates and number of hours of work supervised, the number of individual and group supervision hours weekly, and an evaluation of the applicant's performance;~~

~~(4)~~ (2) A completed, notarized application on a form prescribed by the board, incorporated herein by reference as form PSY COBA-APP-1 and available on the board's website www.psychology.ohio.gov.

~~(5)~~ (3) Not less than three letters of reference from individuals substantially familiar with the applicant's professional conduct, competencies, and personal character. The letters shall be sent directly to the board office and shall come from:...

Mr. Keller moved that Dr. Ross shall file the above changes to OAC 4732-1-01; Dr. Rabold second.

A vote was taken:

Aye: Dr. McCarley, Mrs. Hess, Dr. Drude, Dr. Cole, Dr. Rabold, Mr. Hoffman, Mr. Keller, Dr. Hedges
Nay: None
Abstain: None

The motion passed.

4) HB83 and rule clean-up: 4732-3-01. Dr. Ross described a need to correct references in another rule secondary to statutory changes.

4732-3-01 Definitions.

(E) "Accredited or recognized by a regional or national accrediting agency" or "accredited educational institution" means that an educational institution meets prescribed standards that are necessary ~~but not necessarily sufficient~~ to qualify its graduates for consideration for licensure pursuant to ~~section 4732.15 of the Revised Code or for admission to a licensure examination pursuant to~~ section 4732.10 of the Revised Code or for approval by the board pursuant to division ~~(B)~~(A)(2) of section 4732.22 of the Revised Code. Pursuant to section 4732.10 of the Revised Code, notwithstanding applicants applying for admission to examination for a psychologist license under division (B)(3)(b), (B)(3)(c), or (B)(3)(d) of section 4732.10 of the Revised Code, all applicants for

licensure shall provide evidence of an earned doctoral degree from an accredited educational institution as defined in this paragraph and from a graduate program holding academic program accreditation as that term is defined in paragraph (G) of this rule...

...(H) "Applicant" means any person who applies to the board for licensure pursuant to ~~section 4732.15 of the Revised Code or for admission to a licensure examination pursuant to~~ section 4732.10 of the Revised Code or for approval of the board pursuant to division ~~(B)~~(A)(2) of section 4732.22 of the Revised Code.

Dr, Drude made a motion to direct Dr. Ross to file changes to 4732-3-01 as noted above; Mr. Keller second.

A vote was taken:

Aye: Dr. McCarley, Mrs. Hess, Dr. Drude, Dr. Cole, Dr. Rabold, Mr. Hoffman, Mr. Keller, Dr. Hedges
Nay: None
Abstain: None

The motion passed.

5) Amended supervision rule and clarification of weekly "client" cap. There was discussion about recent attention brought to the Board office regarding a rule updated in OAC 4732-13-04 (B) Supervisor Responsibilities:

"(9) A supervisor shall actively monitor the weekly number of clients and/or training subjects of supervisees who are working under professional work and/or training supervision, as defined in paragraph (A) or (B) of rule 4732-13-03 of the Administrative Code. Although there is no limit on the number of supervisees registered with the board as required in paragraph (B)(25) of this rule, ***a supervisor shall not on a weekly basis, emergency situations excepted, delegate work to supervisees that affects more than one hundred total clients and/or training subjects****. This limitation on supervision does not apply to mental health worker supervision as described in paragraph (A) of this rule."*

Previously the cap of four supervisees without Board authorization to exceed four might have provided more latitude to supervisors in terms of weekly clients affected by a given group of supervisees. The Board discussed organizational mandates to provide services to large groups in mental health services in the Ohio Department of Rehabilitation and Correction (ODRC) and to conduct mental status screenings with each inmate upon arrival as a transfer from another institution. The new rule has unforeseen consequences and has inadvertently pushed some supervisors' caseloads to the limit or over on a weekly basis because of organizational requirements. Dr. Hedges noted that he has also seen the cap challenged in his community mental health setting, so that ODRC psychologists are not alone in experiencing unanticipated challenges. He raised possible solutions, including allowing for a process similar to a "full time equivalent" to account for brief screenings that take minutes but which count as "one client" affected, or amending the rule to include a monthly cap (instead of weekly) to allow for one client to be seen multiple times monthly and count as "one client" affected.

Discussion centered on providing limits and fostering accountability with a cap (current or amended) versus lifting the cap to allow for professional judgment about caseload size and not tying the hands of the supervisor. Following discussion focused on points raised by Dr. McCarley and Dr. Hedges, Dr. Ross urged caution in feeling pressure to make a decision during the meeting. Dr. Randolph asked the members of the Board to reach out to colleagues and collect data and opinions on the following options: 1) eliminate the cap; 2) leave the cap as it stands; 3) move to a monthly cap of 400-450 clients affected; 4) develop a "one hour equivalent" model; and, 5) other options not discussed.

It was agreed that the Board would revisit this rule and take formal action on October 15, 2015.

6) Pre-licensure actions and public information on Web. Dr. Ross asked for discussion about the requirement in law to list specific disciplinary actions on the Internet, and about policy regarding what to do with license holders who entered into consent agreements as a condition of licensure (e.g., requirements to complete additional education or supervised training).

After discussion and clarification of the issues, there was consensus that issuing a license following a pre-licensure consent agreement reflects a remedial action that is not consistent with listing the "license" as having been subject to discipline. These actions constitute public records, although the consensus was to retain current policy—that the actions will not be listed on the license verification site as a "board action" that could unfairly affect the new license holder after complying with Board requirements for the issuance of a license.

7) Timesheet and travel receipt reminders. Dr. Ross reminded the Board to submit time sheets in a timely manner so that payroll allotments are used within the appropriate pay period. The Board reviewed the need to submit receipts for travel expenses in order to be fully reimbursed.

8) Budget overview and projections. Dr. Ross distributed the FY16 budget allotments, and noted that there should be sufficient funding to operate during the fiscal year unless there are inordinate enforcement costs.

9) Performance goals and progress. Dr. Ross distributed his current performance review goals, noting which goals have been met, and which are ongoing.

Dr. Ross ended his report by expressing his gratitude to Dr. McCarley and to Dr. Randolph, whose first terms are ending on October 4, 2015. He stated that a request for continuity of leadership has been made to the Governor's Office via reappointment of seasoned members.

OFFICER ELECTIONS

President, for a one-year term beginning October 5, 2015: Dr. Randolph opened the floor for nominations. Dr. Rabold nominated Dr. Kenneth Drude to serve as Board president; Dr. McCarley second.

There were no other nominations.

By acclimation, Dr. Drude was elected president of the Ohio Board of Psychology for a one-year term beginning October 5, 2015.

Secretary, for a one-year term beginning October 5, 2015: Mr. Keller expressed a desire to continue as Board secretary, placing his name into nomination; Dr. Drude nominated Dr. Rabold to serve as secretary.

Dr. McCarley noted that he seconded each nomination.

Dr. Randolph called for a show of hands on the motion to elect Mr. Keller:

A vote was taken:

Aye: Dr. McCarley, Mr. Keller

The motion failed.

Dr. Randolph called for a show of hands to elect Dr. Rabold:

A vote was taken:

Aye: Mrs. Hess, Dr. Drude, Dr. Cole, Mr. Hoffman, Dr. Hedges

The motion passed.

NEW BUSINESS

None

ADJOURNMENT

In response to a request by Dr. Randolph the meeting was adjourned by consensus.

The meeting was adjourned at 3:10PM.

[SIGNED COPY ON FILE IN BOARD OFFICE]

_____
Ronald Ross, Ph.D.
Executive Director

_____
Kenneth Drude, Ph.D.
President

Scheduled Meetings and Examinations

September 4, 2015, Oral examinations	Riffe Center, 19th floor
September 11, 2015, Oral examinations	Riffe Center, 19th floor
October 15, 2015 Board meeting 9:30AM	Riffe Center, 31 East B
October 16, 2015 Oral examinations 9:30AM	Riffe Center, 19th floor
December 4, 2015 Oral examinations 9:30AM	Riffe Center 19th floor
January 14, 2016 Board meeting 9:30AM	Riffe Center, TBA
January 15, 2016 Oral examinations 9:30AM	Riffe Center 19th floor
March 10-11, 2016 Board meeting/Retreat	TBA
April 14, 2016 Board meeting 9:30AM	Riffe Center, TBA
April 15, 2015 Oral examinations 9:30AM	Riffe Center, 19th floor

Information contained on this website: http://hrp.law.harvard.edu/areas-of-focus/previous-areas-of-focus/counterterrorism-human-rights/professional-misconduct-complaint-larry-james/

Complainants

On July 7, 2010, The International Human Rights Clinic filed a complaint before the Ohio Pyschology Board against Dr. Larry James on behalf of the following complainants:

Dr. Trudy Bond
Trudy Bond, Ed.D., is an independent psychologist in Toledo, Ohio, where she has been treating patients for 30 years . Dr. Bond earned her doctorate in counseling psychology from Oklahoma State University at age 26 and obtained her license to practice psychology in 1980.

Colin Bossen
Colin Bossen is former minister of the Unitarian Universalist Society of Cleveland Heights. He is a graduate of Denison University and the Meadville Lombard Theological School.

Michael Reese
Michael Reese is a former private of the U.S. Army and a member of Disabled American Veterans. He studied mental health at Columbus State Community College and worked for more than a decade as a counselor or teacher for people with disabilities. A resident of Columbus and Cleveland, Michael is a former political action chair of the Columbus NAACP.

Josephine Setzler
Josephine Setzler, Ph.D., is a retired chemistry professor and environmental scientist who currently serves as executive director of a local affiliate of the National Alliance on Mental Illness. Josie got involved in mental health advocacy more than 20 years ago, following her brother's diagnosis of mental illness. She lives in Fremont, Ohio.

http://hrp.law.harvard.edu/areas-of-focus/previous-areas-of-focus/counterterrorism-human-rights/professional-misconduct-complaint-larry-james/complainants/

July 7, 2010

Ronald Ross, PhD., CPM
Executive Director
Ohio Board of Psychology
77 S. High Street, Suite 1830
Columbus, Ohio 43215-6108

Complaint Form – Larry C. James, License No. 6492

Dear Dr. Ross:

Enclosed, you will find a professional misconduct complaint against Dr. Larry C. James, Ohio License # 6492, and Dean of the School of Professional Psychology at Wright State University in Dayton, Ohio.

We are Ohio residents – a veteran, a minister, a psychologist, and a mental health advocate – who are deeply concerned that our State Psychology Board has chosen to license and continues to license a psychologist who may have used his healing skills and training to hurt human beings.

This complaint gathers publicly available evidence indicating that Dr. James's conduct rendered him ineligible for licensure at the time of his application to this Board and warrants revocation of his license today. We present the complaint in good faith, and on the information and belief that the information it contains is true and correct. Based on our clear identification of eighteen specific violations that this Board has the authority to address,[1] we request a prompt, thorough, and impartial investigation into the evidence presented. We hope this Board will agree that "violations are likely to have occurred" and will bring formal charges against Dr. James and conduct a hearing.[2] If through that hearing this Board finds that Dr. James engaged in any of the acts of misconduct alleged herein, we ask this Board to revoke permanently his license to practice psychology in the State of Ohio.

Summary of Alleged Misconduct and Violations

In 2003 and from 2007-2008, Dr. James was a U.S. Army Colonel who served as Chief Psychologist for the intelligence command at the U.S. Naval Station in Guantánamo Bay, Cuba. As outlined in the attached Statement of the Complaint, credible evidence indicates that in that position, Dr. James played an integral role in the system of abusive interrogation and detention used to exploit prisoners' mental and physical vulnerabilities, maximize their feelings of

[1] *See* State Board of Psych Regulatory Compliance Handbook (Revised March 2002)("The complaint is evaluated by the Regulatory Compliance staff, in consultation with the Executive Director, for clarity, specificity, actual violation, and the authority of the Board of Psychology.")
[2] *Id.* ("In many instances, the investigation may reveal information suggesting that violations are likely to have occurred. At that time, formal charges may be brought and the process leading to an administrative hearing and/or a "Consent Agreement" begins.")

disorientation and helplessness, and render them dependent upon their interrogators. These detainees included minors in Dr. James's custody and care.

Dr. James was a senior member – we believe the commanding officer – of the Behavioral Science Consultation Team (BSCT), a small but influential group of mental health professionals that advised on interrogation plans, monitored interrogations, and worked with detention operations to create an environment designed to break down prisoners.

During Dr. James's tenure as the senior intelligence psychologist in Guantánamo, boys and men were threatened with rape and death for themselves and their family members; sexually, culturally, and religiously humiliated; forced naked; deprived of sleep; subjected to sensory deprivation, over-stimulation, and extreme isolation; short-shackled into stress positions for hours; and physically assaulted. The evidence indicates that abuse of this kind was systemic, that BSCT health professionals played an integral role in its planning and practice, and that Dr. James, as the Chief Psychologist of the intelligence command, at minimum knew or should have known it was being inflicted.

The evidence further indicates that Dr. James, directly and/or in his supervisory capacity:

- failed to protect his clients from harm;
- entered into prohibited multiple relationships that compromised his judgment and objectivity and led to the exploitation of people with whom he worked;
- failed to protect confidential information; and
- failed to represent honestly his own conduct, experience, and the results of his services.

Individually, each act of alleged misconduct falls below the standard of practice established by the Board and professional ethics associations. Combined, they reveal a pattern of consistent disregard for the rules that govern his profession and demonstrate a lack of good moral character.

Specifically, Dr. Larry James, through the policies he implemented and the services he provided and supervised, appears to have violated Ohio statutes and the Board's rules governing:

• Good Moral Character	ORC § 4732-10(B)(2)
• Negligence in the Practice of Psychology	ORC § 4732-17(A)(5)
• Willful, Unauthorized Communication	ORC § 4732-17(A)(4)
• Negligence	OAC § 4732-17-01(B)(1)
• Misrepresentation of Affiliations	OAC § 4732-17-01(B)(3)
• False/Misleading Public Statements	OAC § 4732-17-01(B)(3)(c)
• Conflict of Interest	OAC § 4732-17-01(C)(1)
• Dependency	OAC § 4732-17-01(C)(4)
• Welfare of the Client-Informed Choice	OAC § 4732-17-01(C)(5)
• Prohibited Multiple Relationships	OAC § 4732-17-01(E)(2)(a)(ii)
• Confidentiality	OAC § 4732-17-01(G)
• Preventing Client Identification	OAC § 4732-17-01(G)(1)(b)
• Limiting Access to Client Records	OAC § 4732-17-01(G)(1)(d)

- Former Client Confidentiality OAC § 4732-17-01(G)(1)(e)
- Safeguarding Confidential Information OAC § 4732-17-01(G)(2)(d)
- Notice of Limits of Confidentiality OAC § 4732-17-01(G)(2)(e)
- Use of Fraud, Misrepresentation, or Deception OAC § 4732-17-01(I)(2)
- Reporting Violations to Board OAC § 4732-17-01(J)(4)

This Board has the Power and Duty to Investigate and Discipline Dr. James

Pursuant to the Ohio Revised Code and the Ohio Administrative Code, this Board retains the authority and obligation to deny, suspend, or revoke a license to practice psychology in the State of Ohio.[3] Circumstances or factors that may justify an increase in the degree of discipline to be imposed can include:

- adverse impact on the welfare and quality of life of others;
- substantial harm to the client/s including exploitation of trust;
- high level of vulnerability of the victim;
- willful, reckless misconduct;
- lack of insight into the wrongfulness of the conduct; and
- pattern of misconduct.[4]

The evidence suggests that many, if not all, of these aggravating factors are present here.

This Board's primary mission is to protect the public and "consumers of psychological services." It does this through, among other means, investigating "complaints regarding the professional conduct of Ohio's psychologists, and levying sanctions for violations."[5] This Board has declared itself "accountable to the public to appropriately sanction licensees who engage in misconduct ... to foster the safe provision of psychological services and confidence in the profession." And it also recognizes that accountability to the public "includes the Board's licensees," and an obligation to be consistent and fair in its "determination of sanctions."[6]

Nothing in the federal law or the regulations issued by the Department of Defense prevents this Board from formally investigating the allegations against Dr. James and taking appropriate disciplinary action. The military relies on state health professional boards to license, regulate, and sanction the conduct of military health professionals.[7]

A Matter of Concern to the Complainants as Ohio Residents

As residents of Ohio, we rely on this Board to ensure the psychologists practicing in this State are of sound professional character.

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[3] *See* ORC § 4732.10; OAC §§ 4732-17 to 4732-17-01
[4] *See* Ohio State Board of Psychology, Guidelines for Disciplinary Actions and Corrective Orders.
[5] *See id.*
[6] *See id.*
[7] *See* 10 U.S.C.A. § 1094 (a)(1); Department of Defense Directive 6025.13 § 5.2.2.2 (May 4, 2004).

To allow Dr. James's continued licensure without proper investigation would send the mistaken message to psychologists, students, and patients in Ohio that the rules of this State do not apply equally to all psychologists who hold the power to practice granted by this State. It would foster a culture of impunity that would undermine the standards of the profession in Ohio and would threaten the safety of the people of this State.

There is much at stake. The license issued by this Board grants Dr. James the power to not only practice psychology, but also to hold a position of great influence, as Dean of Wright State University's School of Professional Psychology in Dayton. In that capacity, he will be viewed as a role model and leader for a generation of students, many of whom go on to practice psychology in Ohio.

We trust this Board will take this matter seriously, as it would all complaints with merit, in accordance with its mandate. We look forward to a full investigation, and expect that when this Board reviews the ample evidence against Dr. James, it will act in the best interests of the people of Ohio.

Sincerely,

Michael Reese, Complainant
Dr. Trudy Bond, Complainant
Rev. Colin Bossen, Complainant
Josephine Setzler, Complainant

Michael Reese is a former private of the U.S. Army , and a member of Disabled American Veterans. He studied mental health at Columbus State Community College and worked for more than a decade as a counselor or teacher for people with disabilities. Michael is a former political action chair of the Columbus NAACP and now divides his time between Columbus and Cleveland.

Trudy Bond, Ed.D., is an independent psychologist in Toledo, Ohio, where she has been treating patients for 30 years . Dr. Bond earned her doctorate in counseling psychology from Oklahoma State University at age 26 and obtained her license to practice psychology in 1980.

Rev. Colin Bossen is minister of the Unitarian Universalist Society of Cleveland. He is a graduate of Denison University and the Meadville Lombard Theological School.

Josephine Setzler, Ph.D., is a retired chemistry professor and environmental scientist who currently serves as executive director of a local affiliate of the National Alliance on Mental Illness. Josie got involved in mental health advocacy more than 20 years ago, following her brother's diagnosis of mental illness. She lives in Fremont, Ohio.

MISCONDUCT

The allegations contained in this complaint are based on information and belief that they are true and correct.

OHIO LICENSEE LARRY C. JAMES

1. Dr. Larry C. James is a licensed psychologist in Ohio.[1] He applied for his license in July 2008.[2] In September 2008, while his application to this Board was pending, Dr. James published a book titled *Fixing Hell: An Army Psychologist Confronts Abu Ghraib*.[3] On November 4, 2008, he was issued license number 6492 by this Board.[4]

2. Since August 1, 2008, Dr. James has served as Dean of the School of Professional Psychology at Wright State University in Dayton, Ohio.[5] In this capacity, Dr. James oversees the training and education of numerous future psychologists, many of whom will go on to practice in Ohio.[6] Dr. James's position is conditioned on his holding a license to practice in this state.[7]

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[1] *See* Ohio License Center, Apr. 4, 2008, https://license.ohio.gov/Lookup/SearchDetail.asp?ContactIdnt=3989161&DivisionIdnt=83&Type=L/ [hereinafter Ohio License Center].

[2] *See* Letter from Carolyn Knauss, Ohio State Board of Psychology, to Trudy Bond (Sept. 16, 2008).

[3] *See* Larry C. James, *Fixing Hell: An Army Psychologist Confronts Abu Ghraib* (2008) [hereinafter *Fixing Hell*]. From June 2004 to October 2004, Dr. James was the Director of the Behavioral Science Unit at the Joint Interrogation and Debriefing Center at the Abu Ghraib prison in Iraq, where his responsibilities largely mirrored his responsibilities as Chief Psychologist of the BSCT at Guantánamo. *See* Larry C. James, Curriculum Vitae, at 2 (obtained from Wright State University in 2010) [hereinafter Second CV (2010)]; American Psychological Association (APA), Presidential Task Force on Psychological Ethics and National Security (PENS), 2003 Members' Biographical Statement, *available at* http://www.clarku.edu/peacepsychology/tfpens.html [hereinafter APA PENS 2003 Biography]; Lieutenant General Kevin C. Kiley, Army Surgeon General, *Assessment of Detainee Medical Operations for Operation Enduring Freedom (OEF), Guantánamo (GTMO), and Operation Iraqi Freedom (OIF)* (Apr. 13, 2005) ¶ 18-20(b), *available at* http://www1.umn.edu/humanrts/OathBetrayed/Army%20Surgeon%20General%20Report.pdf [hereinafter *Army Surgeon General Report*]; Vice Admiral A.T. Church III, *Review of Department of Defense Detention Operations and Detainee Interrogation Techniques*, at 355 (Mar. 7, 2005), *available at* http://www.aclu.org/files/pdfs/safefree/church_353365_20080430.pdf [hereinafter *Church Report*].

[4] *See* Ohio License Center, *supra* note 1.

[5] *See* Faculty & Staff page for Larry James, Wright State University School of Professional Psychology, http://www.wright.edu/sopp/faculty/admin/James.html; Press Release, Wright State University, Wright State University's School of Professional Psychology Names New Dean, Mar. 13, 2008, *available at* http://www.wright.edu/cgi-bin/cm/news.cgi?action=news_item&id=1432.

[6] *See* Press Release, Wright State University, Maximum Reaccreditation Granted to WSU School of Professional Psychology (June 5, 2005), *available at* http://www.cosm.wright.edu/cgibin/news_item.cgi?961 (stating that nearly half of the graduates of the School of Professional Psychology from 1982 to 2005 went on to practice in Ohio); Wright State University Office of Admissions/Alumni Relations, SOPP 2010 Entering Class Stats, Jun. 27, 2010 (stating that 57% of 2010 incoming students are from Ohio), *available at* http://www.wright.edu/sopp/apply/2010%20Entering%20Class%20Overview.pdf .

[7] *See* Announcement for Dean, School of Professional Psychology, Wright State University, Aug. 27, 2007.

EVIDENCE INDICATES THAT DR. JAMES COMMANDED A TEAM OF MENTAL HEALTH PROFESSIONALS ACTING AS INTERROGATION CONSULTANTS AT GUANTÁNAMO

Evidence Indicates That Dr. James Was the Head of the Joint Intelligence Group Behavioral Science Consultation Team (BSCT) at Guantánamo.

3. Until 2008, Dr. James was a psychologist and colonel in the United States Army.[8] From January to May 2003, Dr. James served as Chief Psychologist of the Joint Task Force at the U.S. Naval Station at Guantánamo Bay, Cuba.[9] Dr. James's admission that he was known as "Biscuit 1," along with military policy documents specifying that "BSCT1" was the designation for the Chief of the Behavioral Science Consultation Team (BSCT), strongly suggest that he led the Guantánamo BSCT at this time.[10] Dr. James admits to leading the BSCT upon his return to Guantánamo in June 2007 through May/June 2008.[11]

4. The Guantánamo BSCT advised on interrogation and detention policy, as well as on individual interrogation plans and specific interrogations.[12]

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[8] *See* Second CV (2010), *supra* note 3, at 2; *Fixing Hell*, *supra* note 3, at 11; APA PENS 2003 Biography, *supra* note 3; Shanita Simmons, *BSCT Operation Integral to JTF Mission Success*, Joint Task Force Guantanamo Newsletter (Jan. 28, 2008), *available at* http://www.jtfgtmo.southcom.mil/storyarchive/2008/January/012808-1-BSCT.html [hereinafter *BSCTs Integral*, JTF-Guantanamo Newsletter (Jan. 28, 2008)]; Jim DeBrosse, *Retired Colonel Puzzled by Guantánamo Critics*, Dayton Daily News, Sept. 21, 2009, *available at* http://www.daytondailynews.com/news/dayton-news/retired-colonel-puzzled-by-Guantánamo-critics-307976.html [hereinafter DeBrosse, DDN].

[9] *See* Second CV (2010), *supra* note 3, at 2; APA PENS 2003 Biography, *supra* note 3 (stating that "[i]n 2003, he was the Chief Psychologist for the Joint Intelligence Group at GTMO, Cuba").

[10] *See Fixing Hell*, *supra* note 3, at 35 ("I was the senior psychologist, so I was known as Biscuit 1."); JTF GTMO-BSCT Memorandum for Record, BSCT Standard Operating Procedures ¶ 3(a) (Dec. 10, 2004) [hereinafter BSCT SOP (2004)] ("BSCT Chief (BSCT1): … Chief, responsible for all issues relating to BSCT operations."); BSCT, Joint Intelligence Group, JTF-GTMO, Standard Operating Procedure ¶ 3(a) (Mar. 28, 2005) [hereinafter BSCT SOP (2005)] (specifying that "BSCT1" is the designation for the BSCT Chief); DeBrosse, DDN, *supra* note 8 ("Col. Larry C. James … was the leader of the team of five psychologists assigned to Gitmo interrogators."). *But see BSCTs Integral*, JTF-Guantanamo Newsletter (Jan. 28, 2008), *supra* note 8 (reporting that he served as the "deputy director of BSCT here from January 2003 to May 2003"). To our knowledge, he has never explained how a U.S. Army Colonel who was Chief Psychologist of the Joint Intelligence Group, was known as BSCT1, advised Gen. Miller, and had the authority to "fix" abuse throughout the camp would not have been in charge of this three-to-five person team. *See infra* ¶¶ 5-7.

[11] *See* Second CV (2010), *supra* note 3, at 2; *see also BSCTs Integral*, JTF-Guantanamo Newsletter (Jan. 28, 2008), *supra* note 8.

[12] *See* JTF GTMO-BSCT Memorandum for Record, BSCT Standard Operating Procedures (Nov. 11, 2002) (draft), at ¶¶ 3, 4(a), 4(d) [hereinafter BSCT SOP (2002)]; *BSCTs Integral*, JTF-Guantanamo Newsletter (Jan. 28, 2008), *supra* note 8; *Fixing Hell*, *supra* note 3, at 49; Army Surgeon General Report, *see supra* note 3, at 1-8 ("There is no doctrine or policy that defines the role of behavioral science personnel in support of interrogation activities. The most complete guidance found by the team were SOPs that describe the role and responsibilities of personnel serving in BSCT positions.").

Evidence Indicates That As BSCT1, Dr. James Created Policy for His Team and Was Responsible for His Team Members' Conduct As Well As His Own.

5. Dr. James admits to having the authority to create BSCT policy for his subordinates to follow.[13]

6. Evidence in the public record suggests that, as BSCT1, Dr. James had command authority over the other two to four mental health professionals who served on the team, as well as other individuals who assisted the team.[14] As team commander, in addition to being responsible for his own conduct, he would have also been legally responsible for conduct by BSCT members and others under his command. That responsibility included the obligation to prevent, report, investigate, and punish abuse inflicted by his subordinates.[15]

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[13] *See* DeBrosse, DDN, *supra* note 8 ("[Dr. James] had the authority to set policy for his small team of psychologists."); Shanita Simmons, *Association Vote Supports Psychologist Presence at Guantánamo*, JTF Guantánamo Public Affairs, Sept. 13, 2007, at 34b, *available at* http://www.jtfgtmo.southcom.mil/storyarchive/2007/September/091307-1-BSCTteam.html [hereinafter APA Vote, JTF-Guantanamo Newsletter] reporting that Dr. James "was intimately involved in creating the policy used by BSCT psychologists who work within military detention facilities").

[14] *See* U.S. Army Medical Command, Memorandum for Commanders, Behavioral Science Consultation Policy ¶ 3(c)(2) (Oct. 20, 2006) [hereinafter BSC Policy (Oct. 20, 2006)] ("The senior military BSC serves as team leader for any other military, civilian, or contractor employee, enlisted, or officer behavioral science personnel who serve on or assist the BSCT."); *Fixing Hell*, *supra* note 3, at 35; BSCT SOP (2004), *supra* note 10, ¶ 3(a) ("BSCT Chief…[is] responsible for all issues relating to BSCT operations); *APA Vote*, JTF-Guantanamo Newsletter, *supra* note 13, at 34b (stating that in his second deployment, "James [was the] officer in charge of the Behavioral Science Consultation Team (BSCT)"); *see also* BSCT SOP (2002), *supra* note 12, ¶¶ 2(a)-(c) (BSCT comprised of one clinical psychologist, one psychiatrist, and one mental health specialist); BSCT SOP (2004), *supra* note 10, ¶¶ 3(a)-(c) (BSCT comprised of two clinical psychologists and one mental health specialist); BSCT SOP (2005) *supra* note 10, ¶¶ 3(a)-(c) (BSCT comprised of two clinical psychologists and one mental health specialist); DeBrosse, DDN, *supra* note 8 (reporting that Col. James led a "team of five psychologists assigned to Gitmo interrogators").

[15] *See* Army Command Policy, Army Regulation 600-20 ¶ 2-1(b) (revised Nov. 30, 2009) [hereinafter A.R. 600-20] ("Commanders are responsible for everything their command does or fails to do.…Commanders delegate sufficient authority to Soldiers in the chain of command to accomplish their assigned duties, and commanders may hold these Soldiers responsible for their actions. Commanders who assign responsibility and authority to their subordinates still retain the overall responsibility for the actions of their commands."); *id.* ¶ 4-1(c) ("Commanders and other leaders will maintain discipline according to the policies of this chapter, applicable laws and regulations, and the orders of seniors."); *id.* ¶ 4-4(a)(2) ("Ensuring the proper conduct of Soldiers is a function of command. Commanders and leaders in the Army … will … [t]ake action consistent with Army regulation in any case where a Soldier's conduct violates good order and military discipline."); *see also* Michael Schmitt, *The American Military Justice System and the Response to Prisoner Abuse*, Crimes of War Project, Jun. 2, 2004, http://www.crimesofwar.org/onnews/news-justice.html ("[C]ommanders are responsible for crimes of subordinates if they knew or should have known that they were being committed or about to be committed and did nothing to stop them and/or report the matter to appropriate authorities for investigation and prosecution."); Uniform Code of Military Justice, at 10 U.S.C. § 877-77 [hereinafter UCMJ], (extending criminal liability to those who aid, abet, counsel, command, or procure the commission of an offense or cause an act to be done which if directly performed by them would be an offense); U.S. Army Field Manual 27-10-501 (stating that responsibility for acts of subordinates "arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof"); UCMJ, 10 U.S.C. § 871-92(3) (specifying that dereliction of duty is a punishable offense); Manual for Courts Martial United States ¶ 16.c.(3)(c) [hereinafter MCM], ("A person is derelict in the performance of duties when that person

7. As a psychologist responsible for other mental health professionals, and as the supervisor of psychological and medical care provided to three juvenile patients,[16] Dr. James also had professional and ethical duties to prevent and report misconduct committed by those under his command, administration and/or supervision.[17]

EVIDENCE INDICATES THAT DR. JAMES APPLIED HIS PROFESSIONAL PSYCHOLOGICAL TRAINING TO AID EXPLOITATIVE AND ABUSIVE INTERROGATIONS

The Guantánamo Interrogation Program Was Designed to Exploit Detainees Psychologically and Physically.

8. The system of interrogation and detention employed at Guantánamo was specifically designed to exploit prisoners' psychological vulnerabilities, maximize their feelings of disorientation and helplessness, and put them in a position of absolute dependency upon their interrogators. "All aspects of the [detention] environment should enhance capture shock, dislocate expectations, foster dependence, and support exploitation to the fullest

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willfully or negligently fails to perform that person's duties or when that person performs them in a culpably inefficient manner.").

[16] *See infra*, ¶¶ 44-47.

[17] OAC § 4732-17-01(J)(4) ("Reporting of violations to the board"); American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct* § 1.05 (2002), *available at* http://www.apa.org/ethics/code/code.pdf [hereinafter APA Ethics Code] ("Reporting ethical violations"); *id.* at § 2.05 ("Psychologists who delegate work to employees, supervisees, or research or teaching assistants or who use the services of others...take reasonable steps to (1) avoid delegating such work to persons who have a multiple relationship with those being served that would likely lead to exploitation or loss of objectivity... and (3) see that such persons perform these services competently."); *id.* § 3.04 ("Avoiding Harm—Psychologists take reasonable steps to avoid harming their clients/patients, students, supervisees, research participants, organizational clients, and others with whom they work, and to minimize harm where it is foreseeable and unavoidable."); OAC §§ 4732-13-01 to 4732-13-04 (explicitly recognizing theory of *respondeat superior* for supervisors).

extent possible," wrote Dr. John Leso,[18] the first BSCT psychologist and Dr. James's predecessor and mentee.[19]

9. This exploitative interrogation system was based on techniques from the U.S. military's Survival, Evasion, Resistance and Escape (SERE) program.[20] The SERE program was originally designed to train U.S. soldiers to resist the types of psychological and physical torture that had been used by the Chinese and North Koreans on our own troops in the Korean War "to generate propaganda not intelligence."[21] In an effort to prepare them for possible capture, the SERE program subjects U.S. personnel to sleep deprivation, isolation, starvation, verbal and physical abuse, exposure to extreme temperatures, sexual and religious humiliation, and, until 2007, waterboarding under controlled conditions.[22]

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[18] Senate Armed Services Committee, *Inquiry into the Treatment of Detainees in U.S. Custody* at 52 (Apr. 21, 2009), *available at* http://documents.nytimes.com/report-by-the-senate-armed-services-committee-on-detainee-treatment [hereinafter *SASC Report*] (quoting BSCT, *Counter-resistance Strategies* at 4-5); *see also id.* at 38-62 (reporting that the assistant-commandant of the U.S. Army Intelligence Center and School recommended that the Guantánamo BSCT work with other teams to create an environment that would be "conducive to extracting information by exploiting the detainee's vulnerabilities"); JTF-GTMO-CG, Camp Delta Standard Operating Procedures ¶ 4-20(a), at 4.3 (Mar. 28, 2003), *available at* http://ccrjustice.org/files/Camp%20Delta%20Operating%20Procedures.pdf [hereinafter Camp Delta SOP] ("The purpose of the Behavior Management Plan is to enhance and exploit the disorientation felt by a newly arrived detainee in the interrogation process. It concentrates on isolating the detainee and fostering dependence of the detainee on his interrogator."); Neil A Lewis. *Interrogators Cite Doctors' Aid at Guantánamo Prison Camp*, N.Y. Times, June 24, 2005, *available at* http://www.nytimes.com/2005/06/24/politics/24gitmo.html [hereinafter Lewis, *Doctors' Aid*] (According to former Guantánamo interrogators, military health professionals "aided interrogators in conducting and refining coercive interrogations of detainees, including providing advice on how to increase stress levels and exploit fears".).

[19] *Fixing Hell*, *supra* note 3, at 18-24. In 2005 and 2008, Dr. James defended clinical psychologist John F. Leso (New York License No. 013429), implying to an American Psychological Association task force that the policy Dr. Leso drafted helped eliminate abuse. *See* E-mail from Col. Larry C. James PhD, Re: regarding our report (July 29, 2005), *in* E-mail Messages to the Listserv of the APA PENS Presidential Task Force, at p. 157 [hereinafter APA PENS Listserv], *available at* http://www.propublica.org/documents/item/e-mails-from-the-american-psychological-associations-task-force-on-ethics-a ("The Army Psychologist (ironically the gentleman who was blasted in the NEJM article) was the one who actually developed a memorandum for the secretary of defense that laid out the outlawed procedures...").

[20] U.S. Department of Defense, Office of the Inspector General, *Review of the DoD-Directed Investigations of Detainee Abuse* (Aug. 25, 2006), at 23-29, *available at* http://www.fas.org/irp/agency/dod/abuse.pdf [hereinafter *OIG-DOD Report*]; *SASC Report*, *supra* note 18, at 38 ("Just weeks after the JPRA training at Fort Bragg, two GTMO personnel who attended the Fort Bragg training drafted a memo proposing the use of physical and psychological pressures in interrogations at GTMO, including some pressures used at SERE schools to teach U.S. soldiers how to resist interrogation by enemies that do not follow the Geneva Conventions."); *id.* at 46, 50 (citing Committee staff interview of MAJ Paul Burney (Aug. 21, 2007)); *id.* at 66 (quoting General Hill in June 3, 2004 Media Availability with Commander U.S. Southern Command).

[21] Colonel Steven M. Kleinman, Statement Before the United States Committee on Armed Services: Hearing on the Treatment of Detainees in US Custody, (Sept. 25, 2008), at 3, *available at* http://armed-services.senate.gov/statemnt/2008/September/Kleinman%2009-25-08.pdf; *see also SASC Report*, *supra* note 18, at 26 ("JPRA's techniques were designed to show Americans the worst possible treatment that they may face...") (citing Committee staff interview of Lt Col Daniel Baumgartner (Aug. 8, 2007)).

[22] *SASC Report*, *supra* note 18, at 4, 21; JTF-GTMO SERE Interrogation Standard Operating Procedure (Dec. 10, 2002), *available at* http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-standard-operating-procedures/gtmo_sere_interrogation_sop.pdf [hereinafter JTF-

10. In 2002, psychologists[23] reverse-engineered the defensive SERE techniques into an offensive interrogation program for use against prisoners held by the U.S. in the "War on Terror."[24] They did so without proper scientific basis,[25] but most importantly, ignoring the U.S. government's longstanding recognition that those techniques are illegal. Government officials have since re-affirmed that some of these techniques constitute torture.[26] Torture and other cruel, inhuman or degrading treatment or punishment are illegal under domestic and international law.[27]

GTMO SERE SOP].

[23] Two psychologists who played a primary role in this process are James Elmer Mitchell (Texas License No. 23564) and John "Bruce" Jessen (Idaho License No. Psy-195). On June 16, 2010, Texas psychologist Dr. Jim Cox filed a complaint against Dr. Mitchell with the Texas State Board of Examiners of Psychology. Todd Essig, *Psychology and Torture*, Simu-Nation (Jun. 17, 2010), *available at* http://trueslant.com/toddessig/files/2010/06/MIT-FINL.pdf.

[24] *SASC Report*, *supra* note 18, at 6-11, 23 ("I believe our niche lies in the fact that we can provide the ability to exploit personnel based on how our enemies have done this type of thing over the last five decades.") (citing memo from Joseph Witsch to Col Randy Moulton and Christopher Wirts, Exploitation Training (July 16, 2002)); *id.* at 26 ("Mr. Shiffrin confirmed that one of the purposes for seeking information from JPRA was to 'reverse-engineer' the techniques."); JTF-GTMO SERE SOP, *supra* note 22, ¶ 1 ("[SERE] tactics can be used to break real detainees during interrogation operations."); *see also* Jane Mayer, *The Experiment*, New Yorker, July 11, 2005, *available at* http://www.newyorker.com/archive/2005/07/11/050711fa_fact4?currentPage=all; Scott Shane, *Interrogation Inc.: 2 U.S. Architects of Harsh Tactics in 9/11's Wake*, N.Y. Times, Aug. 11, 2009, *available at* http://www.nytimes.com/2009/08/12/us/12psychs.html?_r=4&hp=&pagewanted=all [hereinafter Shane, *Interrogation Inc.*].

[25] U.S. Department of Justice, Letter Attaching FBI Analysis of Guantánamo Interrogation Tactics, at 983, 1020-21(May 30, 2003), *available at* http://www.aclu.org/files/assets/torturefoia_11062009_pages5to29.pdf [hereinafter May 30, 2003 FBI Analysis] at 983-85 (stating that techniques were of "questionable effectiveness"); Shane, *Interrogation Inc.*, *supra* note 24 ("They had never carried out a real interrogation. … They [Mitchell and Jessen] had no relevant scholarship."); Katherin Eban, *Rorschach and Awe*, Vanity Fair, July 17, 2007, *available at* http://www.vanityfair.com/politics/features/2007/07/torture200707 ("The tactics were a 'voodoo science,' says Michael Rolince, former section chief of the F.B.I.'s International Terrorism Operations… In truth, many did not consider Mitchell and Jessen to be scientists. They possessed no data about the impact of SERE training on the human psyche, say former associates."); *see also* Central Intelligence Agency, Office of the Inspector General, *Counterterrorism Detention and Interrogation Activities (September 21 – October 2003)* (May 7, 2004), at 21-22, n. 26, 37 [hereinafter *OIG-CIA Report*].

[26] Bob Woodward, *Detainee Tortured, Says U.S. Official*, Wash. Post., Jan. 14, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html (Susan J. Crawford, Convening Authority for Military Commissions under the Bush Administration, admitted that "[w]e tortured [Mohammed al-]Qahtani… [h]is treatment met the legal definition for torture."); *Obama Says Waterboarding is Torture*, Voice of America, Apr. 30, 2010, *available at* http://www1.voanews.com/english/news/a-13-2009-04-30-voa47-68684982.html; *see also* May 30, 2003 FBI Analysis, *supra* note 25 at 983, 1020-2 (warning that many of the techniques may constitute violations of the Torture Statute); *SASC Report*, *supra* note 18, at 20 (quoting LTC Mark Gingras, Army IG Interview (Oct. 11, 2005)); *SASC Report, supra* note 18, at 67-70 ("As lawyers we're talking about adherence to the rule of law being important… And so suddenly we look like we're brushing this aside or we're twisting the law. The feeling was that decision makers within the Pentagon didn't much care about that. They cared about winning the War on Terrorism. And if that meant you had to pull out fingernails, you'd pull out fingernails, figuratively speaking.").

[27] *See* 18 U.S.C. §§ 2340-2340A (Torture Statute); U.S. Const. Amend. VIII; U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984), S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. International Covenant on Civil and Political Rights (Dec. 19, 1966), art. 7, S. Exec. Doc. No. 95-2, at 23 (1978), 999 U.N.T.S. 171, 175; *see also* Geneva Conventions; the Uniform Code of Military Justice, 10 U.S.C.

11. Nevertheless, members of the first Guantánamo BSCT trained in SERE tactics[28] and developed an interrogation policy based on those tactics.[29] Many of these techniques were promoted, used, and further codified as official policy during Dr. James's tenure in Guantánamo.

As Mental Health Professionals, Dr. James and his Behavioral Science Consultation Team Were Vital to the Exploitative Interrogation Program.

12. The Guantánamo BSCT was first created in the summer of 2002 to apply psychology and behavioral science in support of the interrogation mission.[30] Some say this was a novel role for a military BSCT.[31] Until then, behavioral science teams had been used primarily to treat combat stress, evaluate soldiers' suitability for duty, and help former soldiers transition back to civilian life.[32]

13. Mental health professionals thus became essential to the development and implementation of the psychological system of exploitation at Guantánamo. Selected because of their training in mental health,[33] available evidence indicates that Dr. James and the BSCT members allegedly under his command were involved in most, if not all, interrogations conducted

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§ 801 et seq.; the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261-3267; and the War Crimes Act, 18 U.S.C. § 2441.

[28] Members of the first Guantánamo BSCT, including Dr. John Leso and BSCT psychiatrist Paul Burney (Wisconsin License No. 48820-20), traveled to Ft. Bragg, North Carolina on September 16, 2002, to learn about SERE techniques and determine which techniques "might be useful in interrogations at Guantánamo." *See SASC Report*, *supra* note 18, at 43-46; *OIG-DOD Report*, *supra* note 20, at 25. Dr. James asserts that he and his colleague, senior Army SERE psychologist Lt. Colonel Louie "Morgan" Banks (North Carolina License No. 1340), decided to send Dr. Leso to that training, which Dr. Banks eventually organized. Contrary to the conclusions reached by two government investigations, Dr. James portrays the training as a briefing intended to teach Dr. Leso how to follow the Geneva Conventions and "treat all prisoners with decency and respect and how to use incentive-based interviews rather than harsh interrogation tactics." *Fixing Hell*, *supra* note 3, at 22. *But see SASC Report*, *supra* note 18, at 39-49.

[29] *SASC Report*, *supra* note 18, at 50, 61-62; *see* Camp Delta SOP *supra* note 18, ¶ 4-20(a), at 4.3.

[30] *SASC Report*, *supra* note 18, at 38; BSCT SOP (2002), *supra* note 12, ¶ 3 (BSCTs mission was to "provide behavioral science consultation in support of JTF GTMO's interrogation mission."); *see* Major General Geoffrey Miller, Assessment of DOD Counterterrorism Interrogation and Detention Operations in Iraq (Sept. 9, 2003), at 5, *available at* http://www1.umn.edu/humanrts/OathBetrayed/Taguba%20Annex%2020.pdf [hereinafter Miller Report] ("[BSCTs] are essential in developing integrated interrogation strategies and assessing interrogation intelligence production."); *Church Report*, *supra* note 3, at 355 (One of the BSCT's "core missions" is to "support interrogations.").

[31] *SASC Report*, *supra* note 18, at 38-39; *Army Surgeon General Report*, *supra* note 3, at 1-8.

[32] *SASC Report*, *supra* note 18, at 38-39. *See, e.g.*, Spc. Blanka Stratford, *Combating Combat Stress in Iraq*, Anaconda Times, Mar. 8, 2004, at 4 (describing Combat Stress Control teams), *available at* http://www.arcent.army.mil/media/10407/08mar%20anaconda%20times.pdf.

[33] *See* BSCT SOP (2002), *supra* note 12, ¶ 2(a)-(c); BSCT SOP (2004), *supra* note 10, ¶¶ 3(a)-(c), 5(a)-(b); BSC Policy (Oct. 20, 2006), *supra* note 14, ¶¶ 4(a)-(b), 7(a)(1) (showing a license is a prerequisite for BSCT personnel).

during his 2003 and 2007-2008 deployments.[34] Dr. James admits that he was aware of interrogation practices throughout the prison.[35] According to an internal FBI e-mail, BSCT personnel "[knew] everything [that was] going on with each detainee."[36]

14. Dr. James also admits to having "shape[d] the national DOD policy for the biscuit."[37] Issued in 2006, that policy provides that BSCT members should "evaluate the psychological strengths and vulnerabilities of detainees" and "assist in integrating these factors into a successful interrogation."[38]

Preparation and planning for interrogations

15. Available evidence suggests that Dr. James and the BSCT members allegedly under his command met frequently with interrogators to review interrogation plans.[39] They also advised and trained interrogators on specific interrogation techniques.[40]

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[34] *SASC Report*, *supra* note 18, at 39, n. 277 (stating that the 2002 BSCT SOP defined BSCT tasks as "observing interrogations and providing feedback to interrogators on detainee behavior"); BSCT SOP (2004), *supra* note 10, at ¶ 6(b) (listing one of the BSCT's "Mission Essential Tasks" as "[m]onitoring interrogations and other staff-detainee interactions"). BSC Policy (Oct. 20, 2006), *supra* note 14, ¶ 6(a) (BSCT members were an "embedded resource" to the interrogation/debriefing process); *see* Memorandum for Major General Geoffrey D. Miller, Commander, JTF-GTMO, Subject: Results of Commander's Inquiry, re: Allegation of Inhumane Treatment of [REDACTED], at 1323 (Apr. 30, 2003) [hereinafter Commander's Inquiry], *available at* http://action.aclu.org/torturefoia/released/072605/ (reproducing an April 22, 2003, interrogation plan that includes a standard field for "Behavioral Analysis Assessment" and was marked "YES FROM BSCT").

[35] *BSCTs Integral*, JTF-Guantanamo Newsletter, *supra* note 8 ("[T]he BSCT works with interrogators assigned to the Joint Intelligence Group by monitoring their interactions with detainees and providing feedback … [Dr. James said,] 'It is not unusual to see myself or a member of my team walking around the camps observing and interacting with the guards, interrogators and analysts.'"); *see Fixing Hell*, *supra* note 3, at 37, 43, 50-51, 62.

[36] E-mail from FBI [parties redacted] re: GTMO (Jul. 31, 2005), FOIA Document #: DOJFBI001428-DOJFBI001429, at DOJFBI-001328, *available at* http://www.aclu.org/files/projects/foiasearch/pdf/DOJFBI001327.pdf.

[37] *Fixing Hell*, *supra* note 3, at 256.

[38] Memorandum from Kevin C. Kiley, Army Surgeon General, to Commanders, MEDCOM Major Subordinate Commands, Behavioral Science Consultation Policy, Oct. 20, 2006, at 00147, *available at* http://content.nejm.org/cgi/data/359/11/1090/DC1/1.

[39] *See* Commander's Inquiry, *supra* note 34, at 1365 ("while developing IP's [Interrogation Plans] have daily mtgs re; mt. w/ BISCUIT – very planned procedures … talked about ahead of time"); *see also supra* note 34.

[40] *Fixing Hell*, *supra* note 3, at 55 ("I had a hundred scenarios we could try. No matter which strategy we employed, the goal was always the same: get the prisoner to say something in response. *Anything*."); BSCT SOP (2002), *supra* note 12, ¶ 4(a) (listing "consult[ing] on interrogation approach techniques" as a BSCT "Mission Essential Task"); BSCT SOP (2004), *supra* note 10, ¶¶ 5(a)-(b), 6(a), (d) (BSCTs "provide recommendations to enhance the effectiveness of interrogation operations" "[p]rovide[] consultation to interrogation staff" and "[p]rovide[] training on behavioral, psychological, cultural, and religious issues pertaining to the detainee population."); BSC Policy (Oct. 20, 2006), *supra* note 14, ¶¶ 5(a)(8) (BSCTs can "provide advice concerning interrogations" and "provide training for interrogators", 5(a)(10), 6(e)); *BSCTs Integral*, JTF-Guantanamo Newsletter, *supra* note 8 ("Although the BSCT team has gone through several iterations since its inception in summer 2002, Dr. James said its objectives remain the same – to read behavior, look for clues on how to improve communication and to teach techniques on

16. Guantánamo policy documents indicate that Dr. James's responsibilities included working with others in the intelligence and detention commands to develop "detention facility behavior management plans."[41] True to Dr. Leso's 2002 recommendation that the detention environment should shock, dislocate, exploit, and render dependent the detainees, the 2003 Camp Delta Behavior Management Plan, developed during Dr. James's tenure, stated that its purpose was to "to enhance and exploit the disorientation and disorganization" of all incoming prisoners so as to render them dependent on their interrogators.[42]

17. Based on information taken from their medical records, Dr. James admits that his team assessed detainees to determine their fitness for interrogation.[43] Dr. James further admits to instituting a policy that required treating health professionals to disclose detainee medical information to the BSCT.[44] Former interrogators and the ICRC report that both before and after Dr. James's tenure, BSCT personnel and interrogators used medical information to exploit detainees' phobias and psychologically break them down.[45] Dr. James contends that

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how to manage uncooperative detainees."); *Army Surgeon General Report*, *supra* note 7, ¶¶ 18-19(c)(5)-(7), at 18-13.

[41] BSCT SOP (2002), *supra* note 12, ¶ 4(d) (listing "Assist in the development of detention facility behavior management plans" as a "Mission Essential Task"); *see* BSCT SOP (2004), *supra* note 10, ¶ 6(g) (detention policy); BSC Policy (Oct. 20, 2006), *supra* note 14, ¶ 5(a)(11) ("BSCs may advise command authorities on detention facility environment..."); *see also Fixing Hell*, *supra* note 3, at 69 ("What dumbass psychologist at the prison let this happen? Didn't he read the standard operating procedures I wrote at Gitmo a year ago?").

[42] Camp Delta SOP, *supra* note 18, ¶ 4-20(a), at 4.3.

[43] *See Fixing Hell*, *supra* note 3, at 58-59; *see also* BSC Policy (Oct. 20, 2006), *supra* note 14, ¶ 5(a)(5) (listing "permissible purposes" for which BSCTs would be able to disclose detainee medical information); *Army Surgeon General Report*, *supra* note 3, ¶ 18-19(e), at 18-13 (until June 2004, "[s]everal BSCT personnel [at Guantánamo] did have access to detainee medical records"); BSCT SOP (2002), *supra* note 12, ¶ 4(e) (one BSCT "Mission Essential Task" was to "[d]escribe the implications of medical diagnoses and treatment for the interrogation process"); *see also* DoD Instruction 2310.08E (June 6, 2006), at 4.4, *available at* http://www.dtic.mil/whs/directives/corres/pdf/231008p.pdf.

[44] *Fixing Hell*, *supra* note 3, at 57 (contending that he and Lt. Comm. Henderson "devised a plan" whereby "[t]he biscuit staff were the only members of the Joint Intelligence Group or the entire intel community who would have any access or discuss any medical information with the doctors and nurses."). A previous policy had required medical personnel to "convey any information concerning ... the accomplishment of a military or national security mission ... obtained from detainees" to military personnel "who have an apparent need to know the information". Brigadier General R.A. Huck, U.S. Southern Command Confidentiality Policy for Interactions Between Health Care Providers and Enemy Persons Under U.S. Control Detained in Conjunction with Operation ENDURING FREEDOM (Aug. 6, 2002), ¶ 4(d), *available at* http://www1.umn.edu/humanrts/OathBetrayed/Huck%208-2-02.pdf.

[45] *Fixing Hell*, *supra* note 3, at 59 ("[T]he International Committee of the Red Cross... reported...that we were using [the information]... to tell interrogators exactly where to poke the prisoner with a sharp stick."); Neil A. Lewis, *Red Cross Finds Abuse in Guantánamo*, N.Y. Times, Nov. 30, 2004, at A01, *available at* http://www.nytimes.com/2004/11/30/politics/30gitmo.html (reporting that in July 2004, the ICRC said the U.S. had "intentionally used psychological and sometimes physical coercion 'tantamount to torture,'" "asserted that some doctors and other medical workers at Guantánamo were participating in planning for interrogations, in what the report called 'a flagrant violation of medical ethics,'" and that "[d]octors and medical personnel conveyed information about prisoners' mental health and vulnerabilities to interrogators ... sometimes directly, but usually through a group called the Behavioral Science Consultation Team").

his policy's intent was to "eliminate the possibility that any ill or fragile detainee would be harmed as a result of *some abusive interrogation technique*."[46]

Recommending techniques and monitoring interrogations

18. The record also suggests that Dr. James and BSCT members allegedly under his command observed and monitored many, if not all, interrogations.[47] Directly and/or in his supervisory capacity, he assessed and evaluated detainee behavior, suggested techniques, and had at least *de facto* authority to end ongoing interrogations.[48] Dr. James admits to monitoring and intervening in interrogations on the base.[49]

19. As a formal matter, Dr. James may have been assigned a concurrent "safety monitor" role; beginning in 2004, the standard operating procedures [SOPs] stated that the BSCT should ensure that interrogations and detention operations be "*safe*, legal and effective" (emphasis added).[50] However, these SOPs must be read in the context of a program that had at least for a period purportedly redefined acts such as "waterboarding, forced nudity, sleep deprivation, temperature extremes, stress positions and prolonged isolation," previously recognized as illegal, "to be 'safe, legal and effective' 'enhanced' interrogation techniques (EITs)."[51] In practice, the record indicates that these mental health professionals were not so

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[46] *Fixing Hell*, *supra* note 3, at 58-59 ("We used the information to eliminate the possibility that any *ill* or *fragile* detainee would be harmed as a result of some abusive interrogation technique." (emphasis added)). This statement implies that at least some detainees were certified as fit for "some abusive interrogation technique." In 2005, Army Surgeon General Kevin Kiley gave the impression that he was publicly repudiating this policy when he told reporters that a "firewall" had been erected to keep BSCTs away from medical records. The change, he told reporters, was out of "concern for the detainees' privacy" and "to be sure that there was no perception that BSCT members were … also health care providers to the detainees." Lt. Gen. Kevin C. Kiley, Special Defense Department Briefing (Jul. 07, 2005), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3168. *But see Army Surgeon General Report*, *supra* note 12, at 18-13 (reporting that although as of June 2004, the Guantánamo BSCT lacked direct access to medical records, they still retained access to "a restricted database which provided medical information on detainees"); M. Gregg Bloche & Jonathan H. Marks, *Doctors and Interrogators at Guantánamo Bay*, 35 N. Engl. J. Med. 6, 7-8 (2005) (citing a May 24, 2005, Army Medical Command memo which refers to the "interpretation of relevant excerpts from medical records" for the purpose of "assistance with the interrogation process").

[47] *See supra* ¶¶ 13-14.

[48] *See supra* ¶¶ 12-20; *BSCTs Integral*, JTF-Guantanamo Newsletter, *supra* note 8 (stating that Dr. James's duties at Guantánamo included providing interrogators and guards "with feedback by coaching, mentoring and helping to improve their interactions with the detainees"); *infra* ¶ 36.

[49] *See supra* ¶ 13 and note 35; *Fixing Hell*, *supra* note 3, at 50 ("I walked toward the observation room with its one-way mirror that would allow me to peek into the interrogation booths."); *id.* at 62 ("As I watched through a one-way observation window, I saw a detainee being held straight up in a corner …").

[50] BSCT SOP (2004), *supra* note 10, ¶ 4; *see also id.* at 6(b) (listing ". . . provides consultation on policies and strategies for ensuring the safety of detainees . . ." as one of the "Mission Essential Tasks"). *But see* BSCT SOP (2002), *supra* note 12 (containing no visible reference to safety).

[51] Physicians for Human Rights, *Experiments in Torture: Evidence of Human Subject Research and Experimentation in the "Enhanced" Interrogation Program* (Jun. 2010), at 3 [hereineafter *Experiments in Torture*], *available at* http://phrtorturepapers.org/?dl_id=9.

much concerned with *protecting* detainees from pain and suffering, so much as *calibrating* it.[52] Such "medical" monitoring was essential to the Bush Administration's purported legal justification of the program. Justice Department lawyers argued that the mere presence of health personnel in these monitoring roles with the purported intent to regulate the severity of harm was sufficient to immunize those involved from criminal liability for torture.[53]

20. Finally, Physicians for Human Rights recently reported that "[h]ealth professionals working for and on behalf of the CIA" "conducted human research and experimentation on prisoners in US custody as part of [their] monitoring role."[54] Given that CIA and Department of Defense personnel sometimes worked jointly in Guantánamo, these findings raise questions that merit further investigation.

DR. JAMES HAD A PSYCHOLOGIST-CLIENT RELATIONSHIP WITH ALL DETAINEES INTERROGATED AND HELD DURING HIS TENURE IN GUANTÁNAMO

21. Dr. James admits that he had obligations as both a psychologist and soldier.[55] In undertaking to provide psychological services, both as a treatment supervisor and as a senior

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[52] *See, e.g. Fixing Hell*, *supra* note 3, at 48 ("My days were intense, trying to make sure the boys were not abused or *unnecessarily* stressed while also facilitating their interrogation." (emphasis added)); *infra* ¶ 36 ("The BSCT psychiatrist's "protection" of the detainee was limited to asking the interrogator to move chairs out of the way before forcibly dropping the man to the floor. Although the mental health professional decided to end the interrogation in time for dinner and prayer, s/he did so because the guards were tired and the detainee had disclosed sufficient information."); Center for Constitutional Rights, When Healers Harm: John Leso, http://whenhealersharm.org/john-leso/ (last visited Jul. 1, 2010) [hereinafter CCR, John Leso] (citing sources reporting that in 2002, Dr. Leso monitored the torture of Mohammed Al Qahtani and failed to intervene or advised on how to increase his suffering); *infra* note [147] (citing sources reporting that in 2003, Dr. Diane Zierhoffer, called in to assess whether teenage prisoner Mohammed Jawad needed mental health help, advised instead on how to increase his suffering).

[53] *See, e.g.* Office of Legal Counsel, Memorandum for John Rizzo, Interrogation of al Qaeda Operative (Aug. 1, 2002), at 16, *available at* http://www.scribd.com/doc/14346668/DOJ-Torture-Memo-Interrogation-of-Qaeda-Operative-Jay-S-Bybee-812002 ("To violate the statute, an individual must have the specific intent to inflict severe pain or suffering ... Based on the information you have provided us, we believe that those carrying out these procedures would not have the specific intent to inflict severe physical pain or suffering. ... the constant presence of personnel with medical training who have the authority to stop the interrogation should it appear it is medically necessary indicates that it is not your intent to cause severe physical pain."); Office of Legal Counsel, Memorandum for John A. Rizzo, Application of 18 USC §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees (May 10, 2005), at 14 [hereinafter Office of Legal Counsel, Combined Use of Certain Techniques] *available at* http://luxmedia.com.edgesuite.net/aclu/olc_05102005_bradbury_20pg.pdf ("The close monitoring of each detainee for any signs that he is at risk of experiencing severe physical pain reinforces the conclusion that the combined use of interrogation techniques is not intended to inflict such pain."); *see also* Sheri Fink, *Bush Memos Suggest Abuse Isn't Torture If a Doctor Is There*, HUFFINGTON POST, Apr. 19, 2009, http://www.huffingtonpost.com/sheri-fink/bush-memos-suggest-abuse_b_188645.html.

[54] *Experiments in Torture*, *supra* note 51, at 3.

[55] *See Fixing Hell*, *supra* note 3, at 178-179 ("I began to see myself as wearing a white doctor's lab coat while at the same time I also wore a soldier's uniform ... I could no longer try to keep them as separate but equal entities... as most health care professionals in the military try to do, but rather I had to find a way to merge them into one.").

BSCT member, he incurred a duty of care to all the detainees he assessed, monitored, or treated directly and in his supervisory capacity. This duty to the individual detainee clients existed alongside his duty to the U.S. military, his organizational client.[56]

22. Three young prisoners received medical and psychological treatment under Dr. James's close supervision.[57] He admits to using his psychological training to, among other things, supervise the design of the treatment plans for these juveniles, who were under his custody and care.[58] As such, these minors were his clients.

23. In his senior BSCT role, Dr. James also engaged in the "practice of psychology."[59] Directly and/or in a supervisory capacity, he provided "service[s] involving the application of psychological procedures ... to the assessment ... of psychological adjustment or functioning."[60] He did so by, directly and/or in a supervisory capacity, applying psychological "principles, methods, [and] procedures of understanding, predicting, or influencing behavior."[61] These included "principles pertaining to . . . interviewing, counseling, behavior modification, [and] environmental manipulation."[62]

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[56] This Board recognizes that it is possible, though not usually desirable, for a psychologist to have multiple clients with conflicting interests. *See Consent Agreement Between Ronald W. Wright, Ph.D. and the State Board of Psychology of Ohio* (Jul. 26, 2005) [hereinafter *Wright Consent Agreement*] (in which this Board uses the term "client" to refer to all of the individuals evaluated by the psychologist in relation to a domestic dispute, including both adverse parties and their children).

[57] *Fixing Hell*, *supra* note 3, at 38-43.

[58] *Id.* at 40 ("We need to devise a plan for the correctional custody, medical care, and psychological treatment of these young people, and we had to determine how one can safely and morally interrogate teenage terrorists.").

[59] ORC § 4732.01(B) ("'The practice of psychology' means rendering or offering to render to individuals, groups, organizations, or the public any service involving the application of psychological procedures to assessment, diagnosis, prevention, treatment, or amelioration of psychological problems or emotional or mental disorders of individuals or groups; or to the assessment or improvement of psychological adjustment or functioning of individuals or groups, whether or not there is a diagnosable pre-existing psychological problem."); *see Fixing Hell*, *supra* note 3, at 35 ("I was the senior psychologist...").

[60] *See* ORC § 4732.01(B), *supra* note 59; *supra* ¶¶ 12-14; *SASC Report*, *supra* note 18, at 39, n. 277 ("A standard operating procedure was drafted in November 2002, several months after the BSCT was established. It described the BSCT tasks including: consulting on interrogation approach techniques, conducting detainee file reviews to construct personality profiles and provide recommendations for interrogation strategies, observing interrogations and providing feedback to interrogators on detainee behavior, flow of the interrogation process, translator and cultural issues and possible strategies for further interrogation.").

[61] ORC § 4732.01(C) ("'Psychological procedures' include but are not restricted to application of principles, methods, or procedures of understanding, predicting, or influencing behavior, such as the principles pertaining to learning, conditioning, perception, motivation, thinking, emotions, or interpersonal relationships; the methods or procedures of verbal interaction, interviewing, counseling, behavior modification, environmental manipulation, group process, psychological psychotherapy, or hypnosis; and the methods or procedures of administering or interpreting tests of mental abilities, aptitudes, interests, attitudes, personality characteristics, emotions, or motivation."); *see supra* ¶¶ 12-14; *SASC Report*, *supra* note 18, at 39, n. 277.

[62] ORC § 4732.01(C).

24. Dr. James and those allegedly under his command and supervision continuously assessed all detainees interrogated and held in Guantánamo. They studied and sought to influence the prisoners' responses to specific techniques and environmental conditions.[63] As Dr. James admits, his team even evaluated them by reviewing their medical information prior to interrogation.[64] As such, all these detainees were his clients.

DR. JAMES PARTICIPATED IN, ORDERED, SUPERVISED, RATIFIED, FACILITATED, ACQUIESCED IN, AND/OR FAILED TO PREVENT, STOP, REPORT, AND PUNISH ABUSE THAT AT TIMES CONSTITUTED TORTURE

25. Detainees were systematically abused while Dr. James served on and allegedly led the Guantánamo BSCT. Dr. James participated in, ordered, supervised, ratified, facilitated, acquiesced in, and/or failed to prevent, stop, report, and punish that abuse. As a senior advisor on interrogation policy and, evidence suggests, commander of a team that advised on individual interrogations, he influenced the interrogations and detention conditions of all detainees held from approximately mid-January 2003 to May 5, 2003 and June 2007 to May/June 2008.[65]

Directly and/or in his supervisory capacity, Dr. James advised on, participated in, and acquiesced in abusive interrogations.

Interrogations were routinely abusive while Dr. James served as Chief Psychologist and advised the base commander on interrogation policy.

26. During the time that Dr. James advised the Guantánamo commander, Major General Geoffrey Miller, on interrogation policy,[66] Miller reported to his superiors that the use of isolation, sensory deprivation, 20-hour interrogations, stress positions, removal of clothing, hooding, forced grooming, and "individual phobias (such as dogs) to induce stress" were "essential to mission success."[67] If Dr. James is telling the truth about the extent to which

[63] *See supra* ¶ 18; *SASC Report*, *supra* note 18, at 39, n. 277.

[64] *Fixing Hell*, *supra* note 3, at 58-59; *see also Army Surgeon General Report*, *supra* note 3, ¶ 18-19(c).

[65] *See supra* ¶¶ 3-4, 12-20.

[66] *See Fixing Hell*, *supra* note 3, at 36 ("General Miller knew from the outset that we needed to reform the interrogation process and that was the main reason I was on his island."); *see also id.* at 32 ("The room was packed with the key leaders of the command, and the psychologist – that would be me from now on – was required to sit right behind the general."); *id.* at 43 (regarding the juveniles, "it was a requirement by Major General Miller that in order for any interrogation to be conducted, I had to be present the entire time.").

[67] In a January 21, 2003, memo, MG Miller stated that "[t]he command must have the ability to conduct interrogations using a wide variety of techniques" and listed nine techniques as "essential to mission success": "use of an isolation facility; interrogating the detainee in an environment other than the standard interrogation room . . . ; varying levels of deprivation of light and auditory stimuli to include the use of a white room for up to three days; the use of up to 20-hour interrogations; the use of a hood during transportation and movement; removal of all comfort items (including religious items); serving of meals ready to eat (MREs) instead of hot rations; forced grooming, to include shaving of facial hair and head; and the use of false documents and reports." These techniques, MG Miller

Miller relied on his advice, the fact that Miller's demand for abusive techniques intensified between January and March 2003 supports the inference that Dr. James was an advocate for, rather than an opponent of, such abuse. Following the efforts of Miller and his senior advisors, by April 2003, isolating detainees, "adjusting" their sleep, manipulating their diet, and exploiting their fears were among the approved interrogation methods at the prison camp.[68]

27. Those conducting the interrogations understood the message. Reports of abuse were so numerous in the spring of 2003 that a subsequent government review concluded that they "signif[ied] a consistent problem" and resulted from command failure at the prison.[69] The U.S. Senate Armed Services Committee found that the techniques reported, used, or planned for use while Dr. James and his team advised on interrogations in Guantánamo included "threats of death,"[70] "sensory deprivation,"[71] "loud music" and "strobe lights,"[72] religious

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explained, were "intended to induce cooperation over a period of time by weakening the detainee's mental and physical ability to resist." On February 12, 2003, another of MG Miller's chief advisors, LTC Diane Beaver reported to her superiors that "[t]he hallmark" was "isolation and up to 20 hour interrogation," and that "[w]ithout that we can't be successful. . ." By March 21, 2003, MG Miller had expanded the list of techniques that he deemed "essential" and "appropriate," now calling for the use of "stress positions," "removal of clothing," "using detainees' individual phobias (such as dogs) to induce stress," and "grabbing, poking and light pushing." *SASC Report*, *supra* note 18, at 113-14; 128-130.

[68] Memorandum from Secretary of Defense Donald Rumsfeld to Commander, U.S. Southern Command, Counter-Resistance Techniques in the War on Terrorism (Apr. 16, 2003), at Tab A (E, F, G, T, V) [hereinafter Rumsfeld Apr. 16, 2003 Memo]; *SASC Report*, *supra* note 18, at 132.

[69] *SASC Report*, *supra* note 18, at 133-134 (citing Memo, Historic Look at Inappropriate Interrogation Techniques Used at GTMO (undated)).

[70] *SASC Report*, *supra* note 18, at 134-135 ("[T]hreats of death were either used or planned for use in specific JTF-GTMO interrogations..."); *see also infra* ¶ 49 (Canadian Omar Khadr, 16-years-old at the time, reported he was threatened with rape and death in the spring of 2003); Physicians for Human Rights, *Broken Laws, Broken Lives: Medical Evidence of Torture by U.S. Personnel and its Impact*, at 58 (June 2008) [hereinafter *Broken Laws, Broken Lives*] (detainee held from 2002 to November 2003 reported guards threatening to shoot him during interrogations). Reports of threats continued after Dr. James's departure. In August, 2003, Mohamadou Walid Slahi was taken on a boat and led to believe he would be transferred to Jordanian or Egyptian custody. He was shown a forged letter reporting that his mother had been captured and would soon be brought to Guantánamo, where she would be the first female prisoner at the "previously all-male prison environment." He was also told that "his family was 'in danger if he . . . did not cooperate.'" *See* U.S. Department of Justice, Office of the Inspector General, *A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq* (May 2008), at 123-24, *available at* http://www.justice.gov/oig/special/s0805/final.pdf [hereinafter OIG/DOJ Report].

[71] *SASC Report*, *supra* note 18, at 134-135.

[72] *Id.* Short-shackling detainees into painful positions while subjecting them to flashing lights and deafening noise seems to have been common practice in Guantánamo at the time. *See* OIG/DOJ Report, *supra* note 70 at 179-180. Some interrogators considered the use of lights to be part of the "environmental manipulation" technique formally approved for use at Guantánamo in April 2003, but possibly used earlier. *See* Rumsfeld Apr. 16, 2003 Memo, *supra* note 68; OIG/DOJ report, *supra* note 70 at 190 (citing *Church Report*, at 138, 172). *See also* Army Regulation 15-6: *Final Report, Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility*, at 9 (Apr. 1, 2005, amended June 9, 2005) [hereinafter Schmidt-Furlow Report], *available at* http://www.humanrightsfirst.org/us_law/detainees/schmidt-army-reg-150605.pdf (finding that "bright flashing lights and/or loud music were also used to manipulate a detainee's environment on 'numerous occasions' between July 2002 and October 2004. . ."); OIG/DOJ Report, supra note 70, at 190 (approximately 50 FBI agents formerly stationed at Guantánamo told DOJ investigators that they "witnessed or heard about the use of bright lights on

humiliation,[73] and sexual assault and cultural humiliation by female interrogators, including a forced "lap dance"[74] and "wip[ing] . . . [fake] menstrual blood on a detainee's face and forehead."[75] Military personnel held detainees in extreme temperatures, sometimes for days, and some prisoners reported being subjected to pressurized or ice cold water.[76] Interrogation and detention teams often applied these techniques in combination, which severely intensified their effect.[77]

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detainees, sometimes in conjunction with other harsh non-law enforcement techniques."); Eric Stover and Laurel Fletcher, UC Berkeley Human Rights Center, *Guantánamo and its Aftermath: U.S. Detention and Interrogation Practices and Their Impact on Former Detainees,* at 43 (Jul., 08, 2009) [hereinafter *Guantánamo and its Aftermath], available at* http://hrc.berkeley.edu/pdfs/Gtmo-Aftermath.pdf ("Several detainees reported being short shackled and left alone in a room while being bombarded with loud music and strobe lights for hours on end."); *Broken Laws, Broken Lives, supra* note 70, at 33, 78-79.

[73] *SASC Report, supra* note 18, at 134-135 ("forced shaving"); *see also* OIG/DOJ Report, *supra* note 70, at 193. Former U.S. Army Chaplain James Yee reported that in 2003 "[m]any MPs [at Guantánamo] . . . continued to go out of their way to abuse the Qur'ans." James Yee, *For God and Country: Faith and Patriotism under Fire*, 120-21 (2005).

[74] An ACS contractor reported that on April 17, 2003, a female Guantánamo interrogator "removed her overblouse behind the individual and proceeded [sic] stroking his hair and neck while uttering sexual overtones and making comments about his religious affiliation. The session progressed to where she was seated on his lap making sexual [sic] affiliated movements with her chest and pelvis while again speaking sexual [sic] oriented sentences." The detainee was then forced to the floor, where the interrogator straddled him. **The analyst said the activity was documented and approved**." Department of Defense, Memorandum for Record, Subj: Possible Inappropriate Activities (Apr. 26, 2003) (emphasis added), *available at* http://action.aclu.org/torturefoia/released/072605/1243_1381.pdf; *see also* OIG/DOJ Report, *supra* note 70, at 188-190.

[75] OIG/DOJ Report, *supra* note 70, *at 189; see also Broken Laws, Broken Lives, supra* note 70, at 58 (a detainee held from 2002 to November 2003 reported "a woman enter[ing] the interrogation room naked and smear[ing] what he perceived to be menstrual blood on him, which he described as horrifying," and "being forced to look at pornography and to witness naked men and women appearing to have intercourse"); *see also* Shafiq Rasul, Asif Iqbal, Rhuhel Ahmed, Composite Statement: Detention in Afghanistan and Guantanamo Bay ¶¶ 216-32 (Jul. 26, 2004) [hereinafter Tipton Three Statement], *available at* http://ccrjustice.org/files/report_tiptonThree.pdf (reporting that around March/April 2003, UK national Asif Iqbal reported that he was short-shackled for long periods of time, subjected to extreme temperatures and taunted with pornographic magazines as part of his interrogation).

[76] OIG/DOJ Report, *supra* note 70, at 180-181 (reporting that in February or March 2003, an FBI agent saw a detainee short-shackled in a room where "the air conditioner had been set to make it very cold . . . and the detainee was shivering," had "urinated in his pants," and, according to the guards, "had been in the room since the previous day with the air conditioner left on the whole time," without "food, water, or anything else until the interrogators returned." "The agent said the MPs told her that the interrogators were trying to 'break down' detainees through the use of temperature manipulation, loud music, and immobility."); Tipton Three Statement, *supra* note 75, ¶¶ 180-90, 216-32; *see also Broken Laws, Broken Lives, supra* note 70, at 58.

[77] *See supra* notes 75 and 76; *see also* Office of Legal Counsel, Combined Use of Certain Techniques, *supra* note 53; *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, at 28 (Aug. 9, 2009), *available at* http://physiciansforhumanrights.org/library/documents/reports/istanbul-protocol.pdf ("A method-listing approach [of torture methods] may be counterproductive, as the entire clinical picture produced by torture is much more than the simple sum of lesions produced by [individual] methods on a list. Thus, solitary confinement, detention in small or overcrowded cells, exposure to extremes in temperature and deprivation of normal sensory stimulation are some torture methods whose cumulative effects over a period of time should be considered.").

Military policy documents suggest that, directly and/or in his supervisory capacity, Dr. James assisted in the development of abusive detention policy.

28. Publicly available government documents indicate that as part of the interrogation program, Dr. James and/or BSCT members allegedly under his command contributed to detention policy that caused and continues to cause detainees debilitating physical and psychological harm. The self-described purpose of the 2003 Camp Delta behavior management plan for incoming detainees was to "isolat[e] the detainee and foster[] dependence on his interrogator" in order to "enhance and exploit the disorientation and disorganization" of detainees.[78] To that end and through the specific written policy, all detainees were subjected to at least 30 days of solitary confinement in eight-by-six-feet steel cages upon arrival.[79] They were to be denied prayer items and access to a military chaplain and the ICRC.[80] By October 2003, ICRC officials had voiced concern about "excessive isolation"[81] and the "deterioration of mental health of a large number of the detainees."[82]

29. "Detainee Behavior Management" at Guantánamo during Dr. James's tenure also meant creating a manipulative system of arbitrary rewards and punishments.[83] Basic toiletries, toilet paper, mattresses, cups, and at least in practice, even clothes were considered "comfort items" to be given or withheld depending on compliance with interrogators.[84] "Disobedience" – which often included trivial acts, such as writing "have a nice day" on a

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[78] Camp Delta SOP, *supra* note 18, ¶ 4-20(a), at 4.3.

[79] Interrogators could choose to extend isolation beyond the initial 30 day period. Camp Delta SOP, *supra* note 18, ¶ 4-20, at 4.3; *see also* Abdurahman Khadr Testimony 131, July 13, 2004, *in MCI & Solliciteur General du Canada c. Adil Charkaoui* [2003] F.C. 1418, *available at* http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimony-of-a-cia-asset/court-testimony-of-abdurahman-khadr-july-13-2004 ("So you are in this room alone. You can't talk to anybody. Again, they use this room to torture us. So they put the heat up or they put it too low so we are freezing or we are suffocating because there is no air. They put the music on so you cannot sleep. They throw rocks in the block so you can't sleep. They keep on throwing big rocks. … This is pretty much the treatment in isolation. After a month in isolation, I was moved to the general population."); Moazzam Begg, *Enemy Combatant: A British Muslim's Journal to Guantánamo and Back* 194-95 (2006).

[80] Camp Delta SOP, *supra* note 18, ¶ 4-20(a), at 4.3; *see also id.*, ¶ 4-20(a)-(h), (b)(1)-(2) (specifying that in "Phase One," detainees should be denied access to a "Koran, prayer beads, [or a] prayer cap" and that "Phase Two" extended the process of isolating detainees for two weeks).

[81] JTF-GTMO Memorandum for Record, Re: ICRC Meeting with MG Miller (Oct. 9, 2003), at 1, *available at* http://www.washingtonpost.com/wp-srv/nation/documents/GitmoMemo10-09-03.pdf [hereinafter ICRC Meeting with MG Miller].

[82] Associated Press, *Red Cross Finds Deteriorating Mental Health at Guantánamo*, USA Today, Oct. 10, 2003, *available at* http://www.usatoday.com/news/world/2003-10-10-icrc-detainees_x.htm [hereinafter AP, *ICRC Finds Mental Health Deterioration*] ("'We have observed what we consider to be a worrying deterioration in the psychological health of a large number of the internees' because of the uncertainty of their situation…") (quoting ICRC spokesperson after a two-month visit to GTMO in 2003). For more on the effect of isolation and other techniques, see *infra* ¶¶ 50-51.

[83] *See* Camp Delta SOP, *supra* note 18, ¶ 8-1, at 8.1.

[84] *See* Camp Delta SOP, *supra* note 18, ¶ 4-20(a)(4)(a)-(h), at 4.3, ¶ 8-6, at 8.2, Table 8-3 ("Comfort Items"); OIG/DOJ Report, *supra* note 70 at 199-200 (describing how on one occasion, detention operations stripped noncompliant detainees of their pants because "there were no other comfort items left to confiscate").

cup,[85] not giving up a towel,[86] or refusing medication[87] – was punished by riot squads that violently beat detainees.[88] Termed "Initial Response Force," or IRF teams, they were made up of five guards dressed in full riot gear who stormed into cells carrying plastic shields and pepper spray.[89] On January 24, 2003, a military guard playing the role of a prisoner during an IRF training drill was so severely beaten that he sustained lasting brain injuries. The guard, Sean Baker, was dressed in an orange jumpsuit, and some of the IRF team members were unaware that he was not a detainee. In November 2004, he was still suffering epileptic seizures as a consequence of the beating by fellow U.S. soldiers.[90]

As reported by other interrogators, a BSCT member allegedly under Dr. James's command recommended that a man be violently and repeatedly slammed to the floor.

30. On April 22, 2003, a BSCT psychiatrist allegedly under Dr. James's command, recommended that a man be forcefully and repeatedly lifted and dropped to the floor as a means of keeping him awake and "install[ing] interr[ogator's] dominance in [the] room."[91] According to a military investigator, the psychiatrist "believed that the technique was appropriate, approved, applied properly, and was common practice."[92] A government review concluded that the command may have sanctioned the incidents and that "command failures [had] allowed such activity to take place."[93]

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[85] Tipton Three Statement, *supra* note 75, ¶ 149; Human Rights Watch, *Guantánamo: Detainee Accounts*, at 18 (Oct. 26, 2004), *available at* http://www.hrw.org/en/node/77734.

[86] Incident Report (Jan. 18, 2003), FOIA Release from the Office of the Secretary of Defense, *available at* http://humanrights.ucdavis.edu/projects/the-Guantánamo-testimonials-project/testimonies/testimonies-of-military-guards/released-irf-reports-disaggregated/f1_45_48-49.pdf.

[87] Mark Denbeaux et al., *The Guantanamo Detainees During Detention*, Data from Department of Defense Records, Seton Hall University Law School (Jul. 10, 2006), *available at* http://law.shu.edu/publications/guantanamoReports/guantanamo_third_report_7_11_06.pdf at 6-12; David Hicks Aff. ¶ 16 (Aug. 5, 2004) to Major Michael Mori, *available at* http://www.smh.com.au/news/World/David-Hicks-affidavit/2004/12/10/1102625527396.html ("I have seen detainees IRF'ed while they were praying, or for refusing medication.").

[88] *See* OIG/DOJ Report, *supra* note 70, at 195 (stating that the officer in charge of detentions reported that "one medical person" was required to be present during these "forced cell extractions"); *see also* Paisley Dodds, *Videos of Riot Squads at Guantánamo Show Prisoners Being Punched and Stripped From the Waist Down*, Associated Press, Feb. 2, 2005, *available at* http://www.commondreams.org/headlines05/0202-03.htm; Jeremy Scahill, *Little Known Military Thug Squad Still Brutalizing Prisoners at Gitmo Under Obama*, Alternet, May 15, 2009, *available at* http://www.alternet.org/rights/140022/little_known_military_thug_squad_still_brutalizing_prisoners_at_gitmo_under_obama/.

[89] Camp Delta SOP, *supra* note 18, ¶ 24-1, at 24.1

[90] Rebecca Leung, *GI Attacked During Training,* CBS, Nov. 4, 2004, http://www.cbsnews.com/stories/2004/11/02/60II/main652953.shtml.

[91] *See* Commander's Inquiry, *supra* note 34, at 1360-1362 (Investigator's Notes from Interview with BSCT Member).

[92] *Id.* at 1319.

31. A contract interrogator and a contract analyst observing the incident from a neighboring booth reported that, while the intelligence team watched, two guards slammed the man to the floor as many as 25-30 times[94] using force "adequate to cause severe internal injury."[95] The contract interrogator, who had trained and served in the U.S. Army, was so alarmed that he left the room to report the abuse.[96]

32. Although the BSCT health professional disputed the degree of force, s/he admitted to recommending a technique termed "fear up harsh" that included forced exercise.[97] S/he told a military investigator that such techniques were "effective" against "manipulative" and "purposely non-compliant" detainees, and that they did "no harm."[98]

33. Another doctor who examined the prisoner four days after the interrogation noted that the prisoner showed injuries consistent with his account of being, "lifted . . . up then 'slammed' . . . down on his knees, made his mouth . . . spit[] up blood, made a tooth loose, bruised several areas of his upper arms and torso, and created pain on his [left] lower ribs."[99]

34. The prisoner told the doctor that the pain was so bad "he tried to 'cut' the artery in his neck with his fingernails."[100] Yet, he initially refused treatment, telling the doctor, "let me die from what they are doing to me."[101] Apparently implying that treatment would merely enable more abuse, he said he "did not want [one] person to cause the problem to have another person fix it."[102]

35. The examining physician noted that the detainee had been examined for a hyperventilation episode prior to the incident, that he had been on a hunger strike for some time, and that he had a "history of depressive disorder, NOS, in remission."[103] The BSCT psychiatrist

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[93] *SASC Report*, *supra* note 18, at 133 (citing *Memo, Historic Look at Inappropriate Techniques Used at GTMO* (undated)). This review criticized Miller's investigation and rejected his conclusion that the use of this technique had been an isolated incident. The Senate Armed Services Committee adopted that criticism in its report, finding that the inquiry had been improperly limited, had failed to "'address the command failures that allowed such activity to take place, despite apparent command sanctioning of the incidents,'" and ignored other reports of abuse, including two involving sexual and religious harassment by female interrogators. *Id.* at 133-34. Concluding that the incidents "signif[ied] a consistent problem at GTMO," it noted that despite interrogators' admissions that they were using techniques like loud music, yelling and strobe lights, the chain of command insisted they were not used. *Id.* at 134.

[94] Commander's Inquiry, *supra* note 34, at 1318 (Memorandum for General Geoffrey D. Miller).

[95] *Id.* at 1330 (Memorandum from ACS Defense Contractor).

[96] *Id.*

[97] *Id.* at 1360-63 (Investigator's Notes from Interview with BSCT Member).

[98] *Id.* at 1362 (Investigator's Notes from Interview with BSCT Member).

[99] *Id.* at 1347-48 (Narrative Medical Summary).

[100] *Id.* at 1348.

[101] *Id.* at 1347.

[102] *Id.*

[103] *Id.*

allegedly under Dr. James's command had access to the prisoner's medical information but nevertheless cleared the interrogation and actively participated in it. S/he failed to include any of the information noted by the examining physician in the medical and psychiatric history sections of the BSCT post-interrogation report.[104]

36. The BSCT psychiatrist's "protection" of the detainee was limited to asking the interrogator to move chairs out of the way before forcefully dropping the man to the floor.[105] Although the mental health professional decided to end the interrogation in time for dinner and prayer, s/he did so because the guards were tired and apparently the detainee had disclosed sufficient information.[106]

Dr. James failed to prevent and report violent sexual humiliation, religious humiliation, and physical abuse that he witnessed.

37. Dr. James admits to witnessing an interrogator subject a man to violent sexual humiliation, religious humiliation, degradation, and physical abuse without immediately stopping, reporting, or punishing those involved.

38. Dr. James admits that he watched behind a one-way mirror while an interrogator and three prison guards wrestled a struggling near-naked man on the floor.[107] The prisoner had been forced into pink women's panties, lipstick, and a wig. The men then pinned the prisoner to the floor in an effort "to outfit him with the matching pink nightgown."[108]

39. Instead of immediately stopping the abuse and reporting the men for discipline, Dr. James wrote that he "opened [his] thermos, poured a cup of coffee, and watched the episode play out, *hoping* it would take a better turn and not wanting to interfere *without good reason*, even if this was a terrible scene" (emphasis added).[109] It was only later that Dr. James claims to have determined that "someone [was] *gonna* get hurt" (emphasis added) and purportedly decided to intervene.[110]

40. Even then, Dr. James admits that he "never once said anything about the lingerie or the interrogation" to the interrogator and did not report the incident.[111] Yet, in a 2005 e-mail, he

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[104] *See id.* at 1327 (BSCT Memorandum for Record).

[105] *Id.* at 1361 (Investigator's Notes from Interview with BSCT Member)).

[106] *Compare id.* at 1361 (Investigator's Notes from Interview with BSCT Member), *with id.* at 1327-28 (BSCT Memorandum for Record), *and id.* at 1319 (Memorandum for General Geoffrey D. Miller).

[107] *Fixing Hell*, *supra* note 3, at 50-51.

[108] *Id.* at 50.

[109] *Id.* at 50-51.

[110] *Id.* at 51.

[111] *Fixing Hell*, *supra* note 3, at 51.

admits that failure to report coercive interrogation or degradation of detainees is a serious violation of military law.[112] He explained:

> *...military psychologists as military officers are bound by the Geneva convention [sic], APA ethics code* **AND the UCMJ(uniformed** *[sic]* **code of military justice).** *A military officer found guilty of violating the UCMJ . . . may very well get an all expenses paid trip to Leavenworth federal prison. As a military officer, If I obsereve [sic] a violation and I do not act I may be subject to prosecution under the UCMJ.*[113]

41. As a colonel and the senior BSCT psychologist, Dr. James ratified the soldiers' conduct by failing to immediately stop the abuse and to report and discipline the men directly responsible. In his book, he recognized the importance of leadership:

> *When any soldier crossed the line, it had to be dealt with immediately. This meant that if the infraction was not dealt with by the leaders, soldiers would continue to do it because it was allowed by the leaders in charge.*[114]
>
> *Remember, soldiers will do what their leaders allow them to do. If you allow it, a soldier will do it. Thus, you better be clear on what are the appropriate and inappropriate standards of conduct.*[115]
>
> *...they should be posted everywhere, what behaviors will be accepted in your organization and what is clearly, flat-out not to be tolerated.*[116]

42. Unfortunately for the soldiers and the prisoners, Dr. James did not follow his own advice. His command failure sent an implicit message to his subordinates and others involved in interrogations that such behavior was permitted. It helped to foster the climate of abuse and impunity that characterized Guantánamo both during and after his tenure.[117] Interrogators, guards, analysts, and at least one BSCT member seemed to believe that abusive techniques were "appropriate [and] approved."[118] Many continued to use them after he left.[119]

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[112] APA PENS Listserv, *supra* note 19, at 157. For more on the duty to report, see *supra* note 15.

[113] *Id.* This message was reiterated by others members of the APA PENS Task Force; *see, e.g.*, E-mail from Banks, Louis M. COL, Re: Thoughts for the Presidential Task Force (May 11, 2005), *in* APA PENS Listserv, *supra* note 19, at 15-16 ("If a DoD psychologist is aware of the illegal abuse of detainees, and does not attempt to prevent or stop it, he or she is culpable, and should be charged, at least, with dereliction of duty.").

[114] *Fixing Hell*, *supra* note 3 at 234.

[115] *Fixing Hell*, *supra* note 3 at 238.

[116] *Fixing Hell*, *supra* note 3 at 233.

[117] *See supra*, ¶¶ 26-43.

[118] Commander's Inquiry, *supra* note 34, at 1319 (Memorandum for General Geoffrey D. Miller); *see also id.* at 1362 (Investigator's Notes from Interview with BSCT Member); *see also supra* ¶ 30.

Dr. James failed to report the ethical violations of other mental health professionals

43. Dr. James failed to report the misconduct of his mentee and Guantánamo BSCT predecessor, Major John Francis Leso. During Dr. James's first visit to Guantánamo, Dr. Leso told him that he had "witnessed many harsh and inhuman interrogation tactics" and "felt pressure to teach interrogators procedures and tactics that were a challenge to his ethics as a psychologist."[120] By 2005, if not earlier, Dr. James was aware that Dr. Leso had played a role in drafting abusive detainee policies at Guantánamo.[121] However, nothing indicates that Dr. James took action to report or discipline this misconduct.

Dr. James exploited minors and failed to protect them from harm.

Dr. James exploited three boys under his custody and care

44. At Guantánamo, Dr. James admits to supervising closely the medical care, psychological treatment, education, custody, and interrogation of three boys, aged twelve to fourteen years.[122] [redacted] were forcibly and

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[119] *See, e.g., supra* note 70; *infra* ¶ 49; *SASC Report*, *supra* note 18; OIG/DOJ report, *supra* note 70; Center for Constitutional Rights, *Report on Torture and Cruel, Inhuman, or Degrading Treatment or Punishment of Prisoners at Guantánamo Bay, Cuba* (July 2006), *available at* http://ccrjustice.org/files/Report_ReportOnTorture.pdf [hereinafter CCR, *Torture Report* (2006)]; Center for Constitutional Rights, *Current Conditions of Confinement at Guantanamo* (Feb. 23, 2009), *available at* http://ccrjustice.org/files/CCR_Report_Conditions_At_Guantanamo.pdf [hereinafter CCR, *Current Conditions* (Feb. 2009)].

[120] *Fixing Hell*, *supra* note 3, at 29; *see also* CCR, John Leso, *supra* note 52.

[121] *See* E-mail from Col. Larry C. James PhD, Re: regarding our report (July 29, 2005), *in* APA PENS Listserv, *supra* note 19, at 157 (referring to Dr. Leso, Dr. James wrote that "the Army Psychologist (ironically the gentleman who was blasted in the NEJM article) was the one who actually developed a memorandum for the secretary of defense that laid out the outlawed procedures"). The Senate Armed Services Committee did in fact confirm that Dr. Leso (along with Dr. Burney) wrote a memo that eventually formed the basis for a memo signed by Rumsfeld in December 2, 2002. However, it was precisely this memo that first authorized abusive interrogation techniques and later became the subject of so much controversy.

[122] *Fixing Hell*, *supra* note 3, at 38-49.

[redacted]

arbitrarily detained and transported thousands of miles away from their families and denied access to counsel. [redacted] they were released without charge.[redacted]

45. Dr. James admits that he had a duty to "ensure that [the boys] were never harmed in any way whatsoever."[127] Yet, he admits that he transferred them from Bagram Air Force Base in Afghanistan to Guantánamo.[128] Dr. James not only permitted, but oversaw their loading onto a cargo plane, [redacted] for a flight that typically lasted over 20 hours.[129] Others who appear to have been transferred from Bagram to Guantánamo that same day reported being chained around the waist, wrists, back and ankles and the intense pain of being unable to speak, see, hear, move, or even stretch or breathe properly.[130]

[redacted]

[127] *Fixing Hell*, *supra* note 3, at 43.

[128] *Fixing Hell*, *supra* note 3, at 41.

[redacted]

[redacted] Dr. James admits that "for any interrogations to be conducted [on the boys], [he] had to be present the entire time."[134] He also admits to questioning them directly and to spending time with them every day.[135] [redacted]

47. Dr. James exploited the juveniles by assuming the conflicting tasks of supervising both their treatment and interrogations. He admits to focusing on "getting [the boys'] health on track" in preparation for their interrogation.[138] "There was no mistaking our intentions," he explained in his book. "We needed these boys to talk to us and we established a program that would help us get to know them and encourage them to trust us."[139]

48. After applying for a license from this Board, [redacted]

Dr. James allowed other minors to be seriously harmed

[redacted]

[134] *Fixing Hell*, *supra* note 3, at 43.

[135] *Fixing Hell, supra* note 3, at 48 ("Each morning, I . . . spent 9 a.m. to 11 a.m. at Camp Iguana with the teenage terrorists."). It is not clear whether Dr. James was questioning them in his capacity as a treating psychologist or an interrogator. *See id.* at 42 ("Did they just wake up one day and say, 'I want to be a terrorist' or 'I want to kill soldiers'? I couldn't connect the dots in my head, so I started to simply ask each of them the question 'how' and 'why?'").

[redacted]

49. As a senior policy advisor and available evidence suggests, the commander of consultants to individual interrogations, Dr. James knew or should have known that other minors were being seriously harmed by the abusive policies and practices outlined *supra*. At minimum, he had a responsibility to prevent, stop, report, and punish their abuse. These minors include: [redacted]

- Omar Khadr, a Canadian national detained by U.S. forces at the age of 15.[144] During interrogations in the spring of 2003, Omar was spit on; threatened with rape and death; repeatedly lifted by the neck and arms and forcefully dropped to the floor; short-shackled in painful positions for hours; left to urinate on himself; dragged through a mixture of pine oil and urine; and forced to remain in soiled clothing for two days.[145]

- Mohammed Jawad, detained at the age of 15 or 16 and forcibly transferred to Guantánamo in February 2003, possibly on the same flight in which Dr. James brought the other juveniles.[146] Upon arrival, Mohammed was subjected to 30 days of physical and linguistic isolation.[147] Military records from throughout 2003 indicate that he repeatedly cried and asked for his mother during interrogation.[148] In

[redacted]

[144] Omar Khadr Aff. ¶¶ 2-3, Omar Ahmed Khadr v. Prime Minister Can., No. T-1228-08 (Fed. Ct. July 30, 2008), *available at* http://whenhealersharm.org/wp-content/uploads/o-khadr-affadavit1.pdf, [hereinafter Omar Khadr Aff.].

[145] *Id.* ¶¶ 54-59 ("The interrogator became extremely angry, then called in military police and told them to cuff me to the floor. First, they cuffed me with my arms in front of my legs. After approximately half an hour they cuffed me with my arms behind my legs. After another half hour they forced me onto my knees, and cuffed my hands behind my legs. Later still, they forced me on my stomach, bent my knees, and cuffed my hands and feet together. At some point, I urinated on the floor and on myself. Military police poured pine oil on the floor and on me, and then, with me lying on my stomach and my hands and feet cuffed together behind me, the military police dragged me back and forth through the mixture of urine and pine oil on the floor. Later, I was put back in my cell, without being allowed a shower or a change of clothes. I was not given a change of clothes for two days. They did this to me again a few weeks later...").

[146] Amended Petition for Writ of Habeas Corpus on Behalf of Mohammed Jawad ¶¶ 18, 39, Al Halmandy v. Bush, No. 05-cv-2385 (D.D.C. Jan. 13, 2009), *available at* http://www.aclu.org/files/pdfs/natsec/amended_jawad_20090113.pdf [hereinafter ACLU Petition] (stating that Jawad was taken to Guantánamo on or around February 6, 2003). *But see id.* ¶ 40 (stating that Jawad arrived on February 3, 2003).

[147] ACLU Petition, *supra* note 145, ¶ 40.

[148] *Id.* ¶ 42. Mohammed also showed signs of mental illness during his detainment. *Id.* ¶ 43. In September 2003, an interrogator concerned about Mohammed's mental health consulted BSCT psychologist Lt. Col. Diane Zierhoffer. Instead of protecting him, she reportedly observed: "He appears to be rather frightened, and it looks as if he could break easily if he were isolated from his support network and made to rely solely on the interrogator." She also reportedly suggested that interrogators emphasize to Jawad that his family appeared to have forgotten him: "Make him as uncomfortable as possible. Work him as hard as possible." Based on the recommendation of Dr. Zierhoffer, Mohammed was subjected to another 30 days of physical and linguistic isolation. *See* Dan Ephron, *The Biscuit Breaker*, NEWSWEEK, Oct. 18, 2008, *available at* http://www.newsweek.com/id/164497/output/print; Daily Kos,

December 2003, Mohammed tried to kill himself.[149]

[redacted]

DETAINEES SUFFERED SERIOUS PSYCHOLOGICAL AND PHYSICAL HARM AS A RESULT OF ABUSIVE INTERROGATIONS AND CONDITIONS

50. Many detainees have suffered serious harm as a consequence of the systematic effort to "break them" during Dr. James's tenure.[155] This harm was foreseeable.[156] Numerous studies have found that stress positions, deprivation of basic needs, and isolation can cause post-traumatic stress disorder, depressive disorder, and psychosis.[157] Men and boys held in

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Army Psychologist Pleads 'Fifth' in Case of Prisoner 900, http://www.dailykos.com/story/2008/8/14/202415/685/395/568118 (Aug. 14, 2008, 17:25 PDT); ACLU Petition, *supra* note 146, ¶ 44; Amnesty International, *From Ill-Treatment to Unfair Trial: The Case of Mohammed Jawad, Child 'Enemy Combatant'* (Aug. 2008), *available at* http://www.amnesty.org/en/library/asset/AMR51/091/2008/en/ed9d7f13-691e-11dd-8e5e-43ea85d15a69/amr510912008eng.html; ACLU, *Major David J. R. Frakt's Closing Argument in Favor of Dismissal of the Case Against Mohammed Jawad* (June 19, 2008), *available at* http://www.aclu.org/national-security/major-david-j-r-frakts-closing-argument-favor-dismissal-case-against-mohammad-jawa.

[149] ACLU Petition, *supra* note 145, ¶ 46

[redacted]

[155] *See generally* Physicians for Human Rights, *Break Them Down: Systematic Use of Psychological Torture by US Forces* (2005), *available at* http://physiciansforhumanrights.org/library/report-2005-may.html [hereinafter *Break Them Down*].

[156] In fact, it was more than foreseeable; it was intended. *See supra* ¶¶ 10-11; *infra* ¶ 47.

[157] Dr .Craig Haney, an expert on the effects of solitary confinement, wrote in January 2003 that "there is not a single published study of solitary or supermax-like confinement in which nonvoluntary confinement lasting longer than 10 days, where participants were unable to terminate their isolation at will, that failed to result in negative psychological effects." C. Haney, *Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement*, 49 Crime & Delinquency 124 (2003). *See also* PHR, *Leave No Marks: Enhanced Interrogation Techniques and the*

Guantánamo have suffered from insomnia, depression, nightmares, irritability, and aggression, both during and after their detention.[158] They also face physical health problems, such as recurring headaches, eye problems, and general deterioration and pains in their wrists, ankles, back, and knees, a legacy from extended periods of shackling.[159] Individuals detained during James's tenure attempted suicide on multiple occasions.[160] They also demonstrated signs of schizophrenia[161] and psychosis.[162] In 2003 alone, the conditions of detention in Guantánamo, including solitary confinement, led to 350 acts of "self-harm," including 120 "hanging gestures."[163]

51. The effects of detention persist, even after release. Many return home only to be shunned by their families or communities, or turned away by employers because of the stigma that Guantánamo still carries,[164] or to discover that loved ones have died, fallen ill, or built new

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Risk of Criminality (Aug. 2007) (citing Metin Basoglu, *A Multivariate Contextual Analysis of Torture and Cruel, Inhuman, and Degrading Treatments: Implications for an Evidence-Based Definition of Torture*, 79 Am. J. of Orthopsychiatry 135 (2009), H. S. Andersen et al., *A Longitudinal Study of Prisoners on Remand: Repeated Measures of Psychopathology in the Initial Phase of Solitary Versus Nonsolitary Confinement*, 26 Int'l J. L. & Psychiatry 165 (2003), among others); PHR, Commentary on APA PENS Report, Mar. 15, 2006, *available at* http://www.division39.org/sec_com_pdfs (citing A. Keller & J. Gold, *Survivors of Torture, in Kaplan and Sadock's Comprehensive Textbook of Psychiatry* 2400 (B. Sadock & V. Sadock eds., 8th ed., 2005), among others). Additionally, by 2003 extensive data had already been collected on the effect of SERE training on soldiers. That literature demonstrated that the techniques as applied to the soldiers carried a high risk of physical and psychological harm to them. It also indicated that the harm would be amplified by the use, for entirely different purposes, of more severe and prolonged applications of those techniques against non-consenting enemy suspects. *Experiments in Torture*, *supra* note 52, Appendix 1, at 19-24.

[158] International Human Rights Clinic, Univ. of Cal., Berkeley, School of Law, *Returning Home: Resettlement and Reintegration of Detainees Released from the U.S. Naval Base in Guantánamo Bay, Cuba* (Mar. 2009), at 7, *available at* http://hrc.berkeley.edu/pdfs/Gtmo-ReturningHome.pdf [hereinafter *Returning Home*]. *Broken Laws, Broken Live, supra* note 70, at 91-92; *see generally Break Them Down, supra* note 154.

[159] *Returning Home*, *supra* note 157, at 7.

[160] *See supra* ¶ 49; Human Rights Watch, *Locked Up Alone: Detention Conditions and Mental Health at Guantánamo* (June 2008), at 33-34, *available at* http://www.hrw.org/en/reports/2008/06/09/locked-alone [hereinafter *HRW, Locked Up Alone*] (reporting that in December 2007, Ahmed Belbacha tried to kill himself, later telling his lawyer that he felt like he was "being buried alive," and Mohammed El Gharani, captured at 15, tried to kill himself seven times, twice in mid-2007).

[161] *HRW, Locked Up Alone, supra* note 159, at 24-25.

[162] *Id.* at 36-37 (reporting that in January 2008, an independent psychiatrist forced to perform a proxy assessment of "B." because the government would not allow him to examine him in person told B.'s lawyers that his "psychiatric symptoms have expanded and worsened in the past two years. He now appears to meet the clinical criteria for both Post Traumatic Stress Disorder and Major Depressive Disorder with Mood Congruent Psychotic Features. These disorders represent both a quantitative and qualitative worsening of his condition. . . As a result of his continued detention, isolation, and maltreatment, he has begun to lose touch with reality (become psychotic) in addition to experiencing an expanding array of painful and incapacitating psychiatric symptoms.").

[163] *See* Paisley Dodds, *Terror Suspects at Guantánamo Attempted Mass Hanging and Strangling Protest in 2003, U.S. Military Reports*, ASSOCIATED PRESS WORLDSTREAM, Jan. 24, 2005, available at http://www.chron.com/disp/story.mpl/headline/world/3007315.html; Mark P. Denbeaux et al, Seton Hall Law School, *The Guantanamo Detainees During Detention: Data from Department of Defense Records* (2006), at 13-14, *available at* http://law.shu.edu/publications/guantanamoReports/guantanamo_third_report_7_11_06.pdf.

lives without them.[165] These experiences exacerbate trauma and make recovery more difficult.

DR. JAMES MISREPRESENTED HIS EXPERIENCE, THE NATURE OF HIS AFFILIATIONS, AND THE RESULTS OF HIS SERVICES AT GUANTÁNAMO

Dr. James Misrepresented to the Public and to His Professional Association the Nature and Results of His Services As a BSCT Psychologist.

52. Dr. James misrepresented, directly and/or by implication, the purpose and characteristics of the Guantánamo BSCT as a unit concerned primarily with protecting detainees from harm. He also provided false and/or misleading information about the nature and results of his psychological services in Guantánamo. Relevant statements made by Dr. James that are at odds with evidence in the public record and/or internally inconsistent include:

- Statements in his book and to the press that he went to Guantánamo to "improve the treatment of the detainees,"[166] that he "institut[ed] policies intended to prevent prisoner abuse at all military institutions,"[167] that he "helped [interrogators] stay within the SOP [standard operating procedures] and stay away from abusive behaviors,"[168] that in 2003, Major General Miller "made it very clear that he wanted the BSCT to work with interrogators on how to develop rapport-building strategies and techniques with detainees,"[169] and that under Miller's direction, his job was to "teach interrogators how to get intel without yelling, slapping, sleep deprivation, humiliation, or food deprivation";[170]

- Statements in his book and to the press, and e-mails to an APA task force that reports of abuse in Guantánamo ceased with his arrival, [171] that the "harsh techniques" listed by an

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[164] *See Broken Laws, Broken Lives*, *supra* note 70, at 92-93. Despite the paucity of evidence against most individuals detained in Guantánamo, and that the vast majority of those who have been released from there have never been charged with or convicted of a crime by the U.S. government, "[t]he U.S. government repeatedly insists that its decision to release detainees is not an admission that they are cleared of wrongdoing." This absence of a formal exoneration has meant public shunning and abuse, suspicion, limited employment opportunities and even death threats for released detainees in their communities, extending the hell of Guantánamo for these men. *See Guantánamo and its Aftermath, supra* note 72, at 61-72.

[165] *See Guantánamo and its Aftermath*, *supra* note 72, at 65-67.

[166] *Fixing Hell, supra* note 3, at 270. *But see supra* ¶¶ 18-20, 25-28.

[167] *Fixing Hell, supra* note 3, at 270 ("May 5, 2003: Colonel Larry James leaves Guantánamo Bay after instituting policies intended to prevent prisoner abuse at all military institutions."). *But see supra* ¶ 28.

[168] *Id.* at 255 ("...I helped [interrogators] stay within the boundaries of the SOP and stay away from abusive behaviors."). *But see supra* ¶¶ 29-36.

[169] *APA Vote*, JTF-Guantanamo Newsletter (Sept. 13, 2007), *supra* note 13.

[170] *Fixing Hell*, *supra* note 3, at 34 ("General Miller had discussed... that it would be my job to teach the interrogators how to get intel without yelling, slapping, sleep deprivation, humiliation, or food deprivation."). *But see supra* ¶¶ 37-42.

[171] *Id.*at 262 ("There...have been no incidents of abuse at Guantánamo Bay by either an interrogator or psychologist reported since my arrival in Cuba in January 2003."). *But see supra* ¶¶ 30-40, 49-50.

August 2007 APA resolution as prohibited for psychologists "were not used under [his] watch at Gitmo,"[172] that the Joint Task Force in Guantánamo "treat[ed] detainees like every human being should be treated – safely and humanely," and did "not abuse, beat or strip anybody…";[173] that the "problems" of abuse were in fact "fixed," and that psychologists were responsible for such "fix[ing]."[174]

- A statement in an open letter to then-APA President Sharon Brehm that he had never "used 'SERE' techniques in any aspect of [his] work related to interrogations."[175]

- A statement in his book that his predecessor and mentee, Dr. Leso, "was sent to Fort Bragg for briefing on the appropriate and inappropriate behaviors, the rules of engagement, what was legal and not legal, and, most importantly, the Geneva Conventions";[176]

- Statements in e-mails to an American Psychological Association (APA) task force that "psychologists at these facilities worked to protect the welfare and safety of the detainees" and characterized this function as a "major safety role";[177]

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[172] *Id.* at 255. *But see supra* ¶¶ 37-40 (in which he describes witnessing an interrogator and four guards wrestle a naked man in an attempt to dress him in women's clothing, conduct that clearly amounts to forced nakedness and sexual, religious and cultural humiliation, all of which are on APA's list of prohibited techniques).

[173] *APA Vote*, JTF-Guantanamo Newsletter (Sept. 13, 2007), *supra* note 13 ("We treat detainees like every human being should be treated – safely and humanely … There is a percentage of the public that believes what we are doing here is unethical and immoral. No matter what we do, there is nothing we can do to convince some people that we do not abuse, beat or strip anybody…"); *see also BSCTs Integral*, JTF-Guantanamo Newsletter (Jan. 28, 2008), *supra* note 8 ("During my time here, I am proud to say that I have not seen a guard or interrogator abuse anyone in any shape or form"). *But see supra* ¶¶ 30-40.

[174] E-mail from Col. Larry C. James, Re: PENS-A sample agenda (May 23, 2005), *in* APA PENS Listserv *supra* note 19, at 47 ("I am very proud of the fact, it was psychologists who fixed the problems and not caused it. ***This is a factual statement!***") (emphasis in original); E-mail from Col. Larry C. James PhD, Re: regarding our report (July 29, 2005), *in* APA PENS Listserv *supra* note 19, at 157-58 ("[T]hanks to psychologists, procedures are in place to prevent these things from happening again at GITMO."). *But see supra* ¶¶ 12-14.

[175] Letter from Col. Larry C. James to APA President Dr. Sharon Brehm (Jun. 18, 2007), *available at* http://psychoanalystsopposewar.org/blog/wp-content/uploads/2007/06/larryjameslettertoapapresidentdrsharonbrehm.pdf [hereinafter Letter to Sharon Brehm (Jun. 2007)] ("I do not use nor have I ever used "SERE" techniques in any aspect of my work related to interrogations."). *But see supra* ¶¶ 9-11.

[176] *Fixing Hell, supra* note 3, at 22 (asserting that it was he and Morgan Banks who decided to send Dr. Leso for training in Fort Bragg in September 2002, and adding that "Colonel Banks emphasized to Major Leso that it was imperative for him to teach interrogators how to treat all prisoners with decency and respect and how to use incentive-based interviews rather than harsh interrogation tactics"). *But see supra*, ¶¶ 8-11.

[177] E-mail from Col. Larry C. James PhD, Re: Talking about the report (Jul. 7, 2005), *in* APA PENS Listserv *supra* note 19, at 129; e-mail from Col. Larry C. James PhD, Re: FYI – NE Jnl, *in* APA PENS Listserv *supra* note 19, at 144 ("[O]ne of the things I emphasized is the major safety role we (psychologists) have. The psychologist, in order to protect the welfare of the detainee, needs to know if the detainee has a major medical condition."); *see also Fixing Hell, supra* note 3, at 58-59 (arguing that "the intent of the biscuit [sic] was to be the keepers of the relevant medical information so that no detainee would ever be harmed" and "we used this information to eliminate the

Evidence Indicates that Dr. James Misrepresented His Experience to this Board.

53. Dr. James omitted from his paper application for licensure by this Board any reference to his psychological work experience in Guantánamo and Abu Ghraib.[178] In response to this Board's request for "a complete list of all psychological training and work experience,"[179] Dr. James listed only two positions:

- Chief, Dept. of Psychology, Tripler Army Medical Center, Honolulu, May 2004 to July 2008
- Chief, Dept. of Psychology, Walter Reed, Washington, D.C. August 1999 to May 2004.[180]

Asked to describe his activities and responsibilities in each position, he responded that in both positions he "directed the service, research + training programs for a large APA approved program/ department."[181]

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possibility that any ill or fragile detainee would be harmed as a result of some abusive interrogation technique"). *But see supra* ¶¶ 30-36, 44-47, 50-51.

[178] This allegation is based on the application released by this Board to Dr. Bond in response to her public records request of February 9, 2009. *See* Larry James, Application to the Ohio State Board of Psychology (Aug. 13 2008) [hereinafter James Application (Aug. 2008)]. James's CV circulated by Wright State University while he was being considered for hire also omitted his deployments in Abu Ghraib and Guantánamo. *See infra* ¶ 53.

[179] *Id.*

[180] *Id.*

[181] *Id. But see supra* ¶¶ 3-4. Similarly, the 24-page *curriculum vitae* that was circulated by Wright State University when Dr. James interviewed for the Dean's position in the Spring of 2008 contained no reference to his Guantánamo and Abu Ghraib assignments. *See* Larry C. James, Curriculum Vitae (obtained in Spring 2008) [hereinafter First CV]. However, in response to a reporter's request in January 2010, Wright State University produced a different version of Dr. James's CV than the one it had circulated in 2008. *See* Second CV (2010), *supra* note 3, at 2. To the extent that it might shed further light on his credibility, we note that discrepancies exist between Dr. James's application and his CV. Included among these are ten psychology-related jobs in seven different institutions that he failed to mention in his application to this Board. Finally, Dr. James also failed to disclose in his application that from January 25, 1989 to December 31, 2000, he was licensed by the territory of Guam. *See* E-mail from Mamie Balajadia, Ed.D., Clinical Psychology Representative on the Guam Board of Allied Health Examiners, Re: Verification of psychology licensure [sic] (Jun. 22, 2010).

VIOLATIONS

EVIDENCE INDICATES THAT DR. JAMES ENGAGED IN A PATTERN AND PRACTICE OF MISCONDUCT THAT DEMONSTRATED A LACK OF GOOD MORAL CHARACTER AND CONSTITUTED NEGLIGENCE IN THE PRACTICE OF PSYCHOLOGY

"Requirements for admission to examination for a psychologist license shall be that the applicant . . . [i]s of good moral character."
ORC 4732.10(B)(2)

"A psychologist . . . shall be considered negligent if his/her behaviors toward his/her clients, supervisees, employees or students, in the judgment of the board, clearly fall below the standards for acceptable practice of psychology . . "
OAC 4732-17-01(B)(1)

"The state board of psychology may refuse to issue a license to any applicant, may issue a reprimand, or suspend or revoke the license of any licensed psychologist . . . on . . . the . . . grounds [of] [b]eing negligent in the practice of psychology . . ."
ORC 4732.17(A)(5)

54. Dr. James's alleged conduct, both during and since his tenure in Guantánamo, demonstrates a lack of the good moral character required by ORC 4732.10(B)(2). Individually and collectively, these alleged actions fall substantially below acceptable standards of care, constituting negligence in the practice of psychology in violation of OAC 4732-17-01(B)(1).

55. Under Ohio law, a psychologist seeking licensure must demonstrate that he or she is of "good moral character."[182] This Board has the power to refuse to issue or revoke a license for the negligent practice of psychology,[183] defined by the OAC as behavior that "clearly fall[s] below the standards for acceptable practice of psychology."[184]

56. This Board has found that negligent practice can include the following:

- Submitting evaluative reports in custody proceedings that lacked objectivity and impartiality;[185]
- Holding oneself out as the psychologist of a person who is not one's client;[186]

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[182] ORC § 4732.10(B)(2).

[183] ORC § 4732.17(A)(5).

[184] OAC § 4732-17-01(B)(1).

[185] *Consent Agreement Between Deborah Baum, Ph.D. and the State Board of Psychology of Ohio* (Mar. 5, 2003); *Consent Agreement Between Jeanne Dennler, Ph.D. and the State Board of Psychology of Ohio* (May 5, 2003); *Consent Agreement Between Larry Pendley Ph.D. and the State Board of Psychology of Ohio* (Dec. 12, 2002).

- Reporting suspected child neglect based on insufficient information;[187]
- Engaging in "inappropriate personal disclosure to clients and ex-clients;"[188]
- Creating a treatment plan with clients and then not scheduling follow-up appointments or arranging for alternative care;[189]
- Taking three months to write a time-sensitive report requested by a client;[190] and
- Assuming a conflicting forensic role in a domestic dispute involving a client;[191]

57. Moreover, in at least 41 disciplinary cases in 2004, 2006, and 2008, the Board found client welfare, multiple relationship, fraud or misrepresentation, and confidentiality breaches to occur alongside findings of negligence.[192]

58. Dr. James's alleged misconduct in Guantánamo, as detailed *infra*, is at least as serious, and arguably far more serious than the conduct previously disciplined by this Board. As indicated by available evidence, Dr. James's alleged misconduct includes the intentional, reckless, or negligent:

- Failure to protect clients from harm, instead affirmatively causing them psychological and physical harm;
- Failure to avoid prohibited conflicting relationships with persons with whom he worked, compromising his judgment and objectivity and leading to their exploitation;
- Failure to protect confidential information; and

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[186] *Consent Agreement Between William Wells Friday, Ph.D. and the State Board of Psychology of Ohio* (Dec. 1, 2009).

[187] *Consent Agreement Between William McFarren, Ph.D. and the State Board of Psychology of Ohio* (Feb. 25, 2003).

[188] *Consent Agreement Between Margaret Petrone, Ph.D. and the State Board of Psychology of Ohio* (Jan. 6, 2003).

[189] *Consent Agreement Between Rick J. Capasso, Ph.D. and the State Board of Psychology of Ohio* (Dec. 1, 2005) [hereinafter *Capasso Consent Agreement*].

[190] *Consent Agreement Between Eileen Cohen, Ph.D. and the State Board of Psychology of Ohio* (Oct. 7, 2004).

[191] *Consent Agreement Between Diane Frey, Ph.D. and the State Board of Psychology of Ohio* (Jul. 17, 2007); *Consent Agreement Between Susan E. Snyder, Ph.D. and the State Board of Psychology of Ohio* (Oct. 2, 2004).

[192] Ohio State Board of Psychology Disciplinary Cases: James E. Althof, Deborah Baum, Joseph J. Bendo, Virginia A. Black, Mark I. Byrd, Rick J. Capasso, James Rod Coffman, Eileen Lee Cohen, Norma I. Cofresi, Janet King Davis, Jeanne S. Dennler, Robert C. Erikson, Diane E. Frey, William W. Friday, Colin C. Gordon, Michael Hartings, James E. Kaplar, Margaret Lahner, Rhonda J. Lilley, William P. McFarren, Alice Neuman, Meryl A. Orlando, Sharon Pearson, Margaret M. Petrone, Thomas E. Pickton, Michael F. Pignatiello, Stephen Redle, Janice Roberts, Frederick M. Sacks, Daniel W. Sanders, Joseph D. Schroeder, Jeff D. Sherrill, Susan Snyder, Janet K. Strupp, Donald J. Tosi, Dale Wenke, John P. Wilson, Sandra S. Wittstein, Ronald W. Wright, Keli A. Yee, J. Scott Yount. *State Board ALERT!: License Registration 2004*, June 24, 2004, *available at* http://www.psychology.ohio.gov/pdfs/alert2004v7%20REV4%2011inch.pdf; *State Board ALERT!: License Registration 2006*, June 24, 2006, *available at* http://www.psychology.ohio.gov/pdfs/alert2006%20final.pdf; *State Board ALERT!: License Registration 2008*, June 24, 2008, *available at* http://www.psychology.ohio.gov/pubs/2008Newsletter.pdf.

- Failure to represent honestly his own conduct and experience, deceiving not only the general public, but also his current employer, faculty, students, patients, and this Board.

59. The evidence indicates that Dr. James's actions caused his clients harm by, among other things, facilitating their abusive interrogations and conditions of confinement[193] [redacted] Many have suffered serious physical and psychological trauma as a result. Moreover, his false accounts of the services he provided as a psychologist in Guantánamo have and continue to injure the public at large.[195]

60. Individually, each of Dr. James's alleged acts of misconduct falls below the standards of practice established by this Board and national and international professional institutions. Combined, the alleged acts reveal a lack of good moral character and a pattern of consistent disregard for the rules that govern the psychological profession.

61. This Board is empowered to take a range of disciplinary actions and corrective orders.[196] Most of the violations enumerated above carry a minimum penalty of reprimand; for fraud and misrepresentation, the minimum penalty is active license suspension.[197] All of them carry a maximum penalty of license revocation or denial of license application.[198] Circumstances or factors that may justify an increase in the degree of discipline to be imposed may include (1) adverse impact on the welfare and quality of life of others, (2) substantial harm to the client/s including exploitation of trust, (3) high level of vulnerability of the victim, (4) willful, reckless misconduct, (5) lack of insight into the wrongfulness of the conduct, and (6) pattern of misconduct.[199]

62. The evidence suggests that all of these aggravating factors are present here. If this Board, pursuant to a fair, thorough, and impartial investigation and a fair hearing, finds these violations to have occurred, such conduct would merit immediate revocation of Dr. James's Ohio license.

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[193] *See supra* ¶¶ 44-47, 50-51.

[redacted]

[195] *See In Re Barnes*, 510 N.E.2d 392, 398 (Ohio Ct. App. 1986) (noting that "[o]ne of the obvious purposes of the regulation of professions is to prevent damage from misrepresentations about a professional's competence before any person in the general public is damaged. It is preventive justice ..."). *See* Cover Letter.

[196] ORC § 4732.17(A).

[197] Ohio State Board of Psychology, Guidelines for Disciplinary Actions and Corrective Orders, at 5-7, 9, 12, 15, *available at* http://www.psychology.ohio.gov/pdfs/discguidelinesapproved.pdf.

[198] *Id.*

[199] *Id.* at 4.

DR. JAMES EXPLOITED THE DEPENDENCY OF HIS CLIENTS AND FAILED TO PROTECT THEM FROM HARM

"[A] psychologist . . .shall not exploit the trust or dependency of any client, supervisee, evaluee or other person with whom there is a professional psychological role . . . ."
OAC § 4732-17-01(C)(4)

"A psychologist . . . shall accord each client . . . reasonable protection from physical or mental harm or danger."
OAC § 4732-17-01(C)(5)

"A psychologist . . . who has substantial reason to believe that another licensee or psychological . . . supervisee has committed an apparent violation of the statutes or rules of the board that has substantially harmed or is likely to substantially harm a person or organization shall so inform the board in writing . . ."
OAC § 4732-17-01(J)(4)

63. In violation of OAC §§ 4732-17-01(C)(4)-(5), Dr. James failed to provide reasonable protection to the detainees under his care. He further neglected this duty under OAC § 4732-17-01(J)(4) by failing to report the ethical violations of his subordinates and colleagues.

64. The obligations to protect clients,[200] refrain from exploiting them,[201] and to report abuse by other psychologists[202] are basic tenets of professional responsibility, and they require

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[200] *See* OAC § 4732-17-01(C)(5); *see also* APA Ethics Code, *supra* note 17, § 3.04 (requiring that "psychologists take reasonable steps to avoid harming clients/patients, students, supervisees, research participants, organizational clients, and others with whom they work, and to minimize harm where it is foreseeable and unavoidable"); *id.* at Principle A: Beneficence ("[p]sychologists strive to benefit those with whom they work ...In their professional actions, psychologists seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons...").

[201] *See* OAC § 4732-17-01(C)(4); *see also, e.g.,* APA Ethics Code, *supra* note 17, § 3.08 (requiring that "psychologists do not exploit persons over whom they have supervisory, evaluative, or other authority such as clients/patients, students, supervisees, research participants, and employees"); *id.* at Principle A: Beneficence ("psychologists ... take care to do no harm"); APA, Against Torture: Joint Resolution of the American Psychiatric Association and the American Psychological Association (1985), *available at* http://www.apa.org/news/press/statements/joint-resolution-against-torture.pdf [hereinafter APA Against Torture Resolution (1985)] ("... WHEREAS American psychologists are bound by their *Ethical Principles* to 'respect the dignity and worth of the individual and strive for the preservation and protection of fundamental human rights,' . . . and WHEREAS psychological knowledge and techniques may be used to design and carry out torture, and WHEREAS torture victims often suffer from multiple, long-term psychological and physical problems, Be it resolved, that . . . the [APA] condemn[s] torture wherever it occurs, and Be it further resolved, that . . . the [APA] support[s] the [*UN Convention Against Torture*]... *and the UN Principles of Medical Ethics*, as well as the joint Congressional Resolution opposing torture."). Dr. James himself admits that "the ethics code for a psychologist says we can do no harm to a human being." *Fixing Hell*, *supra* note 3, at 35.

[202] The duty to report abuse follows naturally from the duty to protect one's clients from physical and psychological harm. *See* OAC § 4732-17-01(J)(4); APA Ethics Code, *supra* note 17, § 1.05 ("If an apparent ethical violation has substantially harmed or is likely to substantially harm a person or organization and is not appropriate for [resolving by bringing it to the attention of that individual] or is not resolved properly in that fashion, psychologists take further action appropriate to the situation. Such action might include referral to state or national committees on professional

psychologists to refrain from acting in ways "reasonably likely to cause harm."[203] The Board has found, for example, that such a reasonable likelihood arises when a psychologist initiates a client relationship and then fails to provide follow-up or referral services.[204] Dr. James's apparent conduct, as discerned from available evidence, would constitute a far more grievous dereliction of his ethical duties.

65. Dr. James assumed professional psychological roles in evaluating and treating detainees at Guantánamo, and as such, these detainees were his clients.[205] Notwithstanding this relationship and the heightened professional obligations that arose from it, evidence suggests that Dr. James played a direct and intentional role in their abuse and exploitation. Furthermore, as Chief Psychologist and alleged commander and supervisor of other BSCT members, Dr. James would also have been legally and ethically responsible for their behavior.[206] Yet, the evidence indicates that he ordered, supervised, ratified, facilitated, acquiesced in, and/or failed to prevent, stop, report, and punish abusive behavior by other members of the BSCT, causing psychological devastation to people he was duty-bound to protect.[207] The harm arising from his conduct was more than "reasonably likely." As such, Dr. James violated his ethical duty to protect, engaged in the negligent practice of psychology, and demonstrated that he lacks the good moral character necessary for licensure in Ohio.[208]

Dr. James and/or the BSCT Members Allegedly under His Command and Supervision Intentionally and Actively Participated in the Abusive and Exploitative Treatment of Detainees.

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ethics, to state licensing boards, or to the appropriate institutional authorities."); *see also* ORC § 2151.421(A)(1)(a) ("No [licensed psychologist] who is acting in an official or professional capacity and knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a child under eighteen years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child shall fail to immediately report that knowledge or reasonable cause to suspect to the entity or persons specified in this division.").

[203] *Capasso Consent Agreement*, *supra* note 189, ¶ 11.

[204] *Capasso Consent Agreement*, *supra* note 189 (in which this Board found that by "fostering hope during a family crisis and by subsequently failing to afford [clients'] basic rights to professional follow-through or referral to another appropriate provider," the acts of one psychologist "were reasonably likely to cause harm").

[205] *See supra* ¶¶ 21-22.

[206] *See supra* ¶¶ 5-7; *see also* OAC § 4732-17-01(J)(3) ("A psychologist…shall exercise appropriate supervision over supervisees, as set forth in the rules of the board."); APA Ethics Code, *supra* note 17, § 2.05 ("Psychologists who delegate work to employees, supervisees, or research or teaching assistants or who use the services of others, such as interpreters, take reasonable steps to (1) avoid delegating such work to persons who have a multiple relationship with those being served that would likely lead to exploitation or loss of objectivity; (2) authorize only those responsibilities that such persons can be expected to perform competently on the basis of their education, training, or experience, either independently or with the level of supervision being provided; and (3) see that such persons perform these services competently.").

[207] *See supra* ¶ 50.

[208] *See* OAC §§ 4732-17-01(C)(5), (B)(1); ORC § 4732.10(B)(2); *see supra* § 54-56.

66. Dr. James and/or the BSCT members allegedly under his command and supervision helped to develop interrogation plans designed to exploit detainees' particular psychological weaknesses in order to "break" them.[209] As noted above, during James's tenure at Guantánamo, boys and men were threatened with rape and death for themselves and their family members; sexually, culturally, and religiously humiliated; forced naked; deprived of sleep; subjected to sensory deprivation, over-stimulation, and extreme isolation; short-shackled into stress positions for hours; and physically assaulted.[210] These techniques can only be characterized as harmful.[211] The evidence indicates that abuse of this kind was systemic, that BSCT health professionals played an integral role in its planning and practice, and that Dr. James, as the Chief Psychologist of the intelligence command, at minimum knew or should have known it was being inflicted.[212]

67. The BSCT's role in reviewing detainees' medical information in order to deem them fit for interrogation only served to validate such abuse.[213] The purpose behind granting BSCT members access to detainee medical information is disputed,[214] but even Dr. James's account implies that he and BSCT members allegedly under his command and supervision may have certified some detainees as fit for abuse.[215] Such conduct is prohibited not only by Ohio laws and rules,[216] but also by national and international norms that forbid health professionals from using their medical skills and knowledge to assess a person's ability to withstand abusive interrogation.[217]

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[209] *See* Lewis, *Doctors' Aid*, *supra* note 18; *see also supra* ¶¶ 8, 16-17.

[210] *See supra* ¶¶ 25-42.

[211] *See supra* ¶¶ 50-51. Moreover, the APA expressly and "absolutely" prohibits its members from "knowingly planning, designing, participating in or assisting in the use" of each one of these techniques. *See* APA, Amendment to the Reaffirmation of the APA Position Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and Its Application to Individuals Defined in the United States Code as "Enemy Combatants" (Feb. 22, 2008), *available at* http://www.apa.org/about/governance/council/torture-amend.aspx [hereinafter APA Position Against Torture (2008)]. *But see Fixing Hell*, *supra* note 3 at 255 (in which Dr. James states that he supported the prohibition on psychologists advising on this "set of harsh techniques," and contends that they "were not used under [his] watch at Gitmo … and [he] would never recommend them as an ethical, moral way to obtain intel").

[212] *See supra* ¶¶ 3-14.

[213] *See supra* ¶ 17.

[214] See *supra* ¶¶ 17, 52.

[215] *See Fixing Hell*, *supra* note 3, at 58-59 (contending that they "used the information to eliminate the possibility that any ill or fragile detainee would be harmed as a result of *some abusive interrogation technique*" (emphasis added), implying that at least some detainees may have been certified as fit for such techniques).

[216] *See* ORC 4732-17(A)(5); OAC § 4732-17-01(C)(5); OAC § 4732-17-01(J)(4).

[217] *See* APA Against Torture Resolution (1985) *supra* note 200 (expressing support for UN Principles of Medical Ethics, which state that "[i]t is a contravention of medical ethics for health personnel…[t]o certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments, or to participate in any way in the infliction of any such treatment or punishment which is not in accordance with the relevant international instruments"); American Medical Association, Opinions on Social Policy: E-2.067 Torture (Dec. 1999), *available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion2067.shtml ("physicians should not treat individuals to verify their health so that

68. Dr. James also failed to protect detainees from harm by ordering, supervising, and/or failing to prevent, stop, report, and punish abuse by BSCT members allegedly under his command and supervision.[218] For example, in the April 22, 2003 incident noted above, the BSCT psychiatrist monitoring interrogation recommended a technique that one witness described as repeatedly slamming a detainee's upper body and face to the floor.[219] The physician who examined the prisoner later confirmed that he sustained injuries consistent with his account of the incident.[220] The man told the doctor that the pain was so bad "he tried to 'cut' the artery in his neck with his fingernails."[221] The BSCT member, when questioned in the investigation, reported that the technique had been previously used.[222] The investigator's conclusion that "[a]ll concerned believed that the technique was appropriate, approved, applied properly, and was common practice,"[223] strongly suggests that Dr. James not only knew about this practice that was "reasonably likely to cause harm," but condoned, supervised and/or ordered it.

69. Military policy documents also suggest that, directly and/or in a supervisory capacity, Dr. James helped to develop a detention policy explicitly designed "to enhance and exploit [a detainee's] disorientation and disorganization" by "concentrat[ing] on isolating the detainee and fostering dependence of the detainee on his interrogator."[224] This policy required that all detainees be subjected to mandatory 30 days of solitary confinement upon arrival and granted interrogators the power to extend that period of isolation.[225] During this period, detainees were not to be visited by members of the ICRC or their own chaplain, and they were deprived of religious items necessary to pray.[226] As with the use of "forced exercise," this policy was not only "reasonably likely" to cause harm, it was affirmatively designed to do just that.

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torture can begin or continue"); World Medical Association, Declaration of Tokyo, Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment ¶ 3 (Oct. 1975, as amended May 2006), *available at* http://www.wma.net/en/30publications/10policies/c18/index.html ("The physician shall not use nor allow to be used, as far as he or she can, medical knowledge or skills, or health information specific to individuals, to facilitate or otherwise aid any interrogation, legal or illegal, of those individuals."); International Dual Loyalty Working Group, Dual Loyalty & Human Rights: In Health Professional Practice; Proposed Guidelines & Institutional Mechanisms ¶ 8 (2002), *available at* http://physiciansforhumanrights.org/library/documents/reports/report-2002-duelloyalty-sect4.pdf ("The health professional should abstain from participating, actively or passively, in any form of torture."); *id.* ¶ 9 ("[t]he health professional should not provide any means or knowledge to facilitate the practice of torture or cruel, inhuman, or degrading treatment or punishment…").

[218] *See supra* ¶¶ 30-36.

[219] *See supra* ¶¶ 30-36.

[220] *See supra* ¶¶ 30-36.

[221] *See supra* ¶¶ 30-36.

[222] *See supra* ¶ 30.

[223] *Id.*

[224] *See supra* ¶¶ 5, 8, 14-16, 28.

[225] *See supra* ¶ 28.

[226] *Id.*

70. Dr. James's alleged actions and omissions regarding the three young prisoners were also more than "reasonably likely" to cause them harm. He knowingly exposed them to physical and mental harm by leading an operation in which they were forced onto a cargo plane, reportedly bound and blindfolded, for over 20 hours from Afghanistan to Guantánamo.[227] Dr. James "facilitated" interrogations of boys [redacted] These boys—held incommunicado thousands of miles from their families[230]—had no one to turn to except for Dr. James and the military personnel he selected to supervise them.[231] Dr. James and his subordinates rendered them dependent and then exploited that dependency in order to extract information. In Dr. James's own words: "We needed these boys to talk to us, and we established a program that would help us get to know them and encourage them to talk to us."[232]

Dr. James Failed to Prevent, Stop, Report, and/or Punish the Abusive and Unethical Behaviors of Others.

71. Dr. James acquiesced in, ratified and/or failed to prevent, stop, report, and punish the abusive behavior of others, including other mental health professionals.[233] To fulfill his obligation to protect detainees from harm, Dr. James was required to stop and punish or, at the very least, object to and report treatment reasonably likely to cause harm.[234] Dr. James's senior rank and/or alleged command position would have heightened his obligation to ensure that others on his team were acting ethically.[235] A supervisor's fidelity to the duty to report ethical breaches sets a standard of professionalism for his or her subordinates and supervisees. By failing to discipline those under his command and control and to report abuse by others, Dr. James ratified their actions. He contributed to the climate of abuse and impunity that characterized Guantánamo during his tenure, thus ensuring that the abuse would continue.[236]

72. By his own admission, Dr. James failed to immediately stop or even object to the incident, described above, of physical violence and sexual and religious humiliation perpetrated by

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[227] *See supra* ¶¶ 44-47.

[redacted]

[229] *See supra* ¶ 46

[230] *See supra* ¶ 44.

[231] *Id.*

[232] *See supra* ¶ 47.

[233] *See supra* ¶¶ 25-43.

[234] OAC § 4732-17-01(C)(5); OAC § 4732-17-01(J)(4).

[235] *See supra* ¶¶ 3-7, 18, 21-24.

[236] *See supra* ¶¶ 26-40, 49.

military police and interrogators against a detainee, whom they had forced into lipstick, a wig, and women's underwear. Rather, Dr. James asserted that his first reaction was to drink coffee and *hope* it would take a "*better turn*" (emphasis added).[237] His admission that he acted only after watching this abuse unfold, and that only after some time did he conclude that "[*s*]*omeone* [*was*] *gonna get hurt*" (emphasis added)[238] demonstrates his callous disregard for the mental and physical harm that had already been inflicted on the detainee. According to his own account of this incident, Dr. James "never once said anything about the lingerie or the interrogation."[239] His failure to communicate explicitly the wrongfulness of the conduct and to discipline those involved amounted to ratification of those particular acts.[240]

73. Finally, Dr. James failed to report the ethical violations of other mental health professionals.[241] As BSCT Commander, Chief Psychologist, or even as a senior-ranking member of a 3-5 person team charged with advising on interrogations throughout the base, Dr. James knew or should have known that his colleagues were advising interrogators on how to hurt detainees and calibrate their suffering.[242] He certainly knew that Dr. Leso had been involved in unethical conduct.[243] The evidence suggests that he also must have known of the BSCT psychiatrist's participation in the April 22, 2003 interrogation that repeatedly slammed the detainee to the floor. The psychiatrist and all others involved in the interrogation contended that the technique was "appropriate, approved, applied properly, and was common practice."[244] More importantly, the matter was the subject of an investigation conducted while Dr. James was still in Guantánamo and in which key command leaders were questioned.[245] Yet, nothing indicates that he reported any mental health professional's misconduct to the APA or appropriate licensing authority.[246] Instead, he has gone to great lengths to publicly misrepresent the type of services provided by Dr. Leso and other BSCT psychologists and psychiatrists in Guantánamo.[247]

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[237] *See supra* ¶¶ 37-40.

[238] *Id.*

[239] *Id.* at 51.

[240] His failure to report or punish this treatment could also constitute a war crime and dereliction of duty. *See supra* note 15. However, the relevant question for this Board is not whether the conduct was legal, but whether it is ethical for a prison psychologist, in a position of influence, to witness the violent forcing of a naked, distraught, non-consenting man into women's lingerie and not, at minimum, report the conduct. We do not think it is. Neither, it seems, does the APA. *See, e.g.,* APA Position Against Torture (2008), *supra* note 210.

[241] OAC § 4732-17-01(J)(4).

[242] *See supra* ¶¶ 3-19.

[243] *See supra* ¶ 43;

[244] *See supra* ¶ 42; *see also supra* ¶ 30.

[245] *See supra* ¶ 30.

[246] *See supra* ¶ 43.

[247] *See infra* ¶ 52.

74. By failing to report abuse and the ethical violations of his subordinates and colleagues, Dr. James exposed detainees to further harm and seriously damaged the integrity of the profession.[248]

DR. JAMES MAINTAINED PROHIBITED MULTIPLE RELATIONSHIPS THAT LED TO THE EXPLOITATION OF DETAINEES AND TO CONFLICTS OF INTEREST COMPROMISING HIS JUDGMENT AND OBJECTIVITY.

"The board prescribes that certain multiple relationships are expressly prohibited due to inherent risks of exploitation, impaired judgment by clients, supervisees and evaluees, and/or impaired judgment, competence or objectivity of the psychologist."
OAC § 4732-17-01(E)(2)

"A psychologist . . . shall not: . . . Undertake a professional psychological role with persons with whom he/she has had a familial, personal, social, supervisory, employment, or other relationship, and the professional psychological role results in: exploitation of the person; or, impaired judgment, competence, and/or objectivity in the performance of one's functions as a psychologist."
OAC § 4732-17-01(E)(2)(a), (a)(ii)

75. Dr. James violated OAC § 4732-17-01(E)(2)(a)(ii) by maintaining multiple conflicting relationships with detainees.

76. Ohio law prohibits psychologists from assuming multiple professional psychological roles that could result in the exploitation of those with whom they work or the impairment of the psychologist's judgment or objectivity.[249] This Board has often disciplined psychologists who assume conflicting "dual relationships" that corrupt the integrity of their work.[250] In 2004, for example, the Board indefinitely suspended the license of a psychologist who violated this rule by failing to maintain objectivity in the dual roles of therapist and forensic consultant for two children.[251]

77. The multiple professional psychological roles that Dr. James assumed at Guantánamo—including supervising treating psychologist, purported safety monitor, interrogation planner,

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[248] *See supra* note 119.

[249] OAC § 4732-17-01(E)(2)(a)(ii). The APA Ethics Code similarly requires that a "psychologist refrain[] from entering into a multiple relationship if the multiple relationship could reasonably be expected to…risk[] exploitation or harm to the person with whom the professional relationship exists." APA Ethics Code, *supra* note 17, § 3.05(a).

[250] *See, e.g., In re Virginia A. Black* (Ohio State Bd. of Psychology Mar. 21, 2003) (decision and order); *In re Mark Byrd* (Ohio State Bd. of Psychology Mar. 12, 2003) (decision and order); *In re James E. Althof, Ph.D.* (Ohio State Bd. of Psychology Oct. 21, 2004) (decision and order); *In re Dr. Susan Snyder* (Ohio State Bd. of Psychology June 27, 2005) (hearing report and recommendations) [hereinafter *In re Snyder* (June 27, 2005)]; *In re Janet K. Strupp* (Ohio State Bd. of Psychology Dec. 5, 2005) (adjudication order); *Consent Agreement between Rhonda J. Lilley, Ph.D. and Ohio State Bd. of Psychology* (Jan. 28, 2005);

[251] *See In re Snyder* (June 27, 2005), *supra* note 249, ¶¶ 34-35 (Findings of Fact) (expert testimony of Dr. Jeffrey Smalldon).

and advisor—created conflicts of interest that exploited detainees and compromised Dr. James's judgment and objectivity. Rather than avoiding these directly conflicting roles, Dr. James embraced them, violating his ethical duties, engaging in the negligent practice of psychology, and demonstrating a lack of the good moral character necessary for licensure in Ohio.

Dr. James Assumed Multiple Prohibited Relationships with Minors under His Care by Assuming a Role in Their Treatment and Their Interrogation.

78. Dr. James admits that he "was charged with building a team for the academic, medical, [and] psychological . . . efforts" for three boys held at Guantánamo. As such, Dr. James assumed a professional role as the boys' supervising treating psychologist.[252] While admitting that the boys were "fragile psychologically" and claiming that his job was to ensure that they were not harmed,[253] Dr. James nonetheless assumed the conflicting professional role of advisor to their interrogators. He oversaw the intelligence collection efforts relating to the minors under his care,[254] was present at all of their frequent and prolonged interrogations,[255] and apparently provided interrogators and guards "with feedback by coaching [and] mentoring."[256]

79. Ohio law prohibits conflicting roles where they merely "risk" exploitation.[257] Dr. James's involvement in interrogations was *aimed* at exploitation. The purpose of these interrogations was, at best, to use the boys to gather actionable military intelligence, not to provide treatment.[258] Dr. James describes his role as "getting [the boys'] health on track" in preparation for interrogation.[259] He admits: "There was no mistaking our intentions. We needed these boys to talk to us, and we established a program that would help us get to know them and encourage them to trust us."[260]

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[252] *See supra* ¶ 44.

[253] *Id.*

[254] *See supra* ¶ 44-47.

[255] *See supra* ¶ 46.

[256] *BSCTs Integral*, JTF-Guantanamo Newsletter, *supra* note 8.

[257] OAC § 4732-17-01(E)(2); *see also* APA Ethics Code, *supra* note 17, § 3.06 ("[P]sychologists refrain from taking on a professional role when...professional...interests or relationships could reasonably be expected to (1) impair their objectivity, competence, or effectiveness in performing their functions as psychologists or (2) expose the person or organization with whom the professional relationship exists to harm or exploitation."). The DOD has instructed BSCT members to be "keenly aware" of multiple relationships since these relationships are inevitable in military situations. BSC Policy (Oct. 20, 2006), *supra* note 14, at 18-19.

[258] *See supra* ¶ 47.

[259] *Id.*

[260] *Id.*

80. Dr. James's assumption of dual relationships with these boys led to role confusion, which impaired his judgment and objectivity. Although the juveniles were released without ever having been charged with a crime,[261] Dr. James published a book characterizing them as "teenage terrorists"[262] and intelligence sources [redacted]

81. The interests of a treating psychologist (to protect and heal the prisoner) and of an interrogation advisor (to exploit the prisoner's dependency and weaknesses for intelligence) are irreconcilable. Dr. James knew that these roles were in conflict.[264] Yet, instead of withdrawing from these conflicting roles, Dr. James chose to flout established standards by doing precisely what professional – and military rules – have long prohibited.[265] Reflecting on his roles at Guantánamo, and later at Abu Ghraib, Dr. James admits that he first saw himself "as wearing a white doctor's lab coat while at the same time . . . a soldier's uniform."[266] Then, he said, he decided to "no longer try to keep them as separate but equal entities . . . , as most health care professionals in the military try to do, but rather . . . find a way to merge them into one."[267] Finally, he wrote:

> *It was clear to me that I was no longer a doctor but rather a combatant with the sole purpose of helping the Army kill or capture the enemy.*[268]

82. The problem, of course, is that Dr. James *was* a "doctor," insofar as he held a healing license. More importantly to this Board, despite having grossly disregarded his ethical obligations as a psychologist, Dr. James nevertheless sought to retain the privilege and status

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[261] DoD Releases Juveniles (Jan. 29, 2004), *supra* note 126.

[262] *Fixing Hell*, *supra* note 3, at 39.

[redacted]

[264] *See supra* ¶ 21; *Fixing Hell*, *supra* note 3, at 49 ("It was a constant struggle to find the right psychological balance between seeing them as either terrorists who happened to be fourteen or harmless boys caught up in the tragedy of their third world nation's plight."); *Fixing Hell*, *supra* note 3, at 48 ("My days were intense, trying to make sure the boys were not abused or unnecessarily stressed while also facilitating their interrogation.").

[265] *See, e.g.*, APA Ethics Code, *supra* note 17, § 3.05 ("Multiple Relationships"); DoD Directive 3115.09 (Nov. 3, 2005) ¶ 3.4.3.3, available at http://www.cdi.org/news/law/DoD-Directive-3115_09.pdf (stating that behavioral science consultants who provide interrogation advice "may not provide medical care for detainees except in an emergency when no other health care providers can respond adequately"); *see also* E-mail from Col. Louie M. Banks re: Discussion (May 11, 2005), *in* APA PENS Listserv *supra* note 19, at 17-18 (noting requirement that military personnel involved in mental health evaluation and treatment not be involved in interrogation support); *see also* American Medical Association, Code of Medical Ethics Opinion E-2.068 - Physician Participation in Interrogation, *available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion2068.shtml ("Physicians must neither conduct nor directly participate in an interrogation, because a role as physician-interrogator undermines the physician's role as healer and thereby erodes trust in the individual physician-interrogator and in the medical profession.").

[266] *Fixing Hell, supra* note 3, at 178-179; *supra* ¶ 21.

[267] *Id.* at 179.

[268] *Id.* at 170.

that come with being a "doctor." Yet, his decision to merge the roles of healer and interrogator was made to the clear detriment of his clients,[269] and embodied exactly the sort of ethical conflict against which the OAC is meant to protect.[270]

To the Extent that BSCT Members Were Charged with Monitoring Detainee Safety, Dr. James and Those Allegedly under His Command Entered into Prohibited Multiple Relationships with Other Detainees at Guantánamo.

83. If in addition to exploiting their prisoners for intelligence, Dr. James and those allegedly under his command were also purportedly expected to monitor their safety, then the duties of the Guantánamo BSCT required assuming conflicting multiple relationships. While Dr. James and his team may have been formally assigned the role of "safety monitors,"[271] fulfilling this function while simultaneously advising on ways to increase the detainees' stress constituted a clearly established and recognizable conflict of interest.

84. The roles of protector and exploiter are fundamentally in conflict, and a reasonable psychologist would have recognized that the assumption of these conflicting roles was unethical. Yet, Dr. James—who allegedly had control over the scope and definition of BSCT members' duties—*embraced and promoted* the idea that psychologists could simultaneously exploit and protect.[272] In doing so, he not only assumed the prohibited multiple relationships himself, but also ensured that his subordinates and their successors would find themselves in a position where fulfilling their BSCT tasks meant violating their own ethical obligations.[273]

85. Dr. James's assumption of conflicting protective and intelligence extraction roles at Guantánamo compromised his judgment and objectivity. Within the "enhanced interrogation program" context, the detainees' exploitation was not so much a "risk" but an inherent factor of Dr. James's dual role.[274] In fact, detainees suffered tremendously under Dr. James's watch.[275]

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[269] *See supra* ¶¶ 50-51.

[270] OAC § 4732-17-01(E)(2)(a)(ii).

[271] *See supra* ¶ 19.

[272] *See supra* ¶¶ 45, 47.

[273] Following orders is not a defense to ethical or legal liability. *See* APA Ethics Committee, No Defense to Torture under the APA Ethics Code (Jun. 2009), *available at* http://www.apa.org/news/press/statements/ethics-statement-torture.pdf; APA Ethics Code, *supra* note 17, §§ 1.02 -1.03 (as amended, Feb. 10, 2010), *available at* http://www.apa.org/news/press/releases/2010/02/ethics-code.aspx; ICRC, Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal (1950), Principle IV, *available at* http://www.icrc.org/ihl.nsf/FULL/390?OpenDocument.

[274] *See supra* ¶¶ 8-20.

[275] *See supra* ¶¶ 49-51.

DR. JAMES FAILED TO MAINTAIN CONFIDENTIALITY

"When any case report or other confidential information is used as the basis of teaching, research, or other published reports, a psychologist . . . shall exercise reasonable care to ensure that the reported material is appropriately disguised to prevent client or subject identification."
OAC § 4732-17-01(G)(1)(b)

"A psychologist . . . shall continue to treat all information regarding a client as confidential after the professional relationship between the psychologist . . . and the client has ceased."
OAC § 4732-17-01(G)(1)(e)

"The state board of psychology may refuse to issue a license to any applicant, may issue a reprimand, or suspend or revoke the license of any licensed psychologist or licensed school psychologist [for] willful, unauthorized communication of information received in professional confidence."
ORC § 4732-17(A)(4)

"A psychologist . . . shall safeguard the confidential information obtained in the course of practice, teaching, research, or other professional duties. With the exceptions as required or permitted by statute, a psychologist. . . . shall disclose confidential information to others only with the informed written consent of the client."
OAC § 4732-17-01(G)(2)(d)

"A psychologist . . . shall limit access to client records and shall ensure that all persons working under his/her authority comply with the requirements for confidentiality of client material."
OAC § 4732-17-01(G)(1)(d)

86. Dr. James violated OAC § 4732-17-01(G)(1)(b), OAC § 4732-17-01(G)(1)(e), and ORC § 4732-17(A)(4) by failing to protect client confidentiality and willfully communicating information received in professional confidence.

87. [redacted] Moreover, during his tenure at Guantánamo, he failed to safeguard and limit access to client records in violation of OAC § 4732-17-01(G)(2)(d) and OAC § 4732-17-01(G)(1)(d).

88. The OAC defines confidential information as "information revealed by an individual or individuals or otherwise obtained by a psychologist . . . where there is reasonable expectation that it was revealed or obtained as a result of the professional relationship between the individual(s) and the psychologist."[277] Psychologists rely on confidentiality rules to build trust with their clients. Without this trust, they cannot carry out their professional responsibilities effectively. Dr. James's confidentiality breaches undermined

[redacted]

[277] OAC § 4732-17-01(G)(1).

the profession, exacerbated harm,[278] constituted negligent practice of psychology, and demonstrated that he lacks the good moral character necessary for licensure in Ohio.

[redacted]

Dr. James Failed to Safeguard Confidential Information and Limit Access to Client Records by Instituting a Policy That Granted the BSCT Access to Detainee Medical Information.

91. In violation of the ethical duty to safeguard confidential information and limit access to client records, Dr. James admits to developing a policy requiring that treating health professionals provide the BSCT with access to the medical information of detainees.[284]

92. As discussed above, widely recognized professional norms prohibit all health professionals – those directly treating detainees and those acting in other capacities – from vetting detainees for abusive interrogation.[285] Dr. James instituted a policy that attempted to circumvent this ethical duty by requiring treating health professionals to improperly disclose confidential information to the BSCT. Yet, BSCT members were themselves health professionals

[278] *See supra* ¶¶ 50-51.

[redacted]

[284] *See supra* ¶ 17.

[285] *Id.*

specifically charged with vetting prisoners for abusive interrogation.[286] Adding a new layer of psychologists and psychiatrists to do the vetting did not correct the ethical problem.

93. Furthermore, the function of the BSCT was inherently exploitative and harmful to detainees.[287] By ensuring that he and other BSCT personnel would have access to detainee medical information, Dr. James's confidentiality breach increased the detainees' risk of being exploited. A reasonable psychologist in his position would have been aware of this risk. Thus, in creating this policy, he also violated his duty to protect the detainees from harm.[288]

DR. JAMES MISREPRESENTED HIS EXPERIENCE, THE NATURE OF HIS AFFILIATIONS, AND THE RESULTS OF HIS SERVICES

"The psychologist . . . shall not misrepresent directly or by implication his/her affiliations or the purposes or characteristics of institutions and organizations with which the psychologist is associated."
OAC § 4732-17-01(B)(3)

"A psychologist . . . shall not include false or misleading information in public statements concerning psychological services offered."
OAC § 4732-17-01(B)(3)(c)

"A psychologist . . . shall not use fraud, misrepresentation, or deception in obtaining a psychology . . . license, in taking a psychology . . . licensing examination, . . . in providing psychological . . . services, in reporting the results of those services, or in conducting any other activity related to the practice of psychology or school psychology..."
OAC § 4732-17-01(I)(2)

94. In violation of the OAC, Dr. James has repeatedly misrepresented to the public, directly and/or by implication, the purpose and characteristics of the Guantánamo BSCT and the nature and results of the psychological services he provided as a senior member of that team. He made misrepresentations prior to his Ohio licensing application, while his application was pending, and he has continued to make misrepresentations after receiving a license by this Board. Furthermore, Dr. James's publicly released application to this Board suggests that he may have used fraud, misrepresentation and/or deception in obtaining a psychology license by omitting from his application any reference to his psychological work experience in Guantánamo and Abu Ghraib.

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[286] *Id.*

[287] *See supra* ¶¶ 8-20, 30-36.

[288] Because Dr. James was neither required nor permitted by statute to develop this policy, his conduct is not exempted under OAC § 4732-17-01(G)(2)(d). Nor can he defend his policy under OAC § 4732-17-01(G)(2)(f), which only permits psychologists to "release confidential information . . . to *conform* with state or federal laws, rules, or regulations." This exemption exists to allow psychologists to conform with existing regulations instituted by others; it cannot be used by psychologists wishing to immunize themselves from liability by *themselves* formulating regulations that call for the systematic violation of client confidentiality.

95. We recognize that the extent of Dr. James's individual complicity in the abuse in Guantánamo is ultimately a matter for this Board to determine, following an investigation and hearing. However, no further investigation is needed to establish that men and boys were physically and psychologically abused as a matter of policy in Guantánamo during, between, and following his deployments. The record on this is clear, thanks not only to victim testimony and reporting by the media and human rights organizations, but also to the critical work of the Senate Armed Services Committee and the inspectors general of the CIA, DOD and DOJ. There is no question that Dr. James has made numerous false or misleading statements. Moreover, the amount, source, and public nature of the evidence contradicting his statements suggest that Dr. James is acting with intent to deceive and mislead.

96. In affirming this Board's decision to indefinitely suspend a psychologist's license, the Court of Appeals of Ohio, Tenth Appellate District clarified that "[o]ne of the obvious purposes of the regulation of professions is to prevent damage from misrepresentations about a professional's competence before any person in the general public is damaged."[289] Dr. James's status as a public figure and position of influence heightens the risk of damage posed by his misrepresentations. As Dean of Wright State University's School of Professional Psychology, President of the Society for Military Psychology of the American Psychological Association,[290] and the convener of trainings such as this year's Executive Workshop for high-level government officials,[291] his statements reach a wide and important audience.

97. Therefore, in addition to violating the rules enumerated above, Dr. James's past and ongoing misrepresentations constitute negligence in the practice of psychology and demonstrate a lack of good moral character required for licensure in Ohio.

The Evidence Suggests that Dr. James May Have Misrepresented His Experience to the Ohio State Board of Psychology.

98. Dr. James omitted from his paper application for licensure by this Board any reference to his psychological work experience in Guantánamo and Abu Ghraib.[292] In response to this Board's request for "a complete list of all psychological training and work experience,"[293] Dr. James listed only that he served as chief of the psychology departments at Walter Reed in Washington, D.C. (August 1999 to May 2004) and at Tripler Army Medical Center in Honolulu (May 2004 to July 2008). Asked to describe his activities and responsibilities in

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[289] *In re Barnes*, 510 N.E.2d at 398 (emphasis added).

[290] *See* APA, Society for Military Psychology (Division 19), http://www.apa.org/about/division/div19.aspx (last visited Jul. 2. 2007).

[291] *See* Wright State University, Psychology of Terrorism Executive Workshop (Feb. 3-4, 2010), available at http://www.wright.edu/idse/Psychology_of_Terrorism_Executive_Workshop.pdf.

[292] *See supra* ¶ 53.

[293] *Id.*

each position, he responded only that he "directed the service, research + training programs for a large APA approved program/department."[294]

99. Even if he formally retained his title at Walter Reed and Tripler Army Medical Center while on assignment in Guantánamo and Abu Ghraib, Dr. James had an obligation to inform this Board that from January 2003 to May 2003, from June 2004 to October 2004, and from June 2007 to June/July 2008, he held vastly different positions in different institutions and locations, requiring different responsibilities, and for which he performed psychological activities of a very different nature.[295] Dr. James was well aware of the heated controversy surrounding these prisons and, in particular, the role of military psychologists in the interrogation and treatment of prisoners held in them.[296] And as a vigorous and visible participant in the debate over the ethics of psychologist participation, he was aware that many in his profession considered such participation highly relevant to the assessment of a psychologist's moral character.[297]

100. Ohio courts recognize that a violation of a rule against misrepresentation can be established by a professional's omission.[298] Thus, unless Dr. James provided additional documentation to this Board (documentation that the Board did not release in response to Dr. Bond's two public records requests), then Dr. James used fraud, misrepresentation and/or deception in obtaining a psychology license, in violation of OAC § 4732-17-01(I)(2).

Evidence Indicates that Dr. James Misrepresented to the Public and His Professional Association the Nature of His Affiliations and the Results of His Services.

101. Dr. James violated OAC § 4732-17-01(I)(2). By stating that reports of abuse in Guantánamo ceased with his arrival;[299] that the "harsh techniques" prohibited by the APA for psychologists "were not used under [his] watch at Gitmo;"[300] that the Joint Task Force in Guantánamo "treat[ed] detainees like every human being should be treated – safely and

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[294] *Id.*

[295] *See supra* note 180 for additional omissions, including his licensure in Guam.

[296] *See, e.g.,* Letter to Sharon Brehm (Jun. 2007), *supra* note 174; APA PENS Listserv *supra* note 19; *Fixing Hell supra* note 3, at 240-256 (Ch. 13: "Facing My Critics").

[297] *See* Letter to Sharon Brehm (Jun. 2007), *supra* note 174; *Fixing Hell supra* note 3, at 240-256 (Ch. 13: "Facing My Critics").

[298] *In Re Barnes*, 510 N.E.2d 392, 397 ("...in the regulation of a profession (such as psychology), a violation of a rule against 'misrepresentation' can be established by the actions (and in some circumstances, the inactions) of a professional without the necessity of demonstrating that any other person (patient, client, customer, or other professional) has been misled to his/her damage ... We are examining the authority of the state to regulate a profession for the protection of the public. The profession of psychology is not unlike the legal profession in the importance of its relationship with its clientele, which is drawn from the general public...").

[299] *Id.*

[300] *Id.*

humanely," and did "not abuse, beat or strip anybody…";[301] that the "problems" of abuse were in fact "fixed;" and that psychologists were responsible for such "fix[ing],"[302] Dr. James engaged in fraud, misrepresentation, and/or deception in reporting the results of his services.

102. Dr. James also violated OAC § 4732-17-01(B)(3) by misrepresenting, directly and/or by implication, the purpose and characteristics of the Guantánamo BSCT as a unit concerned primarily with protecting detainees from harm. He violated OAC § 4732-17-01(B)(3)(c) by providing false and/or misleading information to the public about the nature of his psychological services. For example, in e-mails to an American Psychological Association task force, Dr. James wrote that "psychologists at these facilities worked to protect the welfare and safety of the detainees" and characterized this function as a "major safety role."[303]

103. As discussed *supra*, the Senate Armed Services Committee concluded that the Guantánamo BSCT played an integral role in the exploitative interrogation program used at the prison.[304] Dr. James and his subordinates were not independent monitors; they were active and important participants in interrogation teams tasked with breaking down prisoners. Their role as advisers may have included calibrating the amount of harm that detainees suffered. But ensuring that detainees were slammed to the floor *in the right way*;[305] or that they not be stripped naked and sexually and religiously humiliated *for too long*[306] is under no reasonable interpretation "protecting [their] welfare and safety."

104. Dr. James was not sent to Guantánamo to ensure the humane treatment of detainees. At the time of his deployment and during his tenure, neither the Department of Defense leadership nor JTF-GTMO's commanding officer showed any intention of adopting lawful and humane treatment of detainees. In January 2003, Secretary of Defense Rumsfeld had convened a working group intent on producing, over the objections of high-ranking military lawyers, an April 2003 policy that reinstated approval of abusive interrogation techniques such as isolation, sleep deprivation, diet manipulation, and fear exploitation.[307] While Dr. James contends that Miller tasked him with getting intelligence without humiliation or sleep deprivation, the Senate Armed Services Committee reports that, during the period of Dr. James's tenure, Miller insisted on the need to, among other things, strip detainees and interrogate them for 20 hours.[308]

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[301] *Id.*

[302] *Id.*

[303] *See supra* ¶ 52.

[304] *See supra* ¶ 12.

[305] *See supra* ¶¶ 30-36.

[306] *See supra* ¶¶ 37-42.

[307] *See supra* ¶ 26 and note 68.

[308] *See supra* ¶ 26 and note 67.

105. Dr. James's statement that he "helped [interrogators] stay within the SOP [standard operating procedures] *and* stay away from abusive behaviors" (emphasis added) is highly misleading, in that it . The suggestion is that staying within the SOP prevented soldiers from abusing detainees. However, abusive behavior was enshrined in the standard operating procedures, thanks in part to the BSCT members themselves.[309]

106. Despite clear evidence that SERE-based techniques were camp policy and regularly used at the time,[310] Dr. James vehemently denies having ever used them. To date, he has not explained how he played an influential role in the BSCT at this time without using any of the techniques outlined in the task force's standard operating procedures.

107. It is not true that "it was psychologists who fixed the problems and not caused it." As described *supra*, BSCT psychologists played an integral role in planning, implementing, and purportedly legitimizing abusive interrogations and detention conditions.[311] They did this before Dr. James's arrival, and continued after his departure. Guantánamo's first BSCT psychologist, John Leso, co-drafted the blueprint for abusive techniques and participated in the application of those techniques to Mohammed al Qahtani in 2002.[312] In the fall of 2003, Dr. James's successor, BSCT psychologist Diane Zierhoffer, reportedly advised interrogators to increase the suffering of the mentally fragile teenage prisoner Mohammed Jawad.[313]

108. Another example of Dr. James's inconsistency: in September 2007 and January 2008, he told reporters that the Joint Task Force in Guantánamo "treat[ed] detainees … safely and humanely" and did "not abuse, beat or strip anybody," and that he had "not seen a guard or interrogator abuse anyone in any shape or form." Yet a few months later, he published a book in which he described having witnessed, in 2003, three guards and an interrogator violently wrestling a naked detainee to the floor in an attempt to force him into women's lingerie.[314] Taking yet another confusing turn, he insisted later in the same book that none of the "harsh techniques" prohibited by the APA were used while he was in Guantanamo. That list includes forced nudity and sexual, religious, and cultural humiliation.

109. Finally, and easiest of all to disprove, is Dr. James's direct and implied contention that abuses came to a stop after his arrival in Guantanamo. Dr. James did not "fix" abuse at the prison. As discussed *supra*, the Senate Armed Services Committee reported that abuses continued during and after his tenure. The Senate concluded that among the many abusive techniques reportedly used or planned for use in Guantánamo during the spring and summer

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[309] *See supra* ¶¶ 3-20.

[310] *See supra* ¶¶ 8-11.

[311] *See supra* ¶¶ 12-42.

[312] *See supra* note 52.

[313] *See supra* ¶ 52 and note 148.

[314] *See supra* ¶¶ 37-40.

of 2003 were "threats of death," "sensory deprivation," religious humiliation, and sexual assault and humiliation by female interrogators."[315]

110. By September 2008, when Dr. James published his book, the public record was replete with "incidents of abuse by [interrogators and psychologists] reported since [his] arrival in Cuba in January 2003."[316] Since then, even more reports have come to light.[317] Yet, instead of acknowledging earlier reports or subsequently correcting his previous statements, Dr. James misrepresented and has continued to misrepresent the truth.[318]

REQUEST FOR INVESTIGATION AND SANCTION

111. Following a prompt, thorough, and impartial investigation into the fitness of Dr. Larry James to practice psychology, we ask this Board to seek permanent revocation of his license to practice psychology in the State of Ohio.

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[315] *See supra* notes 74-75.

[316] *See, e.g., Commander's Inquiry* (Apr. 30, 2003), *supra* note 34; OIG/DOJ Report (May 2008), *supra* note 70; Schmidt-Furlow Report (Apr. 1, 2005, am. June 9, 2005), *supra* note 72; Tipton Three Statement (Jul. 26, 2004), *supra* note 75; *ICRC Finds Mental Health Deterioration* (Oct. 10, 2003), *supra* note 82; *Break Them Down* (2005) *supra* note 154; *Locked Up and Alone* (June 2008), *supra* note 159; *Broken Laws, Broken Lives* (June 2008), *supra* note 70.

[317] *See, e.g., SASC Report* (Nov. 2008, released Apr. 21, 2009), *supra* note 18; *Experiments in Torture* (Jun. 2010), *supra* note 51; *Guantanamo and its Aftermath* (Jul. 2009), *supra* note 72; ACLU Petition (Jan. 13, 2009), *supra* note 145.

[318] *See supra* ¶ 52.

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EXHIBIT E-JAMES AFFIDAVIT

STATE BOARD OF PSYCHOLOGY
OHIO

January 26, 2011

Beth Collis, Attorney at Law
Collis, Smiles & Collis, LLC
1650 Lake Shore Drive, Suite 225
Columbus, OH 43204

RE: COMPLAINT [Larry James, Ph.D.]

Dear Ms. Collis:

This serves to inform you that the State Board of Psychology has completed its review of your clients' complaint against Larry James, Ph.D.

It has been determined that we are unable to proceed to formal action in this matter.

Please inform the complainants and their attorneys of this determination, with our gratitude for everybody's patience while this matter was carefully considered.

Thank you.

Sincerely,

Carolyn Knauss
Investigator

cc: Roger Carroll, Principal Assistant Attorney General & Counsel to the Board

IN THE MONTGOMERY COUNTY, OHIO, COURT OF COMMON PLEAS
CIVIL DIVISION

LARRY C. JAMES, *et al.,*	:	
	:	
Plaintiffs,	:	Case No. 2017 CV 00839
	:	
v.	:	
	:	
DAVID HOFFMAN, *et al.,*	:	Judge Timothy N. O'Connell
	:	
Defendants.	:	

EXHIBITS F - G

to

AFFIDAVIT OF LARRY JAMES

(PART 2)

In Support Of

PLAINTIFFS' CONSOLIDATED MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND FORUM NON CONVENIENS

EXHIBIT F-JAMES AFFIDAVIT

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

DR. TRUDY BOND
[redacted]

MR. MICHAEL REESE
[redacted]

REV. COLIN BOSSEN
[redacted]

DR. JOSEPHINE SETZLER
[redacted]

Petitioners,

v.

STATE BOARD OF PSYCHOLOGY
77 S. High Street, Suite 1830
Columbus, Ohio 43215

Respondent.

Case No. _____

Judge _____

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' VERIFIED COMPLAINT

INTRODUCTION

Petitioners ask that the Court grant a writ of mandamus, in accordance with R.C. Chapter 2731, to order the State Board of Psychology of Ohio [hereinafter "Board"] to fulfill its legal obligations under Ohio statutes and regulations. Courts have long recognized "mandamus as the appropriate remedy to correct an abuse of discretion by a public board in a decision that is not

appealable." *State ex rel. Gaylor, Inc. v. Goodenow*, 125 Ohio St. 3d 407, 2010-Ohio-1844, 928 N.E.2d 728, at ¶16.

The regulatory scheme established by R.C. 4732 was designed to protect the public. In accordance with this legislative purpose, the statute imposes clear legal duties to protect the public by licensing and disciplining psychologists to ensure that they comply with codified ethical standards. The rules and regulations that implement the statute impose on the Board specific duties—including a clear legal duty to investigate complaints against licensees, and to proceed to "formal action" when the Board has jurisdiction and there is substantial evidence that "a violation is likely to have occurred." Members of the public have a corresponding clear legal right to file complaints and have their complaints investigated in accordance with the Board's specific duties.

The circumstances of the present case trigger the above rights and duties in R.C. 4732 and the rules and regulations that give effect to the statute's purpose. On July 7, 2010, Petitioners filed a complaint [hereinafter "Board Complaint"] with the Board against Dr. Larry C. James, a psychologist licensed by the Board. The Board Complaint alleges violations of eighteen provisions of Ohio statutes and Board rules stemming from Dr. James's role as a senior psychologist at the U.S. military prison at Guantánamo Bay, Cuba. Specifically, the Board Complaint alleges that Dr. James bore responsibility for abuse and exploitation, some of which rose to the level of torture, of people held at Guantánamo Bay. The Board Complaint also details how Dr. James, after leaving Guantánamo Bay, improperly disclosed confidential patient history and misled the public and the Board about his role in the exploitation of detainees at Guantánamo Bay.

The alleged conduct fell squarely within the Board's jurisdiction, and the allegations were supported by over one thousand pages of documentation, including reports, records, and hearings from the U.S. military, Senate, Department of Justice, Central Intelligence Agency, as well as statements from survivors and witnesses. Indeed, some of the violations were supported or definitively established by Dr. James's own public admissions. In these circumstances, the Board had duties to investigate and to proceed to formal action based on the evidence presented.

Instead, the Board ignored these duties, and in a cursory letter, dismissed Petitioners' Board Complaint without justifying its decision in law or evidence. By disregarding both its jurisdictional mandate and the clear weight of the evidence, the Board abrogated its duties to regulate psychologists and to protect the public, and thereby abused its discretion. The Board's failure to conduct a meaningful and good faith investigation, and its perfunctory dismissal of Petitioners' Board Complaint without explanation constituted additional acts of arbitrary and unreasonable abuse of discretion.

The Board's action harmed Petitioners and the public by failing to address Petitioners' serious allegations and concerns and by denying Petitioners' rights. In order for the rights and duties articulated in the statute to be meaningful, R.C. 4732 may not be interpreted to permit arbitrary dismissal of allegations of serious violations supported by substantial evidence that the violations likely occurred; such interpretation would render the statute meaningless. See *State ex rel. Selected Properties v. Gottfried* (1955), 163 Ohio St. 469, 471, 127 N.E.2d 371; *Thomas v. Mills* (1927), 117 Ohio St. 114, 122-23, 157 N.E. 488.

Petitioners have no available remedy at law to correct the injustice caused by the Board's arbitrary dismissal, which was in derogation of its legal duties and Petitioners' rights. In the absence of constitutional and statutory appeal mechanisms, the injustice can be remedied only

through a writ of mandamus ordering the Board to proceed to formal action. Alternatively, the Court should compel the Board to investigate meaningfully and in good faith. Additionally, the Court should compel the Board to provide clearly articulated reasons grounded in fact or law for any decision, and to show that it investigated meaningfully and/or carried out a formal disciplinary proceeding in good faith. In these circumstances, a writ of mandamus must issue.

ARGUMENT

A writ of mandamus should be granted where respondents have a "clear legal duty" to perform the relief requested, petitioners possess a "clear legal right" to the requested relief, and no other adequate remedy at law exists. *State ex rel. Nat. City Bank v. Board of Ed. of Cleveland City School Dist.* (1977), 52 Ohio St.2d 81, 84, 6 O.O.3d 288, 369 N.E.2d 1200. Each element is met in this case.

I. THE REGULATORY SCHEME ESTABLISHED BY R.C. 4732 LIMITS THE DISCRETION OF THE BOARD BY ARTICULATING THE BOARD'S CLEAR LEGAL DUTIES AND THE CORRELATIVE CLEAR LEGAL RIGHTS OF THOSE WHO BRING COMPLAINTS BEFORE THE BOARD.

The Ohio General Assembly created the Board to regulate the profession for the purpose of protecting the public from the unsafe practice of psychology. See R.C. 4732; Ohio Adm. Code 4732; Ohio State Board of Psychology, Guidelines for Disciplinary Actions and Corrective Orders, at 2. The Board must do so first by ensuring that everyone who receives a license meets professional standards, and second by monitoring the behavior of psychologists once they are licensed to ensure that they continue to adhere to those standards. The Board cannot withhold licenses or discipline psychologists arbitrarily, but must guide itself by defined criteria to ensure that it upholds its standards and treats individuals fairly. Guidelines for Disciplinary Actions and Corrective Orders, supra, at 2. When engaging in its monitoring role, the Board has a duty to receive and investigate complaints, and proceed to formal disciplinary action when there is

jurisdiction and there is enough evidence to indicate that a violation likely occurred. All concerned individuals have a right to bring these complaints, and complainants that present substantial evidence that a violation likely occurred have a clear legal right to have their complaint be the subject of investigation and formal action by the Board.

The Board has a broad duty to protect the public by regulating the profession of psychology[1] and disciplining those engaged in the practice of psychology. This responsibility starts with a duty to apply defined professional standards to the granting of licenses[2] and continues with a duty to monitor—also applying defined criteria—the behavior of psychologists once they are licensed. This latter duty requires the Board to evaluate misconduct, including misconduct that occurred prior to licensure and outside of Ohio,[3] and to discipline psychologists for misconduct.[4] Taken together, these provisions articulate a clear legal duty to oversee the practice of psychology by Ohio licensees, including by granting licenses only to those who meet the standards and by disciplining those licensees who subsequently violate them.

A fundamental component of the Board's responsibility to discipline the misconduct of its licensees is the clear legal duty to receive and investigate complaints and proceed to formal

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[1] The Attorney General of Ohio and Ohio courts have found that "the purpose of statutory licensing schemes * * * [is] protection of the public and those whom practitioners serve," 2004 Ohio Atty. Gen. Ops. No. 20, at 7, and that "[o]ne of the obvious purposes of the regulation of professions is to prevent damage * * * before any person in the general public is damaged." *In re Barnes* (1986), 31 Ohio App.3d 201, 206; 510 N.E.2d 392.

[2] See, e.g., R.C. 4732.091(B) (stating that the Board "*shall not* grant a license to an applicant for an initial license *unless* the applicant complies with sections 4776.01 to 4776.04 of the Revised Code") (Emphasis added); R.C. 4732.10(A) (requiring that Board "appoint an entrance examiner who *shall* determine the sufficiency of an applicant's qualifications for admission to the appropriate examination") (Emphasis added); R.C. 4732.10(B)(2) (stating that a "[r]equirement[] for admission to examination for a psychologist license *shall* be that the applicant * * * [i]s of good moral character") (Emphasis added).

[3] See Ohio Adm.Code 4732-17-01(A)(2) ("The rules of professional conduct *shall* apply to the conduct of all psychology and school psychology licensees and applicants, including the applicant's conduct during the period of education, training, and employment that is required for licensure. The term 'psychologist,' as used within these rules of professional conduct, shall be interpreted accordingly, whenever psychological services are being provided in *any context*.") (Emphasis added).

[4] See, e.g., Ohio Adm.Code 4732-19-01 (stating that "[l]icensed psychologists and licensed school psychologists governed by Chapter 4732 of the Revised Code and by these rules *shall* be disciplined in accordance with Chapters 4732 and 119 of the Revised Code for violation of these rules") (Emphasis added).

action when the Board has jurisdiction and there is substantial evidence that a serious violation is "likely to have occurred."[5] The process of receiving and responding to complaints is one of the principal means by which the Board monitors the conduct of psychologists.[6] In describing its own investigation process, the Board acknowledges that it "has the responsibility to *enforce* the Law and Rules Governing Psychologists, found in ORC and OAC Chapters 4732." (Emphasis added.) Ohio State Board of Psychology, Investigation Process Summary (Rev. December 2005), ¶1. The obligation to enforce the standards of conduct imposes defined limits on the Board's discretion. In particular, *serious* violations of the professional standards that call directly on the Board's responsibility to protect the public cannot go unaddressed. In this context, "enforce" means that the Board must investigate complaints and proceed to formal action when there is substantial evidence that a serious violation is likely to have occurred.

Selective enforcement based neither on evidence nor on law will fail to fulfill the Board's duties. The Board acknowledges that its own Guidelines for Disciplinary Actions and Corrective Orders are grounded in the Board's obligation to the public and its licensees to provide "for optimal levels of consistency and fairness in the determination of sanctions for a given violation." Guidelines for Disciplinary Actions and Corrective Orders, supra, at 2. These guidelines recognize that some regulations, including ones alleged to have been violated in the Board Complaint, reflect more serious misconduct and historically have required the Board's intervention through regulatory compliance/enforcement actions. Id. at 2, 5-7, 9, 15. In recognition of the more serious nature of these violations, the Board refers to minimum sanctions

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[5] See Ohio State Board of Psychology, State Board of Psychology Regulatory Compliance Handbook (Rev. 2002), ¶6 (indicating that formal action is appropriate where the investigation reveals "information suggesting that violations are likely to have occurred"), ¶¶2-3 (complaints are evaluated for "clarity, specificity, actual violation, and the authority of the Board of Psychology" and proceed past initial evaluation when "a complaint appears to allege a violation of ORC Chapter 4732.").

[6] See Guidelines for Disciplinary Actions and Corrective Orders, supra, at ¶2 (recognizing Board's responsibility to protect public includes duty to "investigat[e] complaints regarding the professional conduct [of] Ohio's Psychologists, and levy[] sanctions for violations").

for psychologists found to have violated these provisions. Id. at 2. The Board defines a set of mitigating factors that allow departure from the guidelines if warranted by the circumstances, but should the Board make such a departure, it must specify these factors in its deliberations or negotiation of a consent agreement. Id. However, the Board's own disciplinary guidelines do not contemplate anything but formal action in response to these serious violations. See id.

Hand in hand with these duties, all members of the public have a clear legal right to file complaints.[7] To ensure this right is upheld and to ensure that the Board fulfills its purpose to "provid[e] protections for the public and for consumers of psychological services," complaints must be investigated meaningfully and in good faith, and result in sanctions when appropriate. Guidelines for Disciplinary Actions and Corrective Orders, supra, at 2. According to the Board's own understanding of its purpose and its duties as well as the complainants' corresponding rights, the Board must be held "accountable to the public to appropriately sanction licensees who engage in misconduct, in an effort to foster the safe provision of psychological services and confidence in the profession." Id.

Here, as the Board is "accountable to the public," there are defined limits as to the permissible actions that the Board can take when presented with a well-substantiated complaint of serious violations. When complainants themselves can support their allegations with evidence indicating that a violation is likely to have occurred, they have a clear legal right to have their complaint be the subject of formal action in accordance with the Board's own procedures.

The facts of this case trigger the Board's duties and implicate the rights of Petitioners. The Board Complaint alleges that Dr. James committed misconduct while engaged in the

[7] See, e.g., Ohio Adm. Code 4732-17-01(J)(4) (explicitly discussing psychologists' and "client's *right* to file a complaint") (Emphasis added); State Board of Psychology Regulatory Compliance Handbook, supra, at ¶1 (clarifying that "[a]n initial complaint may be received from a current or former patient/client of an applicant/psychologist/supervisee, from another professional (psychologist, physician, lawyer, etc.) or from a concerned citizen").

practice of psychology as defined by Ohio law. It further specifies violations of eighteen provisions of Ohio statutes and rules and provides over one thousand pages of supporting documentation, including admissions from Dr. James. Having received allegations of extraordinary and well-substantiated violations of norms within its jurisdiction, the Board's duties to investigate and proceed to formal action were triggered. Instead, the Board disregarded its obligations under Ohio statutes and its own rules when it refused to proceed to formal action on the basis of the Board Complaint. The Board dismissed the Board Complaint without explanation, thus violating the rights of the complainants to have their Board Complaint meaningfully considered.

II. IN ORDER TO ENSURE THAT THE COMPLAINANTS' RIGHTS AND THE BOARD'S DUTIES ARE MEANINGFUL, THE REGULATORY SCHEME MUST BE READ TO PROHIBIT ARBITRARY DISCRETION AND TO PROVIDE DEFINITE CRITERIA FOR THE GUIDANCE OF THE BOARD AND THE PROTECTION OF THE CITIZENS OF OHIO.

The statute and its corresponding regulatory scheme, in imposing the aforementioned duties on the Board, establishes clear limits and imposes definite criteria to guide the Board and constrain its discretion. Indeed, to read the statutory scheme differently, as endowing the Board with standardless discretion and the power to act arbitrarily, would be to deprive it of meaning. See *State ex rel. Selected Properties v. Gottfried* , 163 Ohio St. at 471 (finding statute cannot be read to give board "absolute and uncontrolled discretion" with lack of sufficient standards or criteria or enable it to "act on capricious rules of its own or * * * without any rules whatsoever"); *Thomas v. Mills*, 117 Ohio St. at 123 (finding statute "would be unconstitutional" if it gave agent of executive "power to act arbitrarily, and at mere whim").

Nothing in the law, statute, framework, or the Board's own understanding of its duties indicates that it has unbridled discretion. The Supreme Court of Ohio has noted that even "a

broad discretion * * * vested in administrative officers * * * does not permit a mere arbitrary choice." *State ex rel. Hutton v. Indus. Comm.* (1972), 29 Ohio St.2d 9, 14, 278 N.E.2d 34. The General Assembly intended to constrain the Board's action in order to effectively protect the public and the integrity of the profession, and the statute must be construed to give effect to this purpose. *Humphrys v. Winous Co.* (1956), 165 Ohio St. 45, 49, 133 N.E.2d 780 ("The primary duty of a court in construing a statute is to give effect to the intention of the Legislature enacting it."). No other body has been entrusted with this important duty to oversee and regulate the practice of Ohio-licensed psychologists; the power to investigate ethical misconduct and grant, suspend, or revoke a psychologist's ability to practice in Ohio is vested in this Board. The statute cannot be read to frustrate the legislature's intent to provide oversight by permitting the Board to make arbitrary decisions that would indicate it had limitless discretion.

The statutory scheme grants the Board *bounded* discretion. The Board needs and enjoys some range of discretion. At the disciplinary stage, R.C. 4732.17(A) grants the Board some discretion to decide whether and how to discipline a psychologist after concluding formal proceedings. However, even that discretion is limited by the Board's duty to enforce the rules consistently and fairly. Guidelines for Disciplinary Actions and Corrective Orders, at 2. Similarly, at the investigatory stage, the Board has the authority to dismiss frivolous complaints. However, it must investigate non-frivolous complaints, and those investigations must be meaningful and in good faith. The Board does not have discretion to undertake an inadequate, bad faith investigation nor to avoid an investigation altogether. Moreover, the statute cannot be read to allow the Board to arbitrarily dismiss *serious* allegations where there is evidence that the allegations are likely to have occurred and the Board has jurisdiction. No reasonable policy objective would be served by such a rule. Furthermore, the interpretation would not comport

with the Board's own disciplinary guidelines nor with the regulatory scheme's purpose in protecting the public. Therefore, the Court must read the statutory duties and rights, in accordance with the legislative purpose, to constrain the Board's ability to summarily dismiss complaints that have presented substantial evidence that serious violations are likely to have occurred.

The legislature intended to have a functioning regulatory regime by limiting the discretion of the Board. The Board's failure to proceed to formal action in this case constitutes a dereliction of duty that endangers the public, frustrates legislative intent, and fails to prevent injustice.

III. THE BOARD ABUSED ITS DISCRETION BY FAILING TO PROCEED TO FORMAL ACTION AND FAILING TO PROVIDE ANY REASONS FOR ITS DECISION.

On a petition for a writ of mandamus challenging the decision of an administrative agency, the Court reviews an agency's decision for abuse of discretion. *State ex rel. Schachter v. Ohio Pub. Emps. Ret. Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, 905 N.E.2d 1210, at ¶24. Abuse of discretion "means an unreasonable, arbitrary, or unconscionable decision." *State ex rel. Pipoly v. State Teachers Ret. Sys.*, 95 Ohio St. 3d 327, 2002-Ohio-2219, 767 N.E.2d 719, at ¶14. The Court must find an abuse of discretion if the record indicates no basis in law or fact to support the agency's decision. See *State ex rel. Hutton v. Indus. Comm'n*, 29 Ohio St.2d at 14 ("where the record indicates no possible basis for the choice adopted except an arbitrary rejection of all pertinent evidence relating to the subject under consideration, an abuse of discretion has been shown"); see, also, *State ex rel. Mager v. State Teachers Ret. Sys. of Ohio*, 123 Ohio St.3d 195, 2009-Ohio-4908, 915 N.E.2d 320, at ¶¶12-17, 24 (finding that agency had ignored plain meaning of relevant statute and that record indicated petitioner was entitled to benefit).

Although the Board stated that it was "*unable* to proceed to formal action" (emphasis added) it provided no basis, in law or fact, to support this statement, most likely because there is no possible basis that would support such a dismissal. The Board ignored the law, which grants the Board authority and jurisdiction. The Board also ignored the substantial evidence of extraordinary violations presented in the Board Complaint. In these circumstances, the Board's refusal to proceed to formal action is unreasonable, arbitrary, or unconscionable.

The Board's failure to provide any reasons for its action, based in law or fact, is an independent abuse of discretion.

A. The Board abused its discretion by dismissing this case in complete disregard of the law and evidence.

1. The law clearly provides the Board with jurisdiction to proceed to formal action over the allegations in the Board Complaint.

The Board has jurisdiction over the allegations presented in the Board Complaint. The Board Complaint presents evidence of violations of Ohio statutes and Board rules that the Board has both the authority and duty to enforce. The Board also has jurisdiction because Dr. James engaged in the practice of psychology in his role as a senior psychologist at Guantánamo Bay, and the Board must examine the conduct of Ohio licensees and applicants while engaged in the practice of psychology, including prior conduct, conduct outside of Ohio, and conduct engaged in while serving in the military. Because the alleged conduct meets these conditions, the Board has the power and duty to investigate the Board Complaint and proceed to formal action.

The Board Complaint alleges violations of eighteen provisions of Ohio statutes and Board rules over which the Board has jurisdiction.[8] The General Assembly enumerated some of

[8] The Board Complaint alleged violations of the following provisions:
1. Good Moral Character, R.C. 4732-10(B)(2)
2. Negligence in the Practice of Psychology, R.C. 4732-17(A)(5)
3. Willful, Unauthorized Communication, R.C. 4732-17(A)(4)

these provisions in R.C. 4732, in furtherance of the duty it assigned to the Board to protect the public through the regulation of the profession. It also gave the Board the power to promulgate additional rules of professional conduct so that the Board could fulfill this broad duty. The Board has the power and duty to investigate alleged violations of these codified ethical standards and to proceed to formal action where the allegations are sufficiently substantiated.

The Board has not disputed that Dr. James was engaged in the practice of psychology while engaging in the conduct that gave rise to the violations. As a senior psychologist at Guantánamo Bay, Dr. James provided "service[s] involving the application of psychological procedures * * * to the assessment * * * of psychological adjustment or functioning." R.C. 4732.01(B). He did so by applying psychological "principles, methods, [and] procedures of understanding, predicting, or influencing behavior." R.C. 4732.01(C). These included "principles pertaining to * * * interviewing, counseling, behavior modification, [and] environmental manipulation." Id. Dr. James and those allegedly under his command and supervision studied and sought to influence the detainees' responses to specific techniques and environmental conditions. As Dr. James admits, his team even evaluated detainees by reviewing their medical information prior to interrogation. Furthermore, Dr. James admits to supervising both the treatment and interrogation of three juveniles less than fifteen years of age.

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4. Negligence, Ohio Adm.Code 4732-17-01(B)(1)
5. Misrepresentation of Affiliations, Ohio Adm.Code 4732-17-01(B)(3)
6. False/Misleading Public Statements, Ohio Adm.Code 4732-17-01(B)(3)(c)
7. Conflict of Interest, Ohio Adm.Code 4732-17-01(C)(1)
8. Dependency, Ohio Adm.Code 4732-17-01(C)(4)
9. Welfare of the Client-Informed Choice, Ohio Adm.Code 4732-17-01(C)(5)
10. Prohibited Multiple Relationships, Ohio Adm.Code 4732-17-01(E)(2)(a)(ii)
11. Confidentiality, Ohio Adm.Code 4732-17-01(G)
12. Preventing Client Identification, Ohio Adm.Code 4732-17-01(G)(1)(b)
13. Limiting Access to Client Records, Ohio Adm.Code 4732-17-01(G)(1)(d)
14. Former Client Confidentiality, Ohio Adm.Code 4732-17-01(G)(1)(e)
15. Safeguarding Confidential Information, Ohio Adm.Code 4732-17-01(G)(2)(d)
16. Notice of Limits of Confidentiality, Ohio Adm.Code 4732-17-01(G)(2)(e)
17. Use of Fraud, Misrepresentation, or Deception, Ohio Adm.Code 4732-17-01(I)(2); and
18. Reporting Violations to Board, Ohio Adm.Code 4732-17-01(J)(4).

Additionally, the Board's jurisdiction over Dr. James's conduct is not limited to conduct after licensure. In order to fulfill its statutory duty to determine if an applicant or licensee is of "good moral character," the Board must inquire into past actions. Only thus can the Board determine if the applicant or licensee shows "a *pattern of behavior* conforming to a profession's ethical standards and showing an absence of moral turpitude." (Emphasis added.) *Staschak v. State Med. Bd. of Ohio*, No. 03AP-799, 2004-Ohio-4650, at ¶28; R.C. 4732.10(B)(2). The Board cannot maintain the integrity of its licensing process if it disregards evidence that its applicants or licensees engaged in grave professional misconduct prior to licensure in Ohio.

To fully effectuate the regulatory scheme, the Board must not limit itself to examining conduct inside the state. Neither Ohio law nor the Board rules limit the Board's jurisdiction to conduct in Ohio; indeed, both authorities state that the rules of professional conduct apply "*whenever* psychological services are being provided *in any context.*" (Emphasis added.) Ohio Adm.Code 4732-17-01(A)(2). The Board also must review out-of-state conduct in the context of evaluating "good moral character," especially for out-of-state applicants. R.C. 4732.10(B)(2). The Revised Code expressly acknowledges the relevance of out-of-state conduct through its mandate that the Board discipline licensees or applicants for convictions by other state courts. R.C. 4732.17(A)(1).

Similarly, the fact that Dr. James committed these violations during his service in the military does not exempt these actions from the Board's jurisdiction. The military relies on the state professional boards to license, regulate, and sanction the conduct of military health professionals,[9] and requires that these boards are active in investigating and acting upon reports of misconduct "regardless of the practitioner's military status or residency."[10]

[9] This requirement is enumerated in 10 U.S.C. § 1094 as well as Department of Defense Regulations. *Department of Defense Regulation* 6025.13, "Medical Quality Assurance (MQA) in the Military Health System (MHS)" ¶5.2.2.2

Ignoring repeated opportunities to do so, the Board never raised to Petitioners any concern regarding jurisdiction or its power to investigate the Board Complaint. Petitioners nevertheless presented evidence and supplemental briefing on the Board's jurisdiction, see Exhibit 4, Complainants' Supplemental Jurisdictional Submission To the Ohio State Board of Psychology Complaint against Larry C. James (Nov. 24, 2010), to which the Board never responded except to acknowledge receipt. The Board's decision to dismiss the Board Complaint gives no indication that lack of jurisdiction was the reason for dismissal, and indeed, jurisdiction is appropriate in this case.

2. Petitioners presented the Board with substantial evidence that serious violations are likely to have occurred, thus triggering the Board's duty to proceed to formal action against Dr. James.

The meticulously documented, fifty-page Board Complaint contained substantial evidence of conduct by a licensee that, if proven, would plainly constitute professional misconduct under Ohio statutes and rules. Petitioners presented the Board with over one thousand pages of documentation to support the Board Complaint, drawing from reports, records, and hearings from the U.S. military, Senate, Department of Justice, and the Central Intelligence Agency as well as Dr. James's own public admissions and statements from witnesses and survivors. Dr. James admits that he was a member of the Behavioral Science Consultation Team [hereinafter "BSCT"], Bd. Compl. at ¶3, and had the authority to set BSCT policy, Id. at ¶5. According to the Department of Defense, the BSCT used their psychological and mental health training and applied psychology and behavioral science to evaluate detainees

(May 4, 2004) (requiring that health professionals "have and maintain a current, valid, and unrestricted license . . . in accordance with the issuing authority, before practicing within the defined scope of practice for like specialties.")

[10] The Department of Defense, in a regulation implementing the police guidance promulgated in the Directive cited above, defines a healthcare license as "valid" only if "[t]he issuing authority [for that license] accepts, investigates, and acts upon quality assurance information, such as practitioner professional performance, conduct, and ethics of practice, regardless of the practitioner's military status or residency." Department of Defense Regulation 6025.13-R, "Military Health System (MHS) Clinical Quality Assurance (CQA) Program Regulation" ¶DL1.1.23.2 (June 11, 2004).

and exploit their vulnerabilities for use in interrogations. Id. at ¶14, fn. 38 (citing Memorandum from Kevin C. Kiley, Army Surgeon General, to Commanders, MEDCOM Major Subordinate Commands, Behavioral Science Consultation Policy (Oct. 20, 2006) (on file with author)). John Leso, the first BSCT psychologist declared that "[a]ll aspects of the [detention] environment should enhance capture shock, dislocate expectations, foster dependence, and support exploitation to the fullest extent possible." Id. at ¶8. Dr. James also describes an incident where he witnessed an interrogator and three prison guards wrestle a man, whom they forced to wear pink women's panties and lipstick and a wig, to the floor. Id. at ¶¶37-42. Dr. James admits that he did not immediately intervene and instead "opened [his] thermos, poured a cup of coffee, and watched the episode play out * * * ." Id. at ¶39. Dr. James additionally admits to using his treatment relationship with his child patients to exploit them for intelligence purposes. "There was no mistaking our intentions," he explained in his book. "We needed these boys to talk to us and we established a program that would help us get to know them and encourage them to trust us.'" Id. at ¶47. The evidence strongly supports a finding that Dr. James, through the practice of psychology, abused and exploited detainees at Guantánamo Bay.

The Board Complaint includes evidence of specific instances of Dr. James's misconduct, derived from admissions in his 2008 memoir, that independently warrant formal action by the Board. For example, the Board Complaint documents that Dr. James disclosed confidential patient information in his memoir and alleges that, in doing so, he indisputably breached his ethical obligations. Id. at ¶¶86-90.

Finally, the Board Complaint alleges and documents how, through statements Dr. James made to the Board in his licensure application, and to the public in his memoir and elsewhere, Dr. James misrepresented his behavior and the nature of his service at Guantánamo, conduct that

constitutes additional grounds for formal action. Id. at ¶¶52-53. In fact, in his original licensure application to the Board , Dr. James omits any reference to his position at Guantánamo, even though the Board required "a complete list of all psychological training and work experience." Id. at ¶53.

Dr. James published these statements and made them publicly available. On their face, these admissions constitute textbook cases of breach of confidentiality and misrepresentation. In light of this clear evidence of a serious violation, the Board was statutorily obligated to proceed to formal action.

At no point has the Board given any indication that there is some deficiency in this evidence. In addition to the evidence supplied in the Board Complaint, at a meeting with the representatives of the Board on September 30, 2010, Petitioners repeatedly offered to address any of the Board's questions, provide additional evidence, or provide witness testimony. Compl. at ¶52. The Board's representatives insisted that they had no questions and declined Petitioners' offers. Id. Faced with this substantial body of credible evidence, the Board had a duty to proceed to formal action against Dr. James and their decision not to do so constitutes an abuse of discretion.

3. The Board's failure to proceed to formal action was unreasonable, arbitrary, or unconscionable because it had no basis in law or fact, and thus constituted an abuse of discretion.

At no point has the Board given any indication that there is a deficiency with either its jurisdiction or the evidence it received. Despite Petitioners' repeated offers, the Board never asked a legal or evidentiary question to Petitioners, nor did it solicit any additional information or witnesses from Petitioners. Instead, the Board merely issued a cursory letter in which it stated, without explanation, that the Board Complaint had been dismissed. Letter from Carolyn

Knauss, Investigator, State Board of Psychology of Ohio, to Beth Collis, Attorney, Collis, Smiles & Collis (Jan. 26, 2011). While the Board has the authority to dismiss cases where it does not have jurisdiction, here jurisdiction is firmly established. See Section III.A.1, supra. Furthermore, while the Board must be allowed to dismiss frivolous or unsubstantiated cases, in this instance there is substantial evidence of not just serious but *extraordinary* violations that are supported by a credible and voluminous body of evidence, including admissions by the licensee to conduct which, on its face, constitutes violations of the Ohio laws and rules governing psychology. See Section III.A.2, supra. Therefore, the Board's dismissal of Petitioners' complaint could not possibly have been based on insufficient evidence or on lack of jurisdiction.

Given the substantial evidence and admissions detailed in the Board Complaint, as well as the Board's undisputed jurisdiction, the Board's failure to proceed to formal action must be considered an abuse of discretion. In light of the Board's duties to Petitioners and to the public, its decision to refrain from proceeding to formal action must be grounded in reasons of law or fact. However, faced with substantial evidence of serious misconduct that falls within its jurisdiction to discipline, the Board dismissed the Board Complaint without grounding its decision in either. As the record indicates, no possible basis exists for the dismissal except an arbitrary rejection of all the evidence, meaning that the Board's decision is a clear abuse of discretion. See *Hutton*, 278 N.E.2d at 37. To allow the Board to hide behind discretion in this case would remove any safeguard against arbitrary conduct, a result not permitted by the regulatory scheme. This abuse of discretion not only frustrates the legislative intent in defining the duties of the Board, but also violates Petitioners' right to a meaningful review of their Board Complaint and ignores the threat to public safety.

B. The Board's failure to provide any reasons for its dismissal was an independent abuse of discretion.

The Board abused its discretion again when it refused to provide any reasons for its decision not to proceed to formal action against Dr. James. Unable to justify its dismissal of the Board Complaint on any legal or evidentiary basis, the Board's dismissal letter provided no explanation at all. Letter from Carolyn Knauss to Beth Collis, supra. In this way, the Board has sought to use vague and obfuscating language to avoid its clear legal duty to proceed to formal action.

The Ohio Supreme Court has used the writ of mandamus to require an agency to provide reasons for its decisions when that agency's failure to adequately state the basis for its decisions threatens to mask an abuse of discretion. See *State ex rel. Noll v. Indus. Comm. of Ohio* (1991), 57 Ohio St.3d 203, 205-06, 567 N.E.2d 245. This approach has been extended to agency decisions even where there was no explicit statutory requirement that the decisions be explained. See *State ex rel. Ochs v. Indus. Comm.* (1999), 85 Ohio St.3d 674, 676, 710 N.E.2d 1126. In these cases, the Court was principally concerned with the fact that it was dealing with "real live human beings who have suffered an industrial injury," and the Court refused to adopt a rule that would allow the agency to rely on boilerplate language or vagueness in explaining its actions, for fear that "justice and fairness would be lost." *State ex rel. Noll v. Indus. Comm. of Ohio*, 57 Ohio St.3d at 206, 210.

The Board, having no basis in law or evidence upon which to dismiss this case, was unable to articulate a reason for the dismissal. The Board's letter, which constituted its sole response to Petitioners, denies Petitioners' right to have their complaint be the subject of formal action, and provides no reason for this denial. Like in *Noll*, the case at hand stems from the grave injuries suffered by real live human beings, and these injuries—arguably some of the

gravest that human beings can suffer—merit at least an explanation from the Board as to why it has deemed itself unable to act. See *State ex rel. Pipoly v. State Teachers Ret. Sys.*, 95 Ohio St.3d 327, 2002-Ohio-2219, 767 N.E.2d 719, at ¶22 (requiring showing of "comparable need" to that present in *Noll* in order to extend explanation requirement). At stake here are the same notions of justice and fairness that motivated the *Noll* decision. The Board has not disputed that Petitioners submitted substantial evidence that its licensee used his training and license in the healing arts to cause profound harm to another human being. Nor has the Board disputed that such actions constitute misconduct as defined by the statute and rules it has the authority and duty to enforce. To allow the Board to ignore the weight of this evidence and refuse to proceed to formal action, without so much as an explanation, would be to enshrine in the law a zone of impunity and ignore the statutory intent of creating a system to regulate the profession and protect the public. Justice requires that the Board be made to explain its decision in this context.

IV. THERE IS NO ADEQUATE REMEDY IN THE ORDINARY COURSE OF LAW, AND THUS A WRIT OF MANDAMUS SHOULD BE GRANTED.

Petitioners have no adequate remedy at law. Under Ohio law, there is no inherent right to appeal; rather, the right to appeal must be derived from a constitutional or statutory right. *City of Willoughby Hills v. C.C. Bar's Sahara, Inc.* (1992), 64 Ohio St.3d 24, 26, 591 N.E.2d 1203. The statutory scheme governing the Board provides a right of appeal for any party "adversely affected" by the Board's decisions, but it limits that right to those decisions "issued pursuant to an adjudication hearing." Ohio Adm.Code 4732-17-03(B)(6). In this case, the Board dismissed the Board Complaint during the investigative process without ever conducting the adjudication merited by the Board Complaint, effectively depriving Petitioners of a right of appeal. The availability of an appeal is strictly limited to the terms of the statute, see *Ramsdell v. Ohio Civil Rights Comm.* (1990), 56 Ohio St.3d 24, 27, 63 N.E.2d 285, and there is no statutory right of

appeal for complaints that are dismissed without an adjudication. The Board should not be able to evade judicial review of its decisions simply by refusing to proceed to formal action when there are established duties for investigation and action by the Board, and when substantial evidence of abuse has been presented in a complaint, such as this one.

Without the availability of a constitutional or statutory appeal and thus no adequate remedy of law, Petitioners' request for a writ of mandamus is proper. The writ of mandamus has historically been used as a way for courts to grant petitioners relief in extraordinary circumstances of injustice. In English common law, the writ of mandamus was created "not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of peace, or oppression of the subjects, or to the raising of faction, controversy, debate, or to any manner of misgovernment; so that no wrong or injury, either public or private, can be done, but that it shall be (here) reformed or punished by due course of law." *James Bagg's Case*, (1615) 77 Eng. Rep. 1271 (K.B.), 1277-78; 11 Co. Rep. 93 b, 98 a. Lord Mansfield remarked that the writ "ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there *ought* to be one." R v. Barker, (1762) 97 Eng. Rep. 823 (K.B.) 825-26; 3 Burr. 1265, 1267 (Emphasis added).

U.S. courts have utilized the writ of mandamus in this tradition for many years, and Ohio courts continue to uphold the practice by granting writs to petitioners when they have no other adequate remedy at law to obtain the relief justice demands. The Ohio Supreme Court has found that a writ of mandamus should be issued to correct the "justice and fairness * * * lost" with an agency's arbitrary action, without regard for the "additional work" the decision demands from the agency. *State ex rel. Noll v. Indus. Comm. of Ohio*, 57 Ohio St.3d at 206; see also *State ex*

rel. Mitchell v. Robbins & Myers, Inc. (1983), 6 Ohio St.3d 481, 483, 453 N.E.2d 721 (granting a writ of mandamus to correct the increasingly prevalent agency practice of dismissal without providing reasons, causing injustice to individuals). The writ of mandamus allows courts to intervene to ensure that agencies do not abuse their discretion, that petitioners' claims are heard in some forum, and that injustice is corrected. The injustice in this case calls for a writ of mandamus. The Board ignored its legal duties and Petitioners' rights. The law recognizes such wrongs and injuries and solely through a writ of mandamus will justice be served.

CONCLUSION

The Board has failed to fulfill its legal duty to regulate the profession of psychology and protect the public. The Board has violated the clear legal rights of Petitioners and placed the public at risk. Petitioners have no legal remedy for this violation of their rights, and their only recourse is to seek the writ of mandamus to correct this abuse of discretion. For the reasons set forth above, Petitioners respectfully request that the Court order the Board to proceed to formal action against Dr. James or alternatively, to fully investigate the allegations documented in the Board Complaint, and additionally fully explain any decision not to proceed to formal action.

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

DR. TRUDY BOND
[redacted]

MR. MICHAEL REESE
[redacted]

REV. COLIN BOSSEN
[redacted]

DR. JOSEPHINE SETZLER
[redacted]

Petitioners,

v.

STATE BOARD OF PSYCHOLOGY
77 S. High Street, Suite 1830
Columbus, Ohio 43215

Respondent.

Case No. _____

Judge _____

VERIFIED COMPLAINT FOR WRIT OF MANDAMUS

Petitioners Dr. Trudy Bond, Mr. Michael Reese, Rev. Colin Bossen, and Dr. Josephine Setzler ("Petitioners"), state as follows:

PRELIMINARY STATEMENT

1. Petitioners seek a writ of mandamus to compel the State Board of Psychology of Ohio ("Board") to proceed to "formal action" against Dr. Larry C. James, a psychologist licensed

by the Board (License # 6492) and Dean of Wright State University's School of Professional Psychology. Alternatively, if the Court does not compel such formal action, it should compel the Board to investigate meaningfully and in good faith and determine whether to proceed to formal action. Petitioners also seek a writ of mandamus to compel the Board to provide clearly articulated reasons grounded in fact or law for any decision, and to show that it investigated meaningfully and/or carried out a formal proceeding in good faith.

2. On July 7, 2010, Petitioners filed a fifty-page Complaint ("Board Complaint") with the Board against Dr. James. The Board Complaint alleges that Dr. James was responsible for the abuse and exploitation of detainees as a senior psychologist at the U.S. military prison at Guantánamo Bay in violation of Ohio law and Board ethics rules.

3. Petitioners' Board Complaint further details how Dr. James violated Ohio law and Board ethics rules after leaving Guantánamo Bay by publishing confidential patient history in his 2008 memoir and by misleading the public and the Board about his role.

4. In all, the Board Complaint alleges violations of eighteen provisions of Ohio statutes and Board ethics rules. In an affidavit provided to the Board, an expert in psychological ethics concluded, "The allegations contained in this complaint, if true, represent the most serious ethical breaches I have seen in my thirty-five years as a psychologist. They also have the most far reaching implications for the profession of psychology of any ethical or licensing issue I have yet encountered." Exhibit 3, Psychological Report of Bryant L. Welch, J.D., Ph.D. at 4.

5. Petitioners supported the Board Complaint with over a thousand pages of documentation. The Board Complaint cited reports, records, and hearings from the U.S. military, Senate, Department of Justice, Central Intelligence Agency, as well as statements from survivors and witnesses. The Board Complaint cited Dr. James's own public statements, including several

admissions that on their face constitute violations of Ohio law or Board rules. Petitioners repeatedly offered to supplement the record with additional witnesses and expert testimony.

6. The Ohio General Assembly entrusts the Board with the responsibility to oversee Ohio licensees and to regulate the practice of psychology in order to protect the public. This responsibility to the public includes an obligation to uphold and enforce its standards by responding to the professional misconduct of licensees that occurs outside the state and prior to licensure.

7. Presented with evidence that a licensee is likely to have engaged in serious misconduct rising to the level of torture, the Board has a duty to examine the evidence carefully, probe further, and initiate formal action.

8. Having here received such serious allegations and substantial evidence, the Board responded instead with a cursory letter informing Petitioners merely that it was "unable to proceed to formal action in this matter." Exhibit 2, Letter from Carolyn Knauss, Investigator, Ohio State Bd. of Psych., to Beth Collis, Attorney, Collis, Smiles & Collis (Jan. 26, 2011).

9. The Board's decision shows no indication of having been based on evidence or law. On its face, the decision was arbitrary and inconsistent with the Board's previous practice of disciplining psychologists for far less egregious violations of the Board's ethics rules and Ohio laws.

10. Although the Ohio General Assembly granted the Board discretion, that discretion cannot be exercised arbitrarily and may not be abused in frustration of the legislature's intent.

11. The Board's extraordinary abdication of its responsibility in this instance necessitates a writ of mandamus to protect the public, serve the interests of justice, and uphold the integrity of the regulatory system established by the legislature of this state.

PARTIES

12. The below Petitioners filed the Board Complaint at issue here that was not properly investigated or adjudicated by the Board:

a. DR. TRUDY BOND, Ohio license number #2978, has been a practicing psychologist in Ohio for over thirty years. She is a resident and taxpayer of Toledo, Ohio.

b. MR. MICHAEL REESE is a former private of the U.S. Army, member of Disabled American Veterans, and former counselor and teacher for people with disabilities. He is a resident and taxpayer of Columbus, Ohio.

c. REV. COLIN BOSSEN is a minister of the Unitarian Universalist Society of Cleveland. He is resident and taxpayer of Cleveland Heights, Ohio.

d. DR. JOSEPHINE SETZLER is Executive Director of the Seneca, Sandusky and Wyandot chapter of the National Alliance on Mental Illness and has been a mental health advocate for over twenty years. She is a resident and taxpayer of Fremont, Ohio.

13. The Board is a state agency required by R.C. 4732.17 to license and discipline psychologists in Ohio.

JURISDICTION

14. Jurisdiction lies with this Court pursuant to R.C. Chapter 2731.

15. The claims in this matter arise from Petitioners' clear legal rights and the Board's clear legal duties regarding the professional misconduct addressed in the Board Complaint Petitioners filed against Dr. James.

16. Petitioners have no plain or adequate remedy at law to appeal to correct an abuse of discretion by the Board, which in this case arbitrarily disregarded Petitioners' Board Complaint and the evidence of Dr. James's numerous and serious violations.

17. Given the Board's duties and Petitioners' rights and lack of remedy, a petition for a writ of mandamus is appropriate.

STATUTORY AND REGULATORY FRAMEWORK

18. The Ohio General Assembly created the Board to regulate the profession of psychology and to safeguard the public from harm. The Board's primary mission is to "provid[e] protections for the public and for consumers of psychological services." State Bd. of Psych. of Ohio, Guidelines for Disciplinary Actions and Corrective Orders at 2.

19. To give effect to these purposes, the Board has a duty to protect the public first through ensuring that everyone who receives a license meets professional standards, and second by monitoring the behavior of psychologists once they are licensed to ensure that they continue to adhere to those standards. The Board has a duty to license applicant psychologists who meet the standards created by statute and the Board itself, as well as a duty to oversee disciplinary matters, which includes the ability to deny, reprimand, and revoke the licensure of Ohio licensees who fail to meet or maintain those standards. R.C. 4732.10, 4732.17; Ohio Adm.Code 4732-17 to 4732-17-01. In addition, the Board has a specific duty to investigate complaints and proceed to formal action when a violation is "likely to have occurred." See Ohio State Bd. of Psych., State Board of Psychology Regulatory Compliance Handbook (rev. 2002) at ¶6.

20. By the Board's own admission, the Board is "accountable to the public to appropriately sanction licensees who engage in misconduct." Guidelines for Disciplinary Actions and Corrective Orders, supra, at 2.

21. Professional misconduct is defined by the legislature in the Revised Code and by the rules of professional conduct promulgated by the Board and codified in the Administrative Code at section 4732-17. Ohio Adm.Code 4732-17. These laws and rules require that all Ohio-licensed psychologists and applicants adhere to strict ethical and professional norms.

22. Military health professionals are required to maintain a valid state license. The Department of Defense ("DOD") relies on state professional boards to license, investigate, and sanction professional misconduct of its health professionals, including psychologists. 10 U.S.C. § 1094(a)(1), (e)(1)(A) (2006); Department of Defense Directive 6025.13 § 5.2.2.2 (May 4, 2004).

23. The Ohio regulatory framework explicitly recognizes the importance of receiving complaints from the public as a means of bringing the misconduct of psychologists to the attention of the Board. Any individual with knowledge of a licensee's misconduct may bring a complaint to the attention of the Board. See State Board of Psychology Regulatory Compliance Handbook, supra, at ¶1. Ohio psychologists who are aware of another licensee's misconduct are obligated to report that misconduct to the Board. Ohio Adm.Code 4732-17-01(J)(4).

24. The regulatory scheme under R.C. 4732 provides the Board with limited discretion. The Board cannot exercise that discretion arbitrarily. If the Board receives a formal complaint or becomes aware that an Ohio licensee or applicant has engaged in professional misconduct inside or outside the state, the Board has a duty to investigate to determine if there has been a violation of the laws and rules over which the Board has authority.

25. The public has a corresponding right to file complaints and have their complaints investigated.

26. If, through the course of the investigation, the Board finds that allegations are within its jurisdiction and a violation is likely to have occurred, the Board must proceed to formal action.

27. Complainants have a corresponding right to have their complaint be the subject of formal action when they support their allegations with evidence that a violation is likely to have occurred.

28. In order for these rights and duties to be meaningful, R.C. 4732 may not be interpreted to permit the Board "absolute and uncontrolled discretion" to dismiss allegations of serious violations supported by substantial evidence that the violations have likely occurred. See *State ex rel. Selected Properties v. Gottfried* (1955), 163 Ohio St. 469, 471, 127 N.E.2d 371; *Thomas v. Mills* (1927), 117 Ohio St. 114, 122-23, 157 N.E. 488.

FACTS

The Complaint

29. On July 7, 2010, Petitioners filed the Board Complaint against Dr. James. The Board Complaint alleges that Dr. James played a role in the exploitation, abuse, and torture of detainees at Guantánamo Bay, subsequently misrepresented that experience, and improperly disclosed confidential patient information. It alleges violations of eighteen provisions of Ohio statutes and Board rules governing the conduct of psychologists. See Exhibit 1, Statement of Complaint—Larry C. James, License No. 6492, State Board of Psychology of Ohio (July 7, 2010) [hereinafter Bd. Compl.].

30. The Board Complaint draws from numerous sources, including reports, records, and hearings from the U.S. military, Congress, Department of Justice, Central Intelligence

Agency, as well as statements from witnesses and survivors. The Board Complaint also cites Dr. James's own public admissions and statements, which present prima facie evidence of misconduct. See, e.g., Exhibit 1, Bd. Compl. at ¶¶52-53, 86-110. Some of these admissions are contained in Dr. James's memoir, "Fixing Hell: An Army Psychologist Confronts Abu Ghraib." Dr. James published this book in 2008, while his application for an Ohio license was pending before the Board.

31. Until 2008, Dr. James was an active-duty Colonel in the U.S. Army. The Board Complaint alleges that he led a team of mental health professionals in the intelligence command at the U.S. Naval Station in Guantánamo Bay, Cuba, from January 2003 to May 2003, and again from June 2007 through May or June 2008. Exhibit 1, Bd. Compl. at ¶3.

32. According to DOD policy, the team of psychologists and psychiatrists, known as the Behavioral Science Consultation Team ("BSCT"), was tasked with applying psychology and behavioral science to "evaluate the psychological strengths and vulnerabilities of detainees" and to "assist in integrating these factors" into their interrogations. Exhibit 1, Bd. Compl. at ¶14 (quoting Memorandum from Kevin C. Kiley, Army Surgeon General, to Commanders, MEDCOM Major Subordinate Commands, Behavioral Science Consultation Policy (Oct. 20, 2006)).

33. The Board Complaint alleges and documents that as the BSCT's commanding officer, Dr. James would have been responsible not only for his own actions, but also for the conduct of BSCT members and others under his command, as well as for the foreseeable consequences of policies he helped to develop. Exhibit 1, Bd. Compl. at ¶¶5-7.

34. The Board Complaint alleges that as Chief Psychologist and commanding officer of the BSCT, Dr. James participated in designing, implementing, and/or overseeing a system of

interrogation and detention that was intended to exploit prisoners' psychological vulnerabilities, maximize their feelings of disorientation and helplessness, and put them in a position of absolute dependency on their interrogators. Exhibit 1, Bd. Compl. at ¶8.

35. The Board Complaint documents that in their BSCT roles, Dr. James and his subordinates were practicing psychology as defined by R.C. 4732.01(B). Exhibit 1, Bd. Compl. at ¶23. They continuously assessed detainees interrogated and held in Guantánamo Bay; studied and sought to influence the detainees' responses to specific techniques and environmental conditions; and as Dr. James himself admits, evaluated them by reviewing their medical information prior to interrogations. Exhibit 1, Bd. Compl. at ¶24.

36. The Board Complaint documents that Dr. James's position as the commanding BSCT psychologist was contingent on his holding a valid state license to practice the profession. Exhibit 1, Bd. Compl. at ¶13 n.33. The Board Complaint alleges that he, along with other BSCT members, was selected because of his mental health training. Exhibit 1, Bd. Compl. at ¶13.

37. Specifically, the Board Complaint alleges that Dr. James and members of the BSCT under his command and control contributed in the following ways to cause prisoners debilitating physical and psychological harm:

- advised and trained interrogators, meeting with them to review interrogation plans designed to isolate detainees and foster dependence on their interrogators so as to enhance and exploit their disorientation, shock, and fear, Exhibit 1, Bd. Compl. at ¶¶15-16;
- observed, monitored, and retained at least *de facto* authority to end many, if not all, interrogations, many of which involved treatment rising to the level of torture or

cruel, inhuman or degrading treatment or punishment, Exhibit 1, Bd. Compl. at ¶¶13, 18, 25-27;

- assessed and evaluated detainee behavior and suggested abusive interrogation techniques, Exhibit 1, Bd. Compl. at ¶¶13-15, 18;
- exploited minors detained at Guantánamo Bay and, while they were under Dr. James's supervision, failed to protect them from physical and psychological abuse, Exhibit 1, Bd. Compl. at ¶¶44-49.

38. The Board Complaint documents that while Dr. James was Chief Psychologist and alleged commanding officer of the BSCT, men and boys detained in the prison were threatened with rape and death for themselves and their family members; sexually, culturally, and religiously humiliated; forced naked; deprived of sleep; subjected to sensory deprivation, over-stimulation, and extreme isolation; short-shackled into stress positions for hours; and physically assaulted. Exhibit 1, Bd. Compl. at ¶¶26-27.

39. The Board Complaint alleges that Dr. James participated in, ordered, supervised, ratified, facilitated, acquiesced in, and/or failed to prevent, stop, report, and punish this and other types of abuse at the prison. Exhibit 1, Bd. Compl. at ¶25.

40. The Board Complaint provides specific examples of this misconduct, including an incident drawn from Dr. James's own admission in which he watched behind a one-way mirror and drank coffee as an interrogator and three guards wrestled a man to the floor forcing him to wear lipstick, a wig, and women's underwear. The Board Complaint alleges that Dr. James did not report the incident and documents Dr. James's admission that he did not reprimand or discipline the interrogator and guards. Exhibit 1, Bd. Compl. at ¶¶37-42.

41. The U.S. Government had previously recognized such techniques as illegal, and U.S. Government officials have since re-affirmed that some of these techniques constitute torture. Exhibit 1, Bd. Compl. at ¶10.

42. The American Psychological Association ("APA"), which has expressly condemned torture since at least 1985, prohibits psychologists from "knowingly planning, designing, participating in or assisting in the use" of any one of these techniques. American Psychological Association, Amendment to the Reaffirmation of the APA Position Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and Its Application to Individuals Defined in the United States Code as "Enemy Combatants" (Feb. 22, 2008); American Psychological Association, Against Torture: Joint Resolution of the American Psychiatric Association and the American Psychological Association (1985).

43. The Board Complaint alleges that following his tenure at Guantánamo Bay, Dr. James continued to engage in sanctionable misconduct through his public disclosures and misrepresentations of the interrogation and detention practices of the prison and the role he played in setting and implementing those practices.

44. The Board Complaint alleges that Dr. James committed grave breaches of confidentiality through statements he made in his book. Exhibit 1, Bd. Compl. at ¶¶86-87, 89-90.

45. Finally, the Board Complaint alleges that Dr. James misrepresented his experience and the nature of his service at Guantánamo Bay through various statements to the public and in his licensure application to the Board. Exhibit 1, Bd. Compl. at ¶¶52-53, 94-110.

46. The evidence presented in the Board Complaint indicates that while practicing psychology Dr. James: (1) not only failed to protect clients from harm, but directly and indirectly harmed them; (2) entered into prohibited multiple relationships with detainees that compromised

his judgment and objectivity and led to the exploitation of individuals with whom he worked; (3) not only failed to protect confidential information but designed a policy that purported to require other health professionals to breach systematically provider-patient confidentiality; and (4) failed to represent honestly his own conduct, experience, and the results of his service.

47. Individually, each act of alleged misconduct represents a violation of specific provisions of the code of conduct established by the Board and professional ethics associations that could be an independent basis for sanction. Combined, they reveal a pattern of consistent disregard for the rules that govern his profession and demonstrate a lack of "good moral character" as required by R.C. 4732.10(B)(2) for licensure in Ohio.

48. The fifty-page Board Complaint filed by Petitioners was supplemented with over a thousand pages of supporting documentation. The evidence in the Board Complaint contains admissions from Dr. James and other publicly available documents based on government policy and investigations. The admissions in Dr. James's memoir alone are sufficient to warrant an investigation and to proceed to formal action.

49. Beyond Dr. James's own admissions, the additional substantial evidence contained in the Board Complaint only reaffirms that a thorough and independent investigation conducted in good faith, followed by formal action, is proper.

50. The Board Complaint is further supported by a report submitted by psychologist and attorney Dr. Bryant Welch, an expert in psychological ethics. In his report, Dr. Welch concludes that if the allegations contained in the Board Complaint are factually true, the conduct described constitutes the most serious and far-reaching ethical breaches he has ever encountered in his career as a psychologist. Exhibit 3, Psychological Report of Bryant L. Welch, J.D., Ph.D., supra, at 4.

51. Other Ohio residents shared with the Board their concern about the seriousness of the alleged misconduct and its potential implications for people in Ohio. These residents included licensed psychologists, ethicists, veterans, and faith leaders.

52. On July 19, 2010, Petitioners requested a meeting with the Board, with the stated purpose of making themselves available to address any questions the Board might have regarding the law or evidence relating to the Board Complaint and offering to provide supporting witnesses.

53. On September 30, 2010, Petitioners and their counsel met with Supervising Board Member Jane Woodrow, Board Executive Director Ronald Ross, Board Investigator Carolyn Knauss, and Assistant Attorney General Roger Carroll. During this meeting, Petitioners repeatedly offered to answer any legal and factual questions that might concern the Board. Those present on behalf of the Board stated that they had no questions and requested to speak with no witnesses.

54. Until its final decision five months later, the Board did not initiate further contact with Petitioners following the meeting on September 30, 2010.

The Board's Response and Decision

55. On January 31, 2011, the Board sent a cursory letter stating, in part, that, "It has been determined that we are unable to proceed to formal action in this matter." Exhibit 2, Letter from Carolyn Knauss to Beth Collis, supra.

The Board's Abuse of Discretion and Failure to Fulfill Its Duties

56. The Board must base its decision to proceed or not proceed to formal action on a valid legal assessment of jurisdiction and a thorough analysis of the evidence. See *State ex rel. Noll v. Indus. Comm. of Ohio* (1991), 57 Ohio St.3d 203, 205-06, 567 N.E.2d 245. Neither the Board's actions nor its statements, including its response letter, offer any indication that the Board based its decision not to proceed to formal action on law or evidence. See, generally, Exhibit 2, Letter from Carolyn Knauss to Beth Collis, supra.

57. In its letter, the Board asserted no deficiency with the evidence and made no reference to a lack of jurisdiction.

58. An unexplained cursory dismissal of a fifty-page Complaint with over a thousand pages of credible documentation, including government reports and Dr. James's own admissions, constitutes an arbitrary exercise of the discretionary authority and exemplifies abuse. Such action provides no assurances that the Board Complaint has been fully investigated or that Dr. James's continued licensure does not present a continuing risk to public safety.

59. When a professional misconduct complaint within the Board's jurisdiction alleges serious violations of the codified ethical standards and supports those allegations with substantial evidence indicating that these violations are likely to have occurred, the Board has a duty to initiate formal proceedings. The Board must proceed pursuant to its duty to protect the public from psychologists who abuse their professional knowledge and skills to cause harm.

60. No reasonable policy objective is served by the Board's failure to act in this case. The Board Complaint was well-substantiated, and the violations alleged are of the most serious kind. Clear duties exist to investigate and proceed to formal action in this situation. An agency cannot hide behind discretion simply to avoid a controversial case. Similarly, an agency cannot

be said to be exercising non-arbitrary discretion when it acts against the clear weight of the evidence and the goals of the statute in policing the conduct of psychologists.

61. The public relies on the Board, the sole authority entrusted to regulate the licensure of psychology in Ohio, to ensure that licensure remains contingent upon adherence to ethical obligations. The public's trust in psychologists and the profession of psychology depends on the Board's good faith efforts to investigate and appropriately discipline psychologists who violate the codified ethical standards.

62. A dismissal by the Board should only be based on a conclusion that the allegations in the complaint have been fully investigated and do not constitute violations of the laws and rules governing Ohio psychologists. An arbitrary dismissal or a refusal to take disciplinary action, in a case such as this one, can mislead the public into believing that the licensee has been cleared of wrongdoing and risks communicating to other Ohio psychologists that the alleged conduct will be tolerated by the Board.

63. The arbitrary and non-transparent nature of Board's actions have undermined the rule of law and contributed to the perpetuation of injustice.

64. The Board did not adequately address the Board Complaint brought by Petitioners, and therefore failed to vindicate their statutory rights. Instead, the Board has effectively rendered Petitioners' statutory rights a meaningless formality.

65. So long as the Board's decision is allowed to stand, Petitioner Bond can no longer rely on the Board to monitor the ethical behavior of the psychologists that the Board licenses to practice, nor have conviction that the rules and regulations promulgated by the Board will be duly enforced. The Board's decision, should it be allowed to stand, risks inviting future abuse. It damages the integrity of the psychological profession in Ohio by signaling to psychologists that

decisions as to whether to investigate complaints are made arbitrarily by the Board, and that blatant violations of ethical codes may therefore not be meaningfully investigated.

66. So long as the Board's decision is allowed to stand, Petitioner Bossen, in his role as a minister, can no longer trust that when he refers members of his congregation to Ohio-licensed psychologists, they will be helped rather than harmed.

67. So long as the Board's decision is allowed to stand, Petitioner Setzler, who has advocated for the rights of the mentally ill in Ohio since her brother was diagnosed with schizophrenia, can no longer trust that the Board will protect the vulnerable residents of Ohio from psychologists who abuse the power and privilege of their license.

68. So long as the Board's decision is allowed to stand, Petitioner Reese, who receives regular treatment at Ohio Veteran Affairs (VA) hospitals, can no longer trust that the Board will discipline Ohio-licensed military health professionals who commit egregious violations of ethical rules and create an environment of abuse.

69. The Board has come under scrutiny in the past for failing in its duty to investigate and discipline psychologists. See, e.g., Ted Wendling, When Psychologists Cross the Line, The Plain Dealer, Dec. 5-7, 1999 (reporting on how state psychology boards, including the Ohio State Board of Psychology, systematically failed to discipline psychologists for sexual misconduct).

70. When Dr. James applied for Ohio licensure in 2008, Petitioner Bond filed with the Board a request that his application be denied. Complaint against Larry C. James, License State Board of Psychology of Ohio (July 8, 2008). The Board then, like here, disregarded the evidence before it and proceeded to license Dr. James, in violation of its duty to ensure that its licensees met the statutory requirement of good moral character. Letter from Carolyn Knauss, Investigator, Ohio State Board of Psychology, to Trudy Bond, Ed.D. (Sept. 16, 2008).

71. The Board routinely disciplines psychologists for conduct that is arguably far less serious than the conduct alleged in both complaints against Dr. James. Exhibit 1, Bd. Compl. at ¶56-58.

COUNT I
WRIT OF MANDAMUS

72. Petitioners restate and reiterate their previous allegations as if fully rewritten herein.

73. The writ of mandamus is an extraordinary remedy that arose historically to deal precisely with situations like this one, where there is no other avenue for justice. It is the Court's duty in such situations to review agency action and to place limits on the exercise of discretion to ensure that discretion is not exercised arbitrarily or abused.

74. Petitioners have been denied justice through the Board's decisions to not fully investigate and not proceed to formal action. The Board has clear duties to investigate and proceed to formal action when there is evidence of a violation over which the Board has jurisdiction, as in this case.

75. The dismissal of the Board Complaint has no basis in law. The Board Complaint alleges violations by an Ohio licensee of Ohio statutes and regulations over which the Board has jurisdiction.

76. The Board Complaint also presents evidence that serious and extraordinary misconduct by Dr. James rising to the level of torture was likely to have occurred.

77. The Board's dismissal of the Board Complaint without explanation is an independent abuse of discretion that warrants correction.

78. This Court must intervene to vindicate the rights of Petitioners, protect Ohio citizens, and correct the Board's abuse of discretion.

79. Petitioners are entitled to a writ of mandamus to compel the Board to proceed to formal action on the Board Complaint. Petitioners respectfully request this Court to issue a writ instructing the Board to proceed to formal action or, in the alternative, to investigate meaningfully and in good faith.

80. The Board's cursory dismissal of the Board Complaint failed to provide Petitioners with any evidentiary or legal basis for their ruling. There must be some transparency and oversight to ensure objective decision-making. Thus, Petitioners request this Court to instruct the Board to support its decision with evidence or law.

81. **WHEREFORE**, Petitioners pray that this Court issue a writ of mandamus, pursuant to R.C. Chapter 2731.

a. This Court shall issue a writ of mandamus to require the Board to proceed to formal action based on the evidence in the Board Complaint and supporting documentation.

b. Additionally or alternatively, this Court should compel the Board to investigate meaningfully and in good faith.

c. Additionally, the Court should compel the Board to provide clearly articulated reasons grounded in fact or law for any decision, and to show that it investigated meaningfully and/or carried out a formal proceeding in good faith.

d. The Petitioners request to be granted their costs and reasonable attorneys' fees in this lawsuit, and such other relief at law or in equity as this Court deems appropriate.

Respectfully submitted,

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IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

DR. TRUDY BOND, et. al. Relators/Plaintiffs, vs. OHIO STATE BOARD OF PSYCHOLOGY Respondent/Defendant.	Case Number: 11CV-04-4711 Judge L. Beatty

RESPONDENT OHIO STATE BOARD OF PSYCHOLOGY'S MOTION TO DISMISS COMPLAINT IN MANDAMUS

Respondent, Ohio State Board of Psychology ("Psychology Board" or "Board") respectfully moves this Court for an order dismissing the Complaint in Mandamus filed by Relators, pursuant to Civ. R. 12(B) for lack of standing and failure to state a claim upon which relief can be granted. A memorandum in support follows.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. STATEMENT OF THE CASE AND FACTS

Relators, four residents of Ohio, filed a Complaint seeking a Writ of Mandamus to compel Respondent, Psychology Board to either require the Board to proceed with formal disciplinary action against another Psychologist, Dr. Larry James, Dean of the Wright State School of Professional Psychology or to investigate Relators' allegations more fully and provide reasons for any subsequent decision it makes resulting from such investigation. In July 2010 Relators submitted a complaint to the Board against Dr. Larry James, alleging that when he served as a Senior Psychologist for the United States Army at the military prison at Guantanamo Bay he was responsible for the abuse and exploitation of detainees. (Complaint at ¶ 2)

Relators further allege that they provided the Board with information and documentation to support their claim. On September 30, 2010 relators and their counsel met with the Board's representatives to discuss their complaint. (Complaint at ¶ 53) On January 31, 2011 the Board's investigator issued a letter to Relators' counsel stating that the Board has completed its review and has determined that it is unable to proceed with a formal action. (Complaint at ¶ 55)

Interestingly, this is the third complaint Relator Trudy Bond has filed against Dr. James. In July 2008 Dr. Bond requested that the Board deny Dr. James request for a license in Ohio based upon the same allegations. The Board issued Dr. James a license. (Complaint ¶ 70) Also in 2008 based upon the same general allegations Dr. Bond filed a complaint against Dr. James in Louisiana where he had a license to practice psychology. When the Louisiana State Board of Examiners of Psychologists (LSBEP) declined to take disciplinary action against Dr. James, Dr. Bond filed a lawsuit against LSBEP asking the Court to order it to conduct an investigation against the psychologist. The Court of Appeals affirmed the decision of the lower court and

dismissed Dr. Bond's complaint (*Bond v. Louisiana State Board of Examiners of Psychologists* (Louisiana Court of Appeal, First Circuit 2011) 2009 CA 1735 (Attached as Exhibit 1)).

Relators complaint must be dismissed. First Relators do not have standing to pursue this action because they do not have a beneficial interest in this matter. Second there is no clear legal duty on the part of the Psychology Board to initiate disciplinary action against any psychologist since the determination to initiate disciplinary action is a discretionary one. Relators refer to various statutes within Chapter 4732 and rules under O.A.C. 4732, in support of their complaint. (Complaint at ¶ 19, 24) As shown below none of these statutes or rules relied upon by Relators demonstrate that the Board had a clear legal duty to perform the act requested that it take formal action against a psychologist or explain in more detail why it chose not to. The decision to take disciplinary action is a discretionary decision made by the Board based upon the evidence before it. Therefore Relators lack standing to pursue this claim and have failed to state a claim for which relief can be granted. Accordingly the Board respectfully requests the Court dismiss the complaint.

II. LAW AND ARGUMENT

A. THE COURT LACKS JURISDICTION OVER THIS COMPLAINT BECAUSE RELATORS LACK STANDING TO PURSUE THIS CLAIM.

Before an Ohio Court can consider the merits of a legal claim, the person seeking relief must establish standing to sue. *Ohio Contractors Assoc. v. Bicking*, 71 Ohio St. 3d 318, 1994-Ohio-183 at 320. The question of standing depends upon whether the party has alleged a personal stake in the outcome or controversy. *State ex. rel. Dallman v. Franklin County Court of Common Pleas* (1973) 35 Ohio St. 2d 176, 178-179. A private litigant must generally show that he has suffered or is threatened with direct and concrete injury in a manner or degree different

from that suffered by the public in general. *State ex. rel. Ohio Academy of Trial Lawyers v. Sheward* (1994), 86 Ohio St. 3d 451, 1999-Ohio-123 at 470.

This general rule applies to mandamus actions as well. *State ex. rel Sinay v. Sodders* (1997) 80 Ohio St. 3d 224, 1997-Ohio-344 at 224. Moreover a complaint for a writ of mandamus must set forth facts showing that the relator is a party beneficially interested in the requested act before a proper claim is established. R.C. 2731.02. A real party in interest is one who is directly benefited or injured by the outcome of the case rather than one merely having an interest in the action itself. The *State ex rel. Village of Botkins v. Laws,* 69 Ohio St.3d 383, 1994-Ohio-518 at 387.

In their complaint relators are unable to meet the standing requirements. Relators state that they are residents and taxpayers in Ohio. (Complaint ¶ 12) Subsequently relators claim that they will not be able to trust the Psychology Board if the decision not to pursue formal charges against Dr. James is allowed to stand. (Complaint ¶ 64 – 68) Such conclusory allegations do not demonstrate that relators have a personal stake in this matter or that they have suffered or will suffer a direct and concrete injury as a result of the Board's decision. Nor can they show they have a beneficial interest in this matter. At best relators simply have an interest in the action taken by the Psychology Board not to initiate disciplinary action.

In similar circumstances Courts have found that the relators lacked standing and have dismissed the cases for lack of jurisdiction. *State ex rel. Dallman v. Court of Common Pleas, Franklin County* (1973) 35 Ohio St. 2d. 176 (The Superintendent of a state prison has no standing to challenge the order of a court turning over custody of a prisoner to the County Sheriff for reconsideration of sentence because he had no personal stake in the outcome.) *Bowers v. Ohio State Dental Board,* (10th Dist. 2001), 142 Ohio App 3d. 376 (without a personal or

beneficial interest two dentists did not have standing to compel the Dental Board through mandamus to adopt formal regulations regarding which regional dental examinations the Board would accept for licensure). *State ex. rel. Harris v. Silbert* (1959), 169 Ohio St. 261 (an attorney does not have such beneficial interest in the performance of the judicial function of the submission of an annual report by the Chief Judge solely by reason of being a member of the legal profession to maintain an act for writ of mandamus). *State ex rel. Skilton v. Miller* (1955), 164 Ohio St. 163 (A private citizen was not personally affected by the failure of the public official to issue an arrest warrant for an alleged violation of a Sunday closing law. Therefore he had no beneficial interest in the matter and the writ of mandamus he filed would not be issued.) In this case Relators have no legal right which will be affected by the Board's decision not to initiate a formal action against Dr. James. Without a beneficial interest they cannot maintain a mandamus action against the Board.

In essentially the exact same case, the Louisiana Court of Appeals found that Dr. Bond did not have standing to bring an action requiring the Louisiana State Board of Examiners of Psychologists (LSBEP) to take action against Dr. James.

> While Dr. Bond contends that she had a duty to report the psychologist's unethical conduct, she must have a real and actual interest in the action in order to be entitled to a judicial review. Without a showing of some special interest in the performance sought of a public board, which is separate and distinct from the interest of the public at large, plaintiff will not be permitted to proceed. Without some peculiar, special, and individual interest, a citizen has no standing in court to champion a cause or subject matter that pertains to the whole people in common, nor has an individual citizen legal standing in court to enforce the performance of a duty owed to the general public. Here, Dr. Bond has shown no particular, special, or individual interest. (Citations omitted.) (*Bond v. Louisiana State Board of Examiners* at 3.)

Based on the legal precedents cited above, Relators have failed to establish that they have standing to bring this action against the Psychology Board. Accordingly their complaint should be dismissed for lack of subject matter jurisdiction.

B. RELATORS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

In order to prevail upon a motion to dismiss for failure to state a claim, it affirmatively must appear from the allegations of the petition that there could be no set of facts established which would entitle the relator to the relief sought. *Conley v. Gibson* (1957), 355 U.S. 41; *State ext. rel. Seikbert v. Wilkinson*, 69 Ohio St. 3d 489, 1994-Ohio-39; *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St. 2d 242. A 12(B)(6) motion tests only the sufficiency of the petition and not the merits or the parties' respective positions. *Slife v. Kundtz Properties, Inc.* (1974), 40 Ohio App. 2d 179. The court, in considering such motion, must construe all material allegations in the petition and all reasonable inferences drawn from them in favor of the party against whom the motion is made. *Perez v. Cleveland* (1993), 66 Ohio St. 3d 397, reversed on other grounds, (1997) 78 Ohio St.3d 376; *Erie County School District Board of Education v. Rhodes* (1984), 17 Ohio App.3d 35. This deference does not extend however to unsupported conclusions which are not sufficient to withstand a motion to dismiss. *State ex. rel. Hickman v. Capots* (1989), 45 Ohio St.3d 324. Citing *Schulman v. City of Cleveland*, (1972), 30 Ohio St.2d 196, 198 and *Mitchell v. Lawson Milt Co.* (1988), 40 Ohio St.3d 190, 193 .

The Ohio Supreme Court has held that "[a] complaint in mandamus states a claim if it alleges the existence of the legal duty and the want of an adequate remedy law with sufficient particularity so that the respondent is given reasonable notice of the claim asserted." *State ex rel. Alford v. Willoughby* (1970), 58 Ohio St.2d 221, 224. Thus, the court must grant a respondent's

motion to dismiss under Civ.R. 12(B)(6) if the petition is without merit because of an absence of law to support the claim of facts sufficient to give rise to a claim.

In this case, relators are seeking a writ of mandamus that would order the Board to initiate disciplinary action against a psychologist, or to provide a more detailed explanation on why it chose not to. Relators cannot demonstrate that they are entitled to the writ of mandamus. The Ohio Supreme Court has repeatedly held that the petitioner who seeks a writ of mandamus must plead the existence of all necessary facts to support the claim. *State ex rel. Temke v. Outcalt* (1977), 49 Ohio St.3d 189, 190-191 (per curiam) (citations omitted). The entitlement to mandamus relief must, therefore, appear on the face of the petition. In this case it does not, so the Complaint must be dismissed.

1. RELATORS CANNOT MAINTAIN AN ACTION IN MANDAMUS

It is well-established that in order for a writ of mandamus to issue, the relator/plaintiff must show:

1. that they have a clear legal right to the relief prayed for;
2. that the respondent/defendant is under a clear legal duty to perform the act requested; and
3. that there is no plain and adequate remedy in the ordinary course of the law.

State ex rel. Stanley v. Cook (1946), 146 Ohio St. 348; *State ex rel. Broadwalk Shopping Center, Inc. v. Court of Appeals for Cuyahoga County* (1990), 56 Ohio St.3d 33; *State ex. rel. Sekemestrovich v. City of Akron*, 90 Ohio St.3d 536, 2001-Ohio-223.. A relator has the burden of proving that he has met all of these requirements. *State ex rel. Alben v. State Emp. Relations Bd.* (1996), 76 Ohio St.3d 133 (per curiam). Relators have failed to meet and cannot meet this burden.

It has long been held in Ohio that "the creation of a legal duty is a distinctive function of the legislative branch of government." *Davis v. State ex rel Pecsok* (1936), 130 Ohio St. 411; *Stanley*, 146 Ohio St. 348; *State ex rel. Hodges v. Taft* (1992), 64 Ohio St.3d 1. A court cannot create a duty in mandamus. *Hodges*, 64 Ohio St.3d 1. Relators are requesting that this Court mandate the Board "to act in accordance with law and initiate disciplinary action" against a psychologist. However, the statutes relied upon by Relators do not mandate that the Board initiate disciplinary action against any psychologist or provide a detailed explanation of its decision.

For example, R.C. 4732.06 allows the Psychology Board to establish procedures to conduct investigations and hearings, if necessary. Further R.C. 4732.17(B) provides that before the Board may discipline a psychologist written charges must be filed and a hearing must be conducted in accordance with Chapter 119 of the Revised Code. No where in the statute or rules is there a mandatory requirement for the Board to initiate disciplinary charges against a psychologist. The decision to proceed with a disciplinary action against a psychologist is discretionary.

Further, R.C. 4732.10 simply sets forth the qualifications for admission such as age, educational requirements and supervised experience requirements. R.C. 4732.17(A)(1)-(12) and O.A.C. 4732-17 establish the standards of professional conduct and the grounds for taking disciplinary action against a psychologist. Of critical significance is the language contained in R.C. 4732.17(A) which provides

> (A) The State Board of Psychology <u>may</u> refuse to issue a license to any applicant, <u>may</u> issue a reprimand, or suspend or revoke the license of any licensed psychologist and licensed school psychologist on any of the following grounds. (Emphasis added)

Moreover there is no statutory requirement nor have relators cited one which requires the Board of Psychology to explain its rationale for not pursuing formal charges against a psychologist. Without this legal duty relators' action in mandamus must fail.

In a case directly on point the Supreme Court held that mandamus did not lie to compel the Medical Board to take disciplinary action against a physician *State ex. rel. Talwar v. State Med Bd of Ohio* 104 Ohio St.3d 290, 2004-Ohio-6410. Dr. Talwar filed a complaint with the Medical Board alleging that another doctor had fabricated data, altered medical records and made false charges against him regarding his treatment of patients. The court found that Dr. Talwar failed to establish a clear legal right to the initiation of disciplinary charges or a corresponding legal duty of the Board to initiate disciplinary action. The Court reasoned that it is within the Board's discretion on whether to proceed with disciplinary action because it had the discretion to allocate its resources in a manner that will best protect patients. **Id** ¶ 11.

Previously the Court of Appeals in the *Talwar* case had ruled that the Board had not abused its discretion because the determination of whether the facts found by the Board in the course of its investigation support a finding of probable cause is within the Board's discretion and cannot be controlled by mandamus. *Talwar v. State Medical Board of Ohio* (10th Dist.) 156 Ohio App.3d 485, 2004-Ohio-1301 ¶ 9. Similarly it is within the Psychology Board's discretion on whether to initiate formal charges against a licensee. After completing its review it determined that no charges were warranted. Like *Talwar*, the Court should not interfere with the Board's discretionary decision. Therefore Relators complaint in mandamus should be dismissed.

Also in *State ex rel. Westbrook v. Ohio Civil Rights Comm'n* (1985), 17 Ohio St.3d 215 the relevant statute provided that if a complaint was filed with the Commission, the Commission may initiate a preliminary investigation **Id** at 216. The Supreme Court relying on the word

"may" in the statute held that the Commission's authority was discretionary, not mandatory. **Id.** Because the investigatory power was discretionary the court found no legal duty that would support a claim in mandamus. Similarly the Psychology Board's statute provides that it may initiate disciplinary charges against a licensee. R.C. 4732.17. Relying upon the reasoning of the *Westbrook* court, this action also must be dismissed.

Through this mandamus action Relators are attempting to control the discretion of the Psychology Board by arguing that it must initiate formal charges. Such a request is impermissible under mandamus. In *Gosney v. Board of Elections* (March 30, 1989), Seventh App. Dist. No. 88-C-54, 1989 Ohio App. Lexis, the court held that where the performance of a duty is not mandatory but is discretionary, a writ of mandamus will not issue. The Court cited to 67 Ohio Jurisprudence 3d 218-219, Mandamus, Section 19. That section states:

> * * * The duty to be enforced by a writ of mandamus must be specific and definite, and clear and unequivocal; must be specially enjoined by law; must be incident to the office, trust, or station which the respondent holds; and may not be one of a general character which leaves to the respondent any discretion in its performance. The duty to be enforced must be of such character that the courts can prescribe a definite act or series of acts which will constitute performance of the duty, so that the respondent may know what he is obliged to do and may do the act required, and the court may know that the act has been performed and may enforce its performance.

The relator in *Gosney* had filed a petition for mandamus to compel a prosecutor to submit evidence of his investigation into an election for county coroner to a grand jury. The prosecutor had investigated the allegations, determined that they were without merit, and refused to prosecute. The Court held that in doing so, the respondent was exercising a discretionary function and that a writ of mandamus would not lie.

The relator in *Gosney* had also sought a writ against the Secretary of State to compel him to investigate the same matter. The Court held that the same reasoning applied to both the

Secretary of State and the prosecutor. That is, that while the Secretary of State had a duty to investigate irregularities in elections, the extent and scope of the investigation is discretionary. The Court further held that it could not delve into the area of defining what was a proper investigation for the Secretary of State to conduct. Mandamus is limited to compelling the performance of a legal duty and cannot be used to control it.

See also *State ex rel. Village of Botkins v. Laws*, 69 Ohio St.3d 383, 1994-Ohio-518 at 389. (A writ cannot issue to control an officer's exercise of discretion, but it can be issued to compel him to exercise it when he has a clear legal duty to do so.) *State, ex rel. Snyder v. State Controlling Board* (10th Dist. 1983) 11 Ohio App. 34 270 (The exercise of the authority of the State Controlling Board with respect to transfers of capital appropriations from one purpose to another includes the exercise of its judgment and discretion which cannot be limited or controlled by a writ of mandamus.)

In another case a mandamus action was filed against the Attorney General to compel her to take action to identify members of a class of beneficiaries to a charitable trust and cause the trust to come into compliance with registration and reporting requirements under the Ohio Charitable Trust Act. The Court held "[a]bsent an abuse of discretion mandamus cannot compel a public official to act in a certain way on a discretionary matter". *State ex rel. Lee v. Montgomery,* 88 Ohio St.3d 233, 2000-Ohio-316 at 235. Similarly in *State ex rel. Master v. City of Cleveland,* 75 Ohio St. 3d 23, 1996-Ohio-238, the Court would not compel a prosecuting attorney to prosecute a case. citing *State ex rel. Squire v. Taft* (1994), 69 Ohio St.3d 365, 368 and *State ex rel. Murr v. Meyer* (1987) 34 Ohio St.3d 46, 47. Relying upon the Myer decision, the Court in *Pierce v. Court of Common Pleas* (8th Dist. 1992), 1992 Ohio App. Lexis 2015 *6 found that the decision to prosecute is discretionary and by virtue of the discretion can not

impose a clear legal duty on the part of the county prosecutor to perform the requested act. Likewise by virtue of this discretion relator cannot be said to have a clear legal right to the relief prayed for.

In a case very similar to the one at bar, *State ex rel. MacDonald v. Cook* (1986), 15 Ohio St.2d. 85, a relator filed a petition for mandamus seeking to compel the Director of Liquor Control to prosecute a country club for the unlawful sale of beer, wine and other spirituous liquors without a permit. The Supreme Court held that mandamus does not lie for the purpose of compelling a public officer to enforce a police regulation in relation to a specific person. That is exactly what Relators are asking this Court to do, mandate the Board to enforce a police regulation against a specific psychologist.

In another case similar to the one at bar, the Tenth District, in *Robinson v. Office of Disciplinary Counsel* (Aug. 26, 1999), Franklin App. No. 98AP-1431, 1999 Ohio App. Lexis 3928, held that the decision of whether to dismiss a complaint filed with the Office of Disciplinary Counsel was discretionary. The Court stated:

> In *Reynolds v. State* (full citation omitted), the Supreme Court of Ohio held that the "the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion." Id. at paragraph one of the syllabus. It is clear in this case the basic function to be performed by the ODC falls within this category. The decision as to whether to dismiss a complaint based upon a review of such complaint is clearly a function involving a high degree of discretion.

Id. at 6-7. The same high degree of discretion granted to the Office of Disciplinary Counsel also applies to decisions made by the Psychology Board in determining whether or not to initiate disciplinary action against a psychologist. Even accepting as true Relators allegations, the decision to initiate formal discipline by the Psychology Board is within the Board's discretion

and cannot be controlled by mandamus. Similarly the relators do not have a clear legal right to the relief sought.

Along with their complaint, relators filed a lengthy memorandum in support of their position. Yet they failed to cite any cases which support their contention that they have standing to force a regulatory board to initiate formal disciplinary proceedings against a licensee. The case law clearly demonstrates that they do not.

Equally problematic for relators is their inability to provide any legal authority to support their argument that based upon a complaint filed by a few individuals with the Board regarding the conduct of a psychologist a court can or should second guess the judgment of the Psychology Board and order the Board to convene a formal hearing. Contrary to relators' position, courts through mandamus will not micromanage a Board's investigatory process or control how a Board exercises its discretion. Such a course of action would only undermine the independence and judgment of a regulatory Board. Without providing any legal authority to support their position, their complaint should be dismissed.

III. CONCLUSION

Relators have failed to show that they have a personal stake in the Psychology Board's decision not to initiate formal proceedings against Dr. James. They are unable to show a beneficial interest in the action of the Board so they lack standing to challenge it. Moreover the initiation of disciplinary action is a discretionary act for which a writ of mandamus should not issue. Accordingly, relators failed to state a claim upon which relief can be granted. The Psychology Board respectfully requests that the Complaint in Mandamus be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing RESPONDENT OHIO STATE BOARD OF PSYCHOLOGY'S MOTION TO DISMISS AND MEMORANDUM IN OPPOSITION TO PETITIONERS MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS VERIFIED COMPLAINT was sent by regular U.S. mail on May 18, 2011 to the following:

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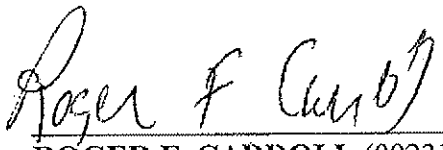

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NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1735

DR. TRUDY BOND

VERSUS

LOUISIANA STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

Judgment rendered: JUN 11 2010

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On Appeal from the Nineteenth Judicial District Court
Parish of East Baton Rouge, State of Louisiana
Suit Number: 569,127; Division: I #24
The Honorable R. Michael Caldwell, Judge Presiding

****

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BEFORE: PARRO, DOWNING, AND GAIDRY, JJ.

Parro, J. concurs by RD

DOWNING, J.

The issue for our consideration is whether a complainant has a right of action to seek judicial review after a professional licensing board fails to pursue disciplinary proceedings against one of its members.

Dr. Trudy Bond, an Ohio psychologist, lodged a complaint with the Louisiana State Board of Examiners of Psychologists (LSBEP), alleging that a psychologist licensed in Louisiana, violated ethical standards of psychology by his mistreatment of foreign detainees while serving in the military at the U.S. military base at Guantanamo Bay, Cuba.[1] After investigating the complaint, LSBEP took no disciplinary action against the member and rendered no decision in the matter. Dr. Bond filed a petition for judicial review, requesting that the district court remand the matter to LSBEP and order LSBEP to conduct a complete investigation, and to hold a hearing.[2] LSBEP responded by filing an exception of no right of action. The district court, sustaining the exception, dismissed Dr. Bond's petition for judicial review; Dr. Bond appealed.[3] For the following reasons, we affirm the district court judgment.

Louisiana Revised Statutes 37:2353C(5) gives LSBEP the authority to revoke or suspend the license of a psychologist and conduct hearings upon complaints concerning the disciplining of a psychologist. La. R.S. 37:2353E provides that "any person aggrieved by an action of the board may seek judicial review," in the 19th Judicial District Court in accordance with La. R.S. 49:950, *et seq.* the Administrative Procedure Act (APA). (Emphasis added). In the underlying administrative matter, no 'action' was taken, and there is no person 'aggrieved' within the legal meaning of that term.

[1] Dr. Bond has not alleged that she has treated any of the detainees whom she claims were mistreated.

[2] Dr. Bond also filed a petition for declaratory judgment action praying for the district court to declare that her complaint had been timely filed. The discussion on this assignment of error is pretermitted.

[3] An amicus brief in support of Dr. Bond's position was filed on behalf of five non-profit organizations, by the Loyola University New Orleans College of Law. We recognize their arguments, and their positions are incorporated into our analysis.

For purposes of determining availability of judicial review under the APA, "adjudication" is a proceeding resulting in a decision or an order. **Jones v. Southern University and A & M College System**, 96-1430, p. 6 (La.App. 1 Cir. 5/9/97), 693 So.2d 1265, 1269. A decision or order, for purposes of the APA, is a disposition required by constitution or statute. **Id.** Therefore, unless there is some constitutional or statutory provision requiring LSBEP to render a decision or order, then there was nothing for the district court to review. The law sets forth no provision requiring LSBEP to act. Therefore, no right of action exists to make them do so.

Moreover, Dr. Bond and the amici brief argue that La. R.S. 37:2351 *et seq*, requires LSBEP to take disciplinary action upon concluding that an enumerated offense has been committed. Here, however, we have no such conclusion that an enumerated offense has been committed. No authority has been cited, and we find none that forces LSBEP to discipline its member after the investigation of the alleged offense has been concluded.

The exception of no right of action calls into question whether the plaintiff has standing or interest required under the law to bring the action. **League of Women Voters of New Orleans v. The City of New Orleans**, 381 So.2d 441, 447 (La. 1980). Stated in the context of the present litigation, the exception of no right of action asks whether Dr. Bond has standing to obtain an order against LSBEP, requiring it to take action in this matter. While Dr. Bond contends that she had a duty to report the psychologist's unethical conduct, she must have a real and actual interest in the action on order to be entitled to a judicial review. Id. 381 So.2d at 447 (La. 1980), *citing* La.-C.C.P. art. 681. Without a showing of some special interest in the performance sought of a public board, which is separate and distinct from the interest of the public at large, plaintiff will not be permitted to proceed. **Id.** Without some peculiar, special, and individual interest, a citizen has

no standing in court to champion a cause or subject matter that pertains to the whole people in common, nor has an individual citizen legal standing in court to enforce the performance of a duty owed to the general public. Id. Here, Dr. Bond has shown no particular, special, or individual interest.[4]

Therefore, while Dr. Bond may have a professional or ethical duty as a psychologist to file a complaint with LSBEP about a fellow psychologist's interrogation techniques, she, however, has no justiciable right to maintain this action for judicial review. We therefore comply with our judicial duty and affirm the district court's judgment dismissing her claim on the exception of no right of action; the cost of this appeal is assessed to plaintiff-appellant, Dr. Trudy Bond.

AFFIRMED

[4] *See also* Wooley v. State Farm Fire & Cas. Ins. Co., 05-1490, pp. 4-8 (La.App. 1 Cir. 2/10/06), 928 So.2d 618, 621-23.

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

Dr. Trudy Bond, Mr. Michael Reese, Rev. Colin Bossen, Dr. Josephine Setzler, Petitioners, v. Ohio State Board of Psychology, Respondent.	)	Case No. 11 CV 004711 Judge L. Beatty MEMORANDUM CONTRA OF PETITIONERS TO RESPONDENT'S MOTION TO DISMISS FILED MAY 18, 2011
	)	Terry J. Lodge (OSC # 0029271) 316 N. Michigan St., Ste. 520 Toledo, OH 43604-5627 (419) 255-7552 Fax (419) 255-8582 tjlodge50@yahoo.com Counsel for Petitioners

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Dr. Trudy Bond, Mr. Michael Reese, Rev. Colin Bossen, and Dr. Josephine Setzler, Relators herein, by and through counsel, set forth their opposition to the Motion to Dismiss brought by Respondent Ohio State Board of Psychology. For the below reasons, this court should deny the Respondent's Motion to Dismiss.

STATEMENT OF THE CASE AND FACTS

On April 13, 2011, Relators sought a Writ of Mandamus against the Ohio State Board of Psychology because of its failure to carry out its clear duty to enforce the laws and rules of the psychology profession in the State of Ohio with regard to a complaint brought against Dr. Larry James in July 2010. Complaint at ¶¶ 1-2, *Trudy Bond et al. v. Ohio State Board of Psychology*,

Case No. 11 CV 004711 (April 13, 2011) (hereinafter "Compl."). Dr. James is a psychologist licensed in Ohio and Dean of Wright State University's School of Professional Psychology. Compl. at ¶ 1. Relators have here alleged that the Board has provided no evidence that it meaningfully investigated the allegations of grave violations of Ohio laws and rules by Dr. James, compl. at ¶¶ 8-9, which were supported by substantial evidence of his involvement in the torture and exploitation of minors and adults detained at a U.S. military prison at Guantánamo Bay, Cuba. Compl. at ¶¶ 2-5, 37-40. Specifically, the July 2010 complaint contained evidence, including Dr. James's own admissions, indicating that Dr. James had overseen a team of mental health professionals who used their professional skills to identify and exploit prisoners' vulnerabilities for interrogation purposes. Compl. at ¶¶ 30-40. Relators provided documentation that while Dr. James was Chief Psychologist of the intelligence command, men and boys in the prison were threatened with rape and death for themselves and their family members; sexually, culturally, and religiously humiliated; forced naked; deprived of sleep; subjected to sensory deprivation, over-stimulation, and extreme isolation; shackled into painful, stress positions for hours; and physically assaulted. Compl. at ¶ 38. Relators alleged in the July 2010 Complaint that Dr. James and those under his command and authority caused prisoners debilitating physical and psychological harm by advising and training interrogators on how to enhance and exploit detainees' disorientation, shock, and fear, including by evaluating detainee behavior, monitoring interrogations, and suggesting abusive interrogation techniques. Compl. at ¶ 37. In addition to these allegations, Relators' July 2010 complaint to the Board alleged that Dr. James had violated Ohio laws and rules governing confidentiality and misrepresentation, and that those violations could be proven through examination of his own writings and publicly available government

records. Compl. at ¶¶ 3, 30. The July 2010 Complaint was further supported by a report submitted by an expert in psychological ethics. This report concluded that if the allegations contained in the July 2010 Complaint are factually true, the conduct described constituted the most serious and far-reaching ethical breaches that the expert had ever encountered in his career as a psychologist. Compl. at ¶ 50. Relators have here also alleged that the Board has failed to explain its reasons for dismissing the complaint against Dr. James or for declining to hold a hearing in the matter, despite having been presented with ample evidence of egregious ethical violations on the part of a licensee over whom they have jurisdiction. Compl. at ¶¶ 8-9.

The General Assembly created the Board to regulate the profession by upholding and enforcing ethical standards to protect the public from the harmful practice of psychology. Compl. at ¶¶ 18-19. The Board's own statements and guidelines clearly provide that its mission is to protect the public welfare and ensure licensees' compliance with the laws and rules governing the profession in the state, including through licensing oversight. Compl. at ¶¶ 6, 18, 20. The Board is responsible for screening its applicants and monitoring its licensees, including those employed by the military. *See* Compl. at ¶ 22.[1] The Board recognizes the importance of receiving complaints from the public as well as the duty of psychologists to report ethical violations of others in their profession. Compl. ¶ 23.

Four Ohioans, including one psychologist licensed by the Board, brought the July 2010 complaint against Dr. James.[2] Each has a personal stake in ensuring that the Board properly

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[1] *See* 10 U.S.C. § 1094(a)(1), (e)(1)(A) (2006); Department of Defense Directive 6025.13 § 5.2.2.2 (May 4, 2004).

[2] Dr. Bond previously reported evidence of Dr. James's alleged misconduct to the Louisiana State Board of Examiners and to the State Board of Psychology in Ohio in 2008, when Dr. James's application before that Board was pending. The Louisiana Board dismissed on that

enforces its standards. Compl. at ¶¶ 12, 64-68. On September 30, 2010, Relators and their counsel met with the Board with the intent to provide the Board with additional information. The Board did not ask a single question of the Relators or their counsel relevant to the July 2010 complaint. Relators nevertheless presented additional information. Although Relators and their counsel offered to answer questions or address concerns of the Board on several occasions, the offers were declined. Compl. at ¶¶ 53-54. Other Ohio residents shared with the Board their concern about the alleged misconduct and its potential implications for people in Ohio. These residents included licensed psychologists, ethicists, veterans, and faith leaders. Compl. at ¶ 51. On January 26, 2011, seven months after filing their complaint, the Relators received a short letter from the Board, stating obliquely that it would be "unable to proceed to formal action in this matter" and citing no reason for its inaction.

On April 13, 2011, Relators filed a Verified Complaint for Writ of Mandamus and a Memorandum of Law in Support of the Verified Complaint. The Verified Complaint does not seek to compel the Board to issue a specific sanction. Rather, it seeks to compel the Board to perform its duties to monitor psychologists' conduct by undertaking, in this case, an appropriate, good faith investigation and a formal hearing on the evidence. Alternatively, Relators seek to compel a full explanation with detailed reasoning for the basis of its dismissal and actions to date. Respondent filed a Motion to Dismiss on May 18, 2011.

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basis that it had not been timely filed; the Ohio Board dismissed without specifying a reason. Compl. at ¶ 70. The July 2010 complaint is different in kind from those previous complaints and was brought by Dr. Setzler, Rev. Bossen, Mr. Reese, and Dr. Bond. It contains new allegations and documentation, including evidence from government investigations and reports that were unavailable at the time of the earlier filings. It also includes information from a memoir published by Dr. James while his application for an Ohio license was still pending. The memoir includes, among other things, admissions about his exploitation of minors. Compl. at ¶¶ 30, 37-38.

SUMMARY OF ARGUMENT

Respondent's Motion to Dismiss should be denied because Relators have standing and have sufficiently alleged that the Board violated their rights and abrogated its duties to monitor and discipline the behavior of its licensees, which is an abuse of its discretion that merits review by this court. While the Board exercises discretion in some areas of its disciplinary duties, the Board abdicates its clear legal duty to uphold the standards of profession by not enforcing the state's laws and rules in this case without a reasonable, good faith justification. The integrity of the regulatory regime will be undermined if the Board is permitted to stand idle in a case where egregious ethical violations are pled and supported by extensive evidence, including allegations based on admissions by the very psychologist in question. Cases alleging misconduct as serious as this warrant particularly careful attention and review by the Board. When the Board ignores its responsibilities and refuses to act, it is the judiciary's role to compel performance of its legislatively mandated duty. Courts' power to review agency conduct for abuse of discretion exists precisely for these reasons, to ensure that the General Assembly's intent to protect the people of Ohio is respected. Thus, this court should deny the Respondent's Motion to Dismiss and proceed to discovery in this matter.

Relators have two independent bases for standing. First, they have private beneficial interests in this case as individuals whose complaint was arbitrarily dismissed by the Board. Each also has further particularized harms resulting from the Board's failure to carry out its duties as established by the General Assembly, including the duty to monitor the conduct of psychologists. For example, Dr. Trudy Bond has a beneficial interest in protecting the value of her license from the injury caused by the Board's disregard for its responsibility to regulate the

profession and to uphold the integrity of its enforcement mechanisms. Second, Petitioners have standing based on the public action standing doctrine, which is available when the relief requested involves a matter of great public import related to public duties of a government body, and where resulting injury to the public would be serious. Respondent failed to address this well-established doctrine in its Motion to Dismiss, but each element of the public action doctrine is met in the current matter. Although not every case against the Board will implicate a public right, this case, because of the extraordinary gravity and credibility of the allegations presented to the Board, coupled with the Board's stark unwillingness to act or explain the reasons for its dismissal, certainly does.

In addition to meeting the standing requirements, Relators stated a claim for mandamus by alleging that the Board abused its discretion and violated its clear legal duties, thereby violating Relators' corresponding legal rights. Relators have also alleged, and the Board has not disputed, that they lack a plain and adequate remedy in the ordinary course of the law. The Verified Complaint makes well-supported allegations that the Board's actions in handling the complaint against Dr. James were arbitrary and an abuse of discretion. Although Respondent asserts in parts of its Motion to Dismiss that it has boundless discretion in how it responds to evidence of serious misconduct, Respondent's Motion to Dismiss at 8, Respondent does concede that "abuse of discretion" is a proper standard for review in a mandamus action. *Id.* at 11. This review for abuse of discretion is well-established. *See, e.g., State ex rel. Lee v. Montgomery* (2000), 88 Ohio St.3d 233, 235. Truly boundless discretion could give agencies room to thwart the very intent of the General Assembly to create regulatory regimes that protect the public. Respondent's interpretation would render this particular regulatory regime devoid of meaning.

See State ex rel. Selected Properties v. Gottfried (1955), 163 Ohio St. 469, 471; *Thomas v. Mills* (1927), 117 Ohio St. 114, 123. The Board has, at a minimum, a clear legal duty to do more than nothing. Merely perfunctory review of a complaint of this magnitude and gravity is inappropriate where, in a situation such as this, the supporting evidence has been provided to the Board. The Verified Complaint alleges that the Board's short letter stating simply that it could not proceed, sent on the heels of persistent refusals to ask questions or accept offers of witnesses or more information, shows, on its face, that the Board abdicated its core function of monitoring the profession and licensure in this case.

While the Board may dispute, as a factual matter, the question of whether its actions were adequate, the allegations in the complaint, taken as true, indicate that they were not. There is no indication that the Board has investigated the allegations in the complaint in any meaningful way, and it has provided no reasons for declining to proceed to formal action despite admissions by Dr. James of ethical violations, over one thousand pages of supporting evidence, and an expert ethics report concluding that the allegations, if factually true, constituted the most serious and far-reaching ethical breaches the expert had ever encountered in his career as a psychologist. Thus, Relators have shown through their allegations that despite ample evidence supporting a *prima facie* case against Dr. James for serious violations, the Board failed to exercise its duties and responsibilities as mandated by the legislature. To fulfill its duties would require a good faith investigation, a formal hearing, or at a minimum an adequate explanation from the Board as to why inaction is appropriate in this particular case.

This case is ultimately about: whether the Board, an agency tasked with protecting the public from the unsafe practice of psychology can essentially ignore documented, credible

allegations that one of its psychologists used his professional skills to torture and exploit people; whether it can refuse to bring charges against that psychologist, even when he has written a book in which he breaches confidentiality obligations to young patients and then admits to exploiting them; and whether it can do nothing while the psychologist, who has misrepresented his experience in Guantánamo, oversees the education of dozens of future psychologists in this state.

Relators have alleged that the Board cannot refuse to act: that the legislature did not give the Board the right to choose inaction in a case like this, much less to do so without needing to justify its decision in fact or law. Our justice system is not designed to permit the Board to work in secrecy to avoid accountability for its decisions. Just as this Court will rule publicly and provide reasons for its actions, the Board should do the same.

That the conduct at issue took place in Guantánamo surely makes its adjudication politically sensitive, but that in no way lessens the need for the Board to perform its duties. Psychologists employed by the military are not exempt from the laws and rules governing psychologists in this state; on the contrary, the military expressly relies on state licensing boards to control the quality of their licensees' services. The Board has a clear legal duty to enforce its norms fairly, whether the psychologist is working in Guantánamo or an Ohio prison or an Ohio school. Failure to do so in this case is an abdication of its duty to protect the public, and demeans the value of an Ohio psychology license and undermines professional standards in this state.

In light of Relators' having properly alleged and supported their claim for mandamus, this Court should deny the Respondent's Motion to Dismiss and proceed to discovery.

ARGUMENT

I. The Allegations in the Complaint Must be Taken as True and Warrant Denying the Motion to Dismiss and Permitting the Case to Proceed to Discovery

A motion to dismiss for failure to state a claim or for lack of standing can only be granted when it appears "beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *Cleveland Elec. Illum. Co. v. Public Util. Comm.* (1996), 76 Ohio St.3d 521, 524 (citing *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 245). Further, the factual allegations of the complaint as well as all reasonable inferences derived therefrom must be taken as true when addressing a motion to dismiss pursuant to Civ. R. 12(B)(6). *Vail v. The Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 280. In resolving a motion to dismiss for failure to state a claim, a trial court may look only to the complaint to determine whether the allegations are legally sufficient to state a claim. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548. A trial court may not use the motion to summarily review the merits of the cause of action. *State ex. rel. Martinelli v. Corrigan* (1994), 68 Ohio St.3d 362, 363.

Respondent recognizes that this is the correct standard, recognizing that "the court . . . must construe all material allegations in the petition and all reasonable inferences drawn from them in favor of the party against whom the motion is made." Respondent's Motion to Dismiss at 11 (citing *Perez v. Cleveland* (1993), 66 Ohio St.3d 397 and other cases). While Respondent may argue that its response to the evidence presented was adequate, the allegations of Board inaction and abdication of its responsibility to carefully probe the serious allegations and initiate formal action suffice to overcome the Motion to Dismiss in an action for mandamus. The complaint alleges with specificity Relators' clear legal rights, as well as the Board's clear legal duties and its abuse of discretion. Relators also allege specific harms they experienced and thus

have standing. They also state clearly, and Respondent does not dispute, the want of a plain or adequate alternative remedy at law. This Court should therefore deny the Motion to Dismiss and allow the matter to proceed to discovery.

II. Relators Have Both Private and Public Standing to Seek Enforcement of the Board's Legal Duties

Relators have two independent grounds for standing in this case. First, they have personal, beneficial interests in the matter because they have been injured by the Board's abdication of its legal duties and abuse of discretion. Their complaint was arbitrarily dismissed by the Board in violation of their right to have their complaint meaningfully reviewed. Moreover, as a psychologist, mental health advocate, reverend, and disabled veteran, each has real interests in the Board's sanctioning of Ohio psychologists who commit grave ethical breaches. Second, Relators have standing based on the public action standing doctrine because the case involves an issue of great importance and public interest; gross dereliction of duty by the Board in fulfilling its core function to protect the public affects the citizenry as a whole; and a failure to remedy this wrong could lead to serious public injury. Respondents' Motion to Dismiss fails to mention this established and relevant standing doctrine, which is applicable in this matter, which significantly implicates public interests, duties, and rights. Relators' Verified Complaint and supporting legal memorandum alleged facts that established their standing to seek enforcement through mandamus of the Board's duties to protect the public and to enforce compliance with professional standards. *See* Compl. at ¶¶ 11-12, 18, 20, 27-29, 51, 61-68, 71, 73, 78; Memorandum of Law in Support of Verified Complaint at 3.

A. Relators Have a Beneficial Interest in the Outcome of This Case

To establish standing for private litigants seeking mandamus, Relators must show that they have a "beneficial interest" in the requested act. *State ex rel. Sinay v. Sodders* (1997), 80 Ohio St.3d 224, 226, 1997-Ohio-344 (citing R.C. 2731.02). A real party in interest has a personal stake in the outcome of the case, which is more than a mere interest in the action. *State ex rel. Village of Botkins v. Laws* (1994), 69 Ohio St. 3d 383, 387, 1994-Ohio-518; *State ex rel. Skilton v. Miller* (1955), 128 N.E.2d 47, 50 (distinguishing private interest from one shared with the general public); *see also State ex rel. Ohio Academy of Trial Lawyers et al. v. Sheward* (1999), 86 Ohio St.3d 451, 469-70, 715 N.E.2d 1062. The policy underlying the standing doctrine is to ensure that courts operate within their appropriate role in the democratic system of government. *See Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (holding that courts must decide "actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect"); *Sheward*, 86 Ohio St.3d at 469 (explaining that establishing a personal stake is required to "ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution").

The matter before this Court is indisputably an actual controversy between two adversaries. On the one side, Relators allege an abuse of discretion by the Board regarding a complaint to that Board supported by *prima facie* evidence of grave ethical misconduct by an Ohio psychologist. On the other, the Board defends its actions, as well as its unbounded discretion and powers to dismiss a complaint, for any reason or for no reason at all. Relators have also alleged specific and concrete injuries caused by the actions of the Board, which are capable of redress by this Court. *See Bourke v. Carnahan* (Ohio Ct.App 2005), 163 Ohio

App.3d 818, 824, 840 N.E.2d 1101 at ¶ 10 (explaining that standing requires injury in fact connected to disputed conduct which is likely to be redressed by decision).[3]

Relators' complaint demonstrated the particularized way in which each Relator has been individually injured by the Board's actions. Compl. ¶¶ 12, 65-68. Dr. Bond has a property interest in her Ohio psychology license because she relies on its validity and legitimacy for her livelihood. Her license is directly affected by the actions of the body that monitors it and that of other psychologists. An important goal of professional licensure is to protect the public from psychologists who have crossed ethical boundaries and caused others serious harm.

The Board's decision to arbitrarily dismiss the complaint against Dr. James and to continue to license him, without explanation and in apparent disregard for the well-substantiated allegations of serious misconduct, undermines the credibility of the Board's licensing practices and the value of Dr. Bond's psychology license. Reasonable people might understand the Board's inaction to indicate that the Board believes Dr. James's conduct does not violate the laws and rules of the profession in this state, and/or does not render a psychologist unfit to practice in Ohio. Under either interpretation, the Board has compromised its integrity as a monitoring and enforcement agency and compromised the value of Dr. Bond's license. Trust is the cornerstone of the psychology profession. At a minimum, Dr. Bond needs and legitimately expects potential and actual patients and clients to view her Ohio psychology license as a certification that she will care for vulnerable people and not exploit them. The Board's failure to

[3] General allegations of injury are sufficient to withstand a motion to dismiss. *Bourke v. Carnahan*, 163 Ohio App.3d at 823 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss, the court will presume that general allegations embrace those specific facts that are necessary to support a claim.").

investigate in good faith or to hold a hearing on Dr. James's conduct devalues Dr. Bond's own Ohio psychology license, as well as her ability to earn the trust and respect of her patients.[4]

In addition, Ohio laws and rules not only specifically grant Dr. Bond the authority to file this complaint; they oblige her to do so, recognizing that as a psychologist, she is particularly well-equipped to recognize misconduct. This duty reinforces the direct and concrete harm that she suffered when Relators' complaint against Dr. James was arbitrarily dismissed.[5]

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[4] Dr. Bond's reliance on the Ohio Board for the legitimacy of her license is one of the many factors that clearly distinguish this case from *Bond v. Louisiana State Board of Examiners*. *See* Respondent's Motion to Dismiss at 5-6 (inaccurately describing *Bond v. LSBEP* as "essentially the exact same case"). Unlike in Louisiana, the public body whose duty Dr. Bond seeks to compel in this case is her own professional board, the very same board that not only authorizes, but *requires* Dr. Bond to report professional misconduct by other licensees. Ohio Adm. Code 4732-17-01(J)(4). Furthermore, while Dr. James held an active license in Louisiana at the time, he was not practicing psychology in that state. Rather, he was and still is, acting as a psychologist and overseeing a professional psychology school here in Ohio, where Dr. Bond also resides and practices. Respondent also ignores that the Louisiana Court of Appeals decision is based primarily on a reading of the Louisiana Administrative Procedure Act, a statute that is not relevant to the question before this Court. Nor does, to Relators' knowledge, Louisiana have a public action doctrine of standing similar to the one long recognized by Ohio courts.

[5] Respondent fails to address the other Relators, but each also has standing based on particularized injuries because the Board has compromised the integrity of the system that regulates the profession of psychology in this state. *See* Compl. at ¶¶ 66-68. Dr. Setzler works as an advocate for her brother and others who suffer mental illness in Ohio, including those held in correctional institutions. If the Board is permitted to avoid serious examination of this complaint, or at least to justify its decision, Ohio correctional authorities are free to use the Board's decision to pressure psychologists to disregard their ethical obligations when dealing with prisoners and others for whom Dr. Setzler advocates. Rev. Bossen's duties as minister to his congregation include referring vulnerable congregants to Ohio-licensed psychologists when they need mental health treatment. Without a clear signal that the Board will protect Ohioans from psychologists who use their professional skills and authority to exploit those in their care, Rev. Bossen's ability to perform his duty and refer those in need of psychological assistance is impaired. Finally, Mr. Reese, a disabled veteran who suffers from chronic illnesses, receives regular treatment at Ohio Veteran Affairs (VA) hospitals. He is more likely than most in the general population to receive care from active-duty and retired military health professionals. If the Board's failure to enforce its laws and rules in this case is based on the fact that the violations occurred while Dr. James was employed by the military, Mr. Reese cannot rely on their license as certification that they are practicing ethically and subject to meaningful licensure monitoring.

All Relators have a personal stake in the outcome of this action that is clearly distinguishable from that of the public at large. Although others in Ohio share Relators' interest in ensuring that the Board prevents torturers from treating patients in this State, see Compl. at ¶ 51, Relators are the only individuals who filed the complaint at issue. Through the Board's arbitrary dismissal, Relators suffered a specific injury different in degree and kind than that of other Ohio citizens. Their legal right to bring a complaint was rendered meaningless by the Board's failure to adequately investigate or adjudicate their claims. It is this special interest that provides Relators with additional grounds for standing to bring an action to compel the Board to perform, in this case, its core function of regulating the profession to protect the public. The Board's actions to date indicate that it has no intention of enforcing its rules against Dr. James, leaving Relators no other recourse than to seek redress in this Court through a mandamus action. The Board's failure to enforce its own rules despite the extraordinary gravity of the violations alleged and the extraordinary amount of credible evidence offered in support is so egregious that, without redress, it risks seriously compromising the integrity of the regulatory system governing the profession of psychology in Ohio. If this Court compels the Board to meaningfully investigate and adjudicate the claims against Dr. James or provide an explanation for its decisions, each Relator will benefit in a greater degree and manner distinct from the general population.

B. The "Public-Right" or "Public-Action" Doctrine of Standing Also Applies Here and Provides an Independent Ground for Standing in This Case

Relators have a second independent basis for standing in this matter based on the "public action" doctrine. For more than one hundred years, Ohio courts have explicitly recognized that

there are circumstances where the lack of standing based on a private right does not foreclose litigation. Courts are to apply the "public action rule of standing" in circumstances "where the alleged wrong affects the citizenry as a whole, involves issues of great importance and interest to the public at large, and the public injury by its refusal would be serious." *Bowers v. Ohio State Dental Bd.* (Ohio App. 10 Dist., 2001), 142 Ohio App.3d 376, 381. Respondents fail to mention even once this well-established doctrine in their Motion to Dismiss. The omission is notable as this matter implicates each prong of the public action standing test. The Board abdicated its core functions and failed to explain its reason for inaction, thereby abandoning its public duty to uphold the integrity of the psychology profession and monitor licensing as directed by the General Assembly. The Board has a clear duty to enforce professional psychological norms in the public interest of receiving safe and proper treatment. Not reviewing the abuse of discretion by the Board would threaten to undermine the regulatory system, thereby causing a serious public injury. The serious injury of an important public interest is what defines this standing doctrine, and thus on this independent ground, Relators have standing to bring this writ of mandamus.

1. The Public Action Standing Doctrine Confers Standing Where, As Here, the Object of Mandamus Is to Procure the Enforcement of A Public Duty

Under the "public action" theory of standing, "'where the question is one of public right and the object of the mandamus is to procure the enforcement of public duty, the people are regarded as the real party and the relator need not show that he has any * * * special interest in the result, since it is sufficient that he is interested as a citizen or taxpayer in having the laws executed and the duty in question enforced.'" *State ex rel. Nimon v. Springdale* (1966), 6 Ohio St.2d 1, 4, 215 N.E.2d 592, 595 (quoting 35 Ohio Jurisprudence 2d 426, Section 141). The

Supreme Court affirmed this principle in *Sheward*, in a decision that struck down Ohio's tort reform statute. *Sheward*, 86 Ohio St.3d at 471-72.

In *Sheward*, the State asserted that the Ohio Academy of Trial Lawyers, as plaintiff, lacked standing based on a private right. *Id.* at 473-74. However, it did find standing based on a "public right." *Id.* at 474-75. Given the public interest aspects of the case, the Court noted that States have unique powers to make their own standing determinations on matters of state law:

> [T]he federal decisions in this area are not binding upon this court, and we are free to dispense with the requirement for injury where the public interest so demands. "Unlike the federal courts, state courts are not bound by constitutional strictures on standing; with state courts standing is a self-imposed rule of restraint. State courts need not become enmeshed in the federal complexities and technicalities involving standing and are free to reject procedural frustrations in favor of just and expeditious determination on the ultimate merits."

Sheward at 470 (quoting 59 American Jurisprudence 2d (1987) 415, Parties, Section 30) (footnote omitted).

In *Sheward*, the Court carefully traced the long-standing history of the public action standing doctrine: courts have "long taken the position that when the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no rights or obligations peculiar to named parties." *Sheward* at 471. The Court cited a long line of decisions dating to 1878 to support the conclusion that there are cases where a plaintiff "may maintain a proper action predicated on his citizenship relation to such public right." *Id.* at 473 (quoting from *State ex rel. Newell v. Brown* (1954), 162 Ohio St. 147, 150-151, 122 N.E.2d 105, 107); *see also State v. Brown* (1882), 38 Ohio St. 344, syll. ¶ 1 (mandamus to compel sheriff to give notice of judicial election may be brought by any citizen pursuant to

interest in administration of justice); *State ex rel. Meyer v. Henderson* (1883), 38 Ohio St. 644, 648-649 ("sufficient to show that [relator] is a citizen, and, as such, interested in the execution of the laws" for writ of mandamus to compel city clerk to advertise for bids on public works); *State ex rel. Trauger v. Nash* (1902), 66 Ohio St. 612, syll. ¶ 1, 615, 64 N.E. 558 (mandamus by private citizen to compel Governor to appoint Lieutenant Governor); *State ex rel. Cater v. N. Olmsted* (1994), 69 Ohio St.3d 315, 322-323, 631 N.E.2d 1048, 1054-55 (mandamus by taxpayer to enforce public right to services of improperly removed public official).

2. The Public Action Standing Doctrine Applies to This Case

This case implicates the public action standing doctrine because the alleged wrong involves issues of great importance and interest to the public at large, affects the citizenry as a whole, and the public injury caused by its refusal would be serious. In the instant matter, the governmental system is threatened because Respondent (an administrative body with quasi-judicial powers) has failed to carry out its core agency functions as established by the General Assembly. The Board cannot, through its inaction, thwart the General Assembly's intent to create a regulatory scheme to protect the public. To do so would be tantamount to the Board overruling the wishes of the branch of government tasked with creating a legislative framework.

The application of the public action standing test in *Bowers* and *Sheward* demonstrates that, when a core governmental function is at stake, a public right is implicated and thus standing exists. In *Bowers*, two dentists attempted to compel their regulatory board to specify through its regulations (rather than through its policy statements) which entrance examination tests were required for Ohio licensure. *Bowers* at 381. The Franklin County Court of Appeals declined to apply the "public-action" standing doctrine in that case because "the duty sought to be compelled

[was] not in any meaningful sense for the benefit of the public as a whole," was "not of great importance and interest to the general public," and the alleged injury to the public was not deemed "serious." *Id.* The court made clear that the board's obligation to create this specific rule "designating which [specific] exams prospective dentists must take" did not rise to the level of a public duty, and thus no core governmental function was implicated. *Id.*

In contrast, *Sheward* dealt with actions by the General Assembly that threatened the judiciary branches' traditional judicial review functions. *See Sheward* at 474-75; *see also* Part II.B.1 (discussing historic line of public action decisions). The *Sheward* Court found standing because a public interest existed where the General Assembly's tort reform statute would overrule several important procedural determinations the courts had made in recent years. The Court held that "the people's interest in keeping the judicial power of the state in those in whom they vested it" clearly rose to the level of a public right. *Sheward* at 474 (finding it "difficult to imagine a right more public in nature than one whose usurpation has been described as the very definition of tyranny"). Critically, the Court noted that if the General Assembly's action were not reviewable, "the whole power of the government would at once become absorbed and taken into itself by the legislature." *Id.* (quoting *Bartlett v. State* (1905), 73 Ohio St. 54, 58, 75 N.E. 939, 941).

This mandamus request implicates similarly important public interests on a number of fronts. First, the complaint filed before the Board contained substantial *prima facie* evidence of numerous grave ethical violations, specifically of involvement in the torture and psychological exploitation of people, including children and adolescents, in Dr. James's custody and care. The weight of the evidence and the seriousness of the harm are of great importance and interest to the

people of this State. The Board's own statements and guidelines acknowledge its duty to protect the public from the unsafe practice of psychology. Yet, here, the Board has failed to act on credible allegations that a licensee intentionally inflicted physical and psychological harm—conduct that clearly implicates public health and safety. The existence of and reliance by the Board on citizen complaints further demonstrates that the citizenry have an important public right and stake in this institution and the monitoring of licenses and misconduct by psychology professionals.

Second, the public interest warrants judicial review here because of the Board's abdication of its public duty to enforce compliance with the norms of the profession, an abdication that affects the citizenry of this State as a whole. This case involves a question of great public consequence: whether a psychologist who allegedly engaged in and promoted torture and other forms of exploitation, breached confidentiality, and then intentionally misled the public and the Board as to his actions, should be permitted to treat patients in Ohio. Finally, the public injury caused by the Board's refusal to act would be serious. When there is no indication that the Board investigated the matter, and when the Board refuses to explain its decision not to hold a hearing, despite significant and credible evidence, the Board has derogated its core responsibilities as established by the legislature. To allow the Board to ignore its delegated responsibilities compromises the very integrity of the governmental system in which an administrative agency must carry out its duties as outlined by the legislature. Furthermore, in asserting boundless discretion beyond the review of this Court, the Board would usurp the well-established power of the judiciary to provide a safeguard against abuse of discretion. Indeed, the Relators' particularized harms discussed above illustrate the diversity of interests and injuries

that citizens of Ohio experience when the integrity of the monitoring and licensure system is undermined severely as in this case.

Ultimately, like in *Sheward*, the workings of government are at stake here, thus making public action standing appropriate and warranting judicial review. Not every case against the Board will implicate the public right established in *Sheward*. This case, however, does because of the extraordinary level of gravity and credibility of the allegations presented to the Board, coupled with the Board's complete unwillingness to act or even explain its dismissal.

III. Relators State a Claim for Mandamus

Relators meet all the elements necessary to state a claim for a writ of mandamus. First, Relators have a clear legal right to file a disciplinary complaint against Dr. James and have it meaningfully considered. Second, the Board has a clear legal duty to enforce compliance with the ethical standards of the profession by meaningfully investigating serious allegations of abuse and holding evidentiary hearings when *prima facie* violations have taken place, such as here. At a minimum, the Board has a duty to communicate the basis for its decision not to proceed. By refusing to investigate Relators' well-substantiated complaint of multiple and grave violations of the state's professional norms or explain its action, the Board abused its discretion and abrogated its duties and Relators' corresponding rights. The lack of a plain and adequate ordinary remedy at law is undisputed, and thus, mandamus in this Court is Relators' only legal recourse.

A. The Board Has Clear Legal Duties to Enforce Licensees' Compliance with the Laws and Rules Governing the Profession of Psychology in Ohio

The Board has a clear legal duty to ensure that Ohio-licensed psychologists comply with professional norms by reviewing and acting on credible allegations of serious violations and by communicating the basis for its actions. Though the Board's various duties are mandatory, some

aspects of them involve the exercise of discretion. *See* Relators' Memorandum of Law, Parts I and II. The fact that the Board enjoys some discretion in how to exercise some of these functions, however, does not vitiate its legal duties, nor grant the Board freedom to do nothing at all. The Board must exercise its discretion within the bounds of the laws and rules of the state, and always toward its fundamental duty to protect the public.

The Board's enforcement and protection duties derive from the Board's fundamental duty to protect the public from the unsafe practice of psychology. *See In re Barnes* (1986), 31 Ohio App.3d 201, 206; 510 N.E.2d 392, 398 (noting, in discussing State Board of Psychology, that "[o]ne of the obvious purposes of the regulation of professions is to prevent damage * * * before any person in the general public is damaged"); 2004 Ohio Op. Att'y. Gen. No. 20, at 7 (concluding, in opinion issued to State Board of Psychology, that "the purpose of statutory licensing schemes * * * [is] protection of the public and those whom practitioners serve"). The Board must implement its overarching public duty through its core function of regulating the profession. *Id.* at 8 ("[the Board's] ability to investigate and discipline a licensee * * * protects the public safety and welfare, and prevents future harm to those who might seek out the licensee's professional services"). The Board's regulatory duties include setting professional standards, ensuring that applicants and licensees meet those standards, and—when these are violated—enforcing the standards through disciplinary measures. For example, the Board must admit psychologists into licensure, but only those who meet defined professional standards. *See, e.g.* R.C. 4732.10(A) ("[the Board] shall appoint an entrance examiner who shall determine the sufficiency of an applicant's qualifications for admission to the appropriate examination"); R.C. 4732.091(B) ("[the Board] shall not grant a license to an applicant for an initial license unless the

applicant complies with [R.C. 4776.01-4776.04]."); R.C. 4732.10(B)(2) ("[r]equirement for admission to examination for a psychologist license shall be that the applicant * * * is of good moral character"). Similarly, the Board must discipline psychologists for misconduct as defined by statutory and regulatory norms. *See* Ohio Adm. Code 4732-19-01 ("[l]icensed psychologists * * * governed by [R.C. 4732] and by these rules shall be disciplined in accordance with [R.C. 4732 and R.C. 119] for violation of these rules.").

These enforcement and protection duties necessarily encompass additional duties to undertake good faith efforts to investigate well-substantiated reports of misconduct and, where there is evidence of a likely violation, to take action against the licensees by proceeding to a hearing or consent agreement. The Board acknowledges that it is expected to fulfill its "primary mission of providing protections for the public and for consumers of psychological services, through examination and licensing, regulatory compliance monitoring, investigation of complaints regarding the professional conduct Ohio's Psychologists, and levying of sanctions for violations." *See* State Psych. Bd, Guidelines for Disciplinary Actions and Corrective Orders, at 2. For example, the Board cannot meet its obligation to discipline without information on professional misconduct. Thus, it has a duty to create mechanisms whereby it receives such information. It has done so here by imposing on Ohio psychologists a legal duty to report violations, see Ohio Adm. Code 4732-17-01(J)(4), and by affording professionals and all concerned citizens a legal right to file misconduct complaints. *See, e.g.*, ORC 4732.171 (assuming existence of complaint mechanism); State Bd. of Psychology, Regulatory Compliance Handbook, at ¶1 (explaining that "[a]n initial complaint may be received * * * from another professional (psychologist, physician, lawyer, etc.) or from a concerned citizen")). When the

Board receives complaints that meet the threshold requirements specified by the Board, the Board has a duty to evaluate and investigate the evidence presented. *See* State Bd. of Psychology, Regulatory Compliance Handbook, at ¶¶ 1-3, 6; State Bd of Psych., Guidelines for Disciplinary Actions, *supra*, at 2; 2004 Ohio Atty. Gen. Ops. No. 20, *supra*, at 8. When the evidence indicates that a serious violation is likely to have occurred, the Board has a presumptive duty to take formal action, in accordance with its duty to enforce professional standards in order to protect the public. *See* State Bd. of Psychology, Regulatory Compliance Handbook, at ¶ 7.

The Board would have this Court rule that the General Assembly, by its usage of the term "may" in some provisions of the Revised Code, has granted it the discretion to essentially ignore substantial, credible evidence of serious ethical violations that implicate public safety; to refuse action for any reason, regardless of legitimacy or even legality; and to keep such reasons secret, protected from the scrutiny not just of the complainant, the victim, and the general public, but also of the courts. By stating that the Board "may issue a reprimand, or suspend or revoke the license of any licensed psychologist" on any of the enumerated grounds, the General Assembly cannot mean that the Board has discretion to simply decide to stop reviewing and acting on evidence of violations by its licensees altogether. *See* R.C. 4732.17(A). Such a reading would be contrary to the Board's recognized duty to protect the public safety and welfare. Yet, that is precisely Respondent's position. *See* Respondent's Motion to Dismiss at 8 ("R.C. 4732.06 *allows* the Psychology Board to establish procedures to conduct investigations and hearings, *if necessary*.") (emphasis added). Nor does the law afford Respondent the discretion to set up a process that is by design or application arbitrary in its enforcement. The Board itself has acknowledged this. *See, e.g.*, State Bd. of Psych., Guidelines for Disciplinary Actions and

Corrective Orders, *supra*, at 2 (acknowledging that Board's obligation to public and licensees includes providing for "optimal levels of consistency and fairness in the determination of sanctions for a given violation"). Indeed, courts have recognized that a regulatory scheme cannot be read to endow an agency with limitless discretion. *See Gottfried*, 163 Ohio St. at 471; *Mills*, 117 Ohio St. at 123. The more reasonable interpretation of this discretionary language is that the Board's mandatory legal duties to enforce compliance and protect the public include a duty to undertake good faith disciplinary efforts. Such efforts, like all public duties that involve an element of discretion, are subject to an abuse of discretion review where there is evidence that the Board has acted in an arbitrary, unreasonable, or unconscionable manner. Relators have presented such evidence here.

B. Relators Alleged and Adequately Supported a Showing of Abuse of Discretion

The performance of legal duties that involve the exercise of discretion can be reviewed for abuse of discretion. Though Respondent implicitly asserts that mandamus cannot issue when a duty involves discretion, it ultimately concedes that "abuse of discretion" is the standard of review in mandamus cases such as this one. Resp. Br. at 11 (citing *State ex rel. Lee v. Montgomery* (2000), 88 Ohio St.3d 233, 235, 2000-Ohio-316). The case law clearly supports the position that review of performance of legal duties for abuse of discretion is appropriate. *See, e.g.*, *Lee*, 88 Ohio St.3d at 235; *State ex rel. Village of Botkins v. Laws* (1994), 69 Ohio St.3d 383, 386, 1994-Ohio-518; *State ex rel. Browning v. Fayette Cty. Commrs.* (App.1993), 14 Ohio Law Abs 529, 529 ("It is a principle of law thoroughly established not only in this state but in other jurisdictions that discretionary acts will be controlled when the discretion is abused.").

Without such court review, the Board would be permitted to arbitrarily, unreasonably, or unconscionably dismiss cases, including those involving allegations of serious violations supported by substantial evidence, like the case against Dr. James. The Board asserts the right to take no action at all—that investigations and hearings are always optional. Resp. Br. at 8. Such an interpretation would render the actions of the Board beyond review in all cases, and in doing so, render the statute and rules meaningless. *See Gottfried*, 163 Ohio St. at 471; *Mills*, 117 Ohio St. at 122-23. This cannot be what the General Assembly intended in creating the legislative framework. This interpretation is also contrary to the case law, which clearly establishes that performance of legal duties, even those involving broad discretion, can be reviewed for abuse. Finally, dismissal on a Motion to Dismiss is particularly inappropriate in this case given the fact-intensive nature of assessing abuse of discretion. *See, e.g., Gosney v. Board of Elections* (March 30, 1989), Seventh App. Dist. No. 88-C-54, 1989 Ohio App. Lexis at 2 (indicating existence of record about agency actions that allowed assessment of whether discretion was reasonable or abused); *Talwar*, 104 Ohio St.3d 290, 292, 2004-Ohio-6410 (basing assessment of Medical Board's actions on board's stated reasons for not taking further action, which were contained in the record).

Respondent relies substantially on cases involving prosecutorial discretion or the discretion of other professional boards to assert that Respondent's actions are not reviewable on the merits. Resp. Br. at 9-12. However, the case law, including decisions relied on by the Respondent, indicates clearly that even when prosecutors and boards perform duties that involve elements of discretion, their actions are still reviewable for abuse of that discretion. In *State ex rel. Murr v. Meyer*, for example, the Supreme Court reviewed an appeals court decision to deny

mandamus because the decision to prosecute was discretionary. Although the Court affirmed the lower court's decision to deny the writ, it began its decision by unequivocally acknowledging that "doubtless, a prosecuting attorney's discretion concerning prosecution is subject to some limits." The Court then proceeded to examine whether the prosecutor in that case had abused his discretion. *State ex rel. Murr v. Meyer* (1987), 34 Ohio St.3d 46, 46. The Court upheld this line of reasoning again a decade later, when it reviewed police and prosecutorial conduct for abuse of discretion. *See State ex rel. Master v. City of Cleveland*, 75 Ohio St.3d 23, 27 ("[p]rosecuting attorney will not be compelled to prosecute a complaint *except when failure to prosecute constitutes an abuse of discretion*") (emphasis added).[6] Other boards' actions merit the same scrutiny. *See, e.g., Talwar*, 104 Ohio St.3d at 292 (reviewing the Medical Board's conduct for abuse of discretion as part of the determination of whether mandamus was proper). Thus, the law is clear that even when prosecutors and boards are granted discretion on when to bring charges, that discretion is not limitless.

When a court finds an abuse of discretion by a public official or agency, it can issue a writ of mandamus to "compel performance" of the public body's official duties, even when those duties involve the exercise of discretion. *See, e.g., Village of Botkins*, 69 Ohio St. at 389; *Browning*, 14 Ohio Law Abs at 529. Courts have distinguished between controlling discretionary outcomes and compelling an agency to exercise its discretion within the bounds of

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[6] Respondent's reliance on lower court cases in other districts to posit a principle that discretion is unreviewable is misplaced, unpersuasive, and out of step with Supreme Court precedent. *See Gosney*, Seventh App. Dist. No. 88-C-54 (concluding, without citing case law for support, that "where the performance of a duty is not mandatory but is discretionary, a writ of mandamus will not issue"); *Pierce v. Court of Common Pleas* (8th Dist. 1992), 1992 Ohio App. Lexis 2015 *6 (citing *Meyer* in determining that "the decision to prosecute is clearly discretionary" but fundamentally misreading it by concluding that "by virtue of its discretion," the decision "cannot impose a clear legal duty on the part of the county prosecutor to perform the requested act").

the law. *See, e.g.*, *Village of Botkins*, 69 Ohio St. at 387; *Browning*, 14 Ohio Law Abs at 529. In *Botkins*, a case involving payment of services to prosecutors, the Court held:

> [R]elator is entitled to a limited writ of mandamus to compel respondents to exercise their discretion pursuant to R.C. 1901.34(C) in determining a reasonable amount of compensation due Evans for the additional services already rendered, which claims he has assigned to relator. In exercising their discretion, respondents are under no duty to award all sums requested, *i.e.*, they are not bound by the amount that relator determined was proper in paying its village solicitor. Nevertheless, their decision should be based upon the evidence submitted to relator concerning the reasonable value of these services.

Botkins, 14 Ohio Law Abs at 389. *Botkins* relied on *Browning* to illustrate the principle that the Court could compel performance. *Id.* at 386 (discussing *Browning* and stating writ would issue "where the county commissioners abused their discretion in allowing only one dollar to a city solicitor for his services in state cases before the municipal court pursuant to G. C. 4307. It determined that the commissioners had abused their discretion where they had 'no knowledge as to the nature or extent of the work and * * * no investigation whatever [was made] as to what the services would reasonably be worth.'"). Thus, while courts may hesitate to dictate to agencies specific outcomes or actions, or how precisely to use their discretion, courts can and will order agencies to compel performance of a legal duty that does involve discretion. *See, e.g.*, *Village of Botkins*, 69 Ohio St. at 387, 389; *see also Lee*, 88 Ohio St. 3d at 235.

Here, despite Respondent's attempt to frame otherwise, Relators have asked the Court to compel the board to perform its mandatory, core legal duties of enforcement and discipline, and to exercise its discretion legitimately within the bounds of the law. As relief, Relators do not ask the Court to specifically control the Board's discretion by forcing a particular sanction from the Board. Rather, Relators ask that the Board perform its investigatory and disciplinary duties with

regard to their complaint, and that it do so reasonably, fairly, in good faith and in accordance with its mandate to protect the safety and welfare of the people of Ohio. The Board has not adequately examined, investigated, or acted on the evidence showing that its licensee had engaged in gross misconduct. Nor has the Board offered evidence that the information provided to it was deficient in any way. *See* Compl. at ¶¶ 2-10, 29-71; Memorandum of Law, Parts I-III. The Board has refused to offer, even to this Court, any explanation for its inaction. Compl. ¶¶ 8-9. These facts as alleged in the Verified Complaint suffice to state a claim that the Board, on its face, has not met its legal obligations. Thus, this Court, like others, has the authority to compel performance of the Board's legal obligations even though they do include elements of discretion.

In addition, dismissal at this stage would be especially premature given the factual inquiry needed to determine if the Board has abused its discretion. The cases on which Respondent relies, as well as others demonstrate that judicial inquiries into abuse of discretion are fact-intensive and require more fully developed records of the officials' actions. *See, e.g.*, *Botkins* at 383-385, 388-389; *State ex rel. Squire v. Taft* (1994), 69 Ohio St.3d 365, 632 N.E.2d 883; *Talwar v. State Medical Board of Ohio* (10th Dist. 2004) 156 Ohio App.3d 485, 488-89, 204-Ohio-1301 (citing that record indicated that Medical Board had investigated and issued report on its findings); *Gosney*, Seventh App. Dist. No. 88-C-54 at 2 (citing affidavit provided by Respondent prosecutor detailing steps of his investigation and the absence of any rebutting affidavits or documentation from Relator). In contrast to both *Gosney* and *Talwar*, the record here is void of any evidence that the Respondent carried out its duties in good faith through investigation or otherwise.[7] Additionally, Relators, unlike Gosney, have supplied the Court with

[7] Respondent's persistent silence during the complaint process, despite Relators' repeated

evidence of inaction as well as substantial supporting evidence of serious ethical violations. This evidence includes admissions of ethical violations by Dr. James, as well as a vast number of supporting documents, including a report from an expert concluding that the alleged conduct, if proven true, would constitute the worst case of professional misconduct he had encountered in his career. *See* Compl. at ¶50. These facts state a claim and thus this Court should deny the Motion to Dismiss.

CONCLUSION

Relators have standing and have sufficiently stated a claim involving abuse of discretion by the Board of its legal duties to enforce compliance of the Ohio ethical code. The Board's ongoing inaction coupled with its persistent reluctance to disclose the reasons for its dismissal should be reviewed by this Court. Thus, this Court should deny Respondent's motion to dismiss.

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inquiries as to whether they might resolve any doubts or concerns on the part of the Board, coupled with the Board's continued refusal to disclose their reasons for dismissal, even to the Court as part of this action, suggests it has not operated in good faith.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra of Petitioners to Respondent's Motion to Dismiss Filed May 18, 2011" was sent by me via regular U.S. mail, postage prepaid this 20th day of July, 2011 to Roger F. Carroll, Esq., Assistant Attorney-General, 30 East Broad St., 26th floor, Columbus, OH 43215-3400.

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Terry J. Lodge
Co-Counsel for Petitioners

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

DR. TRUDY BOND, et. al. Relators/Plaintiffs, vs. OHIO STATE BOARD OF PSYCHOLOGY Respondent/Defendant.	Case Number: 11CV-04-4711 Judge L. Beatty

REPLY BRIEF OF OHIO STATE BOARD OF PSYCHOLOGY

I. INTRODUCTION

After following its procedures the Ohio Psychology Board ("Board") appropriately determined that there was no basis to initiate formal disciplinary action against Dr. Larry James. Disappointed with this decision, relators took the unprecedented step of requesting this Court to intervene and second guess the Board's decision. However, relators face insurmountable obstacles to this effort. As a threshold matter none of the relators have standing to pursue this matter. They have failed to allege and they cannot articulate how they have suffered or will suffer a direct or concrete injury as a result of the Board's decision. Instead they can only claim that as a psychologist, minister, a mental health advocate or a disabled veteran they have a general interest in the Board's decision. This is a fatal flaw to their standing argument.

As an alternative theory relators claim that they should be allowed to proceed with this lawsuit under the 'public action' exception articulated by the court in *State ex. rel. Ohio Academy of Trial Lawyers v. Sheward* (1998), 86 Ohio St. 3d 451. Such an argument is also not persuasive. The *Sheward* decision applied only to a narrow category of rare and extraordinary cases which involve a constitutional challenge to a statute. Id at 503-504. This case does not

involve such a challenge. Nor is this a rare and extraordinary case impacting most of the state. Instead it involves the Board simply performing its normal and routine duties and obligations. Having failed to establish standing, the case must be dismissed.

Notwithstanding the foregoing, relators' claim for mandamus must also be dismissed for failure to state a claim. Relators were unable to cite one case in which a court ordered a regulatory board to initiate disciplinary proceedings against a licensee or to explain in detail the reasons for not going forward with formal action. In fact in a nearly identical case the Supreme Court ruled that it was within the Medical Board's purview to decide on whether to proceed with disciplinary action, because it has the discretion to allocate its resources in a manner that will best protect patients. *State ex. rel. Talwar v. State Med. Bd of Ohio* (2004), 104 Ohio St. 3d 290, 2004-Ohio 6410 ¶ 11. Accordingly based upon the holding in *Talwar*, this action must be dismissed.

II. RELATORS DO NOT HAVE STANDING TO PURSUE THIS ACTION

Relators mistakenly claim that they have standing to pursue this action on two grounds. 1) beneficial interest; and/or 2) the public right or public action doctrine. In each instance relators failed to cite any cases which support their position. By contrast the applicable case law clearly holds that relators do not meet the requirements of standing under either theory. Therefore the case should be dismissed.

A. Relators do not have a personal stake or beneficial interest or have suffered a direct or concrete injury different from the general public.

In their brief relators acknowledge, as they must, that in order to have standing a party must have a "beneficial interest", "personal stake in the outcome of the action", and/or "an interest distinct from one shared with the general public" (relators' Brief p. 11). In relators' case they can not meet any of these requirements. In their brief they fail to provide one example in

which they have or would suffer a direct and specific injury as a result of the Board's action. They fail to demonstrate how they are impacted in a way different from the general public by the Board's decision. Instead they simply assert that they have standing because the Board's decision is important to them. Setting forth a general interest in the action itself is not enough to establish standing.

For example, Dr. Bond claims that as a psychologist her license may be "devalued" by the Board's failure to act. Equally tenuous is the specious claim that Reverend Bosser will be somehow inhibited from referring members of his church for psychological help or that Dr. Setzler, a mental health advocate, fears that the correctional system in Ohio will now ignore its ethical obligations when treating prisoners. Similarly unpersuasive is the assertion that the Board's decision will negatively impact Mr. Reese's ability to obtain ethical psychological treatment at a VA hospital. All these assertions are based upon pure speculation and conjecture. Relators have no personal stake in the Board's decision.

Not surprisingly, relators failed to cite one case in which under similar circumstances a court found that a party had standing. Under relators' theory the concept of standing would be eviscerated and anyone without a direct beneficial interest could successfully initiate a lawsuit. Such a theory is untenable and contrary to law.

In its brief the Board cited numerous cases in which the court found that the parties in similar situations lacked standing and their cases had to be dismissed. *State ex rel. Dallman v. Court of Common Pleas, Franklin County* (1973), 35 Ohio St. 2d. 176 (The Superintendent of a state prison has no standing to challenge the order of a court turning over custody of a prisoner to the County Sheriff for reconsideration of sentence because he had no personal stake in the outcome.) *Bowers v. Ohio State Dental Board*, (10th Dist. 2001), 142 Ohio App 3d. 376 (without

a personal or beneficial interest two dentists did not have standing to compel the Dental Board through mandamus to adopt formal regulations regarding which regional dental examinations the Board would accept for licensure). *State ex. rel. Harris v. Silbert* (1959), 169 Ohio St. 261 (an attorney does not have such beneficial interest in the performance of the judicial function of the submission of an annual report by the Chief Judge solely by reason of being a member of the legal profession to maintain an act for writ of mandamus). *State ex. rel. Skilton v. Miller* (1955), 164 Ohio St. 163 (A private citizen was not personally affected by the failure of the public official to issue an arrest warrant for an alleged violation of a Sunday closing law. Therefore he had no beneficial interest in the matter and the writ of mandamus he filed would not be issued.) Relators ignored these legal precedents and were unable to explain how their case doesn't suffer from the same deficiencies on standing.

Even in the *Sheward* case, the court determined that the case could not proceed as a private action. The fact that the Ohio Academy of Trial Lawyers may lose members and its members would lose fees and clients as a result of a change in the law did not confer personal standing. *Sheward* at 473-474.

In a case just recently decided, a New York court addressed the exact same issue facing this court and ruled that the petitioner did not have standing. *Reisner v. Catone* (Supreme Court of New York, New York County, 2011), No 11 5400/2010 (See Exhibit 2). Petitioner Steven Reisner a psychologist licensed to practice in the state of New York filed a complaint with the Disciplinary Board against Dr. John Liso a psychologist licensed in New York for alleged misconduct when he was a psychologist serving as a Major in the U.S. Army at the United States Naval Station at Guantanamo. In response to the complaint the Office of Professional Discipline stated that there was no legal basis for instituting an investigation into Dr. Liso's activities while

serving in the military. Dr. Reisner then petitioned the court to require the government agency to take disciplinary action against Dr. Liso. Applying New York's law on standing which is very similar to Ohio's, the court dismissed the complaint, because Reisner could not show an injury in fact from the Board's decision. In response to Reisner's assertion that the value of his license was diminished by the Board's action, the court noted that such an assertion is so "speculative and immeasurable that it is not a cognizable injury in fact". Id at 8. The court also found that Reisner did not have standing under the "public interest" doctrine, because it did not fit within the narrow class of well-established clear legal mandates, a public official's contravention of, which would permit all affected individuals to seek mandamus relief. Id at 11.

Further relators cannot dispute that in the Louisiana case filed by Dr. Bond against the Louisiana State Board of Examiners of Psychologists concerning Dr. James, the court found that Dr. Bond did not have standing because she did not have a particular, special or individual interest. *Bond v. Louisiana State Board of Examiners of Psychologists* (Louisiana Court of Appeal, First Circuit, 2011), 2009 CA 1735 (Exhibit 1). Instead relators suggest that the Ohio case is different, because Louisiana does not have a public action doctrine. However, as will be discussed below the public action doctrine does not support their position either.

B. Relators do not have standing under the "public action" exception

Relators reliance on *Bowers v. Ohio Dental Board* (10th Dist. 2001), 142 Ohio App 3d. 376 and *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86, Ohio St. 3d. 451 for the proposition that they have standing under the public action doctrine is misplaced. First, in *Bowers* the Court found that two dentists did not have standing under the public action rule to compel the Dental Board to adopt regulations specifying which exams prospective dentists must take for licensure in Ohio. *Bowers* at 381. Second, relators failed to mention that the court

stated that the "application of the public action rule of standing, however is limited and not all alleged allegations or irregularities rise to that level" Id at 381. Finally, like *Bowers*, the decision of the Psychology Board not to proceed to formal action against Dr. James does not impact the citizens at large and is not of great importance to the general public.[1]

Similarly relators cannot meet the criteria articulated by the Court in *State ex. rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451 for standing under the public action exception. In *Sheward*, the Ohio Supreme Court explained the normal rules of standing are relaxed when a party seeks to vindicate "public rights" affecting the general population of Ohio, not merely personal rights Id at 471-473. However the court expressly cautioned that it did not create a new doctrine allowing citizens "to challenge the constitutionality of every legislative enactment that allegedly violates the doctrine of separation of powers or exceeds legislative authority". Id at 504. Rather the exception applies "only in rare and extraordinary cases where the challenged statute operates directly and broadly to divest the courts of judicial power". Id. See also *State ex. rel Ohio AFL-CIO v. Ohio Bureau of Workers Compensation* (2002), 97 Ohio St. 3d 504, 506 (Confirming that the "granting of writs of mandamus and prohibition to determine the constitutionality of statues will remain extraordinary and limited to exceptional circumstances that demand early resolution"). *State ex. rel. United Automobile, Aerospace & Agric. Implement Workers of Am. v. Ohio Bureau of Workers Comp.*, 108 Ohio St. 3d 432, 2006-Ohio-1327 ¶ 51 (reaffirming that the *Sheward* exception is "narrow" and does not apply where a case "presents only a general and abstract question concerning the constitutionality of a legislative act").

[1] Other cases cited by relators involve voting rights and ballot disputes and have no relevancy to this case. See *State ex. rel. Nimon v. Village of Springdale* (1966) 6 Ohio St. 2d 1; *State ex. rel. Newell v. Brown* (1954) 162 Ohio St. 147; *State v. Brown* (1882) 38 Ohio St. 344; *State of Ohio ex. rel. Trauger v. Nash* (1902) 66 Ohio St. 612; *State ex. rel. Carter v. City of North Olmstead* (1994) 69 Ohio St. 3d 315.

The public action exception in *Sheward* simply does not apply to this case. First relators are not challenging the constitutionality of a statute *State of Ohio ex. rel. International Heat & First Insulators v. Court of Common Pleas* (8th Dist.), No. 85116, 2006-Ohio-274 ¶ 9: Obviously the action of the Board does not in any way attempt to divest a court of judicial power. *Sheward* at 503-504. Further the action is not of the magnitude and scope contemplated by *Sheward* which proposed sweeping changes to civil tort law, revised over one hundred sections of the revised code and overruled the Supreme Court by reenacting provisions that the court previously deemed unconstitutional. See also *State ex. rel. Ohio AFL-CIO v. Taft*, (10th Dist.), No. 03AP-337, 2003-Ohio-6828 ¶16 (This is not one of those rare cases that present exceptional circumstances that demand early resolution" because the only individuals affected by the amended statutes are those employers of the state and its agencies who are regarded to be licensed attorneys in order to perform their job duties.)

Instead, after carefully considering the matter the Board decided not to initiate formal action. (See Exhibit 2 attached to Complaint) As the complainants, Relators are certainly entitled to disagree with the Board's action. However the fact that four individuals take exception to the Board's decision does not elevate the matter to one of great statewide interest and importance. Further the Board's decision does not overturn prior judicial proceedings or actions or make sweeping legislative changes. Accordingly relators do not have standing and their complaint should be dismissed.

III. Relators failed to state a claim for mandamus

Even if relators overcome their standing hurdle, this matter must still be dismissed because they failed to state a claim for relief for mandamus. In their brief relators make no attempt to demonstrate that they have met the three requirements for mandamus. (1) they have a

clear legal right to the relief prayed for; (2) the respondent is under a clear legal duty to perform the act requested; and (3) there is no plan and adequate remedy in the ordinary course of the law. *Sekemestrovich v. City of Akron* (2001), 90 Ohio St. 3d 536, 2001-Ohio-223. Relators are unable to cite one case which requires a regulatory board to initiate disciplinary action against a licensee or to provide an explanation of its decision not to pursue formal action.

As a preliminary matter the Board certainly agrees with relators' comment that one of the Board's responsibilities is to protect the public by ensuring that licensed Ohio Psychologists are complying with the relevant laws, rules and regulations. One method of accomplishing this objective is to initiate disciplinary proceedings when appropriate against psychologists who may have gone astray. However, the Board disagrees with relators on how this objective is accomplished. The Board, not the public at large, is empowered to perform this function. (R.C. 4732.17(A)). (The State Board of Psychology may refuse to issue a license to any applicant, may issue a reprimand, or suspend or revoke the licenses of any licensed psychologist or licensed school psychologist or any of the following grounds.) (Emphasis Added) *Dorrian v. Scioto Conservancy* (1971) 27 Ohio St. 2d 102 (Syllabus Paragraph One). (In statutory construction the word 'may' shall be construed as permissive and there word 'shall' shall be construed as mandatory...) *State ex. rel. City of Niles v. Bernard* (1976), 53 Ohio St. 2d 31, 34; *State ex. rel. Westbrook v. Ohio Civil Rights Commission* (1985), 17 Ohio St. 3d 215, 216 (we would emphasize that R.C. 4112.05(B) states that the commission may initiate a preliminary investigation. Thus, the preliminary investigation is not mandatory.) Therefore the Board is exercising its discretion when it decides on whether to initiate disciplinary proceedings.

Individuals, such as the relators, who file a complaint with the Board are in some sense advocates with their own agenda. They do not possess the independence, objectivity or expertise

of a regulatory board to fairly evaluate whether a complaint has merit. The Board consisting of nine members, six being licensed psychologists and three being consumer advocates, all appointed by the Governor with the advice and consent of the Senate perform this function and have such expertise. (R.C. 4732.02) Contrary to relators' repeated assertion, at all times the Board remains accountable to the public. If a member fails to fulfill his or her obligations he can be removed for malfeasance, misfeasance or nonfeasance, after a hearing.

Summarizing the background of this matter on July 7, 2010 relators failed a complaint with the Board against Dr. Larry James (Complaint ¶ 2). Dr. James is currently Dean of the School of Professional Psychology at Wright State University. After twenty-two years of military service he was honorably discharged from the Army as a colonel. In the Army he was awarded the Bronze Star and the Defense Superior Service Medal for his service to our nation in the global war on terrorism. He was the Chair, Department of Psychology at Walter Reed Army Medical Center and Tripler Army Medical Center. He is Board certified in both Clinical Psychology and Health Psychology[2]. On September 30, 2010, the Executive Director of the Board, the supervising Board member who is a licensed psychologist, the Board's investigator and its attorney heard a presentation from relators regarding their allegations. (Complaint ¶ 53) On January 26, 2011 the Board's investigator sent the relator's attorney a letter informing her that the Board has completed its review of the complaint and determined that it is unable to proceed with formal action. The Board's investigator further stated that the matter was carefully considered. (Complaint ¶ 55, Exhibit 2).[3]

[2] See http://www.wright.edu/sopp/faulty/admin/James.html

[3] Relators ignored the fact if a complaint is closed without formal action the investigation is confidential and not made public.

Relators do not allege that the Board did not follow its procedures in investigating this matter. Rather they simply disagree with the Board's decision. Relators are unable to cite one case in which a court second guessed a regulatory Board's decision not to initiate disciplinary action against a licensee or ordered a regulatory board to elaborate in more detail on why it did not initiate formal proceedings. The ramifications of relator's argument is striking. Any time a complainant disagreed with a regulatory board's decision not to initiate disciplinary action then they could successfully file a mandamus action to obtain juridical review. Such a scenario would undermine the authority of the Boards and jeopardize the rights of the accused.

Not surprisingly no court has embraced relators' position. The Board cited many cases, analogous to the instant matter in which a court refused to mandate a regulatory board such as the Medical Board, the Ohio Civil Rights Commission, Liquor Control Commission, and the Disciplinary Counsel to initiate disciplinary action based upon a complaint filed. *Talwar v. State Medical Board* (2004), 104 Ohio St. 3d. 290, 2004-Ohio-6410; *State ex. rel. Westbrook v. Ohio Civil Rights Commission* (1985), 17 Ohio St. 3d, 215; *State ex. rel MacDonald v. Cook* (1966), 15 Ohio St. 2d 85; *Robinson v. Office of Disciplinary Counsel* (10th Dist. 1999), No. 98AP-1431; 1999 Ohio App. Lexis 3928.

In each case the court ruled that it was within each Board's discretion to decide on whether it would proceed with a disciplinary action. Accordingly relators failed to demonstrate that they had either a legal right to the initiation of disciplinary charges against Dr. James or a legal duty on the part of the Board to initiate such disciplinary action. Therefore the complaint in mandamus should be dismissed.

In addition courts have consistently held that a writ cannot issue to control an officer's exercise of discretion. See *State ex. rel. Village of Botkins v. Laws* (1994), 69 Ohio St. 3d 383,

387 Similarly in *State ex. rel MacDonald v. Cook* (1968), 15 Ohio St. 2d 85, 85-86 the court ruled that he [relator] is seeking to compel a public officer to enforce a public regulation in relation to a specific person. Mandamus does not lie for this purpose. Similar holdings have been rendered by the Tenth District Court of Appeals. See also *Talwar v. State Medical Board* (10th Dist.), 156 Ohio App. 3d 485, 2004-Ohio-1301 ¶ 19 affd., 104 Ohio St. 3d 290, 2004-Ohio-6410 (whether the facts found by the board in the course of its investigation support a finding of probable cause is within the board's discretion and cannot be controlled by mandamus") *State ex. rel. Snyder v. State Controlling Board* (10th Dist. 1983), 11 Ohio App. 3d 270, 272 (the exercise of respondent's authority under R.C. 127.15 [State Controlling Board] includes the exercise of its judgment and discretion which cannot be limited or controlled by writ of mandamus.)

Similarly in Tennessee the court dismissed a mandamus action against the State Registrar requesting it to investigate all irregularities or possible violations of law involving statements on the death certificate of Elvis Presley. *Board of County Commissioners v. Taylor* (Ct. of Appeals Middle Section, 1994), No. 01-A-01-9403-CH-00126, 1994 Tenn. App. Lexis 452. The court concluded that the rule is so general and obvious as to be almost axiomatic that a public official clothed with discretionary...power... cannot be coerced by mandamus... in the exercise of his judgment under that provision. Id at * 16.

In this case after reviewing the complaint the Board exercised its discretion and decided that there was no basis to proceed with a formal action. The Psychology Board properly exercised its discretion. Mandamus cannot control how it exercises that discretion.

Not surprisingly, the relators, who filed the initial complaint, disagreed with the Psychology Board's decision. But then they jump to the rash conclusion that because the Board

rendered a decision contrary to their wishes, the board must have abused its discretion. Such a conclusion is erroneous. An abuse of discretion connotes an unreasonable, arbitrary or unconscionable attitude [*State ex. rel. Lee v. Montgomery* (2000), 88 Ohio St. 3d 233, 235 citing *State ex. rel. First New Shiloh Baptist Church v. Meagler* (1998), 82 Ohio St. 3d 501, 503. In fact the Board followed its own procedures, met with the complainants, listened to their allegations, reviewed the materials and made its decision. Once again relators failed to meet their burden and the action should be dismissed.

IV. CONCLUSION

Based upon the established case law relators do not have standing to pursue this matter and their complaint must be dismissed. Although the court will not have to reach this issue relators have also failed to state a claim for relief for mandamus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing REPLY BRIEF was sent by regular U.S. mail on August 17, 2011 to the following:

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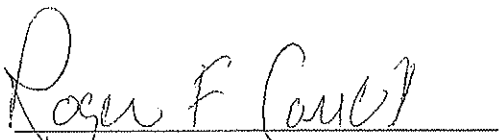

ROGER F. CARROLL (0023142)
Principal Assistant Attorney General

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1735

DR. TRUDY BOND

VERSUS

LOUISIANA STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

Judgment rendered: JUN 11 2010

****

On Appeal from the Nineteenth Judicial District Court
Parish of East Baton Rouge, State of Louisiana
Suit Number: 569,127; Division: I #24
The Honorable R. Michael Caldwell, Judge Presiding

****

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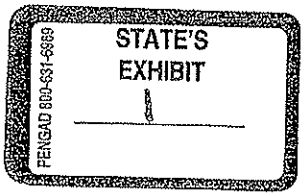
BEFORE: PARRO, DOWNING, AND GAIDRY, JJ.

Parro, J. concurs by RDD



DOWNING, J.

The issue for our consideration is whether a complainant has a right of action to seek judicial review after a professional licensing board fails to pursue disciplinary proceedings against one of its members.

Dr. Trudy Bond, an Ohio psychologist, lodged a complaint with the Louisiana State Board of Examiners of Psychologists (LSBEP), alleging that a psychologist licensed in Louisiana, violated ethical standards of psychology by his mistreatment of foreign detainees while serving in the military at the U.S. military base at Guantanamo Bay, Cuba.[1] After investigating the complaint, LSBEP took no disciplinary action against the member and rendered no decision in the matter. Dr. Bond filed a petition for judicial review, requesting that the district court remand the matter to LSBEP and order LSBEP to conduct a complete investigation, and to hold a hearing.[2] LSBEP responded by filing an exception of no right of action. The district court, sustaining the exception, dismissed Dr. Bond's petition for judicial review; Dr. Bond appealed.[3] For the following reasons, we affirm the district court judgment.

Louisiana Revised Statutes 37:2353C(5) gives LSBEP the authority to revoke or suspend the license of a psychologist and conduct hearings upon complaints concerning the disciplining of a psychologist. La. R.S. 37:2353E provides that "any person aggrieved by an action of the board may seek judicial review," in the 19th Judicial District Court in accordance with La. R.S. 49:950, *et seq.* the Administrative Procedure Act (APA). (Emphasis added). In the underlying administrative matter, no 'action' was taken, and there is no person 'aggrieved' within the legal meaning of that term.

[1] Dr. Bond has not alleged that she has treated any of the detainees whom she claims were mistreated.

[2] Dr. Bond also filed a petition for declaratory judgment action praying for the district court to declare that her complaint had been timely filed. The discussion on this assignment of error is pretermitted.

[3] An amicus brief in support of Dr. Bond's position was filed on behalf of five non-profit organizations, by the Loyola University New Orleans College of Law. We recognize their arguments, and their positions are incorporated into our analysis.

For purposes of determining availability of judicial review under the APA, "adjudication" is a proceeding resulting in a decision or an order. Jones v. Southern University and A & M College System, 96-1430, p. 6 (La.App. 1 Cir. 5/9/97), 693 So.2d 1265, 1269. A decision or order, for purposes of the APA, is a disposition required by constitution or statute. Id. Therefore, unless there is some constitutional or statutory provision requiring LSBEP to render a decision or order, then there was nothing for the district court to review. The law sets forth no provision requiring LSBEP to act. Therefore, no right of action exists to make them do so.

Moreover, Dr. Bond and the amici brief argue that La. R.S. 37:2351 *et seq*, requires LSBEP to take disciplinary action upon concluding that an enumerated offense has been committed. Here, however, we have no such conclusion that an enumerated offense has been committed. No authority has been cited, and we find none that forces LSBEP to discipline its member after the investigation of the alleged offense has been concluded.

The exception of no right of action calls into question whether the plaintiff has standing or interest required under the law to bring the action. League of Women Voters of New Orleans v. The City of New Orleans, 381 So.2d 441, 447 (La. 1980). Stated in the context of the present litigation, the exception of no right of action asks whether Dr. Bond has standing to obtain an order against LSBEP, requiring it to take action in this matter. While Dr. Bond contends that she had a duty to report the psychologist's unethical conduct, she must have a real and actual interest in the action on order to be entitled to a judicial review. Id. 381 So.2d at 447 (La. 1980), *citing* La.-C.C.P. art. 681. Without a showing of some special interest in the performance sought of a public board, which is separate and distinct from the interest of the public at large, plaintiff will not be permitted to proceed. Id. Without some peculiar, special, and individual interest, a citizen has

no standing in court to champion a cause or subject matter that pertains to the whole people in common, nor has an individual citizen legal standing in court to enforce the performance of a duty owed to the general public. Id. Here, Dr. Bond has shown no particular, special, or individual interest.[4]

Therefore, while Dr. Bond may have a professional or ethical duty as a psychologist to file a complaint with LSBEP about a fellow psychologist's interrogation techniques, she, however, has no justiciable right to maintain this action for judicial review. We therefore comply with our judicial duty and affirm the district court's judgment dismissing her claim on the exception of no right of action; the cost of this appeal is assessed to plaintiff-appellant, Dr. Trudy Bond.

AFFIRMED

[4] *See also* Wooley v. State Farm Fire & Cas. Ins. Co., 05-1490, pp. 4-8 (La.App. 1 Cir. 2/10/06), 928 So.2d 618, 621-23.

AUG-16-2011 13:38 P.02

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART ______

PRESENT: ______________________

Index Number : 115400/2010

REISNER, STEVEN

vs.

CATONE, LOUIS

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

this motion to/for ______

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits ______

Replying Affidavits ______

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion Article 78 proceeding is resolved in accordance with the accompanying memorandum decision

FOR THE FOLLOWING REASON(S):

STATE'S EXHIBIT 2

PENGAD 800-631-6989

Dated: 8/1/11 [signature] J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

----------X

In the Matter of the Complaint of STEVEN REISNER,

Petitioner,

Index No. 115400/2010

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

LOUIS CANTONE, Director of the New York Office of Professional Discipline, New York State Department of Education; THE OFFICE OF PROFESSIONAL DISCIPLINE of the New York State Department of Education; and THE NEW YORK STATE DEPARTMENT OF EDUCATION,

Respondents.

----------X

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Nushin Sarkarati, Esq.

For the Respondents:

Eric T. Schneiderman, Esq.
Attorney General of the State of New York
120 Broadway
New York, NY 10271
By: James M. Hershler

Papers submitted on this Article 78 Proceeding:
Notice of Petition, Verified Petition, Affirmation in Support with Exhibits and Memorandum of Law 1
Notice of Cross-Motion, Cross-Motion to Dismiss and Memorandum of Law 2
Memorandum of Law in Opposition to Cross-Motion to Dismiss 3
Reply Memorandum of Law in Support of Cross-Motion to Dismiss 4

PRESENT: HON. SALIANN SCARPULLA, J.S.C.:

This Article 78 proceeding concerns whether the courts of the State of New York may, at the behest of a New York citizen, require a government agency to take disciplinary action against a New York licensed professional who engages in activities on behalf of the United States military. Petitioner Steven Reisner ("Reisner") is a psychologist licensed to practice in the State of New York. On July 7, 2010 Reisner filed a complaint with the State Education Department, Office of Professional Discipline, against non-party Dr. John Leso ("Leso").

Leso, also a psychologist licensed to practice in the State of New York, was, in 2002, a Major in the United States Army. As alleged in Reisner's petition, between June of 2002 and January of 2003, Leso was a member of the Behavioral Science Consultation Team ("the BSCT"). The BSCT was charged with supporting interrogation operations conducted by the United States military on individuals detained at the Guantanamo Bay Naval Base in Cuba.

In his complaint, Reisner alleged that Leso used his expertise in the field of psychology to harm the health of detainees at Guantanamo Bay. Reisner also accused Leso of using his training in psychology to exploit the weaknesses of detainees in a systematic fashion and of recommending that United States military personnel use a series of increasingly abusive interrogation techniques designed to degrade, dehumanize, and disrupt the cognitive function of detainees for the purpose of punishing them and

modifying their behavior. Reisner demanded that Leso be investigated by the OPD for this conduct and disciplined.

By letter dated July 28, 2010, Louis S. Calone, director of the Office of Professional Discipline ("OPD") responded to Reisner's complaint. Calone wrote that the Office of Professional Discipline had "no legal basis for instituting an investigation into Dr. Leso's activities while in the military service of the United States." Calone asserted that there was no basis to investigate Leso because the complained-of activities did not constitute the practice of psychology as defined under New York State law. That is, because Leso did not render his services to the United States military as part of a therapist-patient relationship, his actions taken on behalf of the United States military were not subject to state ethical restraints. Calone concluded his letter by stating:

> I appreciate that there is considerable difference of opinion among reasonable people as to whether some of the interrogation techniques utilized on detainees at Guantanamo Bay were appropriate. But it is not within this Office's purview to express an opinion on that issue. . . Short of [a conviction of Leso for committing a crime] there is no basis for this Office to open an investigation into the conduct alleged by you.

By letter dated August 26, 2010, Reisner's attorneys asked the OPD to reconsider its decision not to open an investigation into Leso's conduct. The OPD did not respond to the August 26, 2010 letter, effectively adhering to its decision not to investigate Leso's alleged conduct while he was in the United States military and at Guantanamo Bay.

On November 25, 2010, Reisner filed this Article 78 petition challenging the OPD's refusal to investigate and discipline Leso. In his petition, Reisner alleges that by

declining to investigate and discipline Leso, the OPD has failed to perform its duty required by law, has reached a judgment affected by an error of law, and has acted in an arbitrary and capricious manner.

The respondents cross-move to dismiss the petition, arguing that Reisner lacks standing to sue for the relief demanded in the petition, because Reisner has not alleged a sufficient injury in fact, and does not have "public interest" standing. Respondents also argue that the petition fails to state a cause of action for mandamus relief, because the OPD's decision whether to investigate and discipline a licensed psychologist is discretionary, not ministerial and because Reisner does not have a clear legal right to demand that Leso be investigated.

Discussion

Before reviewing the merits of the petition, this Court must determine whether Reisner has standing to bring this Article 78 proceeding. *See New York State Assn. of Nurse Anesthetists v Novello*, 2 N.Y.3d 207, 211 (2004). Standing is a "threshold issue." *Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 N.Y.2d 801, 812 (2003). Standing is critical because a court "has no inherent power to right a wrong unless thereby the civil, property or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected." *Society of the Plastics Indus., Inc. v County of Suffolk*, 77 N.Y.2d 761, 772 (1991) (internal quotation marks omitted).

Standing Under Established Precedent

New York has adopted a two-part inquiry for determining whether a party has standing to challenge a governmental action. *see Roberts v Health & Hosps. Corp.*,__ AD3d ___, 2011 NY Slip Op 5882, * 5 (1st Dep't. 2011), citing *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d at 211. The petitioner must show (1) an "injury-in-fact" and (2) that the alleged injury falls within "'the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted.'" *Roberts v Health & Hosps. Corp., supra* at *5, *quoting New York State Assn. of Nurse Anesthetists*, 2 NY3d at 211.

To have suffered an "injury-in-fact," the petitioner must show that petitioner will actually be harmed by the challenged administrative action, that is, that the injury is more than conjectural. *New York State Assn. of Nurse Anesthetists* at 211; *see also Society of the Plastics Indus. v County of Suffolk*, 77 N.Y.2d at 773. It is "special damage, different in kind and degree from the community generally." *Matter of Sun-Brite Car Wash, Inc. v Board of Zoning & Appeals of the Town of N. Hempstead*, 69 N.Y.2d 406, 413 (1987); *Society of the Plastics Indus.*, 77 N.Y.2d at 775 n 1. Thus, the alleged injury must be "personal to the party." *Roberts v Health & Hosps. Corp., supra*, 2011 N.Y. Slip Op. 5882 at *5.

Reisner argues that he suffered an injury-in-fact because the OPD deprived him of his alleged "statutory right to have his complaint of professional misconduct investigated."

Specifically, Reisner argues that pursuant to the New York Education Law, Reisner is guaranteed the right to have any complaint he makes of professional misconduct against a licensed psychologist investigated by the OPD.[1] Reisner concludes that because the OPD denied his statutory right to have his complaint investigated, he, personally, has been injured.

Despite Reisner's argument, the Court finds that nothing in the New York Education Law guarantees a right to each and every person that the OPD formally investigate every single complaint of professional misconduct, no matter the contents or applicability of the complaint. The fact that pursuant to Education Law § 6510 "any person" is permitted to file a complaint against a psychologist, does not by itself grant *every person* a right to have the complaint investigated. As Reisner does not have an immutable, inalienable right to have his complaint investigated, he has not suffered an "injury in fact" by the OPD's decision not to investigate Leso.

In strikingly similar cases, the New York courts have held that one filing a complaint against a professional with an administrative agency regulating the profession does not have individual standing to challenge that agency's decision not to open an investigation into the complaint. *See Sassower v Commn. on Jud.Conduct of the State of New York*, 289 A.D.2d 119 (1st Dep't 2001), *lv denied* 98 N.Y.2d 720 (2002); *see also*

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[1] Reisner cites Education Law § 6510(1), which states in relevant part that "any person" may make a complaint and that "[t]he department shall investigate each complaint which alleges conduct constituting professional misconduct."

Matter of Morrow III v Cahill, 278 A.D.2d 123 (1st Dep't 2000) (an attorney's former client did not have standing to require the Disciplinary Committee to open an investigation into the attorney's conduct); *Mantell v New York State Commn. on Jud. Conduct*, 277 A.D.2d 96 (1st Dep't 2000), *lv denied* 96 N.Y.2d 706 (2001) (denying an attorney standing to bring an Article 78 petition for mandamus to require Commission on Judicial Conduct to open an investigation into a facially meritorious complaint).

Reisner argues that these New York cases are inapplicable because here, unlike the cases cited above, the OPD has misconstrued the breadth of its own authority and the mandatory requirements of the Education Law. The Court disagrees. There is nothing in the Education Law itself to indicate that the New York Legislature intended any and every individual to have an unfettered, statutory, right to have every single complaint of professional misconduct investigated, particularly in those cases where the OPD determines that the complaint does not involve the practice of psychology. Nor is there any indication that the Legislature intended to confer standing on any person who is dissatisfied with the actions (or inactions) of the OPD in investigating complaints.

Further, Reisner has failed to allege that "injury" he suffered as a result of the OPD's decision not to investigate Leso is personal to him, *i.e.*, different in kind from the injury suffered by the New York community at large. As a New York licensed psychologist, Reisner may have a personal interest in preserving the reputation of the practice of psychology and in exposing what Reisner believes are inappropriate activities

of the United States military and its personnel. However, this general interest alone does not confer standing where, as here, Reisner does not allege an injury distinct from that suffered by the New York public at large. *See Matter of Citizens Emergency Comm. to Preserve Preserv. v Tierney*, 70 A.D.3d 576, 576 (1st Dep't 2010) (finding that "interest" and "injury" are not synonymous for the purposes of conferring standing); *New York State Psychiatric Ass'n v Mills*, 29 A.D3d 1058, 1059-1060 (3d Dep't 2006) (psychiatric association's argument that newly adopted license requirements would result in a loss of confidence in the profession was "no different from any injury suffered by the public at large").

Nowhere in his petition has Reisner alleged a concrete injury that he personally suffered as a result of Leso's not being investigated. Reisner's claim, first advanced at oral argument on the petition, that the value of his license is diminished by the inaction of the OPD, is so speculative and immeasurable that it is not a cognizable injury in fact. *See Matter of MFY Legal Servs. Inc. v Dudley*, 67 N.Y.2d 706, 708 (1986); *Matter of McAllan v New York State Dept. of Health*, 60 A.D.3d 464, 464 (1st Dep't 2009); *see also Matter of New York State Psychiatric Assoc., Inc. v Mills*, 29 A.D.3d at 1059-60 (3rd Dep't 2006).[2]

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[2]Reisner cites *Freidus v Guggenheimer*, 57 A.D.2d 760 (1st Dep't 1977)) to show that while New York courts have denied standing to many individuals challenging government agencies not to investigate and/or revoke licenses, there are exceptions. Reisner argues that, in *Freidus*, the petitioner was found to have standing to challenge the Department of Consumer Affairs decision not to hold a disciplinary hearing on one newsstand licensee's complaint against a competitor, where the competitor had been engaged in the same conduct that had caused the complainant to have his licensed

Also, Reisner has not shown that his alleged injury is in the "zone of interests" sought to be protected under the Education Law. The "zone of interests" test requires that the petitioner show that the injury-in-fact falls within the zone of interests sought to be promoted or protected by the statutory provision under which the agency has acted. *Society of the Plastics Indus.*, 77 N.Y.2d at 773. It ties the injury asserted by the petitioner to the governmental act challenged, and thus limits the universe of persons who may challenge an administrative action *Id.*. The requirement that a petitioner's injury fall within the concerns the statute ensures that a group or individual "whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes." *Matter of Transactive Corp. v New York State Dept. of Social Serv.*, 92 N.Y.2d 579, 587 (1998), quoting *Society of the Plastics Indus.*, 77 NY2d at 774.

Reisner's interest in having his complaint investigated as means of safeguarding the value of his own license falls outside of the zone of interests sought to be furthered by Education Law § 6510. The institution of licensing requirements and practice standards

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revoked. *Freidus*, 57 A.D.2d at 761.

Freidus is inapposite, because the First Department never addressed the issue of standing. In addition, the complainant in *Matter of Freidus* had suffered substantial, cognizable injury, the loss of his license, for engaging in the same activities as that which the competitor was accused. Here, Reisner has not alleged nor demonstrated that his personal ability to practice psychology is threatened in any cognizable way by the action, or inaction, of the OPD or Leso.

for psychologists is premised on protecting the welfare of patients seeking professional help. The purpose of the Education Law is not to safeguard the value and prestige of each individual psychologist's license. *See Sheehan v Ambach*, 136 A.D.2d 25, 28 (3rd Dep't 1988) (holding that licensed physical therapists do not have a cognizable interest in challenging the guidelines governing the practice of occupational therapists, because protection from the economic impact of competition was not within the purview of the Department of Education laws and regulations).

Standing Under the "Public Interest" Doctrine

Reisner also argues that he has standing under the public interest doctrine, as described in *Matter of Hebel v West*, 25 A.D.3d 172 (3rd Dep't 2005). In *Hebel*, a New Paltz resident, who was also a village board member, brought a petition challenging the New Paltz mayor's solemnization of same-sex marriages despite lack of proper marriage licenses, in violation of the Domestic Relations Law. The Third Department held that the resident had sufficient standing to sue to enjoin the mayor, even though not articulating particularized injury in fact, because the New Paltz mayor's violation of the Domestic Relations Law was a matter of "great public interest," and "his actions, if allowed to continue, would have the potential result of permitting a part-time local official to effectively amend the marriage laws of this state with input from neither the Legislature nor the courts." *Hebel*, 25 A.D.3d at 176. The Third Department also explained that standing based upon "public interest" should be narrowly applied, to cases where there is

"unprecedented action by a local official". *Id.*[3] Reisner argues that the regulation of the profession of psychology is a matter of sufficiently significant public interest to confer standing upon him.

In *Hebel,* the Third Department made clear that its holding was based solely on the extraordinary facts before it, and that it was not usurping the established two-part standing analysis consistently articulated by the Court of Appeals. This Court acknowledges that there are a narrow class of well-established, clear legal mandates, a public official's contravention of which permits all affected individuals and entities to seek Article 78 mandamus relief. Here, however, the OPD's determination that Leso's alleged involvement in the United States military's interrogation of suspected terrorists did not constitute the practice of psychology is not within that narrow class of well-established, clear legal mandates.

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[3]*See also Albert Elia Bldg. Co. v New York State Urban Dev. Corp.,* 388 N.Y.S.2d 462, 466 (4th Dep't 1976)(Fourth Department stated that "standing has been granted absent personal aggrievement where the matter is one of general public interest," although finding that petitioner's inability to participate in a competitive bidding process was a sufficient particularized injury to confer standing).

For the reasons set forth above, the Court finds that petitioner Steven Reisner does not have standing to prosecute this Article 78 proceeding. Accordingly, the Court grants respondents' cross-motion and dismissed the petition. The Clerk of the Court is directed to enter judgment dismissing the petition.

Dated: New York, New York
August 9, 2011

ENTER

Hon. Saliann Scarpulla, J.S.C.

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

DR. TRUDY BOND, et. al. Relators/Plaintiffs, vs. OHIO STATE BOARD OF PSYCHOLOGY Respondent/Defendant.	Case Number: 11CV-04-4711 Judge L. Beatty

REPLY MEMORANDUM ON THE OHIO PSYCHOLOGY BOARD'S MOTION TO STAY DISCOVERY

The Ohio Psychology Board filed a motion to dismiss the complaint in mandamus based upon on pure legal grounds. First relators do not have standing to pursue this matter. Ohio law is quite clear on this point. Moreover in a recent decision from New York directly on point, the court ruled that a psychologist filing a similar action did not have standing to require the Disciplinary Board to initiate disciplinary action. See *Reisner v. Catone* (Supreme Ct. of N.Y, New York County, 2011), 115400/2010 (Attached as Exhibit 2 to the Board's Reply Brief.)

Similarly the Board's argument that the mandamus action should be dismissed for failure to state a claim is solely a matter of law. There is no need for discovery in order to rule on the Board's motion and relators do not even suggest that they need discovery to respond. In the interests of judicial economy and efficiency all discovery should be stayed until the court has an opportunity to rule on the Board's motion. If granted, the Board's motion will resolve the entire case.

Moreover under Board policy cases closed without formal Board action are

confidential and not made public. (See State Board of Psychology, Guidelines for Disciplinary Actions p. 3). Therefore any records relators may seek are not subject to disclosure.

For the foregoing reasons the Ohio State Board of Psychology requests that the court stay all discovery until it rules on the Board's dispositive motion.

Respectfully submitted,

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Attorney General of Ohio

Roger F Carroll

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing REPLY MEMORANDUM ON THE OHIO PSYCHOLOGY BOARD'S MOTION TO STAY DISCOVERY was sent by regular U.S. mail on August 17, 2011 to the following:

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IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

Dr. Trudy Bond, Mr. Michael Reese, Rev. Colin Bossen, Dr. Josephine Setzler, Petitioners v. Ohio State Board of Psychology, Respondent.	)	Case No. 11 CV 004711 Judge L. Beatty **MOTION OF PETITIONERS TO REQUEST ORAL HEARING ON RESPONDENT'S MOTION TO DISMISS AND MOTION TO STAY DISCOVERY**

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* * * * *

Dr. Trudy Bond, Mr. Michael Reese, Rev. Colin Bossen, and Dr. Josephine Setzler, Petitioners herein, by and through counsel, set forth their request for an oral hearing on the Motion to Dismiss and Motion to Stay Discovery brought by Respondent Ohio State Board of Psychology ("the Board," or "Respondent"). Petitioners request this hearing due to the extraordinary nature of this case.

Under Local Rule 21.1, upon written request by a party, this Court may give leave for oral hearing on a motion. In other jurisdictions, courts presented with related questions heard oral arguments before issuing their rulings. For example, judges in California, Louisiana, and New York held hearings on other professional boards' motions to dismiss challenges by

individuals who had brought complaints against health professionals for torture. These hearings led to a richer discussion of the complex and unusual factual and legal questions raised by state licensing boards' dismissals of complaints against health professionals for their alleged involvement in the torture of people held in national security prisons. Similarly, this Court should hear oral arguments on the Respondents' motions to dismiss and stay discovery because these motions raise questions – whether the Board abused its discretion in dismissing the complaint filed by Petitioners, and whether Petitioners have standing to request this Court's review of the Board's dismissal – that cannot be resolved without at least some examination of the underlying professional misconduct complaint dismissed by the Board.

This underlying complaint is exceptional in the seriousness of its allegations, the extensiveness of its documentation, and its implication of conduct susceptible to politicization. Furthermore, given the implications of the Board's leaving unexamined credible allegations of torture by a dean of an Ohio psychology school, Petitioners have invoked public interest standing, on the belief that "the alleged wrong affects the citizenry as a whole, involves issues of great importance and interest to the public at large, and the public injury by its refusal would be serious." *Bowers v. Ohio State Dental Bd.* (Ohio App. 10 Dist., 2001), 142 Ohio App.3d 376, 381. The Board responded to the public standing argument with a conclusory statement that the issues in this case do not rise to this level of magnitude, without any reference to the underlying allegations of torture that lie at the heart of this case. *See* Respondent's Reply Brief at 7. Petitioners believe that this question in particular requires the court's careful inquiry and, as such, merits the more robust discussion that a hearing could afford.

Petitioners' mandamus petition is neither frivolous nor ordinary. It involves torture, one

of the most serious harms one human being can inflict on another. It involves the dean of a professional psychology school in this very state. It involves a state agency that indisputably chose to dismiss documented allegations that this influential licensed psychologist used his professional skills, knowledge and status to torture hundreds of men and boys in one of today's most notorious prisons. The Board argues that it can dismiss a petition of this magnitude and gravity without having to explain its reasons, or even the steps it took before making this decision. The Board has not disputed Petitioners' allegations that it failed to even meaningfully investigate the allegations before dismissing them. The Board now asks this Court to dispose of this case before hearing arguments on the merits on the premise that no one – not Petitioners, not this Court – has the power to examine its actions. At its core, this case is about a state agency defending a purported right to complete lack of transparency and accountability in disposing of a complaint involving one of the most defining issues of the decade. Regardless of its outcome, this case will become part of the historical record of how institutions in this country dealt with evidence of torture by public officials. If any questions merit the maximum process this Court has the power to afford, surely these are among them.

For these reasons, Petitioners respectfully request that the Court hear oral arguments before ruling on Respondents' motions to dismiss and stay discovery.

Terry J. Lodge /l ONP

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Co-Counsel for Petitioners

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion of Petitioners to Request Oral Hearing on Respondents' Motion to Dismiss and Motion to Stay Discovery was sent by me via regular U.S. mail, postage prepaid this 22nd day of August, 2011 to Roger F. Carroll, Esq., Assistant Attorney-General, 30 East Broad St., 26th floor, Columbus, OH 43215-3400.

Terry J. Lodge 11 OAR

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IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

Dr. Trudy Bond, Mr. Michael Reese, Rev. Colin Bossen, Dr. Josephine Setzler, Petitioners v. Ohio State Board of Psychology, Respondent.	))))))	Case No. 11 CV 004711 Judge L. Beatty **JUDGMENT ENTRY (GRANTING ORAL HEARING ON RESPONDENT'S MOTION TO DISMISS AND MOTION TO STAY DISCOVERY)**

* * * * *

This cause comes before the Court on the "Motion to Request Oral Hearing on Respondent's Motion to Dismiss and Motion to Stay Discovery" filed by Dr. Trudy Bond, Mr. Michael Reese, Rev. Colin Bossen, and Dr. Josephine Setzler, Petitioners herein. For good cause shown, said motion is found to be well-taken and the same is hereby granted. The Court hereby schedules the Motion to Dismiss and Motion to Stay Discovery for oral argument on _____, 2011 at _____.

_____
Laurel A. Beatty, Judge

E1278 - 077

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

DR. TRUDY BOND, et. al. Relators/Plaintiffs, vs. OHIO STATE BOARD OF PSYCHOLOGY Respondent/Defendant.	Case Number: 11CV-04-4711 Judge L. Beatty

THE OHIO STATE BOARD OF PSYCHOLOGY'S MEMORANDUM CONTRA TO REALTORS' REQUEST FOR AN ORAL ARGUMENT

The Ohio Psychology Board ("Board") takes strong exception to petitioner's characterization of this case. Notwithstanding relators over the top rhetoric, the Board followed its procedures, reviewed a complaint and determined that there was no basis to proceed. It is a process that this Board and other regulatory boards have followed on countless occasions. The legal issues presented in the Board's motion to dismiss based upon lack of standing and failure to state a claim are neither novel nor complex. Rather the Board presented straight forward legal arguments relying upon established legal precedent to support its position.

Interestingly two recent decisions from the courts in New York and Louisiana addressed the same issue and found that the relators did not have standing to pursue their case. *Reisner v. Catone* (Supreme Court of New York, New York County, 2011), No. 11 5400/2010 (a licensed psychologist in New York did not have standing to challenge the Board's decision not to take disciplinary action against a psychologist accused of wrong doing while serving in the Army at Guantanamo). *Bond v. Louisiana State Board of Examiners of Psychologists* (Louisiana Court of Appeal, First Circuit 2011) 2009 (CA 1735) (Dr. Bond, one of the petitioners, in this case did not

have standing to challenge the Louisiana Board's decision not to take disciplinary action against Dr. James for alleged wrong doing while serving in the Army at Guantanamo.) Instead petitioners curiously continue to rely upon the decision *Bowers v. Ohio Dental Board* (10th Dist. 2001), 142 Ohio App. 3d. 376 where the Court found that the dentists in question did not have standing to challenge the Dental Board's action, and more importantly found that the application of the public action rule is very limited. In fact the decision in *Bowers* provides further support for the Psychology Board's position that relators do not have standing.

Local Rule 21.1 provides that an oral argument concerning a motion of this type is the exception. The court is quite capable of issuing a decision based upon the legal memoranda presented by the parties. Relators failed to articulate a legitimate reason for having an oral argument. Instead it appears that relators only want to use the court as a forum to promote their personal agenda. Therefore the Board requests that the court deny relators request for an oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing THE OHIO STATE BOARD OF PSYCHOLOGY'S MEMORANDUM CONTRA TO PETITIONERS REQUEST FOR AN ORAL ARGUMENT was sent by regular U.S. mail on August 29, 2011 to the following:

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IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

Dr. Trudy Bond, Mr. Michael Reese, Rev. Colin Bossen, Dr. Josephine Setzler, Petitioners v. Ohio State Board of Psychology, Respondent.	)	Case No. 11 CV 004711 Judge L. Beatty **PETITIONERS' REPLY MEMORANDUM ON REQUEST FOR ORAL HEARING ON RESPONDENT'S MOTION TO DISMISS AND MOTION TO STAY DISCOVERY**

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INTRODUCTION

Oral argument is appropriate in this case. Contrary to Respondent's allegations, Petitioners did present legitimate reasons for oral argument in this case: the complex and important legal and factual issues make it an exceptional case and merit oral argument. The complexity emerges even at this procedural phase because the questions before this Court—whether Petitioners have standing and whether the Ohio State Board of Psychology ("the Board" or "Respondent") abused its discretion—cannot be resolved without addressing the original complaint filed by Petitioners with the Board against Dr. Larry James. The complaint includes among its allegations of serious professional misconduct evidence indicating that this Ohio

psychology school dean oversaw a policy of torture while serving as a U.S. Army Colonel in Guantánamo. The grave nature of the allegations—the fact that the alleged conduct occurred in a military context, the high level of controversy and politicization surrounding the treatment of U.S. detainees during the "War on Terror," the Board's inexplicable and as yet unexplained refusal to investigate a credible complaint of misconduct, and the implications that the Board's inaction could jeopardize the health and safety of Ohioans—render this a novel and complex case that raises issues of great public importance. Due to these factors, Petitioners believe that the Court would benefit from oral argument before reaching a decision.

Unfortunately, instead of addressing Petitioners' arguments, the Board offered conclusory statements deriding Petitioners' actions and intentions as illegitimate. Respondent went on to criticize Petitioners for citing Ohio law and instead pointed to non-controlling, distinguishable decisions from other jurisdictions to support its argument. Furthermore, the Board omitted the most relevant aspect of those out-of-state cases on the question immediately before the Court: that the judges in New York and Louisiana ruled only *after* first hearing oral argument. Finally, Respondent's memorandum concludes regrettably by accusing Petitioners of requesting oral argument to advance their "personal agenda." These attempts to sidestep the merits should not distract this Court from the central issue of this motion: that this case—involving a psychology board that refuses to take any action or to justify its inaction in response to evidence that a psychology dean, while a U.S. Army Colonel, demonstrably lied, admitted to grave conflicts of interest and oversaw a torture policy in one of the most infamous prisons of our time—is not just like all the other mandamus petitions involving licensing boards that come before this Court. As such, this Court should grant the motion for oral argument.

THIS CASE RAISES COMPLEX LEGAL AND FACTUAL ISSUES OF GREAT PUBLIC IMPORTANCE THAT MERIT DISCUSSION IN ORAL ARGUMENT.

a. Abuse of Discretion

Notably, the Board has not disputed Petitioners' allegation that it did not investigate the evidence presented in the complaint filed with the Board on July 7, 2010 (hereinafter "Board Complaint").[1] Instead, Respondent calls this allegation "over-the-top rhetoric" and insists that a mere "review" of the Board Complaint was sufficient to satisfy its legal duty. Petitioners do not agree that it is "over the top" to expect a psychology licensing board to take appropriate action in response to evidence of widespread torture by a licensee charged with teaching young people in Ohio how best to bring about healing and good mental health. Nor do Petitioners agree that the Board satisfies its legal duty to protect the public by merely reading a complaint that contains grievous *prima facie* ethical violations and choosing inaction without legal or factual basis.

As noted above, Respondent's memorandum ignores Petitioners' argument that the issues presented in this case are complex. Respondent merely repeats that it "reviewed . . . [the] complaint and determined there was no basis to proceed." Resp't's' Mem. Contra Pet'r's Req. for Oral Arg. 1. Yet, Petitioners' core argument is that the Board could not reasonably reach that conclusion on the basis of the facts and law presented in the Board Complaint. After numerous briefs, the Board has yet to explain how it could find "no basis to proceed" despite, among other things: (1) admissions by Dr. James that constitute violations on their face (acknowledging that

[1] Petitioners take the Board's failure to dispute the lack of investigation as an acknowledgment that it did not conduct a factual investigation before reaching its determination that "there was no basis to proceed." Resp't's' Mem. Contra Pet'r's Req. for Oral Arg. 1. Indeed, this is why Petitioners have requested a copy of the Board's investigative file, so that the Court can ascertain precisely what the Board did, if anything, in response to the Board Complaint. Thus, the pending discovery request should not be deferred until after this Court's ruling on dismissal.

he served as both supervisory caregiver and interrogation advisor to young boys kidnapped and detained incommunicado, the explicit mission of the latter role being to exploit children's dependency and weaknesses for intelligence); (2) documented evidence of conduct that serious abuse occurred under his professional watch (e.g., reports that a young Canadian national detained by U.S. forces at the age of 15 was threatened with rape and death; repeatedly lifted by the neck and arms and forcefully dropped to the floor; short-shackled in painful positions for hours; left to urinate on himself; dragged through a mixture of pine oil and urine; and forced to remain in soiled clothing for two days); and (3) an opinion by an expert in psychological ethics concluding that, if true, the conduct described would constitute the worst case of professional misconduct encountered in his career. See Board Complaint at ¶¶ 44-49, 78-82, Petitioners' Verified Complaint for Writ of Mandamus at ¶ 50.

It is significant that the Board has not disputed a single factual or legal allegation made by Petitioners, begging the very legitimate question of how it could reasonably conclude that "there was no basis to proceed". This issue lies at the heart of the abuse of discretion question before the Court. It is an inquiry that cannot be separated from the underlying facts and violations alleged in the Board Complaint, and as such, it warrants the most thorough review this Court can offer, including oral argument.

b. Standing

The question of standing, particularly that of public interest standing, is also complex in this case as the questions surrounding the dismissal of this complaint raise matter of tremendous importance to the Ohio public. At stake is an inquiry into the fitness to practice of a psychology school dean entrusted with teaching young people to use their skills and training to bring about

healing and good mental health. Petitioners' "agenda" in bringing the complaint against Dr. James to the Board is not a personal one. They are not alone in questioning whether an Ohio psychologist allegedly responsible for numerous ethical violations, including torture, is fit to treat Ohio patients, let alone oversee the professional education of future psychologists in this state. Over the last two years, hundreds of Ohioans have expressed concern with Dr. James's past; dozens of them have written to ask the Board to investigate Dr. James' behavior. Pet'r's Compl. at ¶ 51. The interest Petitioners share with the larger Ohio public—in their state psychology board taking basic steps to investigate a psychology dean's alleged overseeing of torture, and his admitted conflict of interests, including acting as care provider and exploiter to boys as young as 11—form the basis for Petitioners' claim of public interest standing.

Petitioners rely on *Bowers v. Ohio Dental Board* (10th Dist. 2001), 142 Ohio App. 3d. 376, among other cases, because *Bowers* preserved the doctrine of public interest standing. As explained in Petitioners' Opposition to Respondent's Motion to Dismiss, the ultimate outcome of *Bowers* is easily distinguishable on the facts. *See* Pet'r's Opp'n to Resp. Mot. to Dismiss 17-20. In terms of public interest standing, this case is closer to *State ex rel. Ohio Academy of Trial Lawyers et al. v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062. However, neither *Sherman*, *Bowers*, nor prior decisions involving challenges of board dismissals have dealt with issues of this magnitude (allegations of torture), or with boards that make inexplicable and unexplained decisions in the face of such grave, well-documented complaints. It is precisely because public interest standing is a doctrine of limited application that, when a *prima facie* case for it is made, as Petitioners have done, that oral argument is warranted.

CONCLUSION

For these reasons, Petitioners respectfully reiterate their request that the Court hear oral arguments before ruling on Respondents' motions to dismiss and stay discovery.

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Deborah A. Popowski
Co-Counsel for Petitioners

Tyler R. Giannini
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion of Petitioners to Request Oral Hearing on Respondents' Motion to Dismiss and Motion to Stay Discovery was sent by me via regular U.S. mail, postage prepaid this 8th day of September, 2011 to Roger F. Carroll, Esq., Assistant Attorney-General, 30 East Broad St., 26th floor, Columbus, OH 43215-3400.

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0A114 - Q77

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

DR. TRUDY BOND, et al.,	:	
Relators	:	CASE NO. 11CV-4711
vs.	:	JUDGE BEATTY
STATE BOARD OF PSYCHOLOGY,	:	MAGISTRATE SKEENS
Respondent	:	

MAGISTRATE'S DECISION ON RESPONDENT'S MOTION TO DISMISS FILED MAY 18, 2011, RESPONDENT'S MOTION TO STAY DISCOVERY FILED MAY 18, 2011, AND RELATORS' MOTION FOR ORAL HEARING FILED AUGUST 24, 2011

SKEENS, MAGISTRATE

This case was referred for a Decision on Respondent's Motion to Dismiss, Respondent's Motion to Stay Discovery, and Relators' Motion for Oral Hearing. The Magistrate's Decision is as follows.

FACTUAL BACKGROUND

On April 13, 2011, Relators Dr. Trudy Bond, Michael Reese, Rev. Colin Bossen, and Dr. Josephine Setzler filed a Complaint seeking a writ of mandamus against Respondent Ohio State Board of Psychology (the "Board").

Relators allege that on July 7, 2010, they filed a complaint with the Board against Dr. Larry C. James, a psychologist licensed by the Board. Complaint, ¶2. The complaint to the Board alleged that Dr. James was responsible for the abuse and exploitation of detainees as a psychologist at the U.S. military facility at Guantanamo Bay, in violation of Ohio law and Board ethics rules. *Id.* Relators allege that their complaint further detailed how Dr. James violated Ohio law and Board ethics rules after leaving Guantanamo Bay by publishing confidential patient histories in his 2008 memoir and by

misleading the public and the Board about his role. *Id.*, ¶3. Relators allege that they supported their Board complaint with documentation, including reports, records and hearings from the U.S. military, Senate, Department of Justice, and Central Intelligence Agency, as well as statements from survivors and witnesses. *Id.*, ¶5. Relators allege that their complaint was further supported by a report by psychologist Bryant L. Welch, who concluded that the factual allegations, if true, constituted serious ethical breaches by Dr. James. *Id.*, ¶50.

Relators allege that on September 30, 2010, they and their counsel met with Supervising Board member Jane Woodrow, Board Executive Director Ronald Ross, Board Investigator Carolyn Knauss, and the Board's legal counsel to discuss their complaint. *Id.*, ¶53. On January 26, 2011, the Board's investigator issued a letter to Relators stating that it had completed its review of the complaint and had determined that it was unable to proceed to formal action in this matter. *Id.*, ¶55.

Relators allege that they have been denied justice through the Board's decisions to not fully investigate and not proceed to formal action. *Id.*, ¶74. Relators seek a writ of mandamus requiring the Board to proceed to formal action on, or investigate in good faith, their allegations against Dr. James and to provide reasons for any decision. *Id.*, ¶81.

On May 18, 2011, Respondent filed the Motion to Dismiss Complaint in Mandamus pursuant to Civ. R. 12(B) for lack of standing and failure to state a claim upon which relief can be granted. On the same date, Respondent filed the Motion to Stay Discovery pending resolution of the Motion to Dismiss. Relators filed briefs opposing

these motions, and Respondent filed replies. On August 24, 2011, Relators filed a Motion for Oral Hearing on the Motions to Dismiss and to Stay.

On October 24, 2011, the Court issued an Order referring the above motions to the Magistrate.

CONCLUSIONS OF LAW

Respondent seeks dismissal of this action on two bases, first pursuant to Civ. R. 12(B)(1) for lack of standing, and second pursuant to Civ. R. 12(B)(6) for failure to state a claim.

Standing

Civ. R. 12(B)(1) provides that a claim may be dismissed if the Court lacks subject matter jurisdiction over the claim. The Court must determine "whether the plaintiff has alleged any cause of action cognizable by the forum." *Avco Financial Services Loan, Inc. v. Hale* (1987), 36 Ohio App.3d 65, 67.

"It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 469.

Relators allege that they have two independent grounds for standing in this case. First, they assert that they have personal, beneficial interests in this matter because they have been injured by the Board's alleged abuse of discretion. Second, they assert that they have standing based on the "public right" standing doctrine because this case involves an issue of great importance and public interest.

To establish standing as a private litigant seeking a writ of mandamus, a relator must show that he has a personal stake in the outcome of the case, which is more than a

mere interest in the action. *State ex rel. Village of Botkins v. Laws* (1994), 69 Ohio St.3d 383, 387. A private litigant must generally show that he has suffered or is threatened with direct and concrete injury, in a manner or degree different from that suffered by the public in general. *Sheward, supra*, 86 Ohio St.3d 451, 469-470.

The Complaint alleges that each Relator has been harmed by the Board's actions. Dr. Bond, a psychologist licensed in Ohio, asserts that her interest in her psychology license is affected because the Board's actions damage the integrity of the psychology profession in Ohio. Complaint, ¶65. Rev. Bossen asserts that he can no longer trust that when he refers members of his congregation to Ohio-licensed psychologists, they will be helped rather than harmed. *Id.*, ¶66. Dr. Setzler, a mental health advocate, alleges that she can no longer trust that the Board will protect vulnerable Ohio residents from psychologists who abuse the privilege of their license. *Id.*, ¶67. Mr. Reese, who receives treatment at Veterans Affairs Hospitals, alleges that he can no longer trust that the Board will discipline Ohio-licensed military health professionals who violate ethical rules. *Id.*, ¶68.

In essence, the harm alleged by each Relator involves damage to the psychology profession from the Board's decision not to take formal action against Dr. James. The allegations of harm are vague, conclusory, and immeasurable. Relators have not alleged how damage to the psychology profession affects them individually in any actual or specific way. Rather, Relators allege concern about potential harm to patients from treatment by unidentified psychologists who may not be properly disciplined. Relators have not alleged direct and concrete injury as required for private litigant standing.

Relators have cited no authority finding private litigant standing under similar circumstances. There is ample authority demonstrating that the types of injury claimed by Relators do not confer standing.

In *Bowers v. Ohio State Dental Board* (2001), 142 Ohio App.3d 376, the Tenth District Court of Appeals held that a dentist did not have standing to obtain a writ of mandamus compelling the Dental Board to adopt regulations regarding dental examinations. Despite the dentist's membership in the profession at issue, the Court stated that he did not have a personal or beneficial interest in the requested writ. *Id.*, p. 381.

In *Reisner v. Cantone* (Supreme Court of New York, New York County, 2011, Case No. 115400/2010; Ex. 2 to State's Reply brief), Dr. Reisner, a psychologist licensed in New York, sought an order compelling a government agency to take disciplinary action based on his complaint against Dr. John Leso, a psychologist who served at the military facility at Guantanamo Bay. In response to Dr. Reisner's argument that the value of his license was diminished by the agency's failure to act, the court stated that such an assertion is so "speculative and immeasurable that it is not a cognizable injury in fact." *Id.*, p. 8.

In essentially the same case as this, *Bond v. Louisiana State Board of Examiners* (Louisiana Court of Appeal 2011), 2009 CA 1735, 39 So.3d 855, at p. 3-4, the court held that Dr. Bond did not have standing to bring an action requiring the Louisiana State Board of Examiners of Psychologists to take action against Dr. James. The court stated:

> Without some peculiar, special, and individual interest, a citizen has no standing in court to champion a cause or subject matter that pertains to the whole people in common, nor has an individual citizen legal standing in

> court to enforce the performance of a duty owed to the general public. Here, Dr. Bond has shown no particular, special, or individual interest.

As noted, Relators also argue that they have standing based on the "public right" standing doctrine.

"Public right" standing allows a party that has not suffered an actual injury to have standing "when the issues sought to be litigated are of great importance and interest to the public." *Sheward, supra*, 86 Ohio St.3d at 471. In *Sheward*, the Court limited the application of "public right" standing as follows: "this court will entertain a public action only 'in the rare and extraordinary case' where the challenged statute operates, 'directly and broadly, to divest the courts of judicial power.'" *Id.*, at 504.

In *State ex. Rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Comp.*, 2002-Ohio-6717, the Court held that "public right" standing permitted a state and national labor union to challenge the constitutionality of legislation that permitted warrantless drug and alcohol testing of injured workers. The court stated that the challenged legislation implicates a public right because it "affects virtually everyone who works in Ohio. The right at stake, to be free from unreasonable searches, is so fundamental as to be contained in our Bill of Rights." *Id.* at ¶12.

In response to the argument that "public right" standing existed in *Bowers, supra*, the Tenth District Court of Appeals stated as follows:

> Application of the public action rule of standing ... is limited ....[C]ourts entertain such actions only where the alleged wrong affects the citizenry as a whole, involves issues of great importance and interest to the public at large, and the public injury by its refusal would be serious. [ ] The vast majority of such cases involve voting rights and ballot disputes ....
>
> Here, the writs sought by appellants would compel appellees to adopt regulations specifying which exams prospective dentists must take for licensure in Ohio. While such relief may be of interest to many Ohioans

> and may tangentially affect their lives as a result of who is permitted to practice dentistry in Ohio, the duty sought to be compelled is not in any meaningful sense for the benefit of the public as a whole. It does not affect the citizenry at large, it is not of great importance and interest to the general public, and the alleged public injury is not serious. Rather, the issues raised by this case are of significant interest to only a select group of people--those who may seek licensure to practice dentistry in Ohio. Simply put, the Board's alleged obligation to adopt a rule designating which exams prospective dentists must take to obtain an Ohio license to practice dentistry is not a public duty. 142 Ohio App.3d at 381.

In *Reisner, supra*, the court rejected Dr. Reisner's argument that the regulation of the profession of psychology is a matter of sufficiently significant public interest to confer "public interest" standing upon him. Ex. 2 to State's Reply Brief, p. 11.

The above legal authority establishes that "public right" standing is limited to those rare cases that rise to the level of the legislation at issue in *Sheward* and *Ohio AFL-CIO*. This case involves a complaint seeking disciplinary action against the license of a single psychologist, Dr. James. As in *Reisner, supra*, the harm alleged by Relators relates to potential damage to the psychology profession if disciplinary action is not taken. As in *Bowers, supra*, the Board's decision on whether to take action against Dr. James "does not affect the citizenry at large, it is not of great importance and interest to the general public, and the alleged public injury is not serious."

For the foregoing reasons, the Magistrate concludes that Relators do not have standing to pursue this action. Pursuant to Civ. R. 12(B)(1), this case must be dismissed for lack of subject matter jurisdiction.

Failure to State a Claim

Civil Rule 12(B)(6) tests the sufficiency of the claims asserted in a complaint. Dismissal of a case pursuant to Civil Rule 12(B)(6) is appropriate only where it appears beyond doubt from the complaint that the plaintiff can prove no set of facts in support of

the claim at issue which would entitle him or her to relief. *York v. Ohio State Highway Patrol* (1991), 60 Ohio St.3d 143, 144. The Court, in construing a complaint upon a motion to dismiss for failure to state a claim, must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192.

In order to obtain a writ of mandamus, a Relator must demonstrate that: (1) Relator has a clear legal right to the relief sought; (2) Respondent has a clear legal duty to provide the requested relief; and (3) Relator has no plain and adequate remedy in the ordinary course of the law. *State ex. rel. Gill v. School Emp. Retirement Sys. of Ohio*, 2009-Ohio-1358, ¶18. A party seeking a writ of mandamus must plead the existence of all necessary facts to support the claim. *State ex rel. Temke v. Outcalt* (1977), 49 Ohio St.2d 189, 190-191.

R.C. 4732.17(A) provides that the Board "may" issue a reprimand or suspend or revoke the license of a psychologist on the specified grounds. Relators have cited no legal authority requiring the Board to initiate disciplinary action against a licensee or to provide an explanation of a decision not to pursue formal action.

In *State ex rel. Talwar v. State Medical Board*, 2004-Ohio-6410, the relator sought to compel the State Medical Board to take disciplinary action based on his complaint against a physician. The Ohio Supreme Court affirmed dismissal of the mandamus action, holding that the relator could not establish the requisite legal right and legal duty regarding the initiation of disciplinary action. *Id.* at ¶7. The Court noted that the governing statutes authorized the board to take disciplinary action, but did not require

that it do so, and that the board had discretion in such decisions in allocating its resources in a manner that will best protect patients. *Id.*, ¶11-12.

In *State ex rel. Westbrook v. Ohio Civil Rights Comm'n* (1985), 17 Ohio St.3d 215, the Court held that the relator was not entitled to a writ of mandamus compelling the Ohio Civil Rights Commission to investigate and file a formal complaint. The Court stated that since the Commission had discretion in determining whether to investigate and issue a formal complaint, the relator could not establish an absolute duty to do so. *Id.* at 216.

See also Gosney v. Board of Elections (Seventh App. Dist. Case No. 88-C-54), 1989 Ohio App. LEXIS 1168, at p. 5 (the court stated that where the performance of a duty is not mandatory but is discretionary, a writ of mandamus will not issue); *State ex rel. MacDonald v. Cook* (1986), 15 Ohio St.2d 85 (mandamus does not lie to compel a public officer to enforce a regulation against a specific person); and *Robinson v. Office of Disciplinary Counsel* (Tenth App. Dist Case No. 98AP-1431), 1999 Ohio App. LEXIS 3928 (affirming dismissal of the case on the basis that the decision on whether to dismiss a complaint filed with the Office of Disciplinary Counsel was discretionary).

For the foregoing reasons, the Magistrate concludes that Relators cannot establish a clear legal right to the relief sought or that Respondent has a clear legal duty to provide the requested relief. Pursuant to Civ. R. 12(B)(6), this case must be dismissed for failure to state a claim.

The Magistrate concludes that an oral hearing is unnecessary because the Motion to Dismiss raises legal issues that are sufficiently addressed by the briefs.

For the foregoing reasons, the Magistrate's Decision is that Respondent's Motion to Dismiss filed May 18, 2011 is granted, Respondent's Motion to Stay Discovery filed May 18, 2011 is moot, and Relators' Motion for an Oral Hearing filed August 24, 2011 is denied.

A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL THE COURT'S ADOPTION OF ANY FACTUAL FINDING OR LEGAL CONCLUSION, WHETHER OR NOT SPECIFICALLY IDENTIFIED AS A FINDING OF FACT OR CONCLUSION OF LAW, UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FINDING OR CONCLUSION AS REQUIRED BY CIV. R. 53(D)(3)(b).

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0A114 - Q87

Franklin County Court of Common Pleas

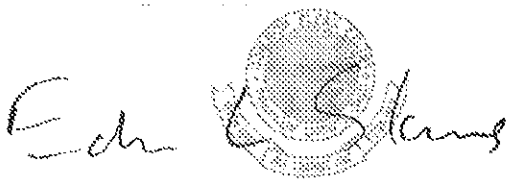
Date: 12-16-2011

Case Title: DR TRUDY BOND -VS- OHIO STATE BOARD PSYCHOLOGY

Case Number: 11CV004711

Type: MAGISTRATE DECISION

So Ordered



/s/ Magistrate Edwin L Skeens

0A140 - S57

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

Dr. Trudy Bond, Mr. Michael Reese, Rev. Colin Bossen, Dr. Josephine Setzler, Petitioners v. Ohio State Board of Psychology, Respondent.	)	Case No. 11 CV 004711 Judge L. Beatty **RELATORS' MEMORANDUM IN SUPPORT OF OBJECTION TO MAGISTRATE'S DECISION**

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This case involves credible allegations of torture by an Ohio psychologist. Yet, the assigned magistrate did not even mention the word torture in his decision. The decision did not acknowledge the grave implications of the allegations made to the Ohio Board of Psychology. Nor did it grasp the need for court oversight to maintain the integrity and viability of the Ohio enforcement mechanism. State licensure and disciplining of psychologists is a key part of the federal scheme regulating military psychologists. The duty here falls to Ohio. The Board's refusal to act in accordance with this duty necessitates judicial action to compel its performance, in respect of the General Assembly's policy to protect the people of Ohio.

Relators object to the magistrate's decisions as to all three motions, and request that the Court: (1) convene an oral argument on all issues, (2) grant Relators the requested discovery, and (3) postpone ruling on the motion to dismiss until it can hear arguments and review discovery. Alternatively, Relators request that the Court reverse the magistrate's decision by denying Respondent's motion to dismiss and proceeding with discovery and a hearing on the merits.

A. STANDARD OF REVIEW

The magistrate erred in finding that Relators lack standing and in dismissing this *mandamus* petition for lack of subject matter jurisdiction (which the Court has, pursuant to O.R.C. Chapter 2731). He incorrectly reviewed – and dismissed – Relators' standing claims as involving subject matter jurisdiction governed by Civ.R.12(B)(1). But a motion to dismiss for lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court. *State ex rel. Jones v. Suster* (1998), 84 Ohio St. 3d 70, 77; *State ex rel. Smith v. Smith* (1996), 75 Ohio St. 3d 418, 420; *State ex rel. LTV Steel Co. v. Gwin*(1992), 64 Ohio St. 3d 245, 251. "These issues are properly raised by a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted." *Brown v. Columbus City Schs. Bd. of Educ.*, 2009-Ohio-3230 (Franklin App. June 30, 2009) (citing *Suster* and *Washington Mut. Bank v. Beatley*, 10th Dist. No. 06AP-1189, 2008 Ohio 1679, p. 10).

In *Bourke v. Carnahan* (Franklin App. 2005), 163 Ohio App.3d 818, 824, 2005 Ohio 5422, the Court of Appeals, in discussing elements of standing, reasoned that:

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for *on a motion to dismiss the court will presume that general allegations embrace those specific facts that are necessary to support a claim.*

(emphasis supplied). Indeed, the factual allegations of the complaint and all reasonable inferences therefrom must be taken as true when addressing a motion to dismiss pursuant to Civ.R. 12(B)(6). *Vail v. The Plain Dealer Publishing Co.* (1995), 72 Ohio St.3d 279, 280. "A complaint in *mandamus* states a claim if it alleges the existence of the legal duty and the want of an adequate remedy at law with sufficient particularity so that the respondent is given reasonable notice of the claim asserted." *State ex rel. Hanson v. Guernsey Cty.Bd. of Comm'rs.* (1992), 65

Ohio St.3d 545, 548 (citing *Jenkins v. McKeithen* (1969), 395 U.S. 411, 421). By applying the wrong standard for review of the Complaint, and failing to accept as true the averments of the complaint and their inferences, the magistrate improperly denied standing to the Relators and incorrectly found they had stated no claim in *mandamus*.

B. OBJECTIONS TO INSUFFICIENT FINDINGS OF FACT

1. Errors Regarding Harm to Relators and the Public

The magistrate ignored reasonable inferences arising from the Complaint that should have been accorded deference. In particular, the Board's dismissal of the complaint against Dr. James, without explanation and in disregard of substantiated allegations of serious misconduct, undermines Board license credibility and, by implication, the integrity of licensed psychologists such as Dr. Trudy Bond, who is a practitioner. Compl. at ¶¶ 12, 65. The magistrate failed to recognize that the public might reasonably misinterpret Board inaction to mean that Dr. James's involvement in torture and misuse of his healing art violates neither laws nor rules of the profession, and does not render a psychologist unfit to practice in Ohio. This view compromises the Board's legitimacy to monitor and enforce. It also impairs the ability of potential and actual patients and clients to trust that Ohio psychology licensure is a credible certification that the professional will care for vulnerable people, not exploit them. The regulatory failure to undertake a *bona fide* investigation or hold a hearing on Dr. James's misconduct thus erodes Dr. Bond's license and harms her ability to earn patients' trust.[1]

The assigned magistrate similarly ignored facts and inferences of distinct injury as alleged by the other Relators. See Compl. at ¶¶ 66-68. Dr. Josephine Setzler works as an advocate for her brother and others who suffer from mental illness, including inmates in

[1]The magistrate also misunderstood that not only do Ohio regulatory laws and rules grant Dr. Bond authority to file her Board complaint, but legally oblige her to do so, since as a fellow professional, she is particularly well-equipped to recognize misconduct.

correctional institutions. She reasonably fears that Ohio correctional authorities may use the Board's inaction in the James case to pressure psychologists to disregard their ethical obligations when treating prisoners and vulnerable patients. Rev. Colin Bossen ministers a congregation and refers vulnerable congregants in need of mental health treatment to Ohio psychologists. The Board's apparent indifference to protecting Ohioans from psychologists who use their professional skills and authority to exploit those in their care significantly impairs Rev. Bossen's ability to confidently refer those in need of psychological help. Michael Reese, a disabled veteran, receives regular treatment at Ohio Veteran Affairs (VA) hospitals. As such, he receives care from active-duty and retired military health professionals. If military abuses of psychological tools are allowed to trump Ohio law, then Mr. Reese cannot rely on a license to indicate that a psychologist is practicing ethically and subjected to meaningful monitoring.

The magistrate reduced this case (Decision p. 7) to "a complaint seeking disciplinary action against the license of a single psychologist, Dr. James," and characterized the Board's decision as one which "'does not affect the citizenry at large . . . is not of great importance and interest to the general public, and the alleged public injury is not serious.'" This trivializes the historically momentous issue of torture and the imperative for accountability for those who commit it, particularly when they are licensed psychologists charged with healing rather than harming. The U.S. military expressly relies on state licensing boards to oversee the quality of their licensees' services. The politically sensitive nature of this case cannot be a reason for a magistrate to fail to draw reasonable inferences in Relators' favor. This Court should defer to the complaint's allegations and require the Ohio Board of Psychology to fairly discharge its duties.

2. Errors Regarding Allegations and Supporting Evidence in Relators' Complaint

The magistrate erred in failing to accept as true that the Board Complaint presented evidence of conduct that, on its face, violated Ohio laws and rules prohibiting psychologists from entering into multiple relationships that compromise judgment and objectivity and lead to the exploitation of people with whom they work. Compl. at ¶46. He overlooked some of the allegations that the evidence included statements made by Dr. James himself in his own book, see *id.* at ¶30, 44, as well as allegations that Dr. James had engaged in misrepresentation. See *id.* at ¶45 (citing Bd. Compl. at ¶¶52-53, 94-110). And the magistrate minimized the gravity of the expert opinion provided by Dr. Bryant Welch, who concluded that the allegations, if true, constituted the most serious and far-reaching ethical breaches he has ever encountered in 35 years as a psychologist and expert in psychological ethics. See *id.* at ¶50.

3. Errors Regarding the Board's Response to Relators' Complaint

The magistrate failed to accept as true and ascribe weight to the allegation, not disputed by the Board, that Board investigators refused to explain why they would not proceed with the complaint. See *id.* at ¶¶55-58. While he noted the September 30, 2010 meeting between Relators and the Board, the magistrate failed to mention that the meeting had been proposed by Relators as an opportunity to answer questions from the Board, but that the investigators repeatedly responded that they had no questions for Relators. *See id.* at ¶53. The Relators repeatedly told the Board that they were available to provide additional information, including witnesses, see *id.* at ¶5, but the Board never took up this offer, nor did investigators, to Relators' knowledge, contact the witnesses Relators suggested. See *id.* at ¶53. The cursory January 30, 2011 letter reflects the apparent lack of any meaningful investigation.

4. Errors Regarding Board Duties

The magistrate failed to mention and adequately consider, in the Factual Background and Conclusions of Law sections of his decision, authority that explicitly articulates the Board's duties to the public, including to individuals who file complaints. These included statements from the Board, the Franklin County Court of Appeals, and the Ohio Attorney General. See Section C(2). In fact, the magistrate's omission of *any* mention of the Board's duty to regulate the profession is glaring and calls into question the soundness of the entire decision. A case that revolves around questions of state agency duties to protect the public cannot reasonably be decided without reference to the very reason for the Board's existence: its duty to regulate the profession in the service of public safety.

5. Errors Regarding Non-Binding and Distinguishable Cases from other Jurisdictions

There are many important distinctions between the instant matter and the decisions of *Bond v. Louisiana State Board of Examiners* (2010), Louisiana Ct. App. 2011, 2009 CA 1735, 39 So.3d 855, and *Reisner v. Cantone* (S.Ct. of New York, New York County 2011), Case No. 115400/2010. The magistrate, misstating fact and law, called the Louisiana decision "essentially the same" as the present matter. Dr. Bond is licensed and practices in Ohio, not Louisiana, and seeks action from the Ohio Board of Psychology - her licensing board - which requires her to report professional misconduct by other licensees. O.A.C. §4732-17-01(J)(4). Dr. James held an active license in Louisiana when Dr. Bond filed a complaint there, but he was not practicing psychology there. In Ohio, he was and still is an active psychologist, and is administering a professional psychology school at Wright State University. Compl. at ¶1. The magistrate ignored that the Louisiana Court of Appeals based its decision on a reading of the Louisiana Administrative Procedure Act, which is not at issue here. Nor did Louisiana's court deal with a

public-action question of standing. The magistrate relied on *Reisner*'s holding that the claimed diminution of Dr. Reisner's psychology license from non-investigation of John Leso was "speculative and immeasurable." But Ohio recognizes intangible injuries in claims of civil assault, sexual harassment, and loss of business goodwill. The magistrate produced no considered authority distinguishing the "immeasurable" harm to Bond's professional license from these other compensable wrongs, but only borrowed the *Reisner* conclusion. Neither the Lousiana nor New York decisions, of course, bound the magistrate to find as he did. Notably, those other courts rendered their decisions only after first hearing oral argument on the salient issues, which this Court has not yet granted.

C. OBJECTIONS TO IMPROPER CONCLUSIONS OF LAW

1. Relators Have Standing to Petition for Mandamus

Relators' factual allegations pertaining to both the wide-reaching and particularized harm of the Board's inaction were more than sufficient to meet the pleading stage requirements and survive Respondent's motion to dismiss. The magistrate erred in his legal conclusion; failed to apply the proper standard of review; failed to consider Relators' factual allegations and legal interpretations of binding legal authority; and improperly relied on nonbinding and distinguishable decisions from other jurisdictions.

The magistrate's decision fails to properly address and characterize Relators' allegations concerning the harm caused by the Board's actions and inaction. Neither the Board nor the assigned magistrate has thus far disputed the following allegations: that many human beings were tortured and cruelly treated, Compl. at ¶ 2; that Dr. James bears some direct responsibility for their torture and cruel treatment, *id.*, at ¶¶ 31–40; that Dr. James engaged in this conduct

while acting as a professional psychologist , *id.*, at ¶¶ 34–35; that Dr. James is currently an influential psychologist and educator in this state, with a license to care for patients, *id.*, at ¶ 1; that Dr. James enjoys this power thanks to authority granted to him by the Board, *id.*, at ¶¶ 1, 6; that Dr. James's alleged actions violate the rules and laws governing psychologists in this state, *id.*, at ¶¶ 3–4, 29; that Dr. James engaged in other unethical conduct that, on its face, violates additional laws and rules governing Ohio psychologists, *id.*, at ¶ 30; that Relators provided the Board with notice, credible evidence, and expert opinions supporting their allegations, and otherwise properly followed procedure, *id.*, at ¶¶ 48, 50; and that, in response, the Board has done nothing beyond read Relators' complaint and host a meeting with Relators in which its representatives failed to pose questions or accept, at that time or subsequently, offers of additional information, *id.*, at ¶¶ 8–9, 53, 54.[2]

Therefore, the standing question before this Court is whether these alleged actions pose, or risk posing, significant harm to the Relators or the public at large. By mischaracterizing the alleged harm, the magistrate's decision wrongly concludes that no significant harm has been wrought on the people of Ohio. Yet, an adjudicator who presumes as true the aforementioned factual allegations and makes all reasonable inferences in favor of the Relators could not reasonably conclude that the people of Ohio are not notably harmed by an unrepentant torturer's continued authority to treat Ohio patients and educate future psychologists, many of whom will go on to treat Ohio patients themselves. Nor could an adjudicator reasonably conclude that the people of Ohio are not significantly harmed by the state regulatory agency's refusal to apply the laws and rules governing psychologists to one of its profession's most powerful members.

Once that harm is properly characterized and acknowledged, the magistrate's refusal to

[2]Even if any of these allegations were disputed, the magistrate has an obligation to take as true the factual allegations of the complaint as well as all reasonable inferences derived therefrom when addressing a motion to dismiss. See Section A.

grant standing cannot be defended. Relators do not agree, as the magistrate's decision would imply, that the legal system is so deficient that it has no mechanism with which to remedy a public harm of such gravity. The very purpose of both mandamus and public interest standing doctrines is to correct this kind of corrosive injustice. The true question before this Court, then, becomes not whether it has the authority to remedy this injustice (it does), nor whether Relators are harmed (they are). The true question is whether this harm is more properly raised by Relators in their private capacity or as members of the greater public. Relators experience their injury as concrete and direct, for reasons articulated in earlier briefs and repeated below. Nevertheless, if the Court finds that Relators' injuries are not sufficiently distinguishable from those of their fellow Ohioans, then let the Court hear Relators in their capacities as members of the public. For, if the remedy of mandamus is to have any meaning, the Court must be empowered to hear claims that are so serious and broad-reaching that they affect millions of people across Ohio. And if this Court were to disagree, and to conclude that these particular claimants, whether in their private capacity or as members of the public, are not properly placed to seek remedy for this injustice from the Court, then Relators request that the Court, at a minimum, clarify who would.

a. Relators Established Standing as a Matter of Public Right

The "public-right" or "public-action" doctrine of standing applies here and provides an independent ground for standing. In framing the case as being about the Board's failure to discipline a single psychologist, see Decision at 7, the magistrate failed to note that the psychologist at issue is among the most influential in this state and was responsible for policies of torture and ill-treatment in one of the world's most notorious prisons. See Pet. Req. Oral Arg.

at 2–3. He also failed to consider Relators' allegation that hundreds of Ohioans have expressed concern about the seriousness of the alleged misconduct and its potential implications for people in Ohio, and that dozens of them have written to ask the Board to investigate Dr. James' behavior. See Compl. at ¶ 51; Pet. Reply Mem. on Oral Arg. at 5. Finally, the magistrate mischaracterized the alleged harm as relating to "potential damage to the psychology profession," see Decision at 7, when Relators alleged both potential and ongoing damage to a broader public beyond the psychology profession. See Pet. Opp. Brief at 17–20.

Furthermore, the magistrate misread *Sheward* if he concluded from it that public right standing could only be recognized in challenges to statutes that divest courts of power. See Decision at 6. The language quoted from *Sheward* is from a section in which the Court's majority responded to the dissent's allegation that it intended to replace the actual-injury component of standing with a public-right component *specifically* in *constitutional* challenges to *legislative enactments* where Relators "asserted that a coequal branch of government ha[d] exceeded its constitutional authority." *Sheward* at 503. Read in context, the proper limiting rule derived from *Sheward*, to be applied generally to mandamus challenges is that the action must risk posing harm of the "magnitude and scope" caused by the tort reform statute at issue in that case. *Id.* at 504.

The Supreme Court cemented this less limited interpretation of public right standing in *State ex. Rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Comp.*, when it recognized public right standing without including in its reasoning any reference to the divestment of judicial power, even when applying *Sheward*. *State ex. Rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Comp.* (2002), 97 Ohio St. 3d 504, 506; see also Pet. Opp. Brief at 17-20. The magistrate noted that the

Court recognized public right standing in *Ohio AFL-CIO* because permitting warrantless drug and alcohol testing of injured workers "affect[ed] virtually everyone who works in Ohio." *Id.* at 506. However, he failed to apply that reasoning in disregarding Relators' allegation that the public action at issue here affects everyone who relies on mental health services in Ohio. Furthermore, despite *Ohio AFL-CIO*'s being clear that the fundamental nature of the "right at stake, to be free from unreasonable searches" was an important factor in the Court's recognition of public right standing, *id.* at 506, the magistrate ignored that the case before the Court is about one of the most fundamental human rights of all: the right to be free from torture, one that is similarly enshrined in our Bill of Rights.

The magistrate misapplied *Bowers* in reasoning that the injury caused by abdication of the Dental Board's duty in that case (to give prospective dentists notice of the tests required for licensure) could be compared in magnitude to the abdication of Psychology Board's duty in this case (to investigate, and if warranted by the evidence, discipline licensed psychologists responsible for the torture of children and adults). See Decision at 6-7. He failed to consider Relators' allegation that, unlike *Bowers*, the duty sought to be compelled here *is* for the benefit of the public as a whole. See Pet. Opp. Brief at 17–20. Finally, the magistrate relied on an erroneous decision by a New York trial court, issued after the filing of Relators' opposition brief, without noting its non-binding nature or considering important factual and legal differences between that case and the one before this Court. See Section (B)(6).

b. Relators Established Standing as Private Litigants

Relators established private standing by alleging enough general facts to show that they suffered direct and concrete injuries from the Board's abdication of public duty. See, e.g., Pet.

Opp. Brief at 10-14. Besides incorrectly framing the harm as one inflicted only on the psychology profession, the magistrate erred by imposing an improperly higher pleading burden, see Section A, and by concluding that their particularized injury allegations were conclusory or insufficiently specific. See Decision at 4. He failed to adequately consider Relators' arguments that the Board, in acting with complete lack of transparency, has withheld information that further illustrates the degree to which it has abdicated its public duty. The scale of the arbitrariness at issue is a crucial element of the injury suffered by Relators, and the magistrate erred in disregarding Relators' argument that this case should not be dismissed on these grounds without discovery and oral arguments. See Pet. Opp. Brief at 5, 8-10, 25; Pet. Req. Oral Arg. at 3. Similarly, the magistrate erred in finding the alleged injury deficient because of immeasurability. See Decision at 4. When seeking equitable relief, Relator's injury need not be quantifiably measurable in order to be direct and concrete.

In support of his statement that there was "ample authority demonstrating that the types of injury claimed by Relators do not confer standing," the only binding, precedential case cited by the magistrate was *Bowers*, a case that Relators successfully distinguished with arguments not acknowledged or dispose of by the magistrate. The other two cases cited in support are distinguishable, non-binding decisions issued by courts in other jurisdictions. See Decision at 5. Calling *Bond v. Louisiana State Board of Examiners of Psychologists* "essentially the same" case as the one at hand was a gross misstatement of fact and law. See Decision at 5 (citing *Bond*); Section B(5). The assessment of harm to Relators in Ohio is necessarily different from the assessment of injury to Dr. Bond's license in Louisiana, where Dr. James does not currently practice or serve as dean of a state psychology school, and where Dr. Bond is not licensed.

2. Relators Stated a Claim in Mandamus by Establishing their Clear Legal Rights,

Respondent's Clear Legal Duty, and the Want of an Adequate Alternative Remedy at Law

Relators established that the Board violated their rights by abrogating its duties to monitor and discipline the behavior of its licensees, through conduct that constituted an abuse of discretion for which no adequate alternative remedy at law exists. Comp. at 1-3, 13-18; Pet. Opp. Brief at 5-8, 20-29. They did so with sufficient particularity so as to give Respondents reasonable notice of the claim asserted. See *Hanson* at 548. Yet, inexplicably, the magistrate's decision contains no discussion of Relators' argument that the Board's purpose and source of authority derive from its fundamental duty to protect the public from the unsafe practice of psychology. *See, e.g., In re Barnes* (1986), 31 Ohio App.3d 201, 206; 510 N.E.2d 392, 398.

The magistrate erred in stating that Relators cited no legal authority requiring the Board to take the requested actions. See Decision at 8. Relators in fact provided authority that explicitly articulates the Board's duties to both the Ohio public and to individuals who file complaints. These included statements from the Board, the Franklin County Court of Appeals, and the Ohio Attorney General; they also cited the Revised and Administrative codes in further support. See, e.g., Pet. Memo. in Supp. of Compl. at 4–8. Additionally, the magistrate included no discussion supporting his conclusion, implied in his dismissal for failure to state a claim, that Relators' allegations had failed to give Respondent reasonable notice of the claim asserted.

The magistrate's decision suggests that he did not presume the truth of all factual allegations in the complaint, and that he did not make all reasonable inferences in Relators' favor, as required of adjudicators reviewing motions for dismissal based on Rule 12(B)(6). See Section A. Had the magistrate considered the legal authority cited by Relators and made the proper presumptions and inferences, he could not have reasonably concluded that the Board has

no legal obligation to take seriously a complaint of this nature. Instead, he appears not to have followed the cited *York* and *Mitchell* standards, while erroneously applying *State ex rel. Temke v. Outcalt* (1977), 49 Ohio St.2d 189, 360 N.E.2d 701, and omitting reference to more recent relevant authority. The standard in *Temke*, that relators in mandamus "must plead *and prove* the existence of all necessary facts" is not articulated in reference to motion to dismiss. *Temke* at 190 (citing *State ex rel. Baker v. Hanefeld* (1938), 134 Ohio St. 540, 541, 18 N.E.2d 404) (emphasis added). The Court denied mandamus in *Baker* only after both parties had submitted interrogatories and produced an agreed statement of facts. *Baker* at 540. The Supreme Court clarified the requisite standard for pleading here in *Hanson*. See Section A.

Furthermore, the assigned magistrate misread and/or misapplied *Talwar v. State Medical Board of Ohio*, *State ex rel. Westbrook v. Ohio Civil Rights Comm'n*, *Gosney v. Board of Elections*, *State ex rel. Macdonald v. Cook*, and *Robinson v. Office of Disciplinary Counsel*, all of which are distinguishable cases that are not dispositive. See, e.g., Pet. Opp. Brief at 25-26, 29-30 (discussing how *Talwar* and *Gosney* involved respondents that investigated and/or provided information on why they reached their decisions, crucial facts that Relators allege are absent here, an assertion that must be presently construed in Relators' favor). Meanwhile, the magistrate failed to address on-point authority cited by Relators and, most importantly, failed to review Respondent's actions for abuse of discretion, which Relators correctly argued is the appropriate standard of review here. See Pet. Opp. Brief at 24-26 (citing, e.g., Resp. Brief at 11; *State ex rel. Lee v. Montgomery* (2000), 88 Ohio St.3d 233, 235, 2000-Ohio-316; *State ex rel. Village of Botkins v. Laws* (1994), 69 Ohio St.3d 383, 386, 1994-Ohio-518; *State ex rel. Browning v. Fayette Cty. Commrs.* (App.1993), 14 Ohio Law Abs 529, 529).

III. Oral Arguments Are Appropriate and Necessary in this Case

The assigned magistrate erred in concluding that a hearing was unnecessary. He failed to cite, let alone engage with, Relators' arguments: (1) that the Court could not decide on the legal and factual questions at issue in the motion to dismiss without engaging on some level with the allegations in the underlying complaint; (2) that all the cases from other jurisdictions described as similar or "the same" by the Board were decided only after hearing oral argument; (3) that the Board Complaint was exceptional in the seriousness of its allegations, the extensive supporting documentation provided, and its susceptibility to politicization; and (4) that *prima facie* arguments of public interest standing merit additional examination at oral argument.

This Court should hear oral arguments on this motion, as it did on the motion to dismiss another, very recent, case dealing with public standing. *ProgressOhio.org, Inc., et al., Plaintiffs v. JobsOhio, et al., Defendants*, Case No. 11-CVH-010807 (Entry, November 17, 2011)(granting oral argument on the State of Ohio's motion to dismiss on the basis of a lack of public standing).

IV. Discovery is Appropriate and Necessary in this Case

Having erred in granting Respondent's motion to dismiss, the magistrate also erred in concluding that the discovery dispute was rendered moot. The abbreviated decision letter by the Board provides no information to the Court or the Petitioners as to what steps were or were not taken. As a result, discovery of the investigative file remains essential so that the Court may have a complete record on which to determine the Board's "clear legal duty." The trial court must constrain its exercise of discretion over discovery matters to "consider the interests of parties seeking discovery and the interests of parties and non-parties resisting discovery." *Martin v. The Budd Co.* (1998), 128 Ohio App.3d 115, 119.

/s/ Terry J. Lodge
Terry J. Lodge
Co-Counsel for Petitioners

/s/ Deborah A. Popowski
Deborah A. Popowski
Co-Counsel for Petitioners

Tyler R. Giannini
Co-Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on December 30th, 2011, I electronically filed the foregoing "Relator's Memorandum in Support of Objection to Magistrate's Decision" with the Clerk of Court using the electronic case filing system, and that pursuant to system practice it was to be served electronically upon the following: Roger Carroll, email: roger.carroll@ohioattorneygeneral.gov, street address: Assistant Attorney-General, 30 East Broad St., 26th floor, Columbus, OH 43215-3400.

.

/s/ Terry J. Lodge
Terry J. Lodge
Co-Counsel for Petitioners

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

DR. TRUDY BOND, et. al., Relators, vs. OHIO STATE BOARD OF PSYCHOLOGY, Respondent.	Case Number: 11CV-004711 Judge Beatty Magistrate Skeens

THE OHIO STATE BOARD OF PSYCHOLOGY'S
RESPONSE TO RELATORS' OBJECTIONS TO MAGISTRATE'S DECISION

After carefully considering the parties' arguments and reviewing the applicable case law, the Magistrate crafted a well-reasoned opinion finding that Relators did not have standing and failed to state a claim. Therefore, the Magistrate properly concluded that the Board's Motion to Dismiss should be granted. Unable to rebut the Magistrate's legal reasoning, Realtors instead in their objections simply escalated their rhetoric. Such a tactic cannot obscure the fact that Relators legal arguments are flawed and without any basis. Accordingly, the Common Pleas Court should accept the Magistrate's Decision in its entirety.

In its comments to the Relators' objections the Board will not repeat all the arguments made in its Motion to Dismiss (filed on May 18, 2011), Motion to Stay Discovery (filed on May 18, 2011), Reply Brief (filed on August 17, 2011), Reply Memorandum on Board's Motion to Stay Discovery (filed August 17, 2011), Board's Memorandum Contra on Relator's Request for Oral Argument (filed August 29, 2011).

Standing

The Magistrate correctly noted "that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue" *State ex. rel. Ohio Academy of Trial Lawyers v. Sheward,* 86 Ohio St. 3d 451, 469 (1999). Contrary to Relators' assertion the Magistrate then accurately recited, with specific references to the Complaint, the basis for the Relators' claim that they had standing (Magistrate's Decision p. 4). After reviewing their allegations the Magistrate correctly concluded that Relators "have not alleged direct and concrete injury as required for private litigant standing" (Magistrate's Decision p. 4). Moreover, the Magistrate correctly commented that Relators failed to cite one case in which under similar circumstances a court found that a party had private litigant standing. Relators have never been able to dispute this fact. Further, the cases cited by the Magistrate support his conclusion.

The Magistrate also recognized that Relators' argument that they had standing under the "public right" exception was similarly lacking and contrary to established case law. The narrow public right exception carved out by Supreme Court in *State ex. rel. Ohio Academy of Trial Lawyers v. Sherward,* 86 Ohio St 3d 451 (1999), *State ex. rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Compensation* 97 Ohio St. 3d 504 (2002) and *State ex. rel. United Automobile Aerospace & Agric. Implement Workers of Am. v. Ohio Bureau of Workers' Comp.,* 108 Ohio St. 3d 432, 2006-Ohio-1327 applies in only rare and extraordinary circumstances. This case does not fit within this narrow exception.

Recently, Franklin County Common Pleas Court Judge Laurel Beatty issued a decision dismissing a purported "public action" suit on grounds that are relevant here. *ProgressOhio.org, Inc. v. JobsOhio* (Dec.2, 2011), Case No. 11-cv-010807 (Decision attached as Exhibit 1). Judge Beatty recognized that Sheward suits are limited to "rare cases" of extreme magnitude. *Id.* at p.

21 (quoting *Sheward,* 86 Ohio St.3d at 504). Judge Beatty determined that the case before her – a constitutional challenge to the privatization of economic development activities performed by the Department of Development – did not rise to the same level as *Sheward. Id.* at pp. 20-24.

The decision in *ProgressOhio.org* is consistent with a long line of Tenth District cases in which "public right" complaints were deemed of insufficient magnitude. See *Smith v. Hayes* (10th Dist.), 2005-Ohio-2961, ¶ 11 (Desertion of Child Under 72 Hours Old Act, allowing person to surrender newborn to a safe haven without fear of criminal prosecution, was not legislation of magnitude sufficient to invoke public interest exception); *Brown v. Columbus City Schools, Bd. Of Educ.* (10th Dist.), 2009-Ohio-3230, ¶ 14 (challenge to public school funding allocation methods not of sufficient magnitude); *Bowers v. State Dental Bd.* (10th Dist. 2001), 142 Ohio App.3d 376, 381 (licensure examinations for dentists not of sufficient public import). The decision by the Psychology Board not to initiate disciplinary proceedings against a licensed psychologist does not impact the citizenry at large and it is not of great importance and interest to the general public. Based upon the established legal precedent, the Magistrate properly concluded the Relators did not have standing under the public right exception.

Failure to State a Claim

Not only do Relators lack standing to pursue this action, but they also failed to state a claim for Relief for Mandamus. The Magistrate correctly cited the proper standard for reviewing a Motion to Dismiss. As a threshold matter Relators failed to cite any case which required a regulatory board to initiate disciplinary action against a licensee or to provide an explanation of its decision not to pursue a formal action. Moreover, Relators are unable to distinguish the series of cases cited by the Board in which the Court refused to order a regulatory board to initiate disciplinary action based upon a complaint. See *Talwar v. State Medical Board* (2004), 104

Ohio St. 3d 290, 2004-Ohio-6410; *State ex. rel. Westbrook v. Ohio Civil Rights Commission* (1985), 17 Ohio St. 3d, 215; *State ex. rel. MacDonald v. Cook* (1966), 15 Ohio St. 2d 85; *Robinson v. Office of Disciplinary Counsel* (10th Dist. 1999), No. 98AP-1431; 1999 Ohio App. Lexis 3928.

The Magistrate was correct when he concluded that Relators cannot establish a clear legal right to the relief sought or show that the Board has a clear legal duty to provide the requested relief. Therefore, it also was appropriate to dismiss Relators' Complaint for failure to state a claim.

Also, the Magistrate was correct in deciding that oral argument was unnecessary in this case because the legal issues were sufficiently addressed in the briefs. Further supporting the decision in this case not to conduct an oral argument, the Board previously stated that the legal issues in this case are neither novel nor complex.

Finally, since the Motion to Dismiss was granted the request for discovery is moot. (See also Board's Reply Memorandum to Stay Discovery filed on August 17, 2011).

For the foregoing reasons the Board requests the Court reject Relators' objections and adopt the Magistrate's Decision in its entirety and grant the Board's Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *State Board's Response to Relator's Objections to the Magistrate's Decision* was sent by regular U.S. mail on January 9, 2012 to the following:

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Counsel for Relators

/s/ Roger F. Carroll
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IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

DR. TRUDY BOND, *et al.*,	:	
Relators	:	CASE NO. 11CV-4711
vs.	:	JUDGE CRAWFORD
STATE BOARD OF PSYCHOLOGY,	:	
Respondent	:	

DECISION AND ENTRY ADOPTING MAGISTRATE'S DECISION ON RESPONDENT'S MOTION TO DISMISS AND NOTICE OF FINAL APPEALABLE ORDER

CRAWFORD, JUDGE

On April 13, 2011, Relators filed the Complaint seeking a writ of mandamus against Respondent Ohio State Board of Psychology. The writ sought by Relators would require Respondent to take action on Relators' complaint against Dr. Larry C. James, a psychologist licensed by Respondent.

On December 16, 2011, the Magistrate filed a Decision granting Respondent's Motion to Dismiss this action. On December 30, 2011, Relators filed objections to the Magistrate's Decision.

Pursuant to Civ. R. 53, the Court has undertaken an independent and *de novo* review of the record and Relators' objections to the Magistrate's Decision.

The Magistrate concluded that this case must be dismissed because Relators do not have standing to pursue this action. "It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469 (1999). The Court finds that Relators have not alleged direct and concrete personal

injury as required for private litigant standing and have not established "public right" standing.

The Magistrate further concluded that this action must be dismissed for failure to state a claim under Civ. R. 12(B)(6). In order to obtain a writ of mandamus, a Relator must demonstrate that: (1) Relator has a clear legal right to the relief sought; (2) Respondent has a clear legal duty to provide the requested relief; and (3) Relator has no plain and adequate remedy in the ordinary course of the law. *State ex. rel. Gill v. School Emp. Retirement Sys. of Ohio*, 121 Ohio St.3d 567, 2009-Ohio-1358, ¶18.

R.C. 4732.17(A) provides that Respondent "may" issue a reprimand or suspend or revoke the license of a psychologist on the specified grounds. Relators have cited no legal authority requiring Respondent to initiate disciplinary action against a licensee or to provide an explanation of a decision not to pursue formal action. The Court concludes that Relators cannot establish a clear legal right to the relief sought or that Respondent has a clear legal duty to provide the requested relief.

For the foregoing reasons, the Court hereby overrules Relators' objections to the Magistrate's December 16, 2011 Decision and adopts said Decision in its entirety. This case is hereby dismissed. Respondent's Motion to Stay Discovery filed May 18, 2011 is moot and Relators' Motion for an Oral Hearing filed August 24, 2011 is denied. This is a final appealable Order.

Copies to:

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Toledo OH 43604-5627

Roger F. Carroll, Counsel for Respondent
30 E. Broad Street, 26th Floor
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Franklin County Court of Common Pleas

Date: 06-26-2013

Case Title: DR TRUDY BOND -VS- OHIO STATE BOARD PSYCHOLOGY

Case Number: 11CV004711

Type: DECISION/ENTRY

It Is So Ordered.

/s/ Judge Dale Crawford

Court Disposition

Case Number: 11CV004711

Case Style: DR TRUDY BOND -VS- OHIO STATE BOARD PSYCHOLOGY

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 11CV0047112011-12-3099980000
   Document Title: 12-30-2011-OBJECTION TO
   Disposition: OBJECTION DENIED

2. Motion CMS Document Id: 11CV0047112011-05-1899980000
   Document Title: 05-18-2011-MOTION TO STAY
   Disposition: MOTION IS MOOT

3. Motion CMS Document Id: 11CV0047112011-06-1499980000
   Document Title: 06-14-2011-MOTION
   Disposition: MOTION IS MOOT

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

September 29, 2014

Prepared by

Advocates for U.S. Torture Prosecutions

Dr. Trudy Bond, Prof. Benjamin Davis, Dr. Curtis F. J. Doebbler, and
The International Human Rights Clinic at Harvard Law School

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.

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 students[1]—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 harm[6] and, in some cases, death.[7]

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[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,

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

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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-idUS.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

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 approval[18] from the Department of

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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*

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 nudity[20] 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

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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 society[28] 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 vague[32] or referred to investigations that, based on statements made by

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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.").

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

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[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.").

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

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[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) [*hereineafter 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.

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

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[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 solider 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 Libya[57]—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. 2[58] and places the United States in continued breach of its obligations

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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

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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 policy[66] 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 laws[71]—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]

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[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.

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[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).

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

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[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.

"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'

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[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,

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[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.").

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]

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[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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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

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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://detaineetaskforce.org/resources/alleged-wrongful-conduct-charges/#sdfootnote1sym

"The following is a list of military personnel – by rank and age where available[101] – 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.

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.

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

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

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.

- 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

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.

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.

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.

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.

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 ad- ministration 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

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."

IN THE MONTGOMERY COUNTY, OHIO, COURT OF COMMON PLEAS
CIVIL DIVISION

LARRY C. JAMES, *et al.,*	:	
	:	
Plaintiffs,	:	Case No. 2017 CV 00839
	:	
v.	:	
	:	
DAVID HOFFMAN, *et al.,*	:	Judge Timothy N. O'Connell
	:	
Defendants.	:	

EXHIBITS H - J

to

AFFIDAVIT OF LARRY JAMES

(PART 3 OF 3)

In Support Of

PLAINTIFFS' CONSOLIDATED MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND FORUM NON CONVENIENS

EXHIBIT H-JAMES AFFIDAVIT

Submission to the United Nations Committee Against Torture on the Review of the Periodic Report of the United States of America on the List of Issues Prior to Reporting

June 27, 2016

Prepared by
Citizens for U.S. Torture Prosecutions
Dr. Trudy Bond, Prof. Benjamin Davis

Summary:

1. We have previously made a submission to the UN Committee Against Torture (Committee) in regard to the United States' obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT") to 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.[1]

2. Since the United States last reported to the Committee in November of 2014, more evidence has been declassified that confirms that civilian and military officials, including psychologists, were involved in an international criminal program of torture. The Senate Select Committee on Intelligence publicly released a redacted version of the Findings and Conclusions and Executive Summary of the Committee's Study of the CIA's Detention and Interrogation Program, providing further information and documentation of the role of two psychologists, James Elmer Mitchell (Dr. Mitchell) and John (Bruce) Jessen (Dr. Jessen), who designed, implemented, and personally administered a torture program for the U.S.

3. According to the allegations in a complaint brought by two victims and the family of a third victim who died from his torture, psychologists Mitchell and Jessen created a torture program by drawing on experiments on dogs from the 1960s and theorized that if human beings were subjected to systematic abuse, the victims would become helpless and unable to resist an interrogator's demand for information. The CIA adopted the approach proposed by Mitchell and Jessen and paid them to develop the resulting torture program.

4. Documents filed by attorneys for Dr. Mitchell and Dr. Jessen on 21 June 2016 offer personal acknowledgement by the psychologists Mitchell and Jessen of their treatment of the prisoner Mr. Abu Zubaydah. In the documents referenced, Dr. Mitchell admits that he "recommended that Mr. Zubaydah not be provided with any amenities, his sleep be disrupted, and noise be fed into his cell." Drs. Mitchell and Jessen admit that Mr. Zubaydah was stripped naked, and that his cell was lit by halogen lamps 24 hours/day. Drs.Mitchell and Jessen admit that security personnel would enter Mr. Zubaydah's cell and he would be hooded and shackled. They both admitted that Dr.

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[1] *See* Advocates for U.S. Torture Prosecutions, "Shadow Report to the United Nations Committee Against Torture on the Review of the Periodic Report of the United States of America," September 29, 2014, *available at* http://hrp.law.harvard.edu/wp-content/uploads/2014/10/CAT-Shadow-Report-Advocates-for-US-Torture-Prosecutions.pdf

Jessen placed a rolled up towel behind Mr. Zubaydah's neck and "walled" him three or four times. Drs. Mitchell and Jessen admitted that they placed Mr. Zubaydah inside the two boxes, the larger of which was coffin-sized, for several hours before forcing him inside the second, significantly smaller, box, which measured 2.5 foot square and 21 inches deep.

Once Mr.Zubaydah was removed from the smaller confinement box, Drs. Mitchell and Jessen admit to again subjecting him to repeated "walling." Drs. Mitchell and Jessen admit to using "facial slaps, abdominal slaps and facial grabs" on Mr. Zubaydah. Drs. Mitchell and Jessen also admit they waterboarded Mr. Zubaydah.

4. In late 2014, the Board of the American Psychological Association (APA) authorized an independent review of longstanding allegations of collusion between APA leaders and government officials in abusive interrogations and detention conditions that had prevailed beginning in 2002. Seven months later in July of 2015, after reviewing over 50,000 documents and more than 200 interviews with 148 people, attorney David Hoffman and his Sidley Austin colleagues completed their 500-page report. It confirmed that senior APA representatives had indeed colluded with Department of Defense (DoD) officials to support policies that protected and preserved the ongoing participation of psychologists in harsh detention and interrogation operations, including torture and cruel, inhuman or degrading treatment or punishment.

5. Mohammed al-Qahtani has been imprisoned at Guantánamo Bay since 2002 and was subjected to the Pentagon's "First Special Interrogation Plan"—a regime of torture authorized by former Secretary of Defense Donald Rumsfeld and others.[2] Mr. al Qahtani is the only specifically identified Guantánamo detainee the government has openly admitted was tortured. In 2009, Susan J. Crawford, then the Convening Authority in charge of the U.S. Department of Defense's Military Commissions, explained that she had refused to authorize Mr. al-Qahtani's capital trial by military commission in 2008 because "we tortured Qahtani."[2]

6. On 6 June 2016, attorneys for Mohammed al-Qahtani provided new information in presenting his case to the Periodic Review Board Hearing at Guantánamo Bay. An expert witness who is board certified in Psychiatry and Neurology with a sub-specialization board certification in Forensic Psychiatry evaluated Mr. al-Qahtani based on "extensive conversations with Mr. al-Qahtani at Guantanamo, on a telephonic interview with his family in Saudi Arabia, and on her review of records of an involuntary psychiatric hospitalization in 2000." As the expert witness, she states in a separate report that Mr. al-Qahtani suffered from schizophrenia, major depression, and possibly neurocognitive disorder due to traumatic brain injury prior to his imprisonment at Guantánamo Bay.

7. According to statements cited in Mr. al-Qahtani's Periodic Review Board Hearing at Guantánamo Bay, "the torture and conditions of his confinement at Guantanamo were nothing short of devastating, exacerbating his pre-existing psychological ailments. Besides taxing him physically to the point that he was on the brink of death and had to be hospitalized twice, they caused psychotic symptoms that included repeated hallucinations involving ghosts and a talking bird. Mr. al-Qahtani also often soiled himself, cried uncontrollably, and conversed with himself and with others who were not present."

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[2] JOHN RIZZO, COMPANY MAN 181-202 (SCRIBNER 2014)

8. Psychologist John Leso led the Behavioral Science Consultation Team at Guantanamo from June 2002 to January 2003. According to the 2008 Senate Armed Services Committee investigation, Dr. Leso, along with Paul Burney who was the psychiatrist on his BSCT team, devised, recommended, and implemented psychologically and physically harmful and abusive detention and interrogation tactics. As "BSCT #1," Dr. Leso co-authored an October 2002 "Counter Resistance Strategy Memorandum" that included the following proposed techniques (among others) that contributed to the torture of Mr. al-Qahtani: daily 20-hour interrogations; strict isolation for up to 30 days without visitation from treating medical professionals or the International Committee of the Red Cross (with extended isolation upon approval); sleep deprivation; removal of all comfort items such as mattresses, sheets, and religious items; removal of clothing; handcuffing and hooding; exposure to extreme temperatures; the use of scenarios designed to convince the detainee he might experience a painful or fatal outcome; and exposure to cold weather or water. Dr. Leso's October BSCT memorandum directly formed the basis for the December 2002 authorization memo from Secretary of Defense Donald Rumsfeld, which gave approval to most of the techniques Leso and Burney had recommended. The Leso-Burney BSCT memorandum also formed the basis of the interrogation of Mr. al-Qahtani. In addition to his role in designing the implemented abusive interrogation protocols, a leaked log of the interrogation of Mr. al-Qahtani indicates that Dr. Leso was present and participated in at least some of these sessions.

9. As previously reported in the Shadow Report of Advocates for U.S. Torture Prosecutions, which was presented to the Committee prior to the combined third to fifth periodic reports of the United States of America (CAT/C/USA/3-5) at its 1264th and 1267th meetings, the Bush and Obama administrations have shielded torture psychologists from professional liability. The CIA finances a $5 million insurance policy[3] 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.[4] 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.[5] To protect them from professional liability, the Defense Department promulgated policies asserting that these psychologists, because they were not "charged with the medical care

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[3] 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/.

[4] *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.

[5] 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.

of detainees,"[6] were not subject to a duty to limit or avoid harm.[7] The Defense policies "conflate[d] legal standards with ethical ones," effectively declaring ethical anything that did not violate criminal laws[8]—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.

10. On 19 December 2014 in the Committee's Concluding Observations to the combined third to fifth periodic reports of the United States of America (CAT/C/USA/3-5), the Committee recommended in paragraphs 12(a) and (b), that the State party

> **(a) Carry out prompt, impartial and effective investigations wherever there is reasonable ground to believe that an act of torture and ill-treatment has been committed in any territory under its jurisdiction, especially in those cases resulting in death in custody;**
>
> **(b) Ensure that alleged perpetrators of and accomplices to torture, including persons in positions of command and those who provided legal cover, are duly prosecuted and, if found guilty, given penalties commensurate with the grave nature of their acts. In that connection, the Committee draws the State party's attention to paragraphs 9 and 26 of its general comment No. 2 (2007).**

11. To date, there is no evidence that the State party has investigated any psychologist that was possibly involved in acts of torture or ill-treatment.

Recommended Questions:

1. Were the following psychologists ever criminally investigated for their role in torture, and if indicated, why have they not been prosecuted?
    a. Former Central Intelligence Agency (CIA) contractor Dr. James Mitchell
    b. Former Central Intelligence Agency (CIA) contractor Dr. John (Bruce) Jessen
    c. Former Department of Defense psychologist Dr. John Leso
2. Were the high-level civilians and military authorities that authorized, acquiesced or consented in any manner to acts of torture in the United States torture regime in the War

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[6] *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].
[7] 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].
[8] *See* INSTRUCTION 2310.08E; ETHICS ABANDONED at 64-65.

on Terror ever criminally investigated for their role in torture, and if indicated, why have they not been prosecuted?

3. At a minimum, has the United States considered making a formal apology for creating a worldwide torture regime in its War on Terror?

Suggested Recommendation:

That the United States promptly and impartially prosecute psychologists and other high-level civilian or military authorities responsible for authorizing, acquiescing, or consenting in any way to acts of torture.

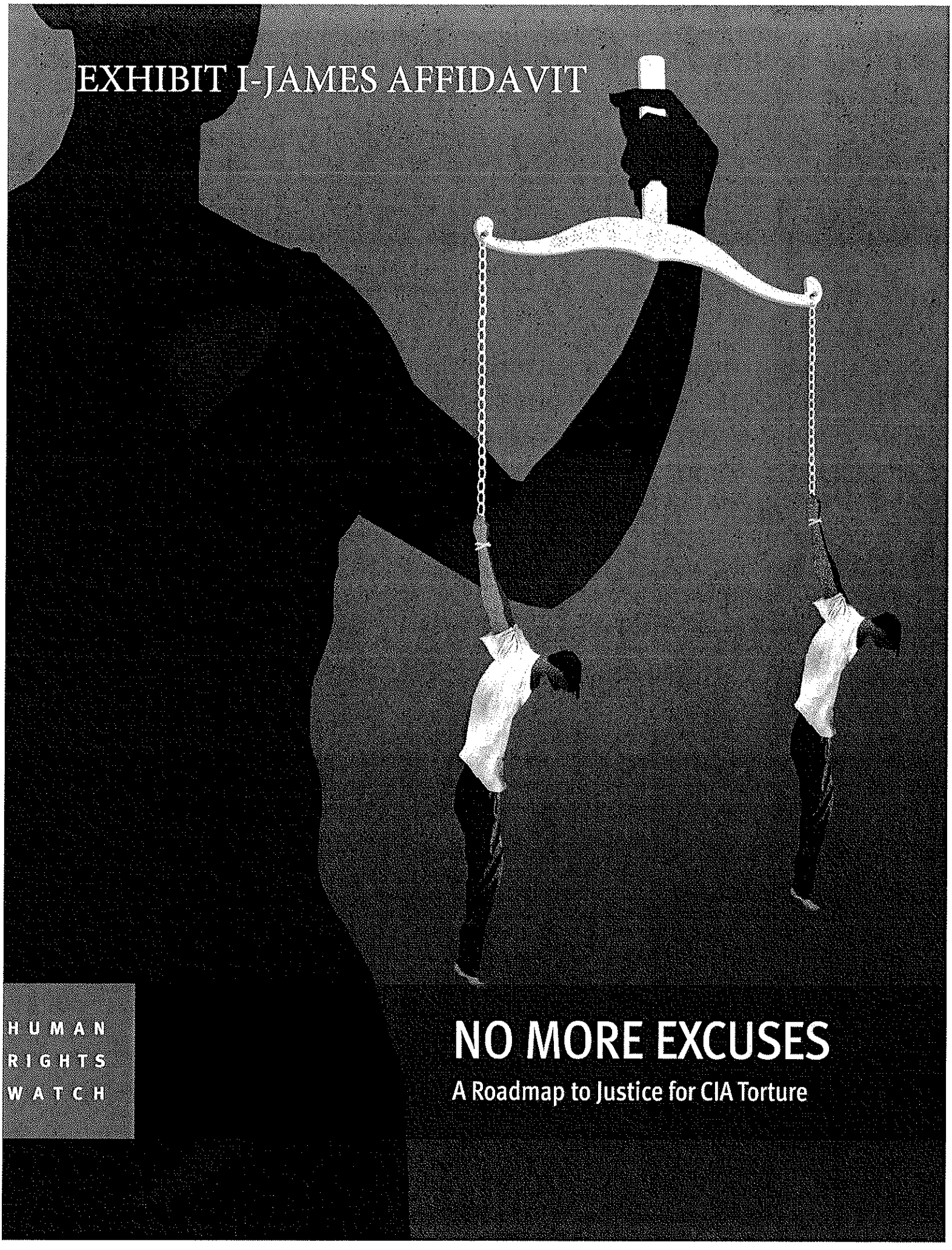
That the United States consider formally apologizing for the torture regime that it put in place in the War on Terror.

Authors

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.

Benjamin G. Davis is an Associate Professor of Law at the University of Toledo College of Law. He has been working on and writing about accountability for U.S. torture for ten years. In 2006, he led the effort to adopt the American Society of International Law Centennial Resolution on Laws of War and Detainee Treatment, only the eighth resolution adopted in its history. He has observed the military commissions at Guantánamo Bay, Cuba, and Fort Meade, Maryland.

EXHIBIT I-JAMES AFFIDAVIT



HUMAN RIGHTS WATCH

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Human Rights Watch is dedicated to protecting the human rights of people around the world. We stand with victims and activists to prevent discrimination, to uphold political freedom, to protect people from inhumane conduct in wartime, and to bring offenders to justice. We investigate and expose human rights violations and hold abusers accountable. We challenge governments and those who hold power to end abusive practices and respect international human rights law. We enlist the public and the international community to support the cause of human rights for all.

Human Rights Watch is an international organization with staff in more than 40 countries, and offices in Amsterdam, Beirut, Berlin, Brussels, Chicago, Geneva, Goma, Johannesburg, London, Los Angeles, Moscow, Nairobi, New York, Paris, San Francisco, Tokyo, Toronto, Tunis, Washington DC, and Zurich.

For more information, please visit our website: http://www.hrw.org

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No More Excuses

A Roadmap to Justice for CIA Torture

Summary

It is now well established that following the attacks on the United States on September 11, 2001, the US Central Intelligence Agency (CIA) operated a global, state-sanctioned program in which it abducted scores of people throughout the world, held them in secret detention—sometimes for years—or "rendered" them to various countries, and tortured or otherwise ill-treated them. While the program officially ended in 2009, the cover-up of these crimes appears to be ongoing.

Many detainees were held by the CIA in pitch-dark windowless cells, chained to walls, naked or diapered, for weeks or months at a time. The CIA forced them into painful stress positions that made it impossible for them to lie down or sleep for days, to the point where many hallucinated or begged to be killed to end their misery. It used "waterboarding" and similar techniques to cause near suffocation or drowning, crammed detainees naked into tiny boxes, and prevented them from bathing, using toilets, or cutting their hair or nails for months. "We looked like monsters," one detainee said of his appearance while in CIA custody.

Much new information about detention and interrogation in the CIA program became public with the release in redacted form of the 499-page summary of the Senate Select Committee on Intelligence report in December 2014 ("Senate Summary"). The Senate Summary reported that the CIA subjected at least five detainees to "rectal feeding," described in one case as infusing the pureed contents of a lunch tray into the detainee's rectum via a medical tube, done "without evidence of medical necessity." The Senate Summary also found that during a waterboarding session, one detainee became "completely unresponsive, with bubbles rising through his open, full mouth." The CIA forced some detainees to stand for days on end without sleep while they had broken bones in their legs and feet, even though CIA personnel knew this would cause them long-term physical injury. A CIA cable described one detainee as "clearly a broken man" and "on the verge of complete breakdown."

The US government has not adequately accounted for these abuses. It has an obligation under international law to prosecute torture where warranted and provide redress to victims, but it has done neither. No one with real responsibility for these crimes has been

held accountable and the government has actively thwarted attempts on the part of victims to obtain redress and compensation in US courts.

The Obama administration asserted that it conducted a criminal investigation of the CIA program through a Department of Justice inquiry led by a career prosecutor, Assistant US Attorney John Durham. The Durham investigation closed on August 30, 2012 without bringing any criminal charges. The apparent failure of the investigation to question current or former detainees undercuts any claims that it was thorough or credible.

As set out in this report, Human Rights Watch concludes there is substantial evidence to support the opening of new investigations into allegations of criminal offenses by numerous US officials and agents in connection with the CIA program. These include torture, assault, sexual abuse, war crimes, and conspiracy to commit such crimes. In reaching this conclusion, we have drawn on our own investigations, media and other public reports, and the declassified information in the Senate Summary. But more evidence exists that has yet to be made public.

We believe that an independent and impartial investigation that has access to the full Senate report, other information that the government continues to keep classified, and interviews with current and former detainees, would yield further evidence of crimes and identify more suspects than we do here.

US officials who played a role in the process of creating, authorizing, and implementing the CIA program should be among those investigated for conspiracy to torture as well as other crimes. They include: Acting CIA General Counsel John Rizzo, Assistant Attorney General for Office of Legal Counsel (OLC) Jay Bybee, OLC Deputy Assistant Attorney General John Yoo, an individual identified as "CTC Legal" in the Senate Summary, CIA Director George Tenet, National Security Legal Advisor John Bellinger, Attorney General John Ashcroft, White House Counsel Legal Advisor Alberto Gonzales, Counsel to the Vice President David Addington, Deputy White House Counsel Timothy Flanigan, National Security Advisor Condoleezza Rice, Defense Department General Counsel William Haynes II, Vice President Dick Cheney, and President George W. Bush. In addition, James Mitchell and Bruce Jessen, CIA psychologist contractors who devised the program, proposed it to the CIA, and helped carry it out, should also be investigated for their role in the initial conspiracy.

We believe there is also sufficient evidence to investigate others who were not necessarily part of the initial conspiracy but who later joined it. Individuals can join an already existing conspiracy if they are aware of the conspiracy's unlawful aims, in this case torture, and take steps intended to help the conspiracy succeed. These would include those who reauthorized the program after the legal memos endorsing it—the "Torture Memos"— were withdrawn, those who supplied false information to the Justice Department upon which the Justice Department relied in providing reauthorization, and those who later oversaw operation of the CIA program.

Others should not only be investigated for torture but also for offenses such as war crimes, assault, and sexual abuse. Even if individuals who carried out the torture can be said to have reasonably relied in good faith upon OLC memos or CIA guidance to justify their conduct—which, as detailed below, there is serious reason to doubt—considerable evidence exists that CIA officers and interrogators tortured detainees in ways that went beyond what was authorized.

This report also considers and rebuts arguments that barriers to prosecution under US law—such as statutes of limitation, certain defenses, or a "specific intent" requirement—might make it impossible to pursue criminal cases.

The failure to credibly investigate and prosecute torture committed in any territory under US jurisdiction violates US obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and other treaties to which the US is a party. Other countries and entities should open their own investigations into CIA torture and should exercise universal jurisdiction, where applicable, over US nationals and others implicated in torture or other abuses. Additionally, countries that were complicit or otherwise unlawfully assisted the CIA program should also conduct investigations into the alleged illegal conduct of their own nationals.

Besides violating international law, the US government's inaction in the face of clear evidence of torture sends a message to future US policymakers and officials that they too can commit torture and other ill-treatment and not fear being held accountable. Several presidential candidates for the 2016 elections have already indicated they would consider using so-called "enhanced interrogation techniques" if they were to be elected.

Holding government officials accountable for serious abuses is never easy; when high-level officials are involved, it can be politically divisive. But Human Rights Watch research over the past 25 years in dozens of countries has shown that forgoing criminal accountability carries a high price. (See particularly Human Rights Watch, *Selling Justice Short* (2009)). Lack of accountability may fuel future abuses and weaken the rule of law.

Globally, the US unwillingness to prosecute CIA torture weakens US authority to oppose torture and other abuses abroad, provides a ready excuse for countries unwilling to prevent or prosecute torture in their own countries, and undermines global respect for the rule of law.

The egregious abuse of prisoners in CIA custody and failure to hold anyone accountable has undermined global efforts to fight terrorism. Detainee abuse, including abuse of prisoners by the US military, has been used by terrorist groups to obtain new recruits and contributed to anti-US sentiment in many countries.

Ultimately, the guilt or innocence of any of the US officials involved in organizing or carrying out the CIA program will rest with the criminal justice system. Suspects should be tried in criminal proceedings that comport with international due process and fair trial standards, including allowing them to challenge evidence, present defenses, and raise mitigating circumstances. But before these fundamental institutions of democratic rule can even be set in motion, US criminal justice officials need to first conduct credible investigations and bring charges where appropriate, requirements that have gone unmet for well over a decade since the first revelations of CIA torture after 9/11.

This report is organized into three parts—credible investigations and prosecutions, redress, and international justice—reflecting different steps the US and other countries should take to pursue accountability for CIA program abuses.

Credible Investigations and Prosecutions: The first part of this report examines some of the specific federal criminal charges that could be brought against US officials involved the CIA program. The most senior responsible officials should not be able to avoid culpability on the grounds that they relied on advice from White House lawyers stating that the interrogation techniques used on detainees did not amount to torture. This defense is weak not only because the legal reasoning was so poor that it was soon repudiated by other Bush

administration lawyers and virtually all other legal professionals, but also because, in this case, those involved in the CIA program themselves helped create the legal advice being used as a shield to protect them from accountability for their alleged crimes.

Officials in the CIA and at the White House should have known, from the moment the techniques in question were proposed, that they were violating the federal Torture Statute: the techniques were reverse-engineered from a program designed to train US special forces to endure torture, some were explicitly designated as torture by US courts, and many were banned in the US Army Field Manual for Intelligence Interrogations in effect at the time the abuse was approved.

And there is evidence in the Senate Summary that officials actually knew that the techniques violated the Torture Statute. According to a Department of Justice Office of Professional Responsibility investigation (OPR investigation), the CIA, through its acting General Counsel John Rizzo, expressed concern about "criminal liability" under the Torture Statute and sought, but failed to obtain, a guarantee from the Justice Department's Criminal Division that employees would not be prosecuted for use of the techniques.

The Senate Summary also contains a reference to a draft letter to the attorney general from "CTC Legal" —a likely reference to someone in the legal department of the CIA's counterterrorism center—acknowledging that the "aggressive methods" of interrogation the CIA was planning would violate the Torture Statute. While there are no records showing that the letter was sent, its existence shows that at least some CIA advisers believed from the beginning that the techniques being proposed were illegal. Finally, the OPR investigation also noted that in mid-2002 senior White House and CIA officials appear to have been involved in shaping the contents of the soon-to-be issued legal memos authorizing abusive interrogation techniques, with sections likely added at their request after the Justice Department refusal to give a non-prosecution guarantee.

Viewed in this context, there is strong reason to conclude that the infamous and since discredited "Torture Memos" issued by the OLC in August 2002 authorizing techniques that many others had previously determined to be torture, should be viewed as little more than a legal fig leaf. "The position taken by the government lawyers in these legal memoranda amount to counseling a client as to how to get away with violating the law,"

said John Gibbons, former chief judge of the US Court of Appeals for the Third Circuit, after the memos had been released.

Other White House and CIA officials and OLC lawyers later joined the conspiracy by knowingly keeping in the dark government officials they knew would oppose the CIA program, allowing the conduct to continue despite knowledge detainees were being mistreated, and reauthorizing the program once original authorizations were revoked after news of torture by the US military at the Abu Ghraib prison in Iraq became public.

CIA personnel also engaged in practices that went well beyond the illegal techniques "authorized" by the Torture Memos. Practices such as "rectal feedings," use of water to induce near suffocation, and certain painful stress positions, were either not authorized or administered in ways that were not authorized. As such, the memos should not even be contemplated as a defense for such actions.

Lastly, while the five-year federal statute of limitations for most federal crimes might be thought to present an insurmountable bar to prosecution, it should not apply to many of the crimes committed as part of the CIA program. It is not a bar to prosecutions for torture or conspiracy to torture when there is a "foreseeable risk that death or serious bodily injury" may result, or to prosecutions for the types of sexual abuse allegedly committed by CIA program personnel. For all federal conspiracy charges, moreover, the statute of limitations can be extended if perpetrators conceal a central component of the conspiracy, as seems to have been the case here.

Redress: The second part of this report looks at the US government's obligation to provide redress to victims of abuse, including compensation and rehabilitation services, guarantees of non-repetition (including through legislation and public statements), and public disclosure of relevant information. The Convention against Torture and other treaties require the US to provide redress for torture and other serious abuses, including arbitrary detention and enforced disappearance. Not only has the US failed to provide compensation or any other form of redress to detainees in CIA custody, the Obama administration has blocked every attempt by former detainees to bring civil suits in US courts by invoking doctrines of state secrecy, state immunity, and national security.

International Justice: The third part of this report looks at the efforts of other governments to investigate CIA torture and related abuses that occurred in their countries. Investigations in other countries have targeted US officials as well as national officials alleged to have participated in or been complicit in CIA abuses.

The duty to prosecute serious violations of international law lies primarily with domestic judicial authorities in the country with principal jurisdiction over the crime. This normally requires having a territorial link to the crime or the persons involved. However, third countries can also investigate and prosecute on the basis of universal jurisdiction—laws embodying the idea that certain crimes, including torture and war crimes, are so egregious that every state has an interest in bringing perpetrators to justice.

The Convention against Torture contains a universal jurisdiction clause that places an affirmative duty on governments to prosecute suspects who come on their territory regardless of where the torture took place. The Geneva Conventions of 1949 relating to war crimes contains similar provisions. The US government's failure to conduct its own thorough and credible investigations into allegations of torture increases the importance of states exercising universal jurisdiction for crimes alleged to have been carried out as part of the CIA program.

Although the United States is not a party to the International Criminal Court (ICC), the ICC may also be an avenue to accountability for alleged abuses by US nationals in Afghanistan. The ICC is conducting a preliminary examination of the situation in Afghanistan, which includes alleged torture of detainees by US armed forces there. Whether the preliminary examination will lead to a formal investigation was not known as this writing.

Methodology

The report was assembled using the numerous public source materials that now exist documenting CIA renditions, detentions, torture and other ill-treatment. This includes our own Human Rights Watch reporting and the declassified information in the Senate Summary, but also books, media, and other public reports, both by governmental and non-governmental organizations. It is also informed by nearly 15 years of our own research, reporting and analysis on US counterterrorism abuses post 9/11.

We took this extensive factual record and supplemented it with legal research into the various charges that could be brought for certain offenses under US law. In doing so we focused on the main charges that would be available for the conduct in question and did not include other charges such as obstruction of justice or false reporting that do not center on the actual conduct in question. We also tried to include the most viable charges and intentionally excluded those for which we thought a case might be made but for which it was not clear whether there was sufficient evidence to support. We also supplemented the factual record with legal research into civil remedies and international law.

Key Recommendations

To US Authorities

- The Attorney General, with the support of the president, should appoint a special prosecutor to conduct a thorough, independent, and credible criminal investigation into the CIA torture that examines all evidence, including statements from current and former detainees.
- The president should acknowledge wrongdoing, apologize to victims of torture, and devise policies ensuring that victims receive appropriate redress, compensation, and rehabilitation services.
- The president should declassify the full Senate Intelligence Committee Report on the CIA rendition, detention, and interrogation program, redacting only what is strictly necessary to protect national security, to ensure there is a full public accounting of government wrongdoing and that victims of torture can obtain redress.

To Foreign Governments

- Governments that provided support to the CIA program should ensure impartial and independent criminal investigations of complicity in torture and other criminal offenses allegedly committed in their countries by national and US officials in connection with CIA renditions or interrogations, and prosecute those implicated in crimes. Unless and until US officials show a willingness to pursue meaningful accountability for CIA torture, other governments should exercise universal jurisdiction or other forms of jurisdiction provided under international and domestic law to investigate and, evidence permitting, prosecute US officials for their alleged role in torture and other abuses.

I. Background

Short History of the CIA Program

The September 11, 2001 attacks on the United States took the lives of nearly 3,000 people and had an impact that reverberated, and still reverberates, around the globe. Following those attacks, President George W. Bush publicly sought and soon obtained from Congress the authority to use force against those responsible for the attacks and those assisting them.

Six days after the attacks, on September 17, Bush secretly issued what is known as a Memorandum of Notification (MON)—a covert action directive that granted the CIA unprecedented counterterrorism authority, including to capture and detain individuals "posing a continuing, serious threat of violence or death to U.S. persons and interests or planning terrorist activities."[1] The MON made no reference to interrogations or coercive interrogation techniques.

The CIA immediately began developing a plan to detain individuals under the MON. Senior agency leadership acknowledged that the CIA had limited experience running detention facilities and considered acquiring expertise from the Defense Department and the Federal Bureau of Prisons.[2] In late March 2002 the CIA captured Abu Zubaydah, who became its first detainee.[3] Plans then intensified to establish the use of certain aggressive interrogation techniques. Arguments ensued between the Federal Bureau of Investigation (FBI) and the CIA over the types of interrogation techniques that should be used.[4] The FBI wanted to use methods that they had developed for years that did not involve violence or force. FBI agents and officers involved in these discussions said the aggressive techniques

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[1] US Senate, Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, December 13, 2012, updated April 3, 2014, released December 9, 2014, http://fas.org/irp/congress/2014_rpt/ssci-rdi.pdf (accessed February 18, 2015) (hereinafter "Senate Summary"), p. 11.

[2] Senate Summary, p. 12.

[3] Senate Summary, p. 22.

[4] Senate Summary, p. 27. For a more in-depth discussion of this dispute, see generally, Ali Soufan, *The Black Banner: The Inside Story of 9/11 and the War Against al-Qaeda*, (New York: W.W. Norton & Co. 2011); see also Department of Justice, Oversight and Review Division, Office of Inspector General, "A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq," May, 2008, https://oig.justice.gov/special/s0805/final.pdf (accessed October 12, 2015) (hereinafter "DOJ OIG Report"), pp. 71-75.

the CIA sought to use were not only ineffectual, but would taint any evidence they acquired for use in criminal trials.[5]

The CIA proposed the use of 12 interrogation techniques.[6] The techniques, proposed by two CIA contractors, had previously been used by the military's Joint Personnel Recovery Agency (JPRA) to train US Special Forces to better endure interrogation methods used by enemies who did not abide by the Geneva Conventions.[7]

The 12 "enhanced interrogation techniques" proposed were: (1) the attention grasp; (2) "walling"; (3) facial hold; (4) facial slap; (5) cramped confinement; (6) wall standing; (7) stress positions; (8) sleep deprivation; (9) waterboarding; (10) use of diapers; (11) use of insects; and (12) mock burial.[8] When it was clear that the CIA was going to use such

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[5] US Department of Justice, 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 Techniques' on Suspected Terrorists," July 29, 2009, https://www.aclu.org/files/pdfs/natsec/opr20100219/20090729_OPR_Final_Report_with_20100719_declassifications.pdf (accessed October 12, 2015) p. 33; see also DOJ OIG Report, pp. 71-72.

[6] Senate Summary, p. 32.

[7] Human Rights Watch, *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees*, July 12, 2011, http://www.hrw.org/sites/default/files/reports/us0711webwcover_1.pdf, p. 40, citing US Senate, Committee of Armed Services, "Report on Inquiry into the Treatment of Detainees in US Custody," November 20, 2008, http://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf (accessed October 12, 2015) (hereinafter "SASC Report"), p. 6.

[8] Senate Summary, p. 32. All of these "techniques," with the exception of "diapers" and "mock burial" were eventually approved in an August 1, 2002 memo (though cramped confinement and insects were combined into one and discussed together). In that August 1, 2002, memo each of the "techniques" were approved for use specifically on Abu Zubaydah and were described in the following manner: 1)"attention grasp": grabbing the individual with both hands by the collar in a controlled and quick motion and drawing him to the interrogator; 2) "walling": with his heels touching the wall the subject is "pulled forward and then quickly and firmly push[ed]" into a flexible false wall so that his shoulder blades hit the wall. His head and neck are supported with a rolled towel to prevent whiplash; 3) "facial hold": an interrogator places his open palms on both sides of the individual's face to keep his head immobile; 4) "facial slap": the interrogator slaps an individual's face; the goal is not to inflict physical pain but "to induce shock, surprise and/or humiliation;" 5) "cramped confinement:" the individual is placed in a confined space, usually dark. In the larger box the detainee could stand, but in the smaller one, he could only sit. For Abu Zubaydah, who had a fear of insects, interrogators requested permission to put a small non-stinging insect into his box and to tell Abu Zubaydah, falsely that it could sting. This was approved; 6) "wall standing": a detainee is forced to stand about four to five feet from a wall, touching the wall so that his fingers supported all of his body weight, and he was not permitted to move or reposition his hands or feet. The intent was to induce muscle fatigue. No time limit appears to have been placed on this technique; 7) "stress positions": the memo states that "a variety of stress positions" may be used but only two were described in any detail. One involved forcing Abu Zubaydah to sit on the floor with his legs extended straight out in front of him with his arms raised above his head. Another proposed having him kneel on the floor while leaning back at a 45 degree angle. The intention was to produce muscle fatigue. No specific time limit appears to have been imposed for this technique either; 8) "sleep deprivation": up to 11 days were approved for use on Abu Zubaydah; 9) "waterboard": an individual is bound securely to an inclined bench. The individual's feet are elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. The resulting increased carbon dioxide level in the blood stimulates an increased effort to breathe, producing the perception of "suffocation and incipient panic, i.e. the perception of

methods, the FBI refused to participate in any further interrogations using "enhanced interrogation techniques" or participate in any further discussions about the matter.[9]

As detailed below, the decision to use these techniques was discussed extensively among senior US officials, including but not limited to: CIA General Counsel John Rizzo, Assistant Attorney General and OLC head Jay Bybee, OLC Deputy Assistant Attorney General John Yoo, an unnamed individual identified as "CTC Legal" in the Senate Summary, CIA Director George Tenet, National Security Legal Advisor John Bellinger, Attorney General John Ashcroft, White House Counsel Alberto Gonzales, Counsel to the Vice President David Addington, Deputy White House Counsel Timothy Flanigan, and National Security Advisor Condoleezza Rice.

Before the CIA used the full panoply of these techniques on Abu Zubaydah, the agency sought a guarantee that the Justice Department Criminal Division would not prosecute any US personnel involved.[10] The Criminal Division refused.[11] Following this, the CIA began working intensely with the attorneys in the OLC to obtain memos that would authorize the techniques proposed. (Meetings and deliberations about the content of the memos are discussed in detail below.) Two memos were eventually issued on August 1, 2002. The principal author of the memos was Yoo and they were signed by Assistant Attorney General Jay Bybee.[12]

The first memo was addressed to Gonzales and became known as the "Bybee I Memo." It was unclassified and analyzed the domestic and international legal prohibitions on torture and, among other things, articulated an exceedingly high threshold, later repudiated by the Bush administration, for what constitutes torture: physical pain equivalent in intensity to that accompanying "organ failure, impairment of bodily function, or even death."[13] It did

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drowning." During the 20-40 seconds, water is continuously poured from above. After this period the cloth is lifted and the individual is allowed to breathe three to four full breaths. The procedure may then be repeated. The procedure would likely not last more than 20 minutes during any one application. "Memorandum from Jay S. Bybee, assistant attorney general, to John Rizzo, acting general counsel of the CIA, regarding 'Interrogation of al Qaeda Operative,'" August 1, 2001, http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf (accessed March 31, 2015)("Bybee II Memo.").

[9] OPR Report, p. 47; see also DOJ OIG Report, pp. 71-75.

[10] OPR Report, p. 47.

[11] Ibid.

[12] OPR Report, pp. 75-80, 251, 255.

[13] "Memorandum from Jay S. Bybee, assistant attorney general, to Alberto R. Gonzales, counsel to the president, regarding "Standards for Conduct of Interrogation under 18 U.S.C. Sections 2340-2340A," August 1, 2002,

not discuss the legality of any particular technique nor the legality of applying any type of technique on a specific detainee. It was not made public until it was leaked to the media in June 2004.[14]

The second memo, which was classified, was addressed to John Rizzo but also signed by Bybee, became known as the "Bybee II Memo." It was not released publicly until 2009 and discussed the legality of each of the techniques individually, approving 10 specific interrogation tactics proposed for use on detainee Abu Zubaydah.[15] ("Diapering" and the "mock burial," though initially proposed, were not discussed in the memo). These two memos collectively have publicly become known as the "Bybee Memos," the "August 1, 2002 OLC Memos," or the "Torture Memos."[16]

After these memos were issued, the CIA began using what they called "enhanced interrogation techniques" with little guidance. The CIA now admits that its guidance was poor during this period.[17] At some point after "enhanced interrogation techniques" and detentions were contemplated, the CIA began opening and operating a number of secret detention centers around the world. The US government has still not disclosed exactly where and how many sites it operated. Though a number of CIA sites are identified in the Senate Summary, they are designated using pseudonyms for their locations. But the media and others have long reported that the CIA operated detention centers in at least Afghanistan, Lithuania, Poland, Romania, and Thailand.[18] Additionally, the CIA worked in

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http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug2002.pdf (accessed March 31, 2015)("Bybee I Memo").

[14] Dana Priest, "Justice Dept. Memo Says Torture 'May Be Justified'," *Washington Post*, June 13, 2004, http://www.washingtonpost.com/wp-dyn/articles/A38894-2004Jun13.html (accessed August 18, 2015).

[15] See Bybee II Memo, described in note 8 above.

[16] One former CIA official later called these opinions a "golden shield," and said that they that provided enormous comfort. See Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration*, (New York: W. W. North & Co: 2009), p. 144; see also SASC Report, p. 33.

[17] CIA, "Comments on the Senate Select Committee on Intelligence's Study of the Central Intelligence Agency's Former Detention and Interrogation Program," https://www.cia.gov/library/reports/CIAs_June2013_Response_to_the_SSCI_Study_on_the_Former_Detention_and_Interrogation_Program.pdf (accessed October 12, 2015) (hereinafter "CIA Response"), pp. 2-4.

[18] Adam Goldman and Julie Tate, "Decoding the secret black sites on the Senate's report on the CIA interrogation program," *Washington Post*, December 9, 2014, https://www.washingtonpost.com/news/worldviews/wp/2014/12/09/decoding-the-secret-black-sites-on-the-senates-report-on-the-cia-interrogation-program/ (accessed August 26, 2015); see also Human Rights Watch, "Statement on US Secret Detention Facilities in Europe,"

Human Rights Watch statement, November 6, 2005, https://www.hrw.org/news/2005/11/06/human-rights-watch-statement-us-secret-detention-facilities-europe.

conjunction with a number of other countries to operate, run or use detention sites in locations that included but were not limited to Morocco,[19] Jordan,[20] Pakistan,[21] and Egypt.[22]

During the course of the CIA program, the agency held at least 119 individuals in CIA-run detention centers, according to the Senate Summary. This is a conservative estimate[23] and does not include a number of detainees who were unlawfully rendered as part of the CIA program.[24]

The full name for the CIA Program was the "Rendition, Detention and Interrogation" (RDI) program. Unlawful renditions were a part of the program but the Senate Summary did not address this aspect of it.[25] The summary lists only the names of 119 individuals it considers to be "detainees" in that there was "clear evidence of detention in CIA custody."[26] Left off the list are an unknown number of individuals whom the CIA unlawfully rendered to countries where it was known or recognized as likely that they would be tortured, whether as part of

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[19] Human Rights Watch, *Delivered Into Enemy Hands: US-Led Abuse and Rendition Opponents to Gaddafi's Libya*, September 2012, http://www.hrw.org/sites/default/files/reports/libya0912webwcover_1.pdf, p. 78; Matt Apuzzo, Adam Goldman, "CIA Whisked Detainees From Guantanamo Before Giving Access To Lawyers," *Huffington Post*, May 25, 2011, http://www.huffingtonpost.com/2010/08/06/cia-whisked-detainees-fro_n_673001.html (accessed August 26, 2015); Mathew Cole, "Lithuanian President Announces Investigation into CIA Secret Prison," *ABC News*, October 21, 2009, http://abcnews.go.com/Blotter/lithuania-investigating-secret-cia-prisons/story?id=8874887 (accessed August 26, 2015).

[20] Craig Whitlock, "Jordan's Spy Agency: Holding Cell for the CIA," *Washington Post*, http://www.washingtonpost.com/wp-dyn/content/article/2007/11/30/AR2007113002484.html (accessed August 26, 2015).

[21] *Delivered Into Enemy Hands*, pp. 34-38, 61-62, 84-85.

[22] "Libya/US: Investigate Death of Former CIA Prisoner," Human Rights Watch news release, May 11, 2009, https://www.hrw.org/news/2009/05/11/libya/us-investigate-death-former-cia-prisoner.

[23] Senate Summary, p. 14, n. 26.

[24] Unlawful renditions are not a focus of this report but have been extensively documented in prior reports, including *Delivered Into Enemy Hands*; Human Rights Watch, *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees*, July 12, 2011, http://www.hrw.org/sites/default/files/reports/us0711webwcover_1.pdf. Other organizations have extensively documented CIA renditions as well. See e.g. Open Society Justice Initiative (OSJI), "Globalizing Torture: CIA Secret Detention and Extraordinary Rendition," February 2013, http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf (accessed June 4, 2015) (hereinafter "OSJI, "Globalizing Torture: CIA Secret Detention and Extraordinary Rendition"); The Constitution Project, *The Report of The Constitution Project's Task Force on Detainee Treatment* (hereinafter "The Constitution Project Report") April 2013, http://detaineetaskforce.org/pdf/Full-Report.pdf (accessed August 25, 2015), p. 127. The CIA carried out numerous renditions that were unlawful and in violation of the Convention against Torture and other treaties to which the US is party. The US has an obligation to fairly prosecute those officials responsible for unlawful renditions. Several civil cases involving CIA rendition are discussed in the second chapter of this report "Bringing Criminal Prosecutions in the US."

[25] Rendition is the transfer of an individual between governments. Transferring someone to another country without providing them an adequate opportunity to contest that transfer violates basic rights under international human rights law. Transferring someone to another government where they would face a serious risk of torture or other ill-treatment is also prohibited under international law. Transferring an individual to the custody of another government for the purpose of torture, usually to obtain information, is a practice commonly referred to as rendition to torture. The phrase "extraordinary rendition" has come to mean unlawful rendition. *Delivered Into Enemy Hands*, p. 1, n. 2.

[26] Senate Summary, p. 14, n. 26.

their interrogation or as punishment.[27] Many of those rendered described being held by the CIA or by another government with the CIA's cooperation, either before or after their transfer.[28]

Of the 119 individuals the CIA considers to have been CIA "detainees," according to the Senate Summary, at least 26 were "wrongfully held," and did not meet the CIA's own standards for detention.[29] "CIA records provide insufficient information to justify the detention of many other detainees."[30]

In November 2002, detainee Gul Rahman died from hypothermia after being shackled half-naked to a concrete floor overnight in CIA custody at a detention site in Afghanistan.[31] His death spurred an investigation by the CIA Office of the Inspector General (OIG), including into the broader CIA program. The findings, issued in classified form in a May 2004 report ("CIA OIG Report"), were sharply critical of the both the CIA's use of techniques in an authorized manner, and the use of techniques not authorized.[32]

While the OIG investigation was ongoing, media outlets began reporting that the US was using abusive interrogation methods on detainees in secret detention centers.[33] To counter these reports, the Bush administration began putting out a number of statements aimed at alleviating concerns that the US might be abusing or torturing prisoners. These statements attempted to discount any possibility that the US was using torture and to emphasize that all detainees were being treated humanely even if they were not, in the administration's view, protected by international law.[34]

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[27] See *Getting Away with Torture*, discussing the cases of Maher Arar, Mamdough Habib, Ahmed Agiza and Mohammed al-Zari, Osama Moustafa Nasr (Abu Omar), Muhammad Haydar Zammar, and Muhammad Saad Iqbal Madni, pp. 33-38; See also *Delivered Into Enemy Hands*, discussing the cases of Abdul Hakim Belhadj, Sami Mostefa al-Saadi, and Mustafa Salim Ali el-Madaghi, *Delivered into Enemy Hands*, pp. 78, 91 and 102. See also generally, OSJI, "Globalizing Torture: CIA Secret Detention and Extraordinary Rendition."

[28] Ibid.

[29] Senate Summary, pp. 14-17; see also "Senate Select Committee on Intelligence, Committee's Study of the CIA's Detention and Interrogation Program, Findings and Conclusions," http://www.feinstein.senate.gov/public/index.cfm/files/serve?File_id=a992171e-fd27-47bb-8917-5ebe98c72764&SK=04753BC866283C0F5913D7E1A24FA851 (accessed October 12, 2015)(hereinafter "Senate Summary Findings and Conclusions"), p. 12.

[30] Senate Summary Findings and Conclusions, p. 12.

[31] Senate Summary, p. 54.

[32] See General OIG report. See also Levin and Bradbury Memos.

[33] Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations," *Washington Post*, December 26, 2002, http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html (accessed August 21, 2015).

[34] Senate Summary pp. 115-119; David Cole, "Torture: No One Said No," *New York Review of Books*, March 5, 2015, http://www.nybooks.com/blogs/nyrblog/2015/mar/05/cia-torture-no-one-said-no/ (March 15, 2015).

These statements caused concern among the CIA leadership that other parts of the executive branch were not backing the CIA's program. The CIA began to seek assurances from Secretary of State Rice, the OLC, and other executive branch departments that they continued to support the CIA program. This generated another series of high-level meetings during which the CIA secured reassurance that the White House and the Justice Department backed the program.[35]

After the CIA OIG Report was issued, CIA Director Tenet suspended both the use of what were called "standard" interrogation techniques, as well as "enhanced interrogation techniques," pending a legal and policy review.[36] The CIA OIG Report also called for the CIA to justify the usefulness and necessity of the "enhanced interrogation" program.

Even before the OLC and the CIA approved the use of "enhanced interrogation techniques," the US military had already begun using some of the tactics later authorized in the August 1, 2002 OLC Memos and had trained military interrogators in their use. Formal OLC and CIA approval set the stage for more widespread use of abusive techniques by the military.[37]

In March 2004, reports and photographs emerged about detainee abuse by US military personnel at Abu Ghraib prison in Iraq causing a national scandal.[38] And in June 2004, the Bybee I Memo was leaked to the media.[39] By this time Yoo had left OLC, and Jack Goldsmith was named to replace him.[40]

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[35] Ibid.

[36] Senate Summary, pp. 413-14. "Standard" interrogation techniques appear to have been first identified in a January 28, 2003 Guidance issued by CIA Director Tenet in response to the death of detainee Gul Rahman in CIA custody. See Senate Summary, pp. 62-63. In that Guidance, "standard" interrogation techniques were defined as those "that *do not* incorporate physical or substantial psychological pressure." See OIG report, Appendix E (emphasis in the original). The Guidance said they "include, but are not limited to, all lawful forms of questioning employed by US law enforcement and military interrogation personnel." Some examples included sleep deprivation up to 72 hours, isolation, loud music, and diapering generally not to exceed 72 hours.

[37] See section titled "The US Military's Approval and Use of Torture and Other Ill-Treatment" below. See also *Getting Away with Torture.*

[38] Rebecca Leung, "Abuse of Iraqi POWs by GIS Probed," *CBS News*, April 27, 2004, http://www.cbsnews.com/news/abuse-of-iraqi-pows-by-gis-probed/ (accessed June 9, 2015); see also, Seymour M. Hersh, "Torture at Abu Ghraib," *The New Yorker*, May 10, 2004, http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib (accessed June 6, 2015).

[39] Dana Priest and R. Jeffrey Smith, "Memo Offered Justification for Use of Torture," *Washington Post*, June 8, 2004, http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html (January 29, 2015); Dana Priest, "Justice Dept. Memo Says Torture 'May Be Justified,'" *Washington Post*, June 13, 2004, http://www.washingtonpost.com/wp-dyn/articles/A38894-2004Jun13.html (accessed August 18, 2015).

[40] OPR Report, p. 27.

Goldsmith reexamined the August 1, 2002 memos and concluded that the Bybee I Memo was "riddled with error" and a "one-sided effort to eliminate any hurdles posed by the torture law."[41] On May 3, 2004, in an attempt to get reassurance from OLC that they still endorsed the use of "enhanced interrogation techniques," Muller wrote Goldsmith asking that he reaffirm OLC approval of the techniques as well as approve new ones.[42] On May 27, Goldsmith wrote back to Muller saying that he "strongly recommended" that the CIA suspend use of waterboarding and review steps taken to ensure that in actual practice any use of CIA techniques "adheres closely to the assumptions and limitations in the August 2002 opinion [the Bybee memos]."[43] On June 15, 2004, Goldsmith withdrew the Bybee I Memo and submitted his letter of resignation the following day.[44] Goldsmith kept in place OLC approval for all of the enhanced interrogation techniques other than waterboarding but subject to the assumptions, limitations, and safeguards laid out in the Bybee II Memo, which had not been withdrawn.[45]

Daniel Levin, who took over as acting head of the OLC after Goldsmith's departure, inherited the task of issuing replacement memos for the Bybee I and Bybee II memos.[46] On August 6, 2004, he issued a memo authorizing waterboarding[47] and on December 30, 2004, issued a new legal opinion to replace the unclassified Bybee I Memo.[48] Levin's replacement memo, like the Bybee I memo, analyzed the legal limits of the prohibitions on torture but it acknowledged that the prior legal reasoning was wrong.[49] Levin planned to draft a new memo to replace the classified Bybee II Memo as well but he left the office in February 2005 before he had finished those memos.[50]

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[41] OPR Report, p. 160; see also Goldsmith, *The Terror Presidency*, p. 149.

[42] Fax from Scott Muller, CIA General Counsel, to Jack Goldsmith, March 2, 2004 (hereinafter "Muller Fax"), https://www.aclu.org/sites/default/files/torturefoia/released/082409/olcremand/2004olc22.pdf (accessed April 23, 2015).

[43] Letter from Jack Goldsmith to Scott Muller, May 27, 2004, http://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-muller2004.pdf (accessed August 26, 2015).

[44] OPR Report, p. 121. Goldsmith, *The Terror Presidency*, p. 159.

[45] OPR Report, p. 123.

[46] OPR Report, p. 124.

[47] OPR Report, p. 127.

[48] "Memorandum for James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A," December 30, 2004, https://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc96.pdf (accessed October 12, 2015)(hereinafter "Levin Replacement Memo").

[49] "Levin Replacement Memo, p. 16, n. 27 ("In the August 2002 Memorandum, this Office concluded that the specific intent element of the statute required that infliction of severe pain or suffering be the defendant's 'precise objective' and that it was not enough that the defendant act with knowledge that such pain 'was reasonably likely to result from his actions' (or even that the result 'is certain to occur'). We do not reiterate that test here.")

[50] OPR Report, pp. 122-131.

The OLC deputy head, Stephen Bradbury, temporarily took over Levin's vacant position. He issued two new memos, both on May 10, 2005, intended to replace the Bybee II classified memo. One discussed the legality of individual interrogation techniques and authorized all of the same techniques approved in the Bybee II memo, but with new legal reasoning ("Bradbury Individual Techniques Memo").[51] The memo also authorized several techniques that had not been the subject of OLC opinions but had already been used by the CIA, such as "water dousing" and "nudity." The second May 10, 2005 memo addressed the techniques covered in the Bradbury Individual Techniques Memo but clarified that their use in combination with one another would not violate the Torture Statute ("Bradbury Combined Techniques Memo").[52] Though previously not approved by official OLC memo on any detainee other than Abu Zubaydah, and even then only in cursory fashion,[53] the CIA had since the start of the program frequently used multiple "enhanced interrogation techniques" in combination.[54] A third memo, issued on March 30, 2005, analyzed whether the techniques would violate the prohibition against cruel, inhuman, or degrading treatment or punishment prohibited under the Convention against Torture, and found that they would not ("Bradbury CIDT Memo").[55]

In December 2005, the US Congress passed the Detainee Treatment Act, which barred the use of cruel, inhuman, or degrading treatment or punishment against any detainee in US

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[51] "Memorandum for John A. Rizzo [Senior Deputy General Counsel, CIA]; Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques that May Be Used in the Interrogation of a High Value al Qaeda Detainee," May 10, 2005, http://media.luxmedia.com/aclu/olc_05102005_bradbury46pg.pdf (accessed January 29, 2015)(hereinafter "Bradbury Individual Techniques Memo").

[52] Memorandum for John A. Rizzo [Senior Deputy General Counsel, CIA]; Re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees," May 10, 2005, http://www.justice.gov/sites/default/files/olc/legacy/2013/10/21/memo-bradbury2005-2.pdf (accessed January 29, 2015)(hereinafter "Bradbury Combined Techniques Memo").

[53] Bybee II memo, p. 2, where use of the approved techniques "in some combination," in an "escalating fashion" on Abu Zubaydah is discussed in two sentences without any limitations placed on such combination or analysis thereof. By contrast, the Bradbury Combined Techniques Memo is a 20 page memo evaluating use of techniques in combination and noting that "a complete analysis under [the Torture Statute] ... entails an examination of the combined effects of any techniques that might be used." See also note 310 where the fact that Yoo admitted that his August 1, 2002 memos did not address the "cumulative effect" of the techniques is noted.

[54] Senate Summary Findings and Recommendations, p. 3.

[55] "Memorandum for John A. Rizzo [Senior Deputy General Counsel, CIA]; Re: Application of United States Obligations Under Article 16 of [Convention against Torture] to certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees," May 30, 2005, http://www.justice.gov/sites/default/files/olc/legacy/2013/10/21/memo-bradbury2005.pdf (accessed January 29, 2015)(hereinafter Bradbury CIDT Memo").

custody and required the Defense Department to follow the US Army Field Manual on Intelligence Interrogations when conducting interrogations.[56]

In a speech on September 6, 2006, President Bush formally disclosed the existence of the CIA interrogation program to the public.[57] He announced that a "small number" of detainees had been held by the CIA in locations that he could not disclose and praised the program for having "saved innocent lives."[58] He also announced that the remaining 14 detainees in CIA custody at the time would be sent to the military detention facility at Guantanamo Bay. But he did not end the CIA program at this time. He said it needed to continue because it was "crucial to getting lifesaving information."[59] As late as July 20, 2007, the OLC issued yet another memo authorizing the CIA to use techniques that were abusive, asserting that they would not violate US laws against torture and other ill-treatment or the newly enacted Detainee Treatment Act.[60]

President Barack Obama, on his second full day in office on January 22, 2009, signed an executive order closing the CIA's secret detention facilities and ending the use of "enhanced interrogation techniques."[61]

The CIA Program: What Was Known before the Senate Summary

Before release of the Senate Summary, substantial information had already been published about the CIA program. As early as December 2002, accounts began to emerge of the CIA subjecting detainees to stress positions, unlawful renditions, and other forms of

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[56] Detainee Treatment Act of 2005, Public Law 163-109, 119 Stat. 3136, January 6, 2006, https://www.icrc.org/ihl-nat/a24d1cf3344e99934125673e00508142/b22319a0da00fa02c1257b8600397d29/$FILE/Detainee%20Treatment%20Act%200f%202005%20.pdf (accessed June 10, 2015).

[57] "Transcript—President Bush's Speech on Terrorism," *New York Times*, September 6, 2006, http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=print (accessed June, 10 2015).

[58] Ibid.

[59] Ibid.

[60] Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques That May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees, July 20, 2007, http://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-warcrimesact.pdf (accessed June 10, 2015). Some of the abusive treatment approved included dietary manipulation, extended sleep deprivation, the facial hold, the attention grasp, the abdominal slap, and the insult slap.

[61] Executive Order 13491, "Ensuring Lawful Interrogations," signed January 22, 2009, http://edocket.access.gpo.gov/2009/pdf/E9-1885.pdf (accessed June 15, 2011).

abuse.[62] Following these initial reports, various media outlets and human rights organizations sought to document CIA activities more extensively. As early as 2003, Human Rights Watch had already interviewed persons in Afghanistan with information about CIA detention and, in a series of reports on "Ghost Detainees," we had published initial information on dozens of detainees who had disappeared into US custody.[63]

Especially after news broke of torture and other abuse of detainees by the US military at Abu Ghraib, media outlets and rights organizations frequently reported on CIA abuse of detainees, US efforts to circumvent laws prohibiting torture and other ill-treatment, and the existence of secret CIA detention sites.[64]

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[62] Dana Priest and Barton Gellman, "U.S. Decries Abuse but Defends Interrogations," *Washington Post*, December 26, 2002, http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html (accessed August 21, 2015).

[63] Human Rights Watch, "*Enduring Freedom": Abuses by U.S. Forces in Afghanistan*, vol. 16, no. 3(C), March 2004, http://www.hrw.org/reports/2004/afghanistan0304/afghanistan0304.pdf; Human Rights Watch, *The United States' "Disappeared": The CIA's Long-Term "Ghost Detainees,"* October 12, 2004, https://www.hrw.org/report/2004/10/12/united-states-disappeared-cias-long-term-ghost-detainees; Human Rights Watch, *List of 'Ghost Prisoners' Possibly in CIA Custody*, November 30, 2005, https://www.hrw.org/news/2005/11/30/list-ghost-prisoners-possibly-cia-custody; Human Rights Watch, *Ghost Prisoner: Two Years in Secret CIA Detention*, Vol. 19, No. 1(G), February 27, 2007, http://www.hrw.org/reports/2007/us0207/us0207webwcover.pdf.

[64] A non-exhaustive list of just some of these materials includes *"Enduring Freedom": Abuses by U.S. Forces in Afghanistan*; Human Rights First, "Ending Secret Detentions," June 2004, http://theopenunderground.de/@pdf/war/afghan/EndingSecretDetentions.pdf (accessed August 21, 2015); Human Rights First, "Behind the Wire: An Update to Ending Secret Detentions," March 2005, http://www.humanrightsfirst.org/wp-content/uploads/pdf/behind-the-wire-033005.pdf (accessed August 21, 2015); Amnesty International, "Five years on 'the dark side': A look back at 'war on terror' detentions," December 13, 2006, https://www.amnesty.org/en/documents/document/?indexNumber=amr51%2F195%2F2006&language=en, (accessed June 11, 2015); Human Rights Watch, "Statement on US Secret Detention Facilities in Europe,"

Human Rights Watch statement, November 6, 2005, https://www.hrw.org/news/2005/11/06/human-rights-watch-statement-us-secret-detention-facilities-europe; "US Operated Secret 'Dark Prison' in Kabul," Human Rights Watch news release, December 20, 2005, https://www.hrw.org/news/2005/12/19/us-operated-secret-dark-prison-kabul; Human Rights Watch, *Off the Record: US Responsibility for Enforced Disappearances in the "War on Terror,"* June 7, 2007, https://www.hrw.org/report/2007/06/07/record/us-responsibility-enforced-disappearances-war-terror; Amnesty International, "Below the radar: Secret flights to torture and 'disappearance,'" April 4, 2006, https://www.amnesty.org/en/documents/AMR51/051/2006/en/ (accessed June 11, 2015); Human Rights Watch, "Letter to Bush Requesting Information on Missing Detainees," February 27, 2007, https://www.hrw.org/news/2007/02/26/letter-bush-requesting-information-missing-detainees; *Delivered Into Enemy Hands*; Jane Mayer, "The Black Sites," *The New Yorker*, August 13, 2007, http://www.newyorker.com/magazine/2007/08/13/the-black-sites (accessed June 11, 2015); Dana Priest, "CIA Holds Terror Suspects in Secret Prisons," *Washington Post*, November 2, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html (accessed June 11, 2015); Priest Smith, "Memo Offered Justification for Use of Torture," *Washington Post*; Dana Priest and Joe Stephens, "Secret World of U.S. Interrogation," *Washington Post*, May 11, 2004, http://www.washingtonpost.com/wp-dyn/articles/A15981-2004May10.html (accessed October 13, 2015); Jane Mayer, *The Dark Side*, (New York: Anchor Books, 2008); Steve Coll, *Ghost Wars* (New York: Penguin Books, 2004); Michael Isikoff and David Corn, *Hubris* (New York: Three Rivers Press, 2006); The Constitution Project Report; OSJI, "Globalizing Torture: CIA Secret Detention and Extraordinary Rendition."

The US Military's Approval and Use of Torture and Other Ill-Treatment[65]

The harm of CIA torture was compounded by the US military's adoption of many of the CIA-approved interrogation techniques.

The military's use of the techniques dates to December 2001, when the Office of the Secretary of Defense inquired into the Survival, Evasion, Resistance, and Escape (SERE) program. SERE methods were being used by the military's Joint Personnel Recovery Agency (JPRA) to train US Special Forces to endure interrogation methods used by enemy forces that did not abide by the laws of armed conflict.[66] These techniques, many drawn from the experiences of US service members captured by North Korea during the Korean War, included stripping detainees naked for degradation purposes, exploiting cultural or religious taboos, use of forced standing, exposure to cold, and prolonged sleep deprivation. [67] The CIA later drew on these same SERE techniques to create its "enhanced interrogation" program.[68]

In February 2002, JPRA personnel began providing training and written materials to personnel in or headed to Guantanamo and Afghanistan. [69] In July the CIA proposed the use of SERE-derived interrogation techniques with the first detainee held by the CIA, Abu Zubaydah. In mid-September 2002, just after the OLC issued its first memo authorizing CIA torture, JPRA staff began training Guantanamo personnel in the use of abusive SERE school techniques.[70]

In late September 2002, a delegation of senior officials, including Defense General Counsel William Haynes, White House General Counsel Alberto Gonzales, CIA General Counsel John Rizzo, and Chief of the Criminal Division of the Justice Department Michael Chertoff, visited the military detention facility at Guantanamo to discuss how interrogations were being managed there.[71] The evidence available suggests that the group encouraged the practices.[72]

By October 2002 Guantanamo commander Maj. Gen. Michael Dunlavey was requesting authority to use more aggressive interrogation techniques including stress

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[65] This box is primarily a summary of excerpts from *Getting Away with Torture*, which derived its information from a variety of sources. Additional sources are noted in the citations below.

[66] *Getting Away With Torture*, p. 40, citing SASC Report, p. 6.

[67] *Getting Away With Torture*, p. 41.

[68] *Getting Away With Torture*, p. 41.

[69] *Getting Away With Torture*, pp. 40-41.

[70] *Getting Away with Torture*, pp. 40-41, citing SASC Report, pp. 43-49.

[71] *Getting Away with Torture*, pp. 41-42.

[72] *Getting Away with Torture*, p. 42, citing Phillippe Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (New York: Palgrave Macmillan, 2008), p. 76.

positions; isolation for up to 30 days; deprivation of light and sound; exploiting individual phobias such as fear of dogs; forced grooming; use of scenarios designed to convince the detainee that death or severely painful consequences were imminent for him or his family; and waterboarding.[73]

Haynes submitted a memo to Rumsfeld asking that he approve most of the methods Dunlavey requested, with the exception of waterboarding. On December 2, 2002, Rumsfeld approved most of the recommended techniques and appended a handwritten note to his authorization of these techniques: "I stand for 8-10 hours a day. Why is standing limited to 4 hours?"[74]

Roughly two weeks later after concerns about Rumsfeld's order were raised with Navy General Counsel Alberto Mora, Mora in turn, raised his concerns with Haynes among others. After asserting pressure but still not receiving assurances that the orders would be rescinded, Mora met with Haynes warning him that the "interrogation policies could threaten Secretary Rumsfeld's tenure and could even damage the presidency." [75] On January 15 2003, uncertain whether there would be any change to the interrogation policy, Mora delivered a draft memorandum to Haynes stating that the majority of the proposed techniques violated domestic and international laws, at minimum constituting "cruel and unusual treatment and, at worst, torture."[76] Mora told Haynes that he would not sign the memorandum unless Rumsfeld rescinded his order.[77] Rumsfeld did so on January 15, 2003 but at the same time said that commanders could get approval for the techniques if they asked for it and provided justification.[78] On April 16, 2003, Rumsfeld issued a new memorandum that, while more restrictive than the December 2002 rules, still allowed techniques that went beyond what the laws of war permitted, including isolation, dietary manipulation, and sleep adjustment.[79]

Because of President Bush's February 7, 2002 decision to reject the applicability of the Geneva Conventions to Al-Qaeda and Taliban prisoners in Afghanistan, there was no overarching prescribed interrogation regime for prisoners held there. [80] In late 2002, Special Mission Unit Task Force (SMU TF) officials from Afghanistan visited Guantanamo, compared notes on techniques from JPRA, and started drawing up a more formal list of techniques to be specifically authorized. A large portion of the SMU TF policies were based on Rumsfeld's

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[73] *Getting Away with Torture*, p. 42.

[74] *Getting Away with Torture*, p. 43.

[75] SASC Report, p. 107.

[76] SASC Report, p. 108.

[77] Ibid.

[78] *Getting Away with Torture*, pp. 44-45.

[79] SASC report. p. 132.

[80] *Getting Away with Torture*, p. 46.

December 2, 2002 authorization and the legal reasoning behind the denial of wartime protections to Al-Qaeda and Taliban prisoners.[81]

In January 2003, in response to a Joint Staff inquiry from US Central Command, the US military command in Afghanistan submitted a list of interrogation techniques then in use in Afghanistan. The list included techniques "similar" to those Rumsfeld had approved for Guantanamo even though that memo had been technically rescinded. When the command in Afghanistan received no complaints, it interpreted the silence to mean the techniques were unobjectionable.[82]

Many US military and intelligence personnel sent to Iraq then based their interrogation policies on those formulated by the SMU TF in Afghanistan. For example, Capt. Carolyn Wood, who had helped develop interrogation policies for regular US forces in Afghanistan in late 2002—and who was implicated in the beating deaths of two detainees there in December 2002—was stationed in Iraq and put in command of Abu Ghraib interrogation operations in mid-2003. In July 2003, Captain Wood drafted a proposed interrogation policy based on the Afghanistan and Iraq SMU TF guidelines. This included the presence of military working dogs, stress positions, sleep management, loud music, and light control.[83]

Around the same time, in August 2003, Gen. Geoffrey Miller, who oversaw Guantanamo interrogation efforts, went to Iraq to conduct a counterterrorism assessment. He brought with him interrogation policy guidelines for Guantanamo that he gave to Gen. Ricardo Sanchez, the overall US military commander for Iraq, and proposed them as a model.[84] Sanchez used both Wood's proposed policy and the Guantanamo guidelines to come up with interrogation guidelines for Iraq that he issued on September 14, 2003. [85] The abusive techniques approved, along with other techniques used by the SMU TF units, were among those being used at Abu Ghraib prison when the scandal connected to abuse there became public in 2004.[86]

The US military record on criminal accountability for abuse of detainees post-9/11 has been abysmal. In 2007, Human Rights Watch collected information on some 350 cases of alleged abuse involving more than 600 military personnel. Few had been punished. The highest-ranking officer prosecuted for the abuse of prisoners was a lieutenant colonel, Steven Jordan, court-martialed in 2006 for his role in the Abu Ghraib scandal. He was acquitted in 2007.[87]

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[81] Ibid.

[82] Ibid.

[83] *Getting Away with Torture*, p 47; SASC report, p. 17.

[84] SASC Report, p. 197.

[85] SASC Report, p. 197.

[86] SASC Report, p. 197, 201.

[87] *Getting Away with Torture*, p. 6.

In 2003, several media outlets began to report on CIA interrogation techniques.[88] In March 2004 details of an army investigation into prisoner abuse in Iraq began to surface.[89] In April CBS published photos of the abuse at Abu Ghraib prison. And in May *The New Yorker* published an extensive expose about the abuse.[90] Then in June, one of the Bybee memos purportedly authorizing the CIA's use of "enhanced interrogation techniques" was leaked to the media.[91]

In subsequent years, media outlets and human rights groups documented or obtained information relating to the abusive interrogations of roughly 25 CIA detainees,[92] but information on the treatment of scores of other detainees remains unavailable. Freedom of Information Act requests and lawsuits brought by the American Civil Liberties Union (ACLU) and others compelled the government to disclose a number of documents related to the CIA program.[93] But many other documents remain classified, including the September 17,

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[88] Raymond Bonner, Don Van Natta Jr., and Amy Waldman, "Threats and Responses: Interrogations; Questioning Terror Suspects In a Dark and Surreal World," *New York Times*, March 9, 2003 http://www.nytimes.com/2003/03/09/world/threats-responses-interrogations-questioning-terror-suspects-dark-surreal-world.html; Jess Bravin and Gary Fields, "How Do Interrogators Make A Captured Terrorist Talk?" *Wall Street Journal*, March 4, 2003, http://www.wsj.com/articles/SB10467328255409768800 (accessed August 18, 2015).

[89] Barbara Starr, "Soldiers charged with abusing Iraqi prisoners" *CNN*, March 20, 2003, http://www.cnn.com/2004/US/03/20/iraq.prison.abuse/ (accessed August 18, 2015); Thom Shanker, "The Struggle for Iraq: The Military; 6 G.I.'s in Iraq Are Charged With Abuse Of Prisoners," *New York Times*, March 21, 2015 http://www.nytimes.com/2004/03/21/world/struggle-for-iraq-military-6-gi-s-iraq-are-charged-with-abuse-prisoners.html (accessed August 18, 2015).

[90] Rebecca Leung, "Abuse of Iraqi POWs by GIS Probed," *CBS News*, April 27, 2004, http://www.cbsnews.com/news/abuse-of-iraqi-pows-by-gis-probed/ (accessed June 9, 2015); see also, Seymour Hersh, "Torture at Abu Ghraib," *The New Yorker*, May 10 2004, http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib (accessed June 6, 2015).

[91] Priest and Smith, "Memo Offered Justification for Use of Torture," *Washington Post*; Priest, "Justice Dept. Memo Says Torture 'May Be Justified,'" *Washington Post*.

[92] A non-exhaustive list includes the accounts of 14 former CIA detainees documented in an International Committee of the Red Cross report that was leaked to the press in 2007 (See Mark Danner, "US Torture: Voices from the Black Sites," *New York Review of Books*, April 9, 2009, http://www.nybooks.com/articles/archives/2009/apr/09/us-torture-voices-from-the-black-sites/); The accounts of five former CIA detainees documented in the Human Rights Watch report, *Delivered Into Enemy Hands*; the accounts of plaintiffs who have brought suits in US courts, see e.g. the complaint in *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F.Supp.2d 1128, (N.D. Cal. 2008) (No. 5:07-cv-02798), 2007 WL 2227631, pp. 3-13 (for more detail see individual declarations, e.g. "Declaration of Mohammed Farag Ahman Bashmilah in Support of the Plaintiffs' Motion to Dismiss or, in the Alternative, for Summary Judgment," (hereinafter "Bashmilah Declaration") http://chrgj.org/wp-content/uploads/2012/07/declarationofbashmilah.pdf (accessed June 27, 2014); Craig Smith, Souad Mekhennet, "Algerian Tells of Dark Term in U.S. Hands," *New York Times*, July 7, 2006, http://www.nytimes.com/2006/07/07/world/africa/07algeria.html?pagewanted=all&gwt=pay (accessed June 23, 2015); Clara Gutteridge, "How the US Rendered, Tortured and Discarded One Innocent Man," *The Nation*, June 27, 2012, http://www.thenation.com/article/168621/how-us-rendered-tortured-and-discarded-one-innocent-man; Human Rights Watch, "The Case Of Marwan Jabor," http://www.hrw.org/reports/2007/us0207/2.htm (accessed August 18, 2015); and the account of Suleiman Abdullah Salim in a complaint filed by the American Civil Liberties Union in *Abdullah Salim v. Mitchell*, Civil Action No. 2:15-CV-286-JLQ, October 13, 2015, https://www.aclu.org/sites/default/files/field_document/salim_v._mitchell_-_complaint_10-13-15.pdf (accessed October 14, 2015)(the other plaintiff in this case, Ben Soud, formerly went by the names of Mohamed Shoroeiya and Abd al-Karim; his account is documented in *Delivered into Enemy Hands* and to some extent in the Senate Summary).

[93] See e.g., American Civil Liberties Union, "Accountability for Torture," https://www.aclu.org/feature/accountability-torture?redirect=accountability-torture (accessed June 26, 2015); see also Jason Leopold and Ky Henderson, "Tequila, Painted Pearls, and Prada: How the CIA Helped Produce 'Zero Dark Thirty,'" *Vice News*, September 10, 2015,

2001 Memorandum of Notification purportedly granting the CIA authority to covertly capture and detain[94] individuals posing "a continuing, serious threat of violence or death to U.S. persons and interests or planning terrorist activities," and 11 CIA Office of Inspector General reports related to the CIA program.[95]

Justice Department Inquiry into CIA Torture

In 2007 reports emerged that the CIA had destroyed 92 videotapes depicting two CIA detainees, Abu Zubaydah and Abd al-Rahim al-Nashiri, being interrogated and subjected to the use of CIA torture techniques—including waterboarding.[96] In 2008, the US Department of Justice appointed Special Prosecutor John Durham to look into the tape destruction.[97] After Barack Obama took office, his attorney general, Eric Holder, expanded the Durham investigation to include a preliminary investigation into whether federal laws were violated as part of the CIA interrogation program.[98]

Holder said his decision to expand the investigation was based in part on a report produced by the Justice Department's Office of Professional Responsibility (OPR) finding that two OLC attorneys, John Yoo and Jay Bybee (see below), had engaged in professional misconduct in authorizing the CIA's use of "enhanced interrogation techniques"[99] and

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https://news.vice.com/article/tequila-painted-pearls-and-prada-how-the-cia-helped-produce-zero-dark-thirty (accessed October 14, 2015); Jason Leopold, "The Watchdog, the Whistleblower, and the Secret CIA Torture Report," *Vice News*, May 19, 2015, https://news.vice.com/article/the-watchdog-the-whistleblower-and-the-cias-secret-torture-report (accessed October 14, 2015).

[94] Though the MON provides the CIA with "significant discretion in determining whom to detain, the factual basis for the detention, and the length of the detention," Senator Feinstein, in her Forward to the Senate Summary writes: "It is worth repeating that the covert action authorities approved by the President in September 2001 did not provide any authorization or contemplate coercive interrogations." See Senate Summary, p. 11, and Forward, p. 2, n. 2.

[95] Senate Summary, p. 11; Katherine Hawkins, "Disappearing People and Disappearing the Evidence: The Deeper Significance of the SSCI Report," *Just Security*, August 15, 20014, http://justsecurity.org/14054/guest-post-disappearing-people-disappearing-evidence-deeper-significance-ssci-report/ (accessed June 12, 2015). For a listing of documents withheld in the government's response to an ACLU Freedom of Information Act (FOIA) lawsuit, see Letter from the US Department of Justice Civil Division, to the ACLU, November 14, 2011, https://www.aclu.org/sites/default/files/field_document/cia_vaughn_index_11142011.pdf (accessed June 10, 2015).

[96] Dan Eggen and Joby Warrick, "CIA Destroyed Videos Showing Interrogation," *Washington Post*, December 7, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/12/06/AR2007120601828_pf.html (accessed June 23, 2015); Mark Mazzetti , "U.S. Says C.I.A. Destroyed 92 Tapes of Interrogations," *New York Times*, March 2, 2009, http://www.nytimes.com/2009/03/03/washington/03web-intel.html (accessed April 7, 2015).

[97] Eggen and Warrick, "Criminal Probe on CIA Tapes Opened," *Washington Post*.

[98] Department of Justice, "Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees," August 24, 2009, http://www.justice.gov/opa/speech/attorney-general-eric-holder-regarding-preliminary-review-interrogation-certain-detainees (accessed February 19, 2015)(hereinafter "Attorney General August 24, 2009 Statement on Durham Investigation").

[99] Attorney General August 24, 2009 Statement on Durham Investigation. See also OPR Report. Specifically the OPR Report found that Jay Bybee, Assistant Attorney General at the OLC committed "professional misconduct," and John Yoo, Deputy

recommending that prior determinations by the Justice Department not to prosecute CIA abuses be reexamined.[100] (The OPR Report had not been made public at the time of Holder's announcement and was not disclosed until February 2010).[101] It was also based on a then still-classified 2004 CIA Inspector General report.[102]

Holder, however, also set strict limits to the Durham inquiry, making clear that "the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees."[103] That preliminary investigation looked into 101 cases of alleged CIA abuse.[104]

On November 9, 2010, Holder announced that the Justice Department would not press charges against anyone for destruction of the CIA videotapes depicting the interrogation of two detainees.[105] On June 30, 2011, he announced the closure, with no charges filed, in 99 of the 101 cases.[106] Holder provided little explanation for the decision not to press charges other than to say that Durham had concluded that many of the 101 detainees were never in CIA custody.[107] If that is the case it raises questions about who had custody of the detainees, where they were, and why this meant CIA personnel were not responsible for any wrongdoing.[108] Holder also said that he would open full investigations into the cases of the

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Assistant Attorney General for the OLC "intentional professional misconduct" when they rendered legal advice in support of the CIA's use of so-called "enhanced interrogation techniques," OPR Report, p. 11.

[100] Attorney General August 24, 2009 Statement on Durham Investigation.

[101] Eric Lichtblau and Scott Shane, "Report Faults 2 Authors of Bush Terror Memos," *New York Times*, February 19, 2010, http://www.nytimes.com/2010/02/20/us/politics/20justice.html?_r=0 (accessed June 24, 2015).

[102] Attorney General August 24, 2009 Statement on Durham Investigation. The 2004 CIA Inspector General Report, dated May 7, 2009, was first released in a heavily redacted form by the George W. Bush administration in May 2008, then later in a less redacted form by the Obama administration on August 24, 2009. The latter version is available here: http://graphics8.nytimes.com/packages/pdf/politics/20090825-DETAIN/2004CIAIG.pdf (accessed June 26, 2015)(hereinafter "CIA OIG Report").

[103] Attorney General August 24, 2009 Statement on Durham Investigation.

[104] Department of Justice, "Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees," June 30, 2011, http://www.justice.gov/opa/pr/statement-attorney-general-regarding-investigation-interrogation-certain-detainees (accessed February 19, 2015)(hereinafter "Attorney General June 30, 2011 Statement on Durham Investigation").

[105] Jerry Markon, "No charges in destruction of CIA videotapes, Justice Department says," *Washington Post*, November 9, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/11/09/AR2010110904106.html (accessed June 26, 2015).

[106] Attorney General June 30, 2011 Statement on Durham Investigation.

[107] Ibid.

[108] Ibid. David Passaro, the only CIA contractor or employee to be held criminally liable for detainee abuse, was prosecuted by the Department of Justice for the death of Abdul Wali, who died at a US military base in Kunar province in Afghanistan. See The Constitution Project Report, p. 74. Passaro was convicted of felony assault with a dangerous weapon and three counts of misdemeanor assault, for which he was sentenced in 2006 to eight years and four months in prison. For more information on Passaro's case, see "Anatomy of an Interrogation," *Retro Report*, April 19, 2015, http://www.retroreport.org/video/anatomy-of-an-interrogation/ (July 21, 2015).

two remaining detainees, both of whom had died in US custody.[109] A year later, on August 30, 2012, Holder announced the closure of these cases without bringing any charges.[110] In closing the investigation, Holder said he made his decision because "the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt."[111]

The Durham investigation was primarily focused only on CIA abuse that went beyond what was authorized.[112] This limitation was always too narrow in scope because the authorizations not only permitted interrogation methods in violation of US and international law, but also because they appear to have been designed specifically to create a legal escape hatch for what would otherwise be the illegal use of torture.

Even within the administration-imposed restraints, the investigation appears wholly inadequate. There is no evidence that Durham investigators interviewed any of the detainees in the CIA program, whether still detained or since released.[113] In November 2014 five former CIA detainees who alleged that they had been badly tortured by the CIA

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[109] Attorney General June 30, 2011 Statement on Durham Investigation; Eric Lichtblau and Eric Schmitt, "U.S. Widens Inquiries Into 2 Jail Deaths," *New York Times*, June 30, 2011, http://www.nytimes.com/2011/07/01/us/politics/01DETAIN.html, (accessed April 7, 2015).

[110] Department of Justice, "Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees," August 30, 2012, http://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees (accessed February 19, 2015)(hereinafter "Attorney General August 30, 2012 Statement on Durham Investigation").

[111] Ibid. The basis upon which the Justice Department made this determination is not clear. When announcing closure of the investigation, the Justice Department put out a statement explaining that in making the determination not to bring charges, "Mr. Durham considered all potentially applicable substantive criminal statutes as well as the statutes of limitations and jurisdictional provisions that govern prosecutions under those statutes." Attorney General August 30, 2012 Statement on Durham Investigation. Having "admissible evidence [that] probably will be sufficient to obtain and sustain a conviction" is consistent with determining whether to bring criminal charges according to the US Attorney Manual. The manual further states, "both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact." Department of Justice, US Attorneys' Manual. "Grounds for Commencing or Declining Prosecution," Title 9: Criminal, Section 9-27.220, http://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.150 (accessed July 21, 2015).

[112] "Mr. Durham's review examined 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." Attorney General June 30, 2011 Statement on Durham Investigation.

[113] See Letter from five former CIA detainees alleging they had been subjected to CIA torture beyond what was authorized but yet were not interviewed for the Durham investigation. "Letter former CIA detainees to the United Nations Committee against Torture," Human Rights Watch, November 14, 2014, https://www.hrw.org/news/2014/11/14/letter-former-cia-detainees-united-nations-committee-against-torture; Spencer Ackerman, "Former CIA Detainees Claim US Torture Investigators Never Interviewed Them," *The Guardian*, November 11, 2014, http://www.theguardian.com/us-news/2014/nov/11/libyan-cia-detainees-torture-inquiry-interview (accessed February 12, 2014); Spencer Ackerman, "Doubt Cast Over US Torture Investigation as More CIA Detainees Come Forward," *The Guardian*, November 12, 2014, http://www.theguardian.com/us-news/2014/nov/12/more-cia-detainees-come-forward-us-investigation-torture (accessed February 12, 2014). However, two attorneys representing two different former CIA detainees now held in Guantanamo told Human Rights Watch that Durham spoke to them during the course of his investigation about what happened to their clients while in CIA custody.

asserted in a public letter that Durham never spoke to them during his investigation.[114] They urged the UN Committee against Torture to question the US delegation about this during the impending review of US compliance with the Convention against Torture.[115] Other organizations working with former detainees held by the CIA and detainee defense counsel also report that the Durham team never spoke to their clients.[116]

When the Committee against Torture, charged with reviewing state compliance with the Convention against Torture, asked the US delegation whether any former detainees had been interviewed, the delegation was unwilling to provide an answer. Instead, David Bitkower, deputy assistant attorney general in the Justice Department's Criminal Division, newly disclosed that the Durham investigation had interviewed approximately 96 witnesses, but he would not say whether any of them were former CIA detainees.[117] The US response provoked the following statement from the committee:

> The Committee regrets ... that the delegation was not in a position to describe the investigative methods employed by Mr. Durham or the identities of any witnesses his team may have interviewed. Thus, the Committee remains concerned about information before it that some former CIA detainees, who had been held in U.S. custody abroad, were never interviewed during the investigations, casting doubts as to whether this high-profile inquiry was properly conducted.[118]

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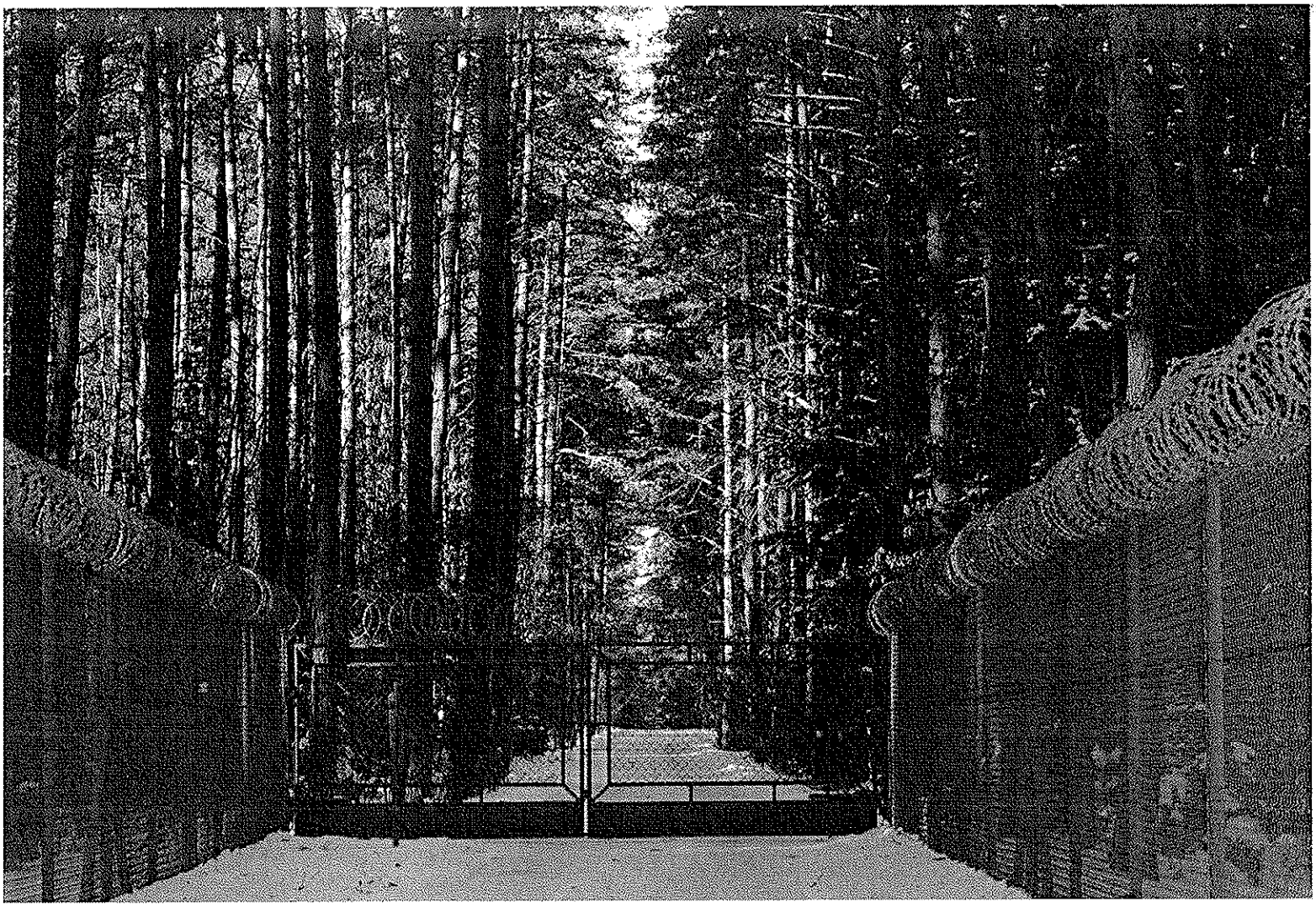
[114] "Letter former CIA detainees to the United Nations Committee against Torture," Human Rights Watch, November 14, 2014, https://www.hrw.org/news/2014/11/14/letter-former-cia-detainees-united-nations-committee-against-torture.

[115] Ibid.

[116] Ackerman, "Doubt Cast Over US Torture Investigation as More CIA Detainees Come Forward," *The Guardian*.

[117] Charlie Savage, "U.N. Commission Presses U.S. on Torture," *New York Times*, November 13, 2014, http://www.nytimes.com/2014/11/14/world/europe/un-commission-presses-us-on-torture.html?_r=0 (accessed February 12, 2014); "Full Transcript: US Third Periodic Report to UN Committee Against Torture, Nov. 12-13, 2014" *US Human Rights Network*, http://www.ushrnetwork.org/sites/ushrnetwork.org/files/cat_complete_transcript_from_just_security.pdf (accessed February 12, 2015). See p. 17 ("Why did the investigation not include victims of torture...?"); see also p. 23, p. 37, p. 46, and pp. 49-50 ("we have not acknowledged one way or the other who it is that the Durham investigation team interviewed or did not interview, and I am not in a position to do that today ... [We] interviewed approximately 96 different witnesses."). The New York Times and Charlie Savage have sued the Department of Justice for information related to the Durham investigation, including FBI witness statements. On September 30, 2015 a judge partially granted their request but denied their request for witness statements. It is not yet clear whether either party will appeal. See *New York Times and Charlie Savage v. the United States Department of Justice*, 14-cv-3777, Document 33, filed September 30, 2015, available at: https://www.documentcloud.org/documents/2436601-savage-nyt-foia-durham-order.html (accessed November 7, 2015).

[118] UN Committee against Torture, "Concluding observations on the third to fifth periodic reports of United States of America," November 20, 2014, (CAT/C/SR. 1276 and 1277) http://justsecurity.org/wp-content/uploads/2014/11/UN-Committee-Against-Torture-Concluding-Observations-United-States.pdf (accessed April 23, 2015), para. 11. (The Committee against Torture further urged the US to "undertake a full review into the way the CIA's responsibilities were discharged in



Barbed wire fence surrounding a military area near Stare Kiejkuty village, where Polish prosecutors are investigating allegations the CIA ran a secret "black site." © 2014 REUTERS/Kacper Pempel

New Details in the Senate Summary

The SSCI report is the product of six years of investigation by Senate Intelligence Committee staff members who had access to more than six million pages of CIA materials. These included operational cables, intelligence reports, internal memoranda, and emails, briefing materials, interview transcripts, contracts, and other records.[119] Notably, the staff members did not have access to more than 9,400 documents that the CIA withheld,

relation to the allegations of torture and ill-treatment against suspects during U.S. custody abroad. In the event of a re-opening of investigations, the State party should ensure that any such inquiries are designed to address the alleged shortcomings in the thoroughness of the previous reviews and investigations.").

[119] Senate Summary, Forward, p. 5.

reportedly asserting the executive privilege on behalf of the White House.[120] The full 6,700-page report was completed in December 2012.[121] However, it took nearly two years for the Senate Intelligence Committee to decide to release the Summary and for the US government to conduct declassification review. The Summary, still partially redacted, was released on December 9, 2014.[122] It is 499 pages long; the remainder of the full report remains classified.

The Summary—and likely the full report—focuses exclusively on the CIA; it does not cover abuses by other US government agencies, including the military. It also does not address the issue of CIA renditions abroad. The Summary's main findings are that the use of "enhanced interrogation techniques" was not an effective means of gathering useful intelligence; that the CIA inflated claims that the techniques were necessary to thwart terrorist attacks; and that the techniques used were far more brutal than previously thought.[123]

The Summary covers many facts that were already well-known, but also includes many new details, including:

- A list of all detainees that the US government says it detained in the CIA detention and interrogation program. However, the US has still not released the names and identities of detainees the CIA did not itself hold for a significant time period but instead rendered to other countries.
- New details about the methods used in the CIA program. For example, the Summary discloses that the CIA subjected detainees to "rectal feedings," in which CIA personnel forcibly inserted tubes into the rectums of detainees and infused pureed food into their bodies, which the Summary and medical experts conclude was not medically necessary.
- Evidence of interrogators' intent to cause severe pain and suffering. This includes, for example, details on how interrogators used excessively large tubes to conduct

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[120] Jonathan Landay, Ali Watkins, and Marisa Taylor, "White House withholds thousands of documents from Senate CIA probe, despite vows of help," *McClatchy*, March 12, 2014, http://www.mcclatchydc.com/2014/03/12/221033/despite-vows-of-help-white-house.html#storylink=cpy (accessed January 20, 2015).

[121] "US: Release Report that Addresses CIA Torture," Human Rights Watch news release, December 13, 2012, https://www.hrw.org/news/2012/12/13/us-release-report-addresses-cia-torture (accessed July 1, 2015).

[122] Senate Select Committee on Intelligence: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, http://www.intelligence.senate.gov/study2014/executive-summary.pdf (accessed February 18, 2015).

[123] Senate Summary, Findings and Conclusions, pp. 1-3.

rectal feedings, or forced detainees into positions that required them to stand for days in order to deprive them of sleep when they already had broken bones in their legs, knowing it would cause permanent and lasting physical injury.

- The disclosure that the CIA paid the company that Mitchell and Jessen formed and was put in charge of implementing, carrying out and evaluating the effectiveness of the CIA program, $81 million dollars.
- The disclosure that Federal Bureau of Prisons officials visited one of several CIA detention facilities in November 2002 in Afghanistan and were "wow'ed" by the degree of sensory deprivation there.
- Accounts of multiple detainees being subjected to water torture in ways that, according to an interrogator, were virtually "indistinguishable" from waterboarding and were unauthorized. Such accounts and prior reporting contradict Senate testimony by then-CIA Director Michael Hayden that only three detainees had ever been waterboarded.
- Evidence that the CIA recognized that the "enhanced interrogation techniques" were unlawful. This can be inferred from, among other things, the CIA's request for Justice Department guarantees not to prosecute such practices under federal laws prohibiting torture and CIA lawyers' acknowledgment in a draft letter to the US attorney general that use of "enhanced interrogation techniques" would be barred by anti-torture laws.
- Details about the various steps the CIA took to cover up possible criminal activity and obstruct the democratic process, including by making false claims to the Justice Department, the White House, and Congress about the scope, nature, successes, and necessity of the interrogation program.
- Efforts the administration took to keep senior members of its National Security Council and Defense Department team in the dark about the program.

The Senate Summary also places these and other facts in the context of US decision-making and explains how the Bush administration came to adopt, authorize, and approve a government-sanctioned program of torture and enforced disappearance around the globe. It should be recognized, however, that although the Senate Summary provides important new details about the interrogation program, it remains an account told largely

from the government's perspective. The voices of the detainees who were subjected to torture are not included.

US Response to the Senate Summary

Evidence has long been available that US officials and agents violated US federal law, as well as international law, in connection with the CIA's rendition, detention, and interrogation program.[124] Failure to prosecute torture is itself a violation of the Convention against Torture.[125] The release of the Senate Summary puts forward further evidence of wrongdoing that the US government is obligated under international law to investigate and appropriately prosecute, as well as provide redress to victims. However, the US has largely failed to act.

The Obama administration and others have put forward three broad reasons why the US need not and should not conduct criminal investigations into alleged abuses by US officials connected to the CIA interrogation program:

- "An investigation was already conducted": The Obama administration's main argument to justify no action is that it already conducted an investigation into these events, pointing to the Durham inquiry.[126]
- "Prosecutions would be politically harmful": President Obama famously said after his election but before taking office that he "had a belief that we need to look forward as opposed to looking backwards."[127] Commentators supporting this

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[124] See *Getting Away with Torture*, p. 49.

[125] Convention against Torture, art. 7.

[126] Carol Rosenberg, "Human rights groups ask attorney general to order new CIA torture probe," *Miami Herald*, June 23, 2015, http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article25313905.html (accessed June 25, 2015). In response to the request for the Attorney General to order a new torture probe, the Justice Department issued the following response to this June 23, 2015 story: "In 2009, the Attorney General directed a preliminary review of the treatment of certain individuals alleged to have been mistreated while in U.S. Government custody subsequent to the 9/11 attacks. That review generated two criminal investigations, but the Department of Justice ultimately declined those cases for prosecution because the admissible evidence would not be sufficient to obtain and sustain convictions beyond a reasonable doubt. Those investigators have also reviewed the Senate Committee's full report and did not find any new information that they had not previously considered in reaching their determination. This inquiry was extraordinarily thorough and we stand by our previously announced decision not to initiate criminal charges." The statements contradict representations made by the Justice Department in ongoing freedom of information act litigation. According to a January 2015 declaration in *ACLU v. CIA*, the Justice Department's copies of the full report have remained unopened and have not been reviewed by Justice Department staff or distributed in any way. See Letter to US Department of Justice Inspector General from Amnesty International USA, September 21, 2015, available at: https://www.amnestyusa.org/pdfs/OIGComplaintAmnestyInternationalUSA.pdf (accessed November 7, 2015), pp. 4-5.

[127] David Johnston and Charlie Savage, "Obama Reluctant to Look Into Bush Programs," *New York Times*, January 11, 2009, http://www.nytimes.com/2009/01/12/us/politics/12inquire.html?_r=0 (accessed October 14, 2015).

approach contend that prosecutions, brought largely against Bush-era officials, would invariably be divisive for the nation.[128]

- "Prosecutions of those involved in the CIA program are not viable under US law": Some observers have concluded that it may not be possible to charge those responsible for CIA abuses due to difficulties in proving intent, the expiration of statutes of limitations, and the applicability of other defenses.[129]

As mentioned above, international human rights law, notably the Convention against Torture and the International Covenant on Civil and Political Rights (ICCPR), obligates states to conduct impartial investigations and appropriately prosecute government officials responsible for torture and other cruel, inhuman, or degrading treatment or punishment.

The UN Committee against Torture has stated that a government's obligation "to investigate, punish, and prevent further torture or ill-treatment in the future" should give "particular attention to the legal responsibility of both the direct perpetrators and officials in the chain of command, whether by acts of instigation, consent or acquiescence."[130] The

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[128] Johnston and Savage, "Obama Reluctant to Look Into Bush Programs," *New York Times*; Kathleen Hennessey and Michael A. Memoli, "CIA torture report not likely to result in reforms or prosecutions," *Los Angeles Times*, December 10, 2014, http://www.latimes.com/world/middleeast/la-fg-torture-next-20141211-story.html ("The Justice Department defended its decision not to prosecute those involved, saying the report would not trigger reconsideration" and additionally quotes Sen. Richard M. Burr as saying, "We're going to focus on real-time oversight. We're not going to be looking back at a decade trying to dredge up things."); see also Raf Sanchez, "Why won't Barack Obama prosecute CIA torturers?" *The Telegraph*, December 12, 2014, http://www.telegraph.co.uk/news/worldnews/barackobama/11291476/Why-wont-Barack-Obama-prosecute-CIA-torturers.html (accessed June 30, 2014) ("The release of the report has been explosive. Deep rifts between the CIA and the Democratic Party have erupted into public view. Morale has slumped at the spy agency and Republicans are accusing the White House of leaving America's spooks to swing in the wind. Imagine how much worse all of that would be if the Obama administration was actually trying to send people to prison. The President would be prosecuting the friends and colleagues of the spies he relies on every day to keep the US safe from terrorism. If the Justice Department went after George W. Bush or Dick Cheney or other senior officials it would be seen as using the criminal justice system to persecute political opponents.").

[129] Michael Mukasey, "The CIA Interrogations Followed the Law," *Wall Street Journal*, December 16, 2014, http://www.wsj.com/articles/michael-b-mukasey-the-cia-interrogations-followed-the-law-1418773648 (accessed April 21, 2015); John Yoo, "Dianne Feinstein's Flawed Torture Report," *Los Angeles Times*, December 13, 2014, http://www.latimes.com/opinion/op-ed/la-oe-yoo-torture-feinstein-20141214-story.html#page=1 (accessed April 21, 2015); Jennifer Bendery and Ali Watkins, "Despite Torture Uproar, DOJ Still Says No To Prosecutions," *Huffington Post*, December 9, 2014, http://www.huffingtonpost.com/2014/12/09/doj-torture_n_6298276.html?1418178014 (accessed March 9, 2015) (An unnamed US Justice Department spokesman, the day the SSCI report was released also alluded to the possibility that statutes of limitations, jurisdictional issues and legal opinions authorizing the abuse were bars to prosecution); "Statement of the Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees, August 30, 2012, http://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees (accessed August 12, 2015)(Holder raised "statutes of limitations and jurisdictional provisions" in closing the only Justice Department investigation into widespread CIA abuses).

[130] UN Committee against Torture, General Comment No. 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/CC/2, (2008), para. 7, http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhskvE%2bTuw1mw%2fKU18dCyrY

Committee considers it "essential" that the "responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein, be fully investigated through competent, independent and impartial prosecutorial and judicial authorities."[131]

The UN Human Rights Committee, the independent expert body that monitors state compliance with the ICCPR, has stated that where investigations uncover human rights violations, governments "must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant." The Committee noted that impunity for arbitrary detention, torture and enforced disappearances, among other abuses, "may well be an important contributing element in the recurrence of the violations."[132]

Neither the Durham inquiry with its narrow mandate and inadequate investigation, nor Obama's decision to give priority to political considerations, overcome US obligations under international law to prosecute serious human rights violations.

In the following section we will discuss in detail the third reason proffered not to prosecute, that prosecutions of US officials for torture may not or may no longer be legally viable.

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[131] Ibid., para. 26.

[132] UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 18, http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2bfud3cPVrcM9YRoiW6Txaxgp3f9kUFpWoq%2fhW%2fTpKi2tPhZsbEJw%2fGeZRASjdFuuJQRnbJEaUhby31WiQPl2mLFDe6ZSwMMvmQGVHA%3d%3d (accessed November 8, 2015).

II. Bringing Criminal Prosecutions in the US

There are several federal offenses that senior US officials, as well as other US personnel, can be charged with concerning the CIA's use of "enhanced interrogation techniques." The following sections discuss the main charges that should be considered. Not discussed here are possible charges against those alleged to have made false claims to federal officials or government bodies, or to have obstructed justice.

Substance of Potential Charges

The key charges are torture, conspiracy to torture, and conspiracy as a stand-alone crime. Assault, sexual abuse, war crimes and murder, as well as conspiracy to commit some of these crimes, are separate offenses that prosecutors can also pursue.[133]

The level of culpability of those charged will vary widely depending on such factors as their involvement in authorizing and implementing or carrying out the program, whether their acts were authorized by the Justice Department, and whether mitigating circumstances apply. Charges could be brought for the actual completed offense or for attempting, or aiding and abetting, the offense.

Torture and Conspiracy to Torture

The US enacted what is referred to here as the Torture Statute to comply with its obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention against Torture).[134] President Ronald Reagan had signed the Convention in 1988 and Congress enacted the Torture Statute in 1994 to comply with the Convention. Reagan said at the time the treaty was ratified that the US "will demonstrate unequivocally our desire to bring an end to the abhorrent practice of torture."[135]

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[133] The statutory sections include: torture (section 2340A(a)); conspiracy to torture (section 2340A(c)); conspiracy to commit other federal crimes (section 371); war crimes (section 2441); sexual abuse (sections 2241-2246); and murder (section 1111).

[134] See H.R. Conf. Rep. No. 103-482, p. 228 (1994); See the Torture Act 18 U.S.C. § 2340 (1994) (hereinafter "Torture Statute"). See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted December 10, 1984, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, art. 7, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx (accessed November 12, 2015).

[135] "Message to the Senate Transmitting the Convention against Torture and Inhuman Treatment or Punishment," *The American Presidency Project*, May 20, 1988, http://www.presidency.ucsb.edu/ws/?pid=35858 (accessed October 15, 2015).

The Torture Statute provides criminal penalties for torture, conspiracy to commit torture, and attempts to commit torture occurring outside the territorial jurisdiction of the United States, regardless of the citizenship of the perpetrator or victim.[136]

The Torture Statute defines torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering ... upon another person within his custody or physical control."[137] To prosecute the crime of conspiracy to torture, prosecutors would have to prove the elements of conspiracy, as well as conspiracy to commit the offense of torture under the Torture Statute.

Legal Standards

Intent Required to Prove Torture

The definition of torture under the Convention against Torture requires that it be "intentionally inflicted."[138] When ratifying the treaty, the US included an understanding containing similar wording—that in order for an act to constitute torture, it must be "specifically intended" to inflict severe physical or mental pain or suffering.[139] The US later included this "specifically intended" language in the Torture Statute.[140] The Senate Summary provides evidence of numerous instances in which US officials demonstrably sought to inflict severe pain or suffering. Even absent such specific intent, there are other serious crimes with which officials might be charged.

Federal courts have not interpreted the term "specifically intended" in reviewing a criminal case.[141] However, several US courts have interpreted the language in the immigration

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[136] Torture Act 18, U.S.C. § 2340A.

[137] Torture Act, 18 U.S.C. §. 2340(1).

[138] Convention against Torture, article 1.

[139] U.S. Reservations, Declarations, and Understandings, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. S17486-01 (daily ed., Oct. 27, 1990), at II(1)(a), http://www1.umn.edu/humanrts/usdocs/tortres.html (January 25, 2015). See Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture,* (Oxford: Oxford University Press, 2008), paras. 106-107.

[140] Torture Act, 18 U.S.C. sec. 2340(1).

[141] Only one case has been brought under the US torture statute. It was brought against Charles "Chuckie" Taylor who was charged in 2006 for torture committed in Liberia and convicted in October 2008. His appeal, which he lost, did not challenge the court's interpretation of "specifically intended." See *United States v. Belfast,* 611 F.3d 783 (11th Cir. Fla. 2010); see also "Jury Convicts Taylor Jr. in First US Prosecution for Torture Abroad," Human Rights Watch news release, December 10, 2008, https://www.hrw.org/news/2008/12/10/jury-convicts-taylor-jr-first-us-prosecution-torture-abroad; "Q & A: Charles 'Chuckie' Taylor, Jr.'s Trial in the United States for Torture Committed in Liberia," Human Rights Watch Q & A, September 23, 2008 https://www.hrw.org/news/2008/09/23/q-charles-chuckie-taylor-jrs-trial-united-states-torture-committed-liberia. The trial court's jury instructions regarding the meaning of "specifically intended" read: "The Defendant can be found guilty of that

context in deciding whether individuals have valid challenges to removal because they face torture in the country to which they would be transferred.[142] In most of these cases courts have followed the lead of *Auguste v. Ridge*, a 2005 appellate court decision upholding an order of removal, which found that the "specifically intended" language in the Senate's reservation requires a showing of the "specific intent" standard used in US criminal prosecutions.[143] The court noted that the specific intent standard is a "term of art" that is "well-known in American jurisprudence" meaning that "in order for an individual to have acted with specific intent, he must expressly intend to achieve the forbidden act."[144]

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offense only if all of the following facts are proved beyond a reasonable doubt: First: That the Defendant committed an act with the specific intent to inflict severe physical pain or suffering ... Specific intent to inflict severe physical pain or suffering means to act with the intent to commit the act as well as the intent to achieve the consequences of the act, namely the infliction of the severe physical pain or suffering. An act that results in the unanticipated or unintended severity of pain and suffering is not torture." *United States v. Belfast*, October 30, 2008, No. 06-20758-CR-ALTONAGA, 2008 WL 10908532.

[142] After the US signed the Convention against Torture, Congress enacted legislation making it the policy of the United States not to "expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." See Foreign Affairs Reform and Restructuring Act of 1988 ("FARRA"), Pub. L. No. 1005-277, Sec. 2242(b), 112 Stat. 2, 2681-821 (1988); 8 U.S.C. Sec. 1231(b)(3). Courts that have interpreted the meaning of "specifically intended" in the context of these removal proceedings include: *Auguste v. Ridge*, 395 F.3d 123, 144-45 (3d Cir. 2005); see also *Pierre v. Gonzales*, 502 F.3d 109, 117-118 (2d Cir. 2007); *Villegas v. Mukasey*, 523 F.3d 984, 989 (9th Cir. 2008).

[143] *Auguste v. Ridge*, 395 F.3d 123, 144-45 (3d Cir. 2005); *Auguste* overturned an earlier Third Circuit case *Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003) (though the implementing legislation states that "'in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering' the regulation then immediately explains: '[a]n act that results in unanticipated or unintended severity of pain and suffering is not torture.' The intent requirement therefore distinguishes between suffering that is the accidental result of an intended act, and suffering that is purposefully inflicted or the foreseeable consequence of deliberate conduct. However, this is not the same as requiring a specific intent to inflict suffering."). In reaching its decision, the *Auguste* court deferred to a Board of Immigration Appeals (BIA) interpretation of the Torture Statute under what is known as a *Chevron* deference standard—named after the case *Chevron, U.S.A., Inc. v. N.R.D.C.* *Chevron* held that agency determinations are accorded deference if Congress has not spoken to the issue and if the agency's determination is neither arbitrary nor capricious. *Chevron*, 467 U.S. 837, 843-44 (1984). Applying this standard the *Auguste* court held that the BIA acted "reasonably" in mandating the use of a "specific intent" requirement. *Auguste*, pp. 144-45. Such deference would not apply in the criminal context because there would be no prior agency determination to defer to. Some academics have been critical of *Auguste's* interpretation. See Redman, "Defining 'Torture': The Collateral Effect on Immigration Law of the Attorney General's Narrow Interpretation of 'Specifically Intended' When Applied to United States Interrogators," 62 *N.Y.U. Ann. Surv. Am. L.* 465-95 (2007); see also Irene Scharf, "Un-Torturing the Definition of Torture and Employing the Rule of Immigration Lenity," 66 *Rutgers L. Rev.* 1, Fall 2013; Jens David Ohlin, "The Torture Lawyers: A Reply to Parry and Harel," *Harvard International Law Journal Online*, vol. 51, June 2005, p.98, http://www.harvardilj.org/wp-content/uploads/2010/09/HILJ-Online_51_Ohlin.pdf (accessed Jan. 28, 2015). It is not clear that a court analyzing the type of intent required under the Torture Statute in a criminal case would come to the same conclusion as those that have analyzed it in the removal context. The fact that a court would be looking retrospectively at whether torture was inflicted rather than prospectively at whether someone faced a risk of torture might have an impact.

[144] *Auguste*, p. 145. (*Auguste* upheld an order of removal challenged by a US legal permanent resident with a criminal record who claimed he would be subjected to indefinite detention despite having served out his sentence, and torture, in Haiti's abusive prison system. The court held that though Haitian prison conditions were "deplorable" and the conditions were used punitively by the government, just because Haitian authorities had knowledge that severe pain and suffering "may result," does not mean they had the intent to inflict severe pain or suffering).

But in the criminal context, the meaning of "specific intent" is anything but clear.[145] As a respected treatise on criminal law notes, courts apply the meaning of "specific intent" in a variety of ways.[146] Some courts suggest that specific intent requires a conscious desire, or "purpose" to produce the proscribed result—in this case severe pain and suffering—"whatever the likelihood of that result happening from the conduct."[147] Other cases suggest that only knowledge or notice that an act will likely result in the proscribed outcome is necessary for "specific intent" and that the notice element will be satisfied by the reasonable foreseeability of the natural and probable consequences of one's act.[148]

Some academics have challenged the notion that the Senate even intended to create a "specific intent" crime with its reservation to the treaty.[149] And, while the infamous Bybee

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[145] See generally Wayne R. LaFave, "Sec. 5.2: Mental States: Intent and Knowledge," in vol. 1 of *Substantive Criminal Law*, 2d ed. (Eagan, MN: Thomson/West, 2003), (Westlaw database updated September 2014), https://1.next.westlaw.com/Browse/Home/SecondarySources/CriminalLawSecondarySources/CriminalLawTextsTreatises/SubstantiveCriminalLaw/ (accessed April 6, 2015).

[146] See Wayne R. LaFave, "Sec. 5.2: Mental States: Intent and Knowledge," in vol. 1 of *Substantive Criminal Law* ("The meaning of the word 'intent' in criminal law has always been rather obscure ...'General intent' is often distinguished from 'specific intent,' although the distinction being drawn by the use of these two terms often varies. ... greater clarity could be accomplished by abandoning the 'specific intent' -'general intent' terminology.").

[147] *U.S. v. Bailey*, 444 U.S. 394, 403-405 (1980)

[148] *United States v. Neiswender*, 590 F.2d 1269, 1273, (4th Cir. 1979). See also *United States Gypsum Co.*, 438 U.S. 422, 445 (U.S. 1978)(it is now generally understood that a person acts with specific intent when he "consciously desires that result, whatever the likelihood of that result happening from his conduct" and with general intent he "knows that the result is practically certain to follow from his conduct, whatever his desire may be as to that result.")

[149] Where Congress seeks to require a showing of "specific intent" it uses that phrase. See Renee C. Redman, "Defining 'Torture': The Collateral Effect on Immigration Law of the Attorney General's Narrow Interpretation of 'Specifically Intended' When Applied to United States Interrogators," 62 *N.Y.U. Ann. Surv. Am. L.* 465, 493, n. 171 (2007) citing Brief of *Amicus Curiae* Allard K. Lowenstein International Human Rights Clinic in Support of Petitioner Guillaume's Petition for a Writ of *Habeas Corpus*," March 30, 2006, http://www.law.yale.edu/documents/pdf/Intellectual_Life/Guillaume_Second_Circuit_Brief_FINAL_060330.pdf (accessed March 17, 2015), pp. 20-22. The brief reveals the results of a survey of the US Criminal Code finding only eight uses of the phrase "specifically intend[s][ed]." In six of these, Congress uses the phrase in contexts that clearly *do not* impose a "specific intent" requirement and have nothing to do with elements of a violation. Rather, in these sections, the word "specifically" is used as an adverb that modifies "intend[s][ed]" in a general sense, such as in 2 U.S.C. section 658b(d)(3)(2000), which discusses the duties of congressional committees and it states that if the bill or joint resolution would make a reduction, the Committee Report will contain: "a statement of how the committee specifically intends to implement the reduction." In contrast, the section of the US code implementing the Genocide Convention states, "[w]hoever [commits a prohibited act] with the *specific intent to* destroy." See Brief of Amicus Curiae Allard K. Lowenstein, p. 22, n. 11. (The only two sections where use of "specifically intend[s][ed] could conceivably be an element of a violation were in the Torture Statute and in one other statute related to punitive damages. In the punitive damages statute it states that there will be no cap on punitive damages if the injury is 'specifically intended' but then defines specifically intended to mean when a "defendant acted with the specific intent to injure the plaintiff."). See also Jens David Ohlin, "The Torture Lawyers: A Reply to Parry and Harel," *Harvard International Law Journal Online*, vol. 51, June 2005, p.98, n. 15, http://www.harvardilj.org/wp-content/uploads/2010/09/HILJ-Online_51_Ohlin.pdf (accessed Jan. 28, 2015)("The [torture] statute was not designed to allow potential perpetrators to open up a wedge between 'pain' and 'severe pain' and argue that they intended the former but did not specifically intend the latter. If this were the case, almost any torture prosecution would be frustrated when a perpetrator concedes that they intended to cause pain but then argue that the resulting severity was accidental. This is the wrong *mens rea* for torture.").

Torture Memos of August 1, 2002 interpreted the Torture Act's language as including a heightened specific intent requirement, less than two years later, the OLC would repudiate that interpretation (see below).[150] Regardless, even using the heightened standard articulated in *Auguste*, the available evidence indicates that the architects of the CIA Program specifically intended torture. Proof of that intent may be inferred from the total facts and circumstances of the case and does not require direct evidence of the accused's mental state.[151] In fact, the process that led to the creation of the Torture Memos, and the memos themselves, are evidence of intent to torture.

Elements of Conspiracy

Senior US officials who devised and authorized the CIA program did not actually carry out torture themselves, but there is a strong case that they engaged in a conspiracy to torture.[152] In order to prove conspiracy under US law, there must be: (1) an agreement, (2) among two or more persons, (3) for an unlawful purpose, and (4) at least one overt act committed in furtherance of the conspiracy.[153] The overt act need not be illegal. It is also

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[150] See Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel of the Justice Department, to James B. Comey, December 30, 2004, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (hereinafter "Levin Replacement Memo"), p. 16, n. 27, https://www.aclu.org/files/torturefoia/released/082409/olcremand/20040lc96.pdf. ("In the August 2002 Memorandum, this Office concluded that the specific intent element of the statute required that infliction of severe pain or suffering be the defendant's 'precise objective' and that it was not enough that the defendant act with knowledge that such pain 'was reasonably likely to result from his actions' (or even that the result 'is certain to occur'). We do not reiterate that test here.")

[151] Oona Hathaway, Aileen Nowlan, Julia Spiegel, "Tortured Reasoning: The Intent to Torture Under International and Domestic Law," 52 Virginia Journal of International Law (2012), p. 791, 798, 805. (Analyzing the required mental state for torture in US jurisprudence in the extradition, civil and very limited criminal context and concluding that to the extent there are differences across different bodies of US domestic law they go to the evidence required to establish intent, rather than to the standard of intent itself).

[152] Conspiracy to torture can be charged as one offense under 18 U.S.C. sec. 2340A(c), which permits the charge of conspiracy to torture, or by combining the stand-alone offense of conspiracy under the federal conspiracy statute, 18 U.S.C. section 371, with a charge of torture under the Torture Act 18 U.S.C. 2340A(a). The only difference appears to be what sentence can be imposed. See *US v. Parrett*, 872 F. Supp. 910, 911 (D. Utah 1994); see also *United States v. Bazzell*, 187 F.2d 878, 885 (7th Cir. 1951). Parrett analyzed whether it was proper to charge a defendant for conspiracy to kidnap using the federal conspiracy statute, 18 U.S.C. sec. 371, combined with the federal kidnapping statute, 18 U.S.C. sec. 1201(a), when essentially the same charge could be brought for conspiracy to kidnap under 18 U.S.C. sec. 1201(c) and held that either 18 U.S.C. sec. 371 combined with 18 U.S.C. sec. 1201(a) or 18 U.S.C. sec. 1201(c) on its own may be used—the only difference would be the penalty that could be imposed. Conspiracy to kidnap under section 1201(c) carries a maximum penalty of life imprisonment while conspiracy to kidnap using section 371 carries a maximum penalty of five years. There is no direct case on point looking at the same issue with regards to the charge of conspiracy to torture given the dearth of cases brought under the Torture Act (only one has been brought in US court, see *United States v. Belfast*, 611 F.3d 783, 793 (11th Cir. Fla. 2010)), but the statutory scheme of the federal kidnapping statute under 18 U.S.C. 1201 is virtually identical to that of the federal Torture Statute under 18 U.S.C. 2340A.

[153] *United States v. Cohen*, 583 F.2d 1030, 1039 (8th Cir. 1978); see also *United States v. Stone*, 323 F. Supp. 2d 886, 888 (E.D. Tenn. 2004).

necessary to demonstrate that conspirators intended to agree to commit elements of the underlying offense, in this case torture.[154]

For conspiracy, the agreement can be inferred from direct or circumstantial evidence.[155] No proof of an express agreement is required. As one court noted, "criminal conspiracies are by their very nature clandestine, and a tacit agreement inferred from the surrounding circumstances can—and often does—suffice to ground a finding of willing participation."[156]

The crime is frequently established as a result of inferences drawn from the acts of persons accused.[157] Relevant circumstantial evidence can include: "the joint appearance of defendants at transactions and negotiations in furtherance of the conspiracy; the relationship among codefendants; mutual representation of defendants to third parties; and other evidence suggesting unity of purpose or common design and understanding among conspirators to accomplish the objects of the conspiracy."[158]

Individuals can also join a conspiracy if there is sufficient evidence they did so with some knowledge of the conspiracy's "unlawful aims"—in this case torture—and with the intent of helping the conspiracy succeed.[159] In addition, under the doctrine of "conscious

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[154] *United States v. Heras*, 609 F.3d 101, 106 (2d Cir. N.Y. 2010); See also *United States v. Feola*, 420 U.S. 671, 686, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975). As previously noted, the Torture Act defines torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering ... upon another person within his custody or physical control." Torture Act, 18 U.S.C. sec. 2340(1). 18 U.S.C. sec. 2340(2) further defines "severe mental pain or suffering" as "the prolonged mental harm caused by or resulting from— (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality."

[155] Charles Doyle, "Federal Conspiracy Law: A Brief Overview," *Congressional Research Service*, April 30, 2010, p. 5, n. 45, https://www.fas.org/sgp/crs/misc/R41223.pdf (accessed January 11, 2015) citing *United States v. Rodriguez-Velez*, 597 F.3d 32, 39 (1st Cir. 2010); *United States v. Johnson*, 592 F.3d 749, 754-55 (7th Cir. 2010); *United States v. Boria*, 592 F.3d 476, 481 (3d Cir. 2010); *United States v. Wardell*, 591 F.3d 1279, 1287 (10th Cir. 2009).

[156] *United States v. Rodriguez-Velez*, 597 F.3d 32, 39 (1st Cir. P.R. 2010).

[157] Ibid.

[158] Doyle, "Federal Conspiracy Law: A Brief Overview," *Congressional Research Service*, p. 5-6, n. 46 citing *United States v. Wardell*, 591 F.3d, pp. 1287-288, which held "[b]ecause 'secrecy and concealment' are frequently essential to a successful conspiracy, 'direct evidence of conspiracy is often hard to come by.' Thus, 'conspiracy convictions may be based on circumstantial evidence, and the jury may infer conspiracy from the defendants' conduct and other circumstantial evidence indicating coordination and concert of action."

[159] *U.S. v. Svoboda*, 347 F.3d 471, 477 (2d Cir. N.Y. 2003) citing *U.S. v. Reyes*, 302 F.3d 48, 53 (2d Cir. 2002). Another way courts put it is "whether there is proof that the defendant (1) had knowledge of the unlawful aims of the charged scheme and

avoidance," knowledge can be found where a defendant consciously avoided learning the fact while aware of the high probability of its existence, even if there is no evidence that the defendant possessed actual knowledge.[160]

Evidence of Conspiracy to Torture

There is substantial evidence supporting charges of conspiracy to torture against senior US officials and CIA contractors, including evidence that some individuals joined the conspiracy after it was first established.

Generating Legal Cover for Torture

After the US apprehension of Abu Zubaydah on March 28, 2002, someone identified as "CTC Legal" in the Senate Summary recommended that a psychologist working on contract in the CIA's Office of Technical Services (OTS)—identified in the Senate Summary as Dr. Grayson Swigert—be used by the CIA to "provide real-time recommendations to overcome Abu Zubaydah's resistance to interrogation."[161] Not long thereafter Swigert, since identified as James Mitchell, and another psychologist identified in the Senate Summary as Dr. Harold Dunbar, since identified as Bruce Jessen, proposed that the CIA use 12 interrogation techniques on detainees.[162] These techniques included waterboarding, painful stress positions, walling, prolonged sleep deprivation, and cramped confinement among others— most of which were eventually approved for use by the OLC.[163] Mitchell and

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(2) evinced, by his actions, an intention to further or promote its unlawful aims." See *Svoboda*, p. 477, citing *U.S. v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1191 (2d Cir. 1989).

[160] *U.S. v. Svoboda*, 347 F.3d 471, 477-478 (2d Cir. N.Y. 2003).

[161] Senate Summary, p. 26. Mitchell was known to CIA OTS because OTS had commissioned Mitchell and Jessen to prepare a report on an al-Qa'ida manual that was initially assessed by the CIA to include strategies to resist interrogation. The report was titled: "Recognizing and Developing Countermeasures to Al-Qaeda Resistance to Interrogation Techniques: A Resistance Training Perspective (undated)," Senate Summary, p. 21, 57.

[162] Senate Summary, p. 32. Jason Leopold, "Psychologist James Mitchell Admits He Waterboarded al Qaeda Suspects," *Vice News*, December 15, 2015, https://news.vice.com/article/psychologist-james-mitchell-admits-he-waterboarded-al-qaeda-suspects (accessed April 29, 2015); "CIA report: Who are the unlikely interrogators?" *BBC*, http://www.bbc.com/news/world-us-canada-30405918 (accessed April 7, 2015).

[163] Senate Summary, p. 32. The express goal of the program was to induce a state of "learned helplessness." OPR Report, p. 236. See also "Memorandum from CIA to OLC, Background Paper on CIA's Combined use of Interrogation Techniques," December 30, 2004, https://www.aclu.org/sites/default/files/torturefoia/released/082409/olcremand/2004olc97.pdf (accessed November 16, 2015). "Learned helplessness" is a psychological theory, based on testing done on humans and animals, which holds that individuals forced to undergo painful or unpleasant stimuli will become unwilling to avoid further exposure to such treatment, presumably because they have learned that they cannot control the situation. Jeannette L. Nolen, "Learned helplessness," Encyclopedia Britannica, http://www.britannica.com/topic/learned-helplessness (accessed November 11, 2015); See also American Psychological Association, "Report to the Special Committee of the Board of Directors of the American Psychological Association Independent Review Relating To APA Ethics Guidelines, National

Jessen were ultimately hired as contractors by the CIA to develop the "enhanced interrogation technique" program, carry it out, and assess its effectiveness.[164]

Officials in the CIA and at the White House knew or should have known, from the moment these techniques were proposed, that they violated the Torture Statute. First, the techniques were derived from those used in the Defense Department's Survival, Evasion, Resistance and Escape (SERE) program—a program designed to train US Special Forces to endure interrogation methods used by enemies who do not abide by the Geneva Conventions and the laws of war, which prohibit torture.[165] Second, the US Army's field manual for intelligence investigations at the time prohibited many of the techniques the CIA was considering and ultimately approved using, such as "abnormal sleep deprivation" and "forcing an individual to stand, sit or kneel in abnormal positions for prolonged periods of time," and "food deprivation," explicitly defining them as forms of torture.[166]

Indeed, the Senate Summary includes strong evidence that CIA and senior White House officials did know, practically from the moment that they were first being considered, that these techniques violated the Torture Statute. According to a Department of Justice Office

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Security Interrogations, and Torture," (hereinafter "Hoffman Report") July 2, 2015, revised September 4, 2015, http://www.apa.org/independent-review/revised-report.pdf (accessed November 14, 2015), p. 529. "On the CIA's behalf, the contract psychologists developed theories of interrogation based on 'learned helplessness,' and developed the list of enhanced interrogation techniques that was approved for use against Abu Zubaydah and subsequent CIA detainees," Senate Summary, Findings and Conclusions, p. 11. The intended purpose was to force detainees to become "passive in response to adverse or uncontrollable events." Senate Summary, Findings and Conclusions, p. 19, n. 32. CIA cables described the interrogations in the following manner: "the deliberate manipulation of the environment is intended to cause psychological disorientation, and reduced psychological wherewithal for the interrogation," as well as "the deliberate establishment of psychological dependence upon the interrogator" Senate Summary, p. 26, n. 94. It can be argued that the psychological state of learned helplessness meets the definition of "severe mental pain or suffering" under the Torture Statute which is defined as "the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality." See 18 U.S.C sec. 2340.

[164] Senate Summary Findings and Conclusions, p. 11. See also Senate Summary, p. 32.

[165] Senate Summary, p. 21. See also "Statement of Senator Carl Levin on Senate Armed Services Committee Report of its Inquiry into the Treatment of Detainees in U.S. Custody," December 11, 2008, http://fas.org/irp/news/2008/12/levin121108.html (accessed March 20, 2015); Among the physical and psychological pressures used at SERE schools are stress positions, sleep deprivation, face and abdomen slaps, isolation, degradation (such as treating the student like an animal), and "walling." Until November 2007, waterboarding was also an approved training technique in the U.S. Navy SERE school. See SASC Report, p. 4.

[166] Department of the Army, *Field Manual 34-52: Intelligence Interrogation*, September 28, 1992, http://fas.org/irp/doddir/army/fm34-52.pdf (accessed February 2, 2015), Chapter 1, p. 8. This document was in effect until December 6, 2006 when it was replaced by the current US field manual for intelligence investigations on December 6, 2006. See "Human Intelligence Collection and Counterintelligence Operations" FM 2-22.3, p. ii ("This publication supersedes FM 34-52, 28 September 1992.") http://fas.org/irp/doddir/army/fm2-22-3.pdf (accessed November 10, 2015). Food deprivation, or "dietary manipulation" as it was called was not officially approved in an OLC guidance memo until May 10, 2005. (See Bradbury Combined Techniques Memo, p. 7).

of Professional Responsibility investigation (OPR investigation), the CIA, through its acting General Counsel John Rizzo, expressed concern about "criminal liability" under the Torture Statute and sought a guarantee from the Justice Department that employees would not be prosecuted for use of these techniques.[167] The Senate Summary also contains reference to a draft letter to the attorney general from "CTC Legal" —a likely reference to someone in the legal department of the CIA's counterterrorism center, headed by Jonathan Fredman at the time[168] —asking for an advance guarantee not to prosecute any US employees or agents using "aggressive methods" of interrogation and acknowledging that these methods would otherwise be prohibited by the Torture Statute.[169] The letter was drafted in July 2002 and circulated internally at the CIA, as well as to Mitchell, though the Senate Summary says there are no records showing that it was ever sent.[170] The existence of the letter indicates that CIA legal advisers believed from the beginning that the techniques being proposed were likely illegal.

At a July 13, 2002 meeting where the guarantee not to prosecute was discussed, Michael Chertoff, head of the Justice Department Criminal Division, refused to provide such a guarantee.[171] At that same meeting, Daniel Levin, chief of staff to the FBI director at the time, also reportedly said that the FBI would not participate in any interrogations employing "enhanced interrogation techniques," whether they were found legal or not and that the FBI would not further discuss the matter.[172] Also present at the meeting was Rizzo;

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[167] OPR Report, p. 37. As early as May 28, 2002, the day Abu Zubaydah was captured, CIA attorneys, including CTC Legal and Rizzo, discussed interpretations of the Torture Statute that might permit CIA officers to use certain interrogation tactics. See Senate Summary, p. 22, n. 61-62.

[168] See "Unclassified paper prepared by Jonathan Fredman for the Senate Armed Services Committee," November 17, 2008, https://www.emptywheel.net/wp-content/uploads/2013/04/Jonathan-Fredman-to-SASC.pdf (accessed August 20, 2015). The paper states in part: "On September 11, 2001, I was chief legal counsel for the CIA Counterterrorist Center, or CTC....Among my responsibilities was to provide legal advice to the Director of CTC about proposed and ongoing operations conducted pursuant to written Presidential direction to CIA provided following the attacks of 9/11." Fredman confirmed that these issues included "detention or interrogation," and specifically interpretation of the anti-torture statute. Fredman wrote, "I stayed at my post in CTC until early April 2004," and that "[a]s the chief counsel for CTC, I managed a legal staff that grew from three people in the days immediately before 9/11 to approximately 10 people thereafter."

[169] Senate Summary, p. 33.

[170] Ibid.

[171] OPR Report, p. 47. Sometime after this meeting, between July 13 and July 16, Chertoff asked Yoo to draft a letter from Yoo to Rizzo stating that after consultation with the Justice Department Criminal Division it is "our understanding" that the Department "does not issue letters of declination for future conduct that might violate federal law." The letter was drafted and approved but there is no record it was ever sent. OPR Report, pp. 48-49.

[172] OPR Report, p. 47 (Daniel Levin later served as Acting Deputy OLC, replacing Yoo and his role in that regard is discussed later in this report).

"CTC Legal"; legal advisor to the National Security Council John Bellinger; and Department of Justice OLC attorneys, including John Yoo.[173]

At that point, senior White House officials, including Counsel to Vice President David Addington and White House Counsel Alberto Gonzales; CIA officials, including Rizzo; and the OLC's Yoo engaged in a series of meetings and consultations in an apparent effort to generate novel legal cover for interrogation techniques that the CIA and others knew likely constituted torture. Eventually, these meetings led to the production of the first official memos, both issued on August 1, 2002, purporting to authorize the use of what the CIA referred to as "enhanced interrogation techniques."

Evidence of the process by which the Bybee Memos were developed includes:

- At some point after Abu Zubaydah's apprehension, the CIA asked the OLC for an opinion as to the legality of the proposed interrogation techniques.[174] Attorney General John Ashcroft instructed Yoo to draft the opinion.[175] Yoo began doing so after an April 16, 2002 meeting with unnamed individuals at the National Security Council.[176] Bellinger, having been told by CIA attorneys that they wanted to use "aggressive" interrogation techniques on Abu Zubaydah and that they wanted a guarantee that the Justice Department would not prosecute (known as a "declination of prosecution"), facilitated contact and meetings among the CIA, OLC, and Justice Department Criminal Division.[177] He also reportedly told Yoo that access to the interrogation program was extremely limited and that the State Department should not be informed.[178]
- Sometime around July 8, 2002, as noted above, "CTC Legal" apparently drafted a letter, identified as a "draft" in the summary, to the attorney general asking that his office provide a guarantee not to prosecute in advance to any US employees or personnel who carry out interrogations on Abu Zubaydah that otherwise might

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[173] Senate Summary, p. 33-34. Another report names Bellinger and places Gonzales at this meeting as well (see "Release of Declassified Narrative Describing the Department of Justice Office of Legal Counsel's Opinions on CIA's Detention and Interrogation Program," April 22, 2009, http://fas.org/irp/congress/2009_rpt/ssci_olc.pdf (accessed March 15, 2015), p. 3).

[174] OPR Report, p. 37.

[175] OPR Report, p. 39.

[176] OPR Report, p. 40-43.

[177] OPR Report, pp. 37-43.

[178] OPR Report, p. 38.

subject them to criminal prosecution. The letter acknowledged that use of the "aggressive methods" would otherwise be prohibited by the Torture Statute "apart from potential reliance upon the doctrines of necessity or of self-defense."[179] The letter was circulated internally at the CIA but there are no records to indicate it was provided to the attorney general.[180]

- On July 12, 2002, Yoo met at the White House Counsel's office with Gonzales and likely Addington[181] about his memo, which Yoo reportedly referred to internally as the "bad things opinion."[182] At this point Yoo's draft memo focused on the definition of torture, the ratification and negotiating history of the Torture Statute, and an analysis of what had been considered torture in prior cases.[183] It did not contain any arguments about whether the statute required specific intent to torture as an element; nor did it address any potential defenses to the statute in the case of prosecution.[184]
- On July 13, 2002, the meeting where Chertoff refused to provide a guarantee not to prosecute and Levin said the FBI would not participate in interrogations, took place. After this, the OLC memos seem to have become more important to the CIA and senior officials at the White House, as they would need to rely upon them to justify the legality of the techniques.
- The same day as the July 13 meeting, at Rizzo's request, Yoo drafted and two days later sent Rizzo a summary of the elements of the Torture Statute and how the specific intent required under it could be negated.[185] In a separate email to Rizzo on

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[179] Senate Summary, p. 33.

[180] Senate Summary, p. 33.

[181] The OPR report indicates Yoo and Gonzales met with either Flanigan or Addington at this meeting but subsequent testimony by Addington at a House Judiciary Committee hearing on June 17, 2008 indicates it was likely Addington at this and at a subsequent meetings with Yoo and Gonzales on July 16, 2002. See also SASC Report, p. 31. See OPR report, p. 52. Neither Addington nor Flanigan cooperated with the OPR investigation, and neither Yoo, Gonzales nor an unnamed OLC attorney who helped Yoo with the memo and was also present at the July 12, 2002 meeting, said they had any specific recollection of whether it was Addington or Flanigan who was present. See OPR report, pp. 7 and 50. Whether Flanigan was present at other meetings, as well as his role in the initial conspiracy should be investigated however because other documents point to Flanigan as being a member of what was known as the "war council" that included Haynes, Gonzales, Rizzo, Yoo and Flanigan, who met regularly on a range of issues including interrogation of enemy combatants in the "war on terror" during the period that interrogation policy was being developed. SASC Report, p. 31, n. 224.

[182] OPR Report, 45-46.

[183] OPR Report, pp. 45-46.

[184] OPR Report, p. 46.

[185] OPR Report, p. 48. Yoo's letter stated that, "if an individual undertook any of the predicate acts for severe mental pain or suffering, but did so in the good faith belief that those acts would not cause the prisoner prolonged mental harm, he would not have acted with the specific intent necessary to establish torture. If, for example, efforts were made to determine what

July 15, likely in follow-up to the letter, Yoo also suggested to Rizzo "one other thing to include ... a footnote saying that we do not address because not asked" the following:(1) how Commander-in-Chief power affects enforcement of the Torture Statute; and (2) possible defenses to violations of the Torture Statute.[186]

- The next day, July 16, Yoo met yet again with Gonzales and likely Addington.[187] After this meeting, Yoo began adding new sections to the memo on the Commander-in-Chief power and possible defenses to violations of the Torture Statute.[188] He also added in arguments about how specific intent could be negated.[189] A colleague of Yoo's, Deputy Assistant Attorney General Patrick Philbin, noticed that the new sections were added and suggested they were "superfluous" and should be removed.[190] Yoo responded: "They want it in there."[191] The arguments remained in the analysis.[192]
- Yoo provided regular briefings about the draft memorandums to Attorney General Ashcroft. He explained to him that the Justice Department Criminal Division had refused to provide the advance declination. At some point Ashcroft asked if it would be possible to issue advance pardons. Yoo informed Ashcroft it would not.[193]
- On July 17, CIA director George Tenet met with National Security Adviser Condoleezza Rice, who told him that the CIA could proceed with its proposed

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long-term impact, if any, specific conduct would have and it was learned that the conduct would not result in prolonged mental harm, any actions undertaken relying on that advice would have be [sic] undertaken in good faith. Due diligence to meet this standard might include such actions as surveying professional literature, consulting with experts, or evidence gained from past experience." The final Bybee I Memo contained similar language. See Bybee I Memo, p. 8.

[186] OPR Report, p. 49.

[187] OPR Report p. 50. As described in more detail in note 181 above, the OPR Report is not clear whether Addington or Flanigan were present at this meeting. Flanigan's and Addington's role in this and subsequent meetings regarding interrogation policy need to be investigated.

[188] OPR Report, p. 49-53. The Commander-in-Chief power argument ended up as Part V of the Bybee I Memo, OPR Report, p. 68. The memo argued that interpreting the Torture Statute to prohibit the use of certain interrogation techniques used to gather information from the enemy would be unconstitutional because it would interfere with the president's Commander-in-Chief power and authority to carry out a military campaign. See Bybee I Memo, p. 2 and pp. 31-39 ("Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield."). The common law defenses arguments ended up as Part VI of the Bybee I Memo. See OPR Report, p. 68. The memo argued that the common law defenses of necessity and self-defense "could provide justifications that would eliminate any criminal liability for violations of the torture statute." Bybee I Memo, p. 39. For a full description of the argument, see Bybee I Memo, pp. 39-46.

[189] OPR Report, p. 53.

[190] OPR Report, p. 51. See also, p. 63, where Philbin is reported to have explained that he thought the analysis should have been limited to what the CIA could do within the law, including the defenses section, which he said "suggests that maybe there is something wrong. You're going to have to use the defenses."

[191] OPR Report, p. 51.

[192] See Bybee I Memo.

[193] OPR Report, p. 49.

interrogation of Abu Zubaydah, subject to the CIA providing more details about the techniques, an explanation as to why they would not cause lasting irreparable harm to Zubaydah, and a determination of legality by the OLC.[194]

- The CIA gathered the requested information over the course of the following week.[195] The CIA asked Mitchell and Jessen about the possible psychological impact of using the waterboard or proposed "mock burial" techniques on Abu Zubaydah. Through a cable from the CIA Chief of Base, they responded that while SERE techniques are applied on volunteer students in a harmless way with no measurable psychological impact, they could not guarantee the same with Abu Zubaydah. While interrogation personnel will "make every effort" to ensure Abu Zubaydah is not "permanently physically or mentally harmed ... we should not say ... that there is no risk."[196]
- On July 24, the OLC orally advised the CIA that Attorney General Ashcroft had concluded that, with the exception of waterboarding, the proposed techniques—including the attention grasp, walling, the facial hold, the facial slap (insult slap), cramped confinement, wall standing, stress positions, sleep deprivation, use of diapers, and use of insects—could be used and were lawful.[197]
- In apparent response to Rice's request, Defense Department General Counsel William Haynes obtained two memos from JPRA staff.[198] The first dated July 25, 2002 listed lesson plans on "exploitation and interrogation" based on what had been effective against "Americans" in the past.[199] A second, dated July 26, 2002 had three attachments. The first included a list of techniques used to train SERE students to resist abusive interrogations; the second included operational risks, associated with the use of SERE-techniques (such as the danger of obtaining false information and that

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[194] Senate Summary, pp. 34-36; "Release of Declassified Narrative Describing the Department of Justice Office of Legal Counsel's Opinions on CIA's Detention and Interrogation Program," April 22, 2009, http://www.intelligence.senate.gov/pdfs/olcopinion.pdf (accessed March 15, 2015), pp. 3-4.

[195] Senate Summary, pp. 34-36.

[196] Senate Summary, p. 36. The waterboard was used for demonstration purposes on a very small number of students in limited applications during the SERE class and was ultimately discontinued in 2007 because of the dramatic effect on students subjected to it. CIA OIG Report, p. 14, n. 14. CIA detainees were waterboarded repeatedly over a very short amount of time. For example, Abu Zubaydah was waterboarded 2-4 times a day with multiple iterations of the watering cycle during each application. Senate Summary, p. 42.

[197] Senate Summary, pp. 36-37; "Release of Declassified Narrative Describing the Department of Justice Office of Legal Counsel's Opinions on CIA's Detention and Interrogation Program," April 22, 2009, http://www.intelligence.senate.gov/pdfs/olcopinion.pdf (accessed March 15, 2015), pp. 3-4.

[198] See generally SASC Report, pp. 24-31, and specifically p. 26 where Haynes states that he was collecting the information for the Justice Department for "a program he was not free to discuss with the Committee, even in a classified setting."

[199] SASC Report, p. 25. See also OPR Report, p. 56.

a detainee's resistance will increase), which were described interchangeably throughout the memo as "physical and psychological duress" and "torture;" and the third included information on the impact of SERE techniques used on SERE students which was described as "minimal"—though this was attributed to the voluntary nature of the program and extensive steps taken to ensure that the students suffered no long term harm.[200] On July 26, Ashcroft orally approved the use of waterboarding.[201]

- Sometime around July 26, and perhaps the same day, the CIA informed OLC that it wanted the approval in writing.[202] On July 26, the White House also told Yoo that they wanted the memos done "as soon as possible."[203] Yoo then incorporated comments from Gonzalez, Chertoff, and Philbin into his drafts.[204]
- The final drafts of the two Bybee Memos, authored by Yoo, were issued on August 1, 2002. The second memo, addressed to Rizzo, invoked CIA consultations with individuals with extensive experience in the use of SERE techniques in justifying its claim that no prolonged mental harm would result from use of the "enhanced interrogation" methods.[205]

This sequence of meetings, correspondence, and events strongly suggest the involvement of senior White House and CIA officials in the production and content of the Bybee Memos. The OPR investigation came to a similar conclusion: "In view of this sequence of events, we believe it is likely that the sections [of the "August 1, 2002 Memos"] were added because some number of attendees at the July 16, 2002 meeting requested the additions, perhaps because the Criminal Division had refused to issue any advance declinations."[206] The fact that the CIA's (CTC Legal's) July 8 draft letter recognized the importance of

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[200] SASC Report, pp. 24-31. See also, OPR Report, p. 56. One of the authors of these memos, Jerald Ogrisseg, has since stated that he produced his analysis with students in mind, not detainees, his analysis was not applicable to the offensive use of SERE techniques, and that he would not stand by the same conclusions if the SERE resistance training were being applied to detainees. SASC Report, p. 30. The nature of the SERE program included extensive physical and psychological pre-screening processes; a limited risk that SERE instructions would mistreat their own personnel; was voluntary in nature, of limited duration, had a known start and end date, and could be terminated by a student at any time. SASC Report, pp. 30-31.

[201] Senate Summary, pp. 36-37; "Release of Declassified Narrative Describing the Department of Justice Office of Legal Counsel's Opinions on CIA's Detention and Interrogation Program," April 22, 2009, http://www.intelligence.senate.gov/pdfs/olcopinion.pdf (accessed March 15, 2015), pp. 3-4.

[202] OPR Report, p. 56.

[203] OPR Report. p. 57.

[204] OPR Report, p. 57.

[205] Bybee II Memo, p. 4. See also OPR Report, p. 56 and CIA OIG Report, p. 14.

[206] OPR Report, p. 52.

"potential reliance upon the doctrines of necessity or of self-defense" to avoid liability under the Torture Statute strengthens this conclusion.

Ultimately, the OPR investigation found that Yoo violated his duty to exercise independent legal judgment, committing "intentional professional misconduct," and that Bybee acted in "reckless disregard" of his obligations to provide independent legal analysis.[207] The OPR investigation called for both lawyers to be referred to their respective state bar associations for discipline but in 2010 Associate Deputy Attorney General David Margolis rejected this recommendation.[208]

The meetings, correspondence, and events also provide evidence relevant to establishing the elements of a criminal conspiracy in that they are evidence of an agreement, among two or more persons (the senior administration officials involved in the meetings and authorizations above) for an unlawful purpose—the use of interrogation techniques that, individually, and certainly when combined as course of conduct, as discussed in more detail below, amounted to torture. Many of the individuals involved also appear to have engaged in overt acts in furtherance of the conspiracy—such as facilitating contact between parties that could approve use of the techniques, ensuring that relevant government officials who might object were not informed of the techniques, orally approving use of the techniques, drafting the memos or providing input for the content of the memos, approving the memos or techniques, giving orders in accordance with use of the techniques, and hiring psychologists Mitchell and Jessen to implement the program.[209]

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207 OPR Report, p. 11. OPR recommended that both lawyers be referred to their respective state bar associations for discipline. Associate Deputy Attorney General David Margolis overruled the OPR's recommended sanctions, however, finding that while Yoo and Bybee exercised "poor judgment," they did not knowingly provide false advice, and therefore were not guilty of professional misconduct. Memorandum from David Margolis, associate deputy attorney general, to attorney general and deputy attorney general, regarding "Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists," (hereinafter "Margolis Memo") January 5, 2010, https://www.aclu.org/files/pdfs/natsec/opr20100219/20100105_DAG_Margolis_Memo.pdf (accessed November 13, 2015), p. 68.

208 See ibid. See also Margolis Memo, pp. 1-2.

209 Mitchell and Jessen had been psychologists with the US Air Force SERE program but the Senate Summary says they had no individual interrogation experience, specialized knowledge of Al-Qaeda, background in terrorism, or relevant regional, cultural, or linguistic expertise. Yet they were the ones who essentially designed the program that was ultimately approved. Senate Summary, p. 32. They were also in charge of carrying out the program and, in part, with evaluating its success. In its response to the Senate Summary, the CIA defended Mitchell and Jessen saying the Senate's assertion that they had "no relevant experience" is "incorrect." See "CIA Comments on the Senate Select Committee on Intelligence Report on the Rendition, Detention, and Interrogation Program," June 27, 2003, https://www.cia.gov/library/reports/CIAs_June2013_Response_to_the_SSCI_Study_on_the_Former_Detention_and_Interrogation_Program.pdf (accessed November 16, 2015)(hereinafter "CIA Response"), p. 11 of the summary section.

Based on the information outlined above, the following individuals should be investigated for their role in the conspiracy: Acting CIA General Counsel John Rizzo, Head of the Justice Department OLC Jay Bybee, OLC Deputy Assistant Attorney General John Yoo, the person identified as "CTC Legal" in the Senate Summary, CIA Director George Tenet, National Security Legal Advisor John Bellinger, Attorney General John Ashcroft, White House Counsel Legal Advisor Alberto Gonzales, Counsel to the Vice President David Addington, Deputy White House Counsel Timothy Flanigan, and National Security Advisor Condoleezza Rice.

President Bush and Vice President Cheney should also be investigated for their roles in approving torture. The Senate Summary indicates that Bush was not briefed on the CIA program until April 8, 2006 and that at that time he "expressed discomfort" at the image of a detainee chained, diapered, and forced to go to the bathroom on himself.[210] However, Bush admits in his autobiography that he discussed the program with Tenet in 2002, prior to application of the first techniques, and personally approved them.[211] Further, a still-classified Memorandum of Notification for covert action, signed by Bush on September 17, 2001, provided the purported basis for authorization of the CIA program, though apparently not for the use of coercive interrogations.[212] More about Cheney's role after the "Torture Memos" were issued is elaborated on below, but media reports indicate that he, together with Addington, was the principal political force pressing OLC lawyers to justify the use of coercive interrogation methods.[213] As Cheney notably said during a media interview in which he defended the actions of Yoo and other OLC lawyers, the lawyers did "what we asked them to do."[214]

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[210] Senate Summary, p. 40.

[211] Senate Summary, p. 40, n. 177.

[212] Senate Summary, p. 11-13. The MON made no reference to interrogations or interrogation techniques but provided the CIA director with "unprecedented authorities" and "significant discretion" to detain persons posing a "continuing, serious threat" to the US. However, Senator Feinstein's Forward to the Summary notes that the MON did not provide authorization or contemplate the use of coercive interrogations. Senate Summary, p. 2, n. 2. See also, Senate Summary, p. 11.

[213] See *Getting Away with Torture*, p. 74, n. 278 stating: Cheney has been described by one author as the "single-minded driving force behind the most aggressive aspects of the Bush administration's counterterrorism policy," (Mayer, *The Dark Side*, p. 343) and by the *Washington Post* as "a prime mover behind the Bush administration's decision to violate the Geneva Conventions and the U.N. Convention Against Torture." ("Vice President for Torture," *Washington Post*, October 26, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/10/25/AR2005102501388.html (accessed November 13, 2015)). See also "Cheney, Rice Approved Use of Waterboarding, Other Interrogation Tactics," *Associated Press*, April 11, 2008, http://www.foxnews.com/story/2008/04/11/cheney-rice-approved-use-waterboarding-other-interrogation-tactics/ (accessed April 5, 2015).

[214] "Transcript of Interview with Vice President Dick Cheney," *ABC's This Week*, p. 9 (Feb. 14, 2010), available at http://abcnews.go.com/ThisWeek/week-transcript-vice-president-dick-cheney/story?id=9818034&singlePage=true (accessed January 12, 2015); see also Testimony of David Addington, former counsel to the vice president, before the House Judiciary Committee Subcommittee on the Constitution, Civil Rights, and Civil Liberties, "In defense of Mr. Yoo, I would simply like to point out that is what his client asked him to do. So it is the professional obligation of the attorney to render the advice on the subjects that the client wants advice on." (The Constitution Project Report, p. 132 citing hearing testimony).

Mitchell and Jessen should be investigated for their alleged direct participation in torture, often applied in ways beyond how it was authorized, but also for their role in the initial conspiracy to torture as well. As the Senate Summary points out, it was Mitchell who first proposed the use of 12 specific techniques derived from the US Military's SERE school on Abu Zubaydah (see above) to the CIA.[215] Both Jessen and Mitchell had been psychologists with the US Air Force SERE school so they would have known the school exposed trainees to interrogation methods that would violate the Geneva Conventions and the laws of war.[216] "CTC Legal's" draft letter to Ashcroft asking for a guarantee to prosecute was circulated to Mitchell.[217] Also in July, Mitchell proposed the CIA enter into a contract with Jessen to aid the CIA in its interrogation process.[218] At some point, Mitchell and Jessen, perhaps not until 2005, formed the company Mitchell Jessen & Associates along with other former JPRA officials and SERE school employees or contractors.[219] They received $81 million on their $180 million contract with the CIA to carry out the program before it was terminated in 2009.[220] The contract was to assess detainees' fitness for the use of "enhanced interrogation techniques," conduct interrogations, and to assess the effectiveness of the techniques as applied.[221]

In late July as Yoo was finishing up the August 1, 2002 memos, he received a psychological assessment of Abu Zubaydah and a report from CIA psychologists asserting that the use of harsh interrogation techniques in SERE training had resulted in no adverse long-term

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[215] Senate Summary, p. 32, n. 138 ("The CIA did not seek out Swigert and Dunbar after a decision was made to use coercive interrogation techniques; rather Swigert and Dunbar played a role in convincing the CIA to adopt such a policy.").

[216] Senate Summary, p. 21. See also "Statement of Senator Carl Levin on Senate Armed Services Committee Report of its Inquiry into the Treatment of Detainees in U.S. Custody," December 11, 2008, http://fas.org/irp/news/2008/12/levin121108.html (accessed October 25, 2015)("The SERE techniques] were designed to give our students a taste of what they might be subjected to if captured by a ruthless, lawless enemy so that they would be better prepared to resist. The techniques were never intended to be used against detainees in U.S. custody .... SERE training is based on illegal exploitation [of the Genera Conventions) over the last 50 years.").

[217] Senate Summary, p. 33. Mitchell by this time was already on contract with the CIA's Office of Technical Services and had been involved in Abu Zubaydah's initial interrogations. Senate Summary, p. 26.

[218] Senate Summary, p. 32.

[219] There are conflicting reports about when the company was formed. The Hoffman Report says that Mitchell and Jessen formed the company in July 2002. Hoffman Report, p. 128. The SASC Report says Mitchell and Jessen formed the company after Jessen retired from the Department of Defense which was in July 2002. SASC Report, pp. 22-23. However, the Senate Summary says Mitchell and Jessen formed company "Y" in 2005. Senate Summary, p. 168. See also CIA response, p. 48, Conclusion 12. In either case each of these sources agree that the company was co-owned by seven individuals, six of whom either worked for JPRA or one of the service SERE schools as employees or contractors. See Hoffman Report, p. 128. SASC Report, pp. 23-24, and Senate Summary, p. 168.

[220] Senate Summary, Findings and Conclusions, p. 11. See also Senate Summary, p. 168.

[221] Hoffman Report, p. 128, citing SASC Report, p. 24. In May 2004 the CIA's policy changed and thereafter Mitchell and Jessen acted only as interrogators. See Hoffman Report, p. 128 citing "Memorandum from John Brennan, Director, Central Intelligence Agency, to Sen. Dianne Feinstein and Sen. Saxby Chambliss, CIA Comments on the Senate Select Committee on Intelligence Report on the Rendition, Detention, and Interrogation Program" (June 27, 2013).

effects.[222] The August 1, 2002 memo (Bybee II Memo) to John Rizzo relied in part upon the psychological assessment of Abu Zubaydah sent to Yoo on July 24, 2002.[223] Whether Mitchell, Jessen, or anyone from the company played a role in making these assessments should be investigated. The author of the July 24, 2002 psychological assessment is not clear but the Senate Summary indicates that Mitchell was present during interrogation sessions with Abu Zubaydah and likely produced a psychological assessment of him.[224] The Senate Summary documents concerns raised in CIA cables about a conflict of interest inherent in having Mitchell and Jessen in charge of conducting psychological assessments of detainees, the appropriateness of the application of "enhanced interrogation techniques" on them, as well as the effectiveness of the techniques.[225] The CIA admits the multiple roles of Mitchell and Jessen raised conflict of interest concerns, especially early on in the program.[226]

Defining "Humane Treatment"

Other government documents, related to later stages of the CIA program, provide further evidence that those named above were part of the conspiracy, and that others joined the conspiracy at a later date. Specifically, there is evidence in the public record indicating that senior US officials or government agents, both had knowledge of the "unlawful aims"

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[222] OPR Report, p. 56.

[223] See Bybee II Memo, pp. 7-9, which uses the exact language used in the psychological assessment faxed to Yoo on July 24, 2002. See "Psychological Assessment of Abu Zubaydah," faxed to John Yoo on July 24, 2002, *ACLU: The Torture Data Base,* https://www.thetorturedatabase.org/document/cia-memo-psychological-assessment-abu-zubaydah?search_url=search/apachesolr_search&search_args=page=3 (accessed July 23, 2015). The Bybee II Memo to the CIA on August 1, 2002 concludes:

> As described above, it appears you have conducted an extensive inquiry to ascertain what impact, if any, these procedures individually and as a course of conduct would have on Zubaydah. You have consulted with interrogation experts, including those with substantial SERE school experience, consulted with outside psychologists, completed a psychological assessment and reviewed the relevant literature on the topic. Based on this inquiry, you believe that the use of the procedures, including the waterboard, and as a course of conduct would not result in prolonged mental harm. Reliance on this information about Zubaydah and about the effect on the use of these techniques more generally demonstrates the presence of a good faith belief that no prolonged mental harm will result from using these methods in the interrogation of Zubaydah. Moreover, we think that this represents not only an honest belief but also a reasonable belief based on the information that you have supplied to us. Thus, we believe that the specific intent to inflict severe mental pain or suffering is not present, and consequently there is no specific intent to inflict severe mental pain or suffering.

[224] See Senate Summary, p. 26 stating that the CIA sent Mitchell as part of an interrogation team to where Abu Zubaydah was being detained shortly after Abu Zubaydah's capture. An FBI interrogation team sent a memo to FBI headquarters at the time stating that CIA psychologists had acquired "tremendous influence" in questioning Abu Zubaydah. Senate Summary, p. 27.

[225] Senate Summary, p. 65. "In a communication to the CIA Inspector General, someone from the CIA's Office of Medical Services writes, "OMS' concerns about conflict of interest were nowhere more graphic than in the setting in which the same individuals applied an EIT which only they were approved to employ, judged both its effectiveness and detainee resilience, and implicitly proposed continued use of the technique—at a daily compensation reported to be $1800/day, or four times that of interrogators who could not use the technique."

[226] CIA Response, p. 10, para. 32.

of the conspiracy—using torture to "enhance" interrogations—or made a deliberate effort to avoid knowing that torture was being used.

In late 2002, CIA officials appear to have grown concerned that President Bush and other senior officials were not fully behind their use of the "enhanced interrogation techniques," and sought reassurance that they had approval to proceed.[227]

The concern stemmed from a memo that Bush issued on February 7, 2002, declaring that the Geneva Conventions did not apply to Taliban and Al-Qaeda detainees but that the US armed forces would nevertheless treat detainees "humanely."[228] The CIA's concerns were compounded by various communications it received about detainee treatment after it began using the OLC-approved techniques. As a result, then-CIA General Counsel Scott Muller decided to draft a "Memorandum for the Record," dated February 12, 2003, memorializing conversations he had with senior members of the administration confirming that the February 7, 2002 memo did not impose new requirements on the CIA to treat detainees "humanely."[229] The memo mentioned conversations about a letter from Secretary of Defense Donald Rumsfeld addressed to George Tenet, and received by the CIA on November 26, 2002, raising the requirement of humane treatment articulated in the president's February 7, 2002 memo in relation to the transfer of a detainee from the

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[227] See David Cole, "'The New Torture Files': Declassified Memos Detail Roles of Bush White House and DOJ Officials Who Conspired to Approve Torture," *Just Security*, March 2, 2015, http://justsecurity.org/20553/new-torture-files-declassified-memos-detail-roles-bush-wh-doj-officials-conspired-approve-torture/ (March 15, 2015); see also, Cole, "Torture: No One Said No," *New York Review of Books*; Senate Summary pp. 115-119; *Getting Away With Torture*, pp. 30-31, citing Senate Select Committee on Intelligence (SSCI), "Declassified Narrative Describing the Department of Justice Office of Legal Counsel's Opinions on the CIA's Detention and Interrogation Program," document released April 22, 2009, http://www.intelligence.senate.gov/publications/declassified-narrative-olc-opinions-cia-detention-and-interrogation-program-april-17 (accessed June 28, 2015), pp. 7; John Sifton, "New Torture Report Details Bushies' Role," *The Daily Beast*, April, 22, 2009, http://www.thedailybeast.com/articles/2009/04/22/new-torture-report-details-bushies-role.html (accessed June 28, 2015).

[228] Memorandum from President George W. Bush to the vice president, secretary of state, secretary of defense, attorney general, chief of staff to the president, CIA director, assistant to the president for National Security Affairs and chairman of the Joint Chiefs of Staff, regarding "Humane Treatment of al Qaeda and Taliban Detainees," February 7, 2002, http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf (accessed March 15, 2015). The Bush memo appears to have built upon a January 25, 2002, memo by Alberto Gonzales stating that in his opinion the "war on terror" was a "new paradigm [that] renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions... ." Memorandum from Alberto R. Gonzales to George W. Bush, President of the United States, January 25, 2002, http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf (accessed March 15, 2015). In urging the president to declare that the Geneva Conventions did not apply to Taliban and Al-Qaeda detainees, Gonzales noted that such a declaration would "Substantially reduce[] the threat of domestic criminal prosecution under the War Crimes Act." The War Crimes Act, discussed below, criminalizes any "grave breach" of the Geneva Conventions, which includes torture.

[229] Memo by CIA General Counsel Scott W. Muller, "Memorandum for the Record: 'Humane' Treatment of CIA detainees," February 12, 2003, http://justsecurity.org/wp-content/uploads/2015/03/Exhibit-B-Bush-Policy-and-Legal-Directives-on-Interrogation.pdf (accessed March 13, 2015)(hereinafter "Muller Memo for the Record.").

Defense Department to CIA custody.[230] It also mentioned conversations between Muller, Gonzales, Addington, Haynes, and Yoo, about a December 27, 2002 letter from Human Rights Watch raising concern about allegations of US abuse of detainees.[231]

In the memo, Muller confirmed that on December 13, 2002, Yoo told him that the February 7, 2002 memo had been "deliberately limited" so it would only be binding on US Armed Forces, not the CIA.[232] Additionally, in two conversations John Bellinger told him that the types of interrogation techniques authorized by the attorney general had been "extensively discussed" and were "consistent with the President's February 7, 2002 memo." Muller also noted that at a January 13, 2003 meeting attended by Muller, Gonzales, Addington, Yoo, and Haynes about the Human Rights Watch December 27, 2002 letter, Addington, Gonzalez and Yoo confirmed that the president's memo was only applicable to the armed forces.[233]

At another meeting three days later, on January 16, 2003, Muller said that there was "an arguable inconsistency between what the CIA was authorized to do and what at least some in the international community might expect in light of the Administration's public statements about 'humane treatment' of detainees on and after the February memo."[234] At that meeting, attended by Muller, Rice, Rumsfeld, Haynes, Secretary of State Collin Powell, Cheney, and Tenet, the CIA's past and ongoing use of approved interrogation techniques was "reaffirmed and in no way drawn into question," according to the Muller memo.[235]

The reassurance provided to the CIA did not put the matter to rest. On June 25, 2003, Haynes wrote to Senator Patrick Leahy, in response to a letter Leahy wrote to Haynes with concerns about detainee treatment, saying that it is US policy to treat all detainees in a manner consistent with its obligations under the Convention against Torture as well as the

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[230] Muller Memo for the Record, p. 3.

[231] Senate Summary, p. 115, n. 685. See also Muller Memo for the Record, pp. 3-4. The letter they were discussing was: "United States: Reports of Torture of Al-Qaeda Suspects," Human Rights Watch, December 27, 2002, http://www.hrw.org/news/2002/12/26/united-states-reports-torture-al-qaeda-suspects (accessed March 16, 2015).

[232] Cole, "'The New Torture Files': Declassified Memos Detail Roles of Bush White House and DOJ Officials Who Conspired to Approve Torture," *Just Security*; See also Cole, "Torture: No One Said No," *New York Review of Books.*

[233] Muller Memo for the Record, pp. 3-4.

[234] Muller Memo for the Record, p. 4.

[235] Muller, February 12, 2003, Memo for the Record, p. 4.

Constitution's ban on cruel, inhuman or degrading treatment or punishment.[236] On June 26, 2003, the White House issued a press release in support of International Support for Victims of Torture Day condemning "cruel" treatment of detainees; and on June 27, 2003, a White House spokesman was quoted as saying that the US government was treating detainees "humanely."[237] All this prompted Tenet to write a letter to National Security Advisor Rice reminding her that the CIA had previously objected to White House statements that all US government detainees were being treated "humanely" and asked that the administration "reaffirm its commitment" to use of the CIA's enhanced interrogation program.[238]

These statements and actions were essentially admissions that, at minimum, the CIA was not treating detainees humanely. They also undermine the credibility of claims that these senior US officials were confident that the authorized techniques did not amount to torture. Additionally, they support the view that at least some officials consciously avoided asking whether the techniques were unlawful and may bring CIA General Counsel Muller, Rumsfeld, Haynes, and possibly Powell, into the ambit of the conspiracy.[239] By January 9 2003, Navy General Counsel Alberto Mora had already informed Rumsfeld and Haynes that many of the same techniques were illegal and demanded orders approving them be rescinded (see above).[240] Documentation from a later July 29, 2003 meeting show Bellinger stating, in response to a question from Vice President Dick Cheney, that there was "no requirement" for a full meeting of the NSC principals to discuss details of the CIA program, which was referred to in the documentation as "controversial."[241] Such a full principals meeting would include Rumsfeld, Powell and Bush. Also present at the meeting were Rice,

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[236] Letter from William J. Haynes, II, general counsel to Department of Defense, to Senator Patrick Leahy, June 25, 2003, letter is available here, "Bush Administration Policy and Legal Directives on Interrogating Al-Qa-ida Detainees," Exhibit E, http://ciasavedlives.com/bdr/bush.pdf (accessed November 13, 2015).

[237] Memorandum from George Tenet, CIA director, to National Security Advisor, Condoleezza Rice, (hereinafter "Tenet Memo for NSA"), July 3, 2003, http://justsecurity.org/wp-content/uploads/2015/03/Exhibit-F-Bush-Policy-and-Legal-Directives-on-Interrogation.pdf (accessed March 16, 2015), para. 2.

[238] Ibid, para. 5.

[239] The roles of Rumsfeld, Haynes, and Powell—present at the January 16, 2003 meeting where use of the CIA techniques was reaffirmed—should be investigated. However, the Senate Summary indicates that neither Powell nor Rumsfeld were briefed on the CIA's enhanced interrogation program prior to the use of the approved techniques on Abu Zubaydah and that as late as July 2003, Powell had still not been briefed for fear he would "blow his stack." Senate Summary, pp. 38, 118. There is substantial evidence that Rumsfeld is responsible for creating conditions for members of the armed forces to commit widespread torture and that he approved specific interrogation techniques that amounted to torture—though that may need to be analyzed separately from any role he may have played to further the aims of a conspiracy to torture as part of the CIA program. See *Getting Away with Torture*, pp. 75-84. Abuses by the US military are beyond the scope of this report.

[240] SASC Report, p. 107. *Getting Away with Torture*, pp. 44-45.

[241] "Memorandum for the Record: Review of Interrogation Program on 29 July 2003," dated August 5, 2003, http://justsecurity.org/wp-content/uploads/2015/03/Exhibit-G-Bush-Policy-and-Legal-Directives-on-Interrogation.pdf (accessed June 28, 2015), p. 5, para. 13.

Tenet, Muller, Ashcroft, Acting Assistant Attorney General OLC Patrick Philbin, Gonzales, and Cheney. During the meeting, Cheney, Rice, Ashcroft and Tenet all agreed that such full principals meeting to "review and reaffirm" the CIA program was not "necessary or advisable."[242] Gonzales stated that he was certain Rumsfeld, through his General Counsel William Haynes, was already clearly aware of the substance of the program. Muller and Bellinger agreed.[243] Rice, however, appears to have changed her mind and on August 4, 2003 had Bellinger call Muller and suggest that Powell and Rumsfeld should be briefed before a specific date that is redacted from the memo.[244]

Reauthorization of the Torture Program

In November 2002, a detainee died in CIA custody and the CIA's Office of Inspector General issued its scathing report on May 7, 2004 about both the use of techniques in an unauthorized manner, and the use of techniques that were never authorized. ("CIA OIG Report").[245] After the CIA OIG Report, CIA director Tenet suspended both the use of what were called "standard" interrogation techniques, as well as "enhanced interrogation techniques" pending a legal and policy review.[246] The program was later reauthorized in a process that spanned the terms of three CIA directors: Tenet who resigned in June 2004, John McLaughlin who replaced him as acting CIA director until September 2004, and Porter Goss who took over from McLaughlin in September 2004.[247] Daniel Levin, in 2004, and Steven Bradbury, in 2005, wrote memos that reauthorized the program, replacing the one that had been withdrawn by Goldsmith and drafting new ones that authorized additional

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[242] Ibid.

[243] Ibid.

[244] Ibid., p. 6.

[245] See generally, CIA OIG Report. On January 2, 2004 CIA Inspector General John Helgerson provided a draft of his final May 7, 2004 OIG report on the CIA's detention and interrogation program to the CIA for comment that had already alerted the CIA to many of his concerns. See Senate Summary, p. 190.

[246] Senate Summary, pp. 413-414. The difference between "standard" and "enhanced" interrogation techniques were first explained in a memo issued by the CIA director Tenet on January 28, 2003. (See CIA OIG Report, Appendix E). The Guidance was issued in response to the death of CIA detainee Gul Rahman. (See Senate Summary, p. 62-63). The memo purportedly formalized existing practice for obtaining required approvals from CIA headquarters prior to use of the techniques. (See CIA OIG Report. p. 6). In that guidance, "standard" interrogation techniques were defined as those "that *do not* incorporate physical or substantial psychological pressure." (See CIA OIG Report, Appendix E (emphasis in the original)). The guidance said they "include, but are not limited to, all lawful forms of questioning employed by US law enforcement and military interrogation personnel." Some examples included sleep deprivation up to 72 hours, isolation, loud music, and diapering generally not to exceed 72 hours.

[247] William Branigin, "CIA Director Tenet Resigns," *Washington Post*, June 3, 2004, http://www.washingtonpost.com/wp-dyn/articles/A12296-2004Jun3.html (accessed April 30, 2015); Barton Gellman and Dafna Linzer, "Top Counterterrorism Officer Removed Amid Turmoil at CIA," *Washington Post*, February 7, 2006 http://www.washingtonpost.com/wp-dyn/content/article/2006/02/07/AR2006020700016_2.html (accessed April 30, 2015).

techniques. These memos rejected the legal reasoning of the prior "Bybee Memos" but then authorized the same and even additional conduct using different legal reasoning.

Prior to re-authorization in 2005, according to the Senate Summary, the CIA provided the Justice Department with numerous descriptions of the interrogation techniques that were false and inconsistent with how the CIA had actually been applying them, the physical and psychological impact of the techniques on detainees, the threat posed by those to whom the techniques were being applied, and their degree of effectiveness.[248] For example, the CIA represented that standing sleep deprivation would be discontinued if it resulted in significant swelling of the lower extremities (edema) but in practice this technique "was repeatedly not stopped when edema occurred."[249] Additionally, the CIA provided false information about the use of light and cold temperatures on detainees, the claim that interrogations would stop when detainees experienced hallucinations, and a number of other matters.[250] The Senate Summary does not clearly identify who exactly is responsible for supplying this false information, identifying a number of CIA sources, and indicates that more information is available in the still classified sections of the complete report.

There is also information in the Senate Summary that Acting Assistant Attorney General for OLC Steven Bradbury was looking for statements from the CIA that he could use to justify the techniques in his new memo. For example, just days before Bradbury issued new memos on May 10, 2005 re-authorizing the program, he sent a letter to the CIA asking if medical monitoring and other safeguards in place "will effectively avoid severe physical pain or suffering for detainees."[251] The CIA's Office of Medical Services (OMS) had expressed discomfort with these types of questions just a few weeks earlier when they received a draft of the OLC authorizing memo for review:

> Simply put, OMS is not in the business of saying what is acceptable in causing discomfort to other human beings, and will not take on that burden.... OMS did not review or vet these techniques prior to their introduction, but rather came into this program with the understanding of your office and DOJ [Department of Justice] that they were already determined as legal, permitted

[248] Senate Summary, pp. 409-431.

[249] Senate Summary, p. 422.

[250] Ibid.

[251] Senate Summary, p. 420.

> and safe. We see this current iteration [of the OLC memorandum] as a reversal of that sequence, and a relocation of those decisions to OMS. If this is the case, that OMS has now the responsibility for determining a procedure's legality through its determination of safety, then we will need to review all procedures in that light given this new responsibility.[252]

Nevertheless, OMS later responded to Bradbury that the CIA's program "has effectively avoided severe physical pain and suffering, and should continue to do so. Application of the thirteen techniques has not to date resulted in any severe or permanent physical injury (or any injury other than transient bruising), and we do not expect this to change."[253]

CIA officials who supplied the false information can be considered to have joined the conspiracy. The overt acts are that they supplied the false facts, were aware of the program's unlawful aims, the infliction of severe pain and suffering, and did so with the intent of the conspiracy to torture succeeding. Similarly, by drafting and issuing new legal memos that reauthorized the same and even additional "enhanced interrogation techniques," especially in light of the controversy around them and problems with the program reported by the CIA OIG, both Levin and Bradbury can be seen as having undertaken overt acts—drafting of the new memos—with knowledge of the conspiracy's unlawful aims and with the intent that the use of these techniques continue and thus that the conspiracy succeed.

Evidence against Other Officials in Connection with the Conspiracy

Other individuals who—due to their positions or reported actions—should be included in an investigation in connection with the conspiracy include:

- Jose Rodriguez, Cofer Black's successor, who oversaw operation of the CIA's program from May 2002-November 2004 and was responsible for ordering the destruction of 92 videotapes documenting the CIA's use of "enhanced interrogation techniques," which included waterboarding sessions, over the objections of senior officials at the

[252] Senate Summary, p. 420, n. 2361.

[253] Senate Summary, p. 421.

White House and the CIA, as well as Congress.[254] Later in his memoirs, Rodriguez describes his order to destroy the tapes as "just getting rid of some ugly visuals."[255]

- The CIA's current deputy general counsel for operations, Robert Eatinger, who is reportedly mentioned by name more than 1,600 times in the Senate's full report, though his name did not appear in the Senate Summary.[256] Eatinger was a lawyer in the CIA's Counterterrorism Center when the center managed and carried out the detention and interrogation program, and from mid-2004 until official termination of the program in January 2009, he was the unit's chief lawyer.[257] He reportedly provided legal advice that Rodriguez had legal authority to destroy the tapes and that the destruction would violate no laws.[258] He is also accused of providing inaccurate information to the OLC about the CIA program upon which the OLC relied when issuing authorizations for CIA action.[259]
- Cofer Black, head of the CIA's counterterrorism center from June 1999 until the end of 2002, appeared to play a key role in implementing the program as well, though his exact role is not necessarily clear from the public record. In October 2008, CIA Director Tenet delegated responsibility to him to manage the capture and detention authorities provided in the MON.[260] Black famously said during testimony before

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[254] Peter Finn and Julie Tate, "2005 destruction of interrogation tapes caused concern at CIA, e-mails show," *Washington Post*, April 16, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/04/15/AR2010041505854.html (accessed April 6, 2015); Peter Taylor, "'Vomiting and screaming' in destroyed waterboarding tapes," BBC, May 9, 2012, http://www.bbc.com/news/world-us-canada-17990955 (accessed April 6, 2015).

[255] Adam Goldman and Matt Apuzzo, "Jose Rodriguez, Ex-CIA Officer, Defends Destroying Waterboarding Videos In 'Hard Measures' Book," *Huffington Post*, April 24, 2012, http://www.huffingtonpost.com/2012/04/24/jose-rodriguez-cia-hard-measures-book_n_1450416.html (accessed April 13, 2015).

[256] "Senator Statement on Intel Committee's CIA Detention, Interrogation Report," March 11, 2014, http://www.feinstein.senate.gov/public/index.cfm/2014/3/feinstein-statement-on-intelligence-committee-s-cia-detention-interrogation-report (accessed April 6, 2015)(hereinafter "Senator Feinstein's March 11, 2014 Senate Floor Statement"); Ken Dilanian, "CIA lawyer Robert Eatinger is no stranger to controversy," *Los Angeles Times*, March 12, 2004, http://articles.latimes.com/2014/mar/12/nation/la-na-cia-lawyer-20140313 (accessed October 21, 2015).

[257] Senator Feinstein's March 11, 2014 Senate Floor Statement.

[258] Mark Mazzetti and Scott Shane, "Bush Lawyers Discussed Fate of CIA Tapes," *New York Times*, December 19, 2007, http://www.nytimes.com/2007/12/19/washington/19intel.html?pagewanted=all&_r=0 (accessed October 19, 2015).

[259] Senator Feinstein's March 11, 2014 Senate Floor Statement; see also Complaint from Katherine Hawkins, National Security Fellow at OpenTheGovernment.org to John P. Fitzpatrick, Director of the Information Security Oversight Office, September 15, 2015, Re: Wrongful classification of information regarding CIA torture, in violation of Executive, http://www.openthegovernment.org/sites/default/files/ISOO_Complaint_CIA_torture.pdf, (accessed October 19, 2015), pp. 11-13 (hereinafter "OpenTheGovernment.org Complaint"), which connects Robert Eatinger to several pseudonyms in the Senate Summary and identifies him as having played a major role in supplying inaccurate information to the OLC.

[260] Senate Summary, p. 13.

Congress on September 26, 2002: "[T]here was 'before' 9/11 and 'after' 9/11. After 9/11 the gloves come off."[261]

- Someone identified as "CTC legal" in the Senate Summary. "CTC Legal" first proposed to the CIA in April 2002 that they use James Mitchell as a CIA consultant in interrogations and the use of aggressive interrogation techniques.[262] "CTC Legal" also was the author of a July 8, 2002 letter that acknowledged the illegality of the CIA's proposed enhanced interrogation techniques.[263] This individual was part of a CIA legal team present at the July 13, 2002 meeting, which included Rizzo and other unnamed CIA lawyers, who proposed the use of "enhanced interrogation techniques" and sought a declination from the Justice Department's Criminal Division.[264] "CTC Legal" also drafted a memo in June 2003 when the CIA was looking at reaffirmation of the CIA program stating that one of the August 1, 2002 memos provided "safe harbor" for the CIA's use of "enhanced interrogation techniques."[265] "CTC Legal" was also present, along with Alfreda Bikowski, during "aggressive" interrogations of Abu Zubaydah that included the use of waterboarding.[266]

OLC Memos as Evidence of Conspiracy and Intent to Torture

Beyond CIA efforts to obtain what would be preemptive immunity from prosecution for using torture, the strained legal reasoning of the "Bybee Memos" themselves also suggests that those involved knew they were creating "authorization" as a cover for what would otherwise almost certainly be deemed illegal acts.

The memos themselves were deeply flawed from a legal perspective and have been widely discredited.[267] The Bybee I Memo invented definitional requirements for torture

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[261] Testimony of Cofer Black, former chief, DCI's Counterterrorism Center, CIA, Before the Senate Select Committee on Intelligence and House of Representatives Permanent Select Committee on Intelligence, "Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001," 107th Congress, September 26, 2002, http://fas.org:8080/irp/congress/2002_hr/092602black.html (accessed April 6, 2015).

[262] Senate Summary, p. 26; see also "OpenTheGovernment Complaint," which connects Jonathan Fredman, Chief Legal Counsel for the CIA's Counterterrorism Center on September 11, 2004 until April 2004 with the pseudonym "CTC Legal" in the Senate Summary, pp. 7-10.

[263] Senate Summary, p. 33.

[264] Senate Summary, p. 33.

[265] Senate Summary, p. 118, n. 690.

[266] Senate Summary, p. 43, n. 197.

[267] For example, nearly 130 prominent lawyers, retired judges and a former director of the FBI released a statement after the first of the memos was leaked to the press condemning their use. "The position taken by the government lawyers in these

that went far beyond any existing standard by, for example, drawing on irrelevant health benefits statutes to argue that "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."[268] Mental pain or suffering would only amount to torture if it results in "significant psychological harm of significant duration, e.g., lasting for months or even years."[269]

The Bybee I Memo advised that the claimed specific intent requirement in the Torture Statute could be negated by a good faith belief that the acts undertaken would not cause prolonged mental harm. A defendant in a criminal case could demonstrate this good faith belief by showing for example that he surveyed the professional literature, consulted with experts, or reviewed evidence gained from past experience.[270] The memo also advised that if an interrogator were to harm a detainee during use of "enhanced interrogation techniques," he would be doing so to prevent further attacks on the US and therefore would be justified by the Commander-in-Chief's constitutional authority to prevent the nation from attack.[271] The assertion ignores well-established US Supreme Court precedent making clear that the executive branch does not have unbridled authority in the conduct foreign affairs—it is bound by congressional statues and judicial decisions.[272] Torture is prohibited by US and international human rights and humanitarian law at all times and for all reasons. There is no exception for war or public emergencies.[273]

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legal memoranda amount to counseling a client as to how to get away with violating the law," wrote one of the signatories. The memos "circumvent long established and universally acknowledged principles of law and common decency," the statement said. Scott Higham, "Law Experts Condemn U.S. Memos On Torture," *Washington Post*, August 5, 2004, http://www.washingtonpost.com/wp-dyn/articles/A41189-2004Aug4.html (accessed January 28, 2015).

[268] Bybee I Memo, p. 1.

[269] Bybee I Memo, p. 1.

[270] Bybee I Memo, p. 8.

[271] Bybee I Memo, p. 46.

[272] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). As Justice Robert H. Jackson stated in a concurring opinion, "[the president] has no monopoly of 'war powers,' whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command. It is also empowered to make rules for the 'Government and Regulation of land and naval Forces,' by which it may to some unknown extent impinge upon even command functions."). Ibid., pp. 643-44. See also Kathleen Clark and Julie Mertus, "Torturing the Law," *Washington Post*, June 20, 2004, http://www.washingtonpost.com/wp-dyn/articles/A54025-2004Jun19.html (accessed April 6, 2015).

[273] Convention against Torture, art. 2(2).

The Justice Department withdrew the Bybee I Memo in June 2004, in the wake of the Abu Ghraib scandal and just days after its contents were leaked to the media.[274] Jack Goldsmith, who replaced Yoo, headed the OLC from October 2003 to June 2004, and was largely responsible for getting the Bybee I Memo withdrawn, said the memo was "riddled with error" and a "one-sided effort to eliminate any hurdles posed by the torture law."[275] On June 4, 2004, CIA Director George Tenet suspended the use of both "enhanced" and "standard" techniques pending policy and legal review.[276] New legal memos issued later to replace the Bybee I Memo acknowledged that the prior legal reasoning was wrong.[277] According to the replacement memo, "Because the discussion concerning the President's Commander-in-Chief power and potential defenses to liability was—and remains—unnecessary, it has been eliminated... Consideration of the bounds of any such authority would be 'inconsistent' with the President's unequivocal directive not to engage in torture."[278]

Specifically concerning the claim that harm to a detainee might be justified in order to prevent the nation from an attack, the replacement memo stated that "[t]here is no exception under the statute permitting torture to be used for a 'good reason.' Thus, a defendant's motive (to protect national security, for example) is not relevant to the question of whether he acted with the requisite specific intent under the statute."[279] On the level of pain required to meet the definition of torture, the replacement memo reads: "[W]e do not believe Congress intended only to reach conduct involving excruciating and agonizing pain or suffering. ...Thus, we do not agree with the August 2002 Memorandum."[280]

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[274] See OPR Report, p. 121; Priest and Smith, "Memo Offered Justification for Use of Torture," *Washington Post*; Priest, "Justice Dept. Memo Says Torture 'May Be Justified,'" *Washington Post*.

[275] OPR, investigation p. 160.

[276] SSCI, pp. 413-414. See discussion of the difference between "standard" and "enhanced" interrogation techniques in section "Reauthorization of the torture program" in note 244 above. The difference between "enhanced" and "standard" interrogation techniques are discussed in the footnotes for this report's chapter Evidence of Conspiracy to Torture: Reauthorization of the Torture Program.

[277] For example,"...we disagree with statements in the August 2002 Memorandum limiting 'severe' pain under the statute to 'excruciating and agonizing' pain 'equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.'" Levin Replacement Memo, p. 2, https://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc96.pdf (accessed January 29, 2015).

[278] Levin Replacement Memo, p. 2.

[279] Levin Replacement Memo, p. 17.

[280] Levin Replacement Memo, p. 8 and p. 8, n. 17.

Though the replacement memos—one issued on December 30, 2004[281] ("Levin Replacement Memo") and several others issued in 2005[282] ("Bradbury Memos")—attempt to apply new legal reasoning, they continued to authorize the same and even additional conduct that amounts to torture or other ill-treatment.[283] For example, they continued to authorize waterboarding. Waterboarding is essentially the same as other forms of water torture that have been prosecuted in US courts,[284] as well as military courts and tribunals in the past.[285] President Barack Obama, former Attorney General Eric Holder, Attorney General Loretta Lynch, have all called waterboarding torture.[286] "The position taken by the government lawyers in these legal memoranda amount to counseling a client as to how to get away with violating the law," said John Gibbons, former chief judge of the US Court of Appeals for the Third Circuit, after the memos had been released.[287]

The language used in the 2005 replacement memos themselves, drafted by then Deputy Assistant Attorney General Steven Bradbury, acknowledges the severity and harshness of the techniques while at the same time purporting to authorize them. One memo states that use of the waterboard does pose a "small risk" of certain "potentially significant medical problems" such as vomiting and aspirating emesis, aspirating water—which might lead to

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[281] Levin Replacement Memo.

[282] Acting OLC head Steven Bradbury issued three opinions to CIA general counsel John Rizzo providing further guidance and authorization for the CIA's "enhanced interrogation techniques" in May 2005. The three memos are discussed in the first section of the Background chapter of this report.

[283] Scott Shane and David Johnston, "U.S. Lawyers Agreed on Legality of Brutal Tactic," *New York Times*, June 6, 2009, http://www.nytimes.com/2009/06/07/us/politics/07lawyers.html?pagewanted=all&_r=0 (accessed April 22, 2015).

[284] A Texas sheriff and two of his deputies who tried to argue they were just following orders were prosecuted and convicted in federal court in 1983 for torturing six detainees. The method of torture was to handcuff the detainees "to a table or chair with the face wrapped tightly with a towel. The head would be pulled back, they said, and water would be poured over the towel until, fearing drowning, they would talk." "Ex-Sherriff Given 10-Year Sentence," *New York Times*, October 27, 1983, http://www.nytimes.com/1983/10/27/us/ex-sheriff-given-10-year-sentence.html (accessed February 3, 2015). The judge sentenced the sheriff to 10 years in prison and fined him $12,000. He also sentenced one of the sheriff's deputies two years plus a three-year suspended sentence, and another to seven years, but he would only serve four. At the sentencing, the judge said that law enforcement had been allowed to fall into "the hands of a bunch of thugs" and that "the operation down there would embarrass the dictator of a country." See also *United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984) affirming the conviction though the opinion was limited to a procedural matter concerning refusal to grant a severance.

[285] See *Getting Away with Torture*, pp. 54-56 listing several instances of US courts and tribunals finding waterboarding and other forms of water abuse constitute torture.

[286] David Stout, "Holder Tells Senators Waterboarding Is Torture," *New York Times*, January 15, 2009, http://www.nytimes.com/2009/01/16/us/politics/16holdercnd.html?scp=3&sq=Eric%20Holder%20torture&st=cse&_r=0 (accessed February 6, 2015); Video: Loretta Lynch: "Waterboarding is torture," *Politico*, January 28, 2015, http://www.politico.com/multimedia/video/2015/01/loretta-lynch-waterboarding-is-torture.html (accessed February 6, 2015); Ewen MacAskill, "Obama: 'I believe waterboarding was torture, and it was a mistake,'" *The Guardian*, April 29, 2009, http://www.theguardian.com/world/2009/apr/30/obama-waterboarding-mistake (accessed February 6, 2015).

[287] Scott Higham, "Law Experts Condemn U.S. Memos On Torture," *Washington Post*, August 5, 2004, http://www.washingtonpost.com/wp-dyn/articles/A41189-2004Aug4.html (accessed March 31, 2015).

pneumonia—or "spasms in the larynx that would prevent [a detainee] from breathing." In the event of such spasms, "a qualified physician would be present to intervene and perform a tracheotomy if necessary."[288] The memo authorizes up to 180 hours (7.5 days) of sleep deprivation, which was often done by forcing detainees to stand nude and diapered during that period.[289] Though the memo acknowledges this may cause "edema," (swelling caused by fluid gathering in the tissues)[290] it suggests that in this case, the detainee can be restrained in a way that will continue to deprive him of sleep while lying prone until the condition subsides and then resume standing.[291] Also, though individuals will likely experience "some discomfort," "distress" and "fatigue," and this can also cause "impairment to coordinated body movement, difficulty with speech, nausea, and blurred vision," this would not amount to torture so long as the individuals are monitored and their diapers checked regularly for skin irritation, the memo read.[292] It also may result in hallucinations, the memo reads, which could result in "profound" disruption of the senses and thus be defined as torture, but because it would not be "calculated" to achieve that result, it would not satisfy the requirements of the torture statute.[293]

Further, a separate memo for the first time authorized use of the techniques in combination (combinations of practices such as diapering, nudity, walling, stress positions, and water dousing, among others).[294] Some of these specific techniques have been referred to as amounting to torture by US courts.[295] The US has also denounced many of these techniques

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[288] Memorandum from Steven Bradbury, deputy assistant attorney general, to John Rizzo, senior deputy general counsel for the CIA, May 10, 2005, (hereinafter "Bradbury Combined Techniques Memo,") http://fas.org/irp/agency/doj/olc/techniques.pdf (access November 13, 2015), p. 14.

[289] Bradbury Combined Techniques Memo, p. 10.

[290] Definition of "edema," *PubmedMed Health*, http://www.ncbi.nlm.nih.gov/pubmedhealth/PMHT0022960/ (accessed February 7, 2015).

[291] Bradbury Combined Techniques Memo, p. 10.

[292] Bradbury Combined Techniques Memo, pp. 37-38

[293] Bradbury Combined Techniques Memo, p. 39.

[294] Bradbury Combined Techniques Memo.

[295] Most cases analyzing whether past conduct amounted to torture are civil, and courts tend to look at a course of conduct rather than whether each individual technique to which a plaintiff was subjected amounted to torture. Some of the specific cases with relevant conduct include: *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1463 (D. Haw. 1995) (a class action in which approximately 10,000 plaintiffs sued the Estate of Ferdinand E. Marcos, the former president of the Philippines, for torture, enforced disappearance, and summary executions. Among the many forms of torture for which the estate was found liable was a technique called the "water cure" where a cloth was placed over the detainee's mouth and nose, and water poured over it producing a drowning sensation. Relief was granted under the Torture Victims Protection Act (TVPA)); *Hilao v. Marcos*, 103 F.3d 789, 790 (9th Cir. 1996) (in which two plaintiffs who did not take part in the class action (above) sued the Marcos' estate. One was interrogated, blindfolded, and severely beaten. Also, while shackled to his cot, a towel was placed over his nose and mouth and, for six hours, interrogators poured water down his nostrils so that he felt as though he were drowning. He then spent more than eight years in detention, five of them in solitary confinement. Another plaintiff was held in incommunicado detention, repeatedly interrogated,

as torture when practiced by other countries.[296] Additionally, the Army Field Manual on Intelligence Interrogation in effect when the OLC memos were issued, prohibits torture and lists as an example of physical torture: "forcing an individual to stand, sit or kneel in abnormal positions for prolonged periods of time," and "food deprivation."[297] It also lists "abnormal sleep deprivation," as an example of mental torture.[298]

Finally, the new memos were issued only after many of the most egregious abuses took place.[299] Even if they had been based on sound legal analysis, they could not have provided retroactive authorization.

Evidence of Torture: Conduct Beyond What Was Authorized

Both international human rights and humanitarian law prohibit torture and other forms of ill-treatment, standards that CIA program practices violated. But even if one were to discount

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subjected to mock executions, and threatened with death. Both plaintiffs were found to have been subjected to torture and were granted relief under the Alien Tort Claims Act and the TVPA); *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (finding that holding one plaintiff at gunpoint, threatening to injure him physically if he did not confess to espionage or otherwise provide information, and incarcerating him in a room with no bed, window, light, electricity, water, toilet or adequate access to sanitary facilities, constituted torture. Also finding that placing loaded guns to plaintiffs' heads, depriving them of medical treatment, and incarcerating them in an environment without adequate toilet facilities constituted torture); See also note 282 above in this section describing a case where a Texas sheriff and two of his deputies who tried to argue they were just following orders were prosecuted and convicted in federal court in 1983 for torturing six detainees. *cf. Padilla v. Yoo*, 678 F.3d 748, 767, n. 15 (9th Cir. Cal. 2012)(In deciding whether respondents, including John Yoo, were entitled to qualified immunity in a civil case brought by a U.S. citizen for violation of his constitutional rights in military detention, the court assumed without deciding that treatment even less severe than some of the harshest of the approved CIA "enhanced interrogation techniques" amounted to torture but also that whether Padilla's abuses amounted to torture was "not beyond debate" at the time the OLC memos were issued. The opinion states—without many details that would allow his treatment to be properly compared to what detainees in the CIA program were subjected to—that Padilla endured prolonged isolation; sensory deprivation, and "stress" positions, among other things).

[296] Human Rights Watch, "USA and Torture: A History of Hypocrisy," December 9, 2014, http://www.hrw.org/news/2014/12/09/usa-and-torture-history-hypocrisy (accessed February 2, 2014); James Ross, "Details of how U.S. rebuked foreign regimes while using same torture methods," Reuters, December 11, 2014 http://blogs.reuters.com/great-debate/2014/12/11/us-called-out-foreign-regimes-as-cia-used-same-torture-methods/ (accessed November 7, 2015); See also *Getting Away With Torture*, p. 57.

297 Department of the Army, Field Manual 34-52: Intelligence Interrogation, September 28, 1992, http://www.fas.org/irp/doddir/army/fm34-52.pdf (accessed February 2, 2015), Chapter 1, p. 8. (However, this language was removed in 2006. See e.g. Human Rights First, "The U.S. Army Field Manual on Interrogation: A Strong Document in Need of Careful Revision," https://www.humanrightsfirst.org/wp-content/uploads/pdf/Army_Field_Manual.pdf (accessed May 8, 2015), p. 2.

[298] Department of the Army, Field Manual 34-52, p. 2.

[299] Senate Summary, p. 96. (While the CIA held detainees from 2002 until 2008, early 2003 was the most active period of the program. Of the 119 detainees identified by the Senate Summary as being held by the CIA, 53 were brought into custody in early 2003. Of the 39 detainees found to have been subjected to "enhanced interrogation techniques," 17 were subjected to them between January 2003 and August 2003, primarily at detention sites identified in the Senate Summary as Cobalt and Blue, both of which are believed to have been in Afghanistan); see also Adam Goldman and Julie Tate, "Decoding the secret black sites on the Senate's report on the CIA interrogation program," *Washington Post*, December 9, 2014, http://www.washingtonpost.com/blogs/worldviews/wp/2014/12/09/decoding-the-secret-black-sites-on-the-senates-report-on-the-cia-interrogation-program/ (accessed February 1, 2015).

those international requirements, the CIA program went beyond the techniques that were authorized and the claimed protections from legal liability set out in the Torture Memos.[300]

First, the CIA used enhanced interrogation techniques on Abu Zubaydah before OLC issued the Bybee Memos. Documents released in April 2010 in response to Freedom of Information Act requests from the ACLU,[301] revealed that the CIA subjected Abu Zubaydah to sleep deprivation beyond 48 hours at some point after his capture but before April 2002.[302] The CIA claims it did this only after "consulting" with "NSC and DOJ" and getting approval to use sleep deprivation for between 24-48 hours. How many hours of sleep deprivation beyond 48 Abu Zubaydah was subjected to, or how many times during this period, is not made clear from the document, but it does say that due to a "misunderstanding" the 24 to 48-hour time frame was exceeded.[303]

Additionally, the Bybee II Memo to Rizzo only approved the use of specific techniques on Zubaydah for certain purposes and under certain conditions.[304] "If these facts change, this advice would not necessarily apply," the memo read.[305] The Senate Summary is filled with examples of changed facts. For one, the CIA applied the authorizations for Zubaydah to other detainees without seeking further formal approval.[306] After the Senate Summary was released, John Yoo said that the initial OLC authorization for the use of "enhanced interrogation techniques" was meant to only apply to Abu Zubaydah.[307] It was not until

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[300] The CIA admits that CIA officers and contractors used techniques that went beyond what were authorized and that they detained individuals who never should have been. But it says those responsible, 16 of them, have been administratively sanctioned and it would not be practical or productive to revisit these practices. See CIA Response, paras. 29 and 30, https://www.cia.gov/library/reports/CIAs_June2013_Response_to_the_SSCI_Study_on_the_Former_Detention_and_Interrogation_Program.pdf (accessed February 7, 2015).

[301] American Civil Liberties Union, "Torture Documents Released 4/15/2010," https://www.aclu.org/torture-documents-released-4152010 (accessed August 13, 2015). See also "How Abu Zubaydah's Sleep Deprivation Got Out of Control," *emptywheel*, April 16, 2015, https://www.emptywheel.net/2010/04/16/how-abu-zubaydahs-sleep-deprivation-got-out-of-control/ (directing readers to pages 113-114 of the massive set of documents released where Abu Zubaydah's sleep deprivation prior to the OLC memos being issued is documented) (accessed August 13, 2015).

[302] American Civil Liberties Union, "The Torture Documents Released 4/15/2010," https://www.aclu.org/sites/default/files/pdfs/natsec/20100415_CIArelease_destructionoftapes.pdf (accessed November 13, 2015), pp. 113-114.

[303] Ibid.

[304] Bybee II Memo, p. 1.

[305] Bybee II Memo, p. 1.

[306] Senate Summary, p. 411; See OPR Report, p. 124, n. 95.

[307] Dan Lamothe, "Former Bush lawyer: U.S. did not consider cumulative effects of 'enhanced interrogation,'" *Washington Post*, December 12, 2014, http://www.washingtonpost.com/news/checkpoint/wp/2014/12/12/former-bush-lawyer-u-s-did-not-consider-cumulative-effects-of-enhanced-interrogation/ (accessed November 13, 2015).

almost a year later, on July 29, 2003, that CIA records indicate, according to the Senate Summary, that the attorney general stated at a meeting that the legal principles of the August 1, 2002 memorandum applied to other detainees.[308]

After Jack Goldsmith took over as head of the OLC after Yoo's departure, he read the CIA OIG Report and learned that the CIA had been using the Bybee II memo to justify the use of "enhanced interrogation techniques" on other detainees. He subsequently wrote a letter to the CIA admonishing them for this practice. "Our initial review of the Inspector General's Report," Goldsmith wrote to Muller on May 27, 2004, "raises the possibility that, at least in some instances and particularly early in the program, the actual practice may not have been congruent with all of these assumptions and limitations [in the August 1, 2002 memo to Rizzo]."[309] While he acknowledged that at some point it appeared that the OLC had agreed that the legal principles articulated in the August 1, 2002 memo could apply to other detainees, he "strongly recommended" that the CIA suspend use of waterboarding and

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[308] Senate Summary, p. 411; OPR Report, pp. 116-117. Apparently one basis for the attorney general's comments at this meeting was a set of "Bullet Points" that the OPR report describes as having generated a "controversy." See OPR Report, p. 114. The origins of the "Bullet Points" appear to be the CIA. They were sent to Yoo on April 2003 by Muller, reworked by an unnamed OLC attorney and Yoo, and then sent back to the CIA. OPR Report, pp. 100-01. According to the unnamed attorney, they were intended to provide a summary to the CIA OIG John Helgerson—who was working on a report evaluating the CIA's detention and interrogation program—of the legal advice the OLC had provided to the CIA about the legality of the detention and interrogation program. They were also meant to "demonstrate that the OLC had already weighed in." OPR Report, p. 101. They appear to have been prepared sometime in June 2003. Muller said they "served as a basis for the 'Legal Authorities' briefing slide used at the July 29, 2003 meeting," which was also attended by Cheney, Rice, Patrick Philbin, the Director of National Intelligence, and others. OPR Report, p. 116. On March 2, 2004 Goldsmith said he first received a copy of the "Bullet Points." OPR Report, p. 114. They were attached to a letter he received from Muller on that day asking him to reaffirm the legal advice he claimed OLC had given to the CIA regarding the detention and interrogation program. Specifically, Muller wanted Goldsmith to reaffirm the August 1, 2002 Yoo letter, the Bybee Memos, and the "Bullet Points." OPR Report, p. 114. Goldsmith was concerned by the "Bullet Points" because they appeared to be a CIA document, contained no legal analysis or any indication that OLC had reviewed them. OPR Report, p. 114. After this, in late May 2004, the CIA Office of General Counsel sent a copy of the final May 7, 2004 CIA OIG report to OLC. The report included descriptions of the legal advice provided to the CIA by OLC and included copies of the "Bullet Points" as appendices. On May 25, 2004, Goldsmith wrote to CIA IG John Helgerson asking for an opportunity to provide comments on the report's discussion of the OLC's legal advice before it was sent to Congress. Two days later, on May 27, 2004, Goldsmith wrote to Muller and advised him that the report "raised concerns about certain aspects of interrogation practice." On June 9, Goldsmith called Yoo to get clarification on the "Bullet Points." OPR Report, p. 116. Yoo told Goldsmith that the OLC had not produced the "Bullet Points" and that they did not constitute the official views of the OLC. OPR Report, p. 116. On June 10, 2004, Goldsmith wrote to Muller that the OLC would not reaffirm the "Bullet Points" which "did not and do not represent an opinion or a statement of the views of this Office." OPR Report, p. 16. Though apparently there had been some discussion about the CIA and the OLC submitting a joint letter to Helgerson, in the end because the two offices had different views about the significance of the Bullet Points, they would not be joint signatories to the letter. OPR Report, p. 116. Goldsmith submitted his comments to Helgerson on June 18, 2004. In those comments he asked that two areas of "ambiguity or mistaken characterizations" in the report be corrected. First, that the attorney general's comments at the July 29, 2003 meeting on the "expanded use" of "enhanced interrogation techniques" were intended to refer to the use of approved techniques on other detainees in addition to Abu Zubaydah, not the use of new techniques. Second, he said that the "Bullet Points" "were not and are not an opinion from OLC or formal statement of views." OPR Report, p. 117.

[309] "Letter from head of the Justice Department Office of Legal Counsel Jack Goldsmith to General Counsel of the CIA Scott Muller," May 27, 2004, http://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-muller2004.pdf (accessed August 23, 2015).

review steps taken to ensure that in actual practice any use of CIA techniques "adheres closely to the assumptions and limitations in the August 2002 opinion."[310] After Goldsmith's resignation from the OLC, subsequent OLC staff appear to have produced individualized memoranda for detainees subject to CIA "enhanced interrogation techniques."[311]

In addition, the Senate Summary and other documents show that the use of the interrogation techniques specifically in combination does not appear to have been specifically approved by OLC memo on any detainee other than Abu Zubaydah, and even then in a cursory fashion, until May 10, 2005.[312] Failure to have done this combination analysis at the outset is one of many a serious flaws of the initial August 1, 2002 memos. For one, US courts tend to look at a course of conduct rather than each individual method of abuse when determining whether it amounts to torture.[313] But for another analyzing techniques individually and in isolation ignores the cumulative impact they will have on an individual victim, especially when combined with the conditions of confinement in CIA detention facilities, conditions not even discussed or considered, in the August 1, 2002 memos. These included complete isolation for long periods of time, total darkness, unsanitary conditions, extreme cold temperatures, and constant loud noise. Moreover, the CIA also does not appear to have obtained advice from the OLC that techniques the CIA referred to as "water dousing," "nudity," "dietary manipulation," and use of the "abdominal slap" would not violate the Torture Statute until August 26, 2004, and even then, the "advice" did not constitute official OLC approval.[314] Yet there is evidence that the CIA used these techniques, and in combination, before August 26, 2004.

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[310] Ibid.

[311] See Bradbury Combined Techniques Memo, p. 4. See also e.g. Letter from Daniel Levin to John Rizzo, September 6, 2004, http://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-rizzo2004-4.pdf (accessed August 26, 2015); and documents 70, 74, 79, 85, 88, 95 described in a Vaughn Index (a document that agencies prepare in FOIA litigation to justify each withholding of information under a FOIA exemption) sent in response to an American Civil Liberties Union FOIA request, https://www.aclu.org/files/assets/torturefoia_vaughn_olc.pdf (accessed August 26, 2015).

[312] See Bradbury Combined Techniques Memo. See also admission of this fact by John Yoo after the Senate Summary was released, Dan Lamothe, "Former Bush lawyer: U.S. did not consider cumulative effects of 'enhanced interrogation,'" *Washington Post*, December 12, 2014, http://www.washingtonpost.com/news/checkpoint/wp/2014/12/12/former-bush-lawyer-u-s-did-not-consider-cumulative-effects-of-enhanced-interrogation/ (accessed April 19, 2009) ("'We did not examine this question of how long you could use the methods for, or what's their cumulative effect,' Yoo said in an interview for C-SPAN's 'Newsmakers' program that included Checkpoint and will air on television Sunday morning. 'Quite frankly, we didn't examine them at that time because in the rush of events, we were just focusing on one person, Abu Zubaida [sec] and the use of these methods we hoped would be one or very few times.'"). See also note 53 above.

[313] See note 293 above.

[314] Letter from Daniel Levin to acting CIA General Counsel John Rizzo, August 26, 2004 (hereinafter "Levin August 26, 2004 Letter to Rizzo"), https://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc85.pdf, p. 2 (accessed April 23, 2015) (The letter responds to a request for "advice" on water dousing as well as three other techniques—dietary manipulation, nudity and abdominal slaps. Levin's letter indicates that the water dousing as described, among other

Even before the Senate Summary was released, the CIA OIG Report documented a number of interrogation techniques allegedly used by the CIA that were not authorized. Though much of the relevant section of the report remains classified, included in the declassified portion were allegations, and in some cases confirmations, of the following: use of pressure points to bring about near unconsciousness; mock executions; other threats; use of a stiff brush; creating abrasions; stepping on a detainee's ankles while shackled; use of cold temperatures; rough or hard "takedown"[315]; and unauthorized so called "water dousing" or waterboarding.[316] In one draft of the CIA OIG Report cited in the Senate Summary, the OIG concluded that in a number of cases, CIA interrogations went "well beyond what was articulated in the written DOJ legal opinion of August 1, 2002."[317]

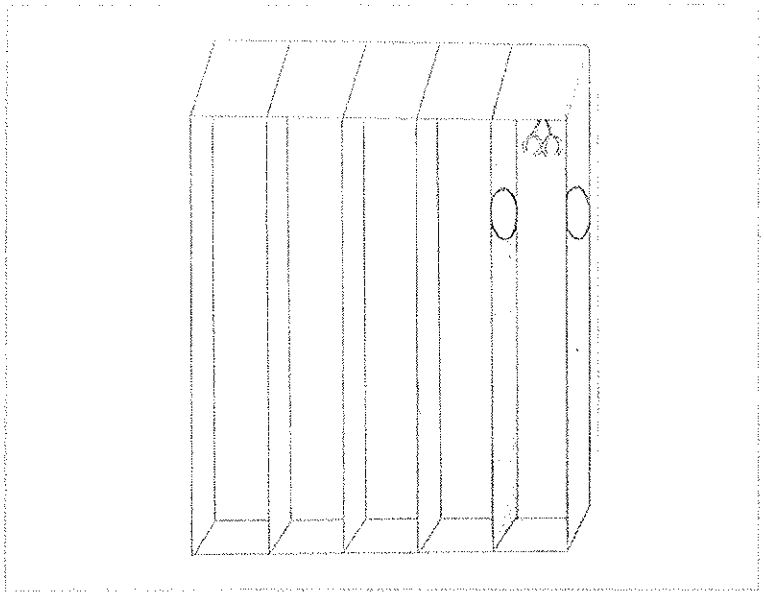
techniques discussed, would not in their opinion violate the Torture Statute but he also says the advice does not constitute OLC's policy approval of the techniques described).

[315] A "rough takedown" was described in the Senate Summary as being when "approximately five CIA officers would scream at a detainee, drag him outside of his cell, cut his clothes off, and secure him with Mylar tape. The detainee would then be hooded and dragged up and down a long corridor while being slapped and punched." See Senate Summary, Findings and Conclusions, p. 4, p. 56, n. 278, and p. 190, n. 1122.

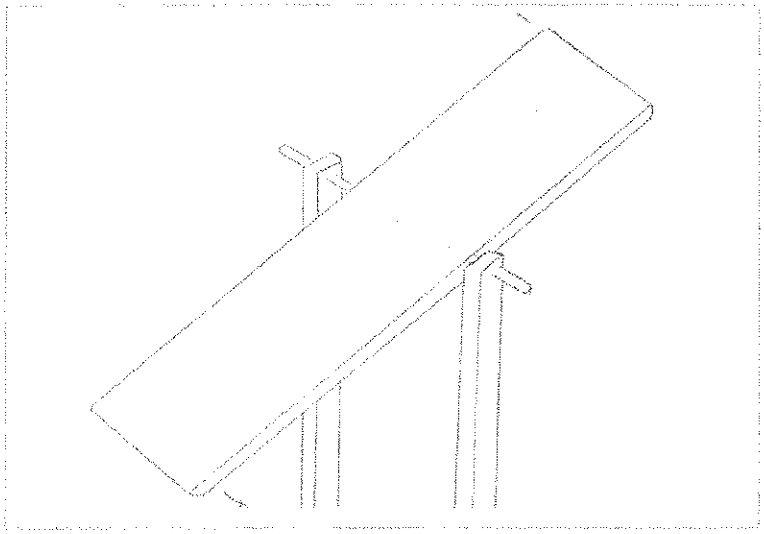
[316] CIA OIG report, pp. 41-79.

[317] Senate Summary, p. 190.

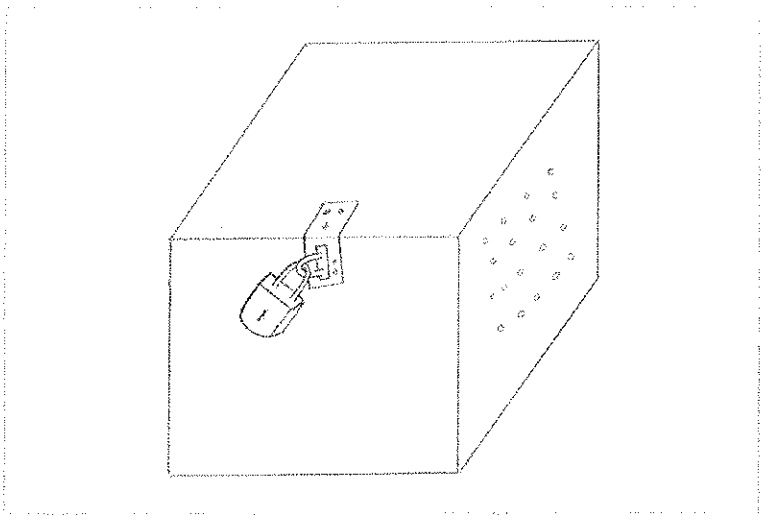
struments that the CIA Used at "Black Sites" as Described and Drawn by One Former CIA Detainee



A sketch by Ben Soud, who formerly went by Mohammed Shoroeiya as well as Abd al-Karim, depicts a narrow windowless box where he said he was held naked for one and a half days while speakers on each side of his ears blared loud music.



A sketch by Ben Soud formerly Mohammed Shoroeiya as well as Abd al-Karim, depicts a wooden board to which he was strapped and on which his interrogators put him when he underwent abuse with water.



A sketch by Ben Soud, formerly Mohammed Shoroeiya as well as Abd al-Karim, said his captors would sometimes threaten to lock him in a small wooden box, like the one drawn by him to the right, and once did lock him such a box.

Waterboarding and Water Dousing

The CIA OIG Report said "water dousing"[318] had been used since early 2003.[319] But the technique does not appear to have been officially approved until much later.[320] According to the Senate Summary, water dousing was not even designated by the CIA as a "standard" interrogation technique[321] until June 2003 and was later re-categorized by the CIA in 2004 as an "enhanced interrogation technique."[322] It appears that it was not until August 26, 2004 that the CIA for the first time got official "advice" from OLC that the technique, if used in the way described, would not violate the Torture Statute.[323]

Even then, OLC made clear that the"advice" did "not constitute the Department of Justice's policy approval for the use of the technique."[324] The OLC apparently did not provide official approval for the use of water dousing as an "enhanced interrogation technique" until May 2005.[325]

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[318] This technique was defined and applied differently throughout the program. In the CIA's initial request to OLC for authorization on March 2, 2004 it was explained as a technique whereby interrogators pour, from either a garden hose or container, potable water over a detainee, while he is either restrained by shackles and/or by an interrogator in a standing or supine position on a floor, bench, or similar level surface, naked or clothed. The water is intended to be applied so that it does not enter the nose or mouth. A "water dousing" session could last from 10 minutes to an hour. Fax from Scott Muller, CIA General Counsel, to Jack Goldsmith, March 2, 2004" (hereinafter "Muller Fax"), https://www.aclu.org/sites/default/files/torturefoia/released/082409/olcremand/2004olc22.pdf (accessed April 23, 2015) (The fax asks Goldsmith to reaffirm OLC approval for the August 1, 2002 memos as well as approve several new techniques, one of which was water dousing). See also, *Delivered Into Enemy Hands*, pp. 48-51 where detainees Khalid Sharif, formerly Abu Hazim, and Mohammed Shoroeiya, who now goes by the name of Mohammed Ahmed Ben Soud and used to go by the name Abd al-Karim describe their "water dousing" and waterboarding experiences. They are referred to as Abu Hazim and Abd al-Karim in the Senate Summary respectively. See also Spencer Ackerman, "Torture by another name: CIA used 'water dousing' on at least 12 detainees," *The Guardian*, October 16, 2015, http://www.theguardian.com/law/2015/oct/16/cia-torture-water-dousing-waterboard-like-technique (accessed October 25, 2015); Lindsay Wise and Jonathan S. Landay, "Despite denials, Senate torture report says waterboarding more widespread than CIA claims," *McClatchy DC*, December 11, 2014, http://www.mcclatchydc.com/news/nation-world/national/national-security/article24777370.html (accessed October 25, 2015).

[319] CIA OIG, p. 76.

[320] Muller Fax (The fax asks Goldsmith to reaffirm OLC approval for the August 1, 2002 memos as well as approve several new techniques, one of which was water dousing).

[321] For an explanation of the difference between "standard" and "enhanced" interrogation techniques, see discussion in notes to section "Reauthorization of the torture program" above. According to the January 28, 2003 Guidance, CIA interrogators were to obtain advance approval to use "standard" interrogation techniques, "whenever feasible," but were required to obtain advance approval for "enhanced" interrogation techniques—though in all instances use of both standard and enhanced techniques were supposed to be documented. (See CIA OIG Report, Appendix E). In the January 28, 2003 Guidance, a number of examples of standard and enhanced techniques are provided but "water dousing" is not listed in either category. (CIA, OIG report, Appendix E).

[322] Senate Summary, p. 63, n. 315.

[323] Levin August 26 2004 Letter to Rizzo.

[324] Ibid., p. 2.

[325] "Bradbury Individual Techniques Memo," May 5, 2015, p. 9 approving water dousing as one of 13 "enhanced interrogation techniques" which could be used, http://media.luxmedia.com/aclu/olc_05102005_bradbury46pg.pdf (accessed April 23, 2015).

Nevertheless, the CIA used it in various ways beginning in early 2003.[326] The Senate Summary documents use of "water dousing" on several detainees in ways that approximated "waterboarding" in April 2003.[327] At detention cite Cobalt, known to be in Afghanistan,[328] where the CIA held most of its detainees,[329] CIA operatives would hold the detainee down while he was naked on a tarp on the floor with the tarp pulled around him to form a makeshift tub while cold or refrigerated water was poured on him.[330] Other detainees were hosed down repeatedly while they were shackled naked, in the standing sleep deprivation position.[331] As approved in 2005, interrogators were not supposed to allow any water to get into a detainee's nose or mouth.[332] However, this was not the way the water dousing was applied on many occasions.[333] In other cases detainees were completely submerged in tubs of water that was not just cold but filled with ice or "icy."[334]

The CIA also "water doused" an unknown number of detainees while on a waterboard.[335] Although this part of the CIA's program is still classified, the Senate Summary says that the CIA used the technique "extensively" on a number of detainees without seeking or obtaining prior authorization.[336] The practice prompted concern from at least one CIA interrogator who said: "I have serious reservations about watering [the detainees] in a prone position ... I think it goes beyond dousing and the effect, to the recipient, could be indistinguishable from the water board ... if it is continued [it] may lead to problems for us."[337]

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[326] CIA OIG report, p. 76.

[327] Senate Summary, pp. 105-109. See also *Delivered Into Enemy Hands*, documenting water dousing accounts on two detainees Khalid Sharif, formerly known as Abu Hazim, and Mohammed Shoroeiya, formerly known as Abd Karim and who now goes by the name of Mohammed Ben Soud, during the same period, pp. 47-51. See also CIA OIG report, p. 76.

[328] Adam Goldman and Julie Tate, "Decoding the secret black sites on the Senate's report on the CIA interrogation program," *Washington Post*, December 9, 2014, https://www.washingtonpost.com/news/worldviews/wp/2014/12/09/decoding-the-secret-black-sites-on-the-senates-report-on-the-cia-interrogation-program/ (accessed August 26, 2015).

[329] Senate Summary, Findings and Conclusions, p. 10.

[330] Senate Summary, p. 105.

[331] Senate Summary, p. 105.

[332] See Bradbury Individual Techniques Memo, pp. 9-10 for rules about how water dousing was supposed to be done.

[333] See Delivered into Enemy Hands, pp. 50-51; See also Senate Summary, pp. 105-108.

[334] *Delivered Into Enemy Hands*, pp. 50-51; See also Senate Summary, pp. 104, n.610; 105, n. 616.

[335] Senate Summary, p. 106.

[336] Senate Summary, p. 106. See also note 618 on this page of the Senate Summary which says "for additional details see Volume III" which is still classified.

[337] Senate Summary, p. 106.

In 2008, then-CIA director Michael Hayden told the US Senate that the CIA had only used waterboarding on three detainees.[338] But a report by Human Rights Watch, corroborated by the Senate Summary, provides strong evidence that the CIA waterboarded at least one other CIA detainee.[339] Later media reports provide evidence the CIA used water on other detainees in other ways that induced the sensation of suffocation or drowning.[340] As noted above, the Senate Summary documents the CIA's use of water to inflict torture on detainees in ways that would often make it indistinguishable from waterboarding and on many more than three detainees.[341] Additionally, the Senate Summary makes clear that even in the cases of the three detainees for which the CIA purports to have had authorization to waterboard, the way in which the CIA used the technique went far beyond what was authorized.[342] During SERE training (see below) from which waterboarding was derived, most trainees experienced the technique only once or twice, knew that it would last a short period of time, and knew that

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[338] Testimony of Michael Hayden in front of the Senate Select Committee on Intelligence, February 5, 2008, http://www.intelligence.senate.gov/pdfs/110824.pdf, p. 71-72 (accessed July 2, 2012) ("Let me make it very clear and to state so officially in front of this Committee that waterboarding has been used on only three detainees."). The CIA waterboarded Khalid Sheikh Mohammed 183 times, Abu Zubaydah at least 83 times, and Abd al-Rahim al-Nashiri twice. CIA Office of the Inspector General, "Special Review: Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)," May 7, 2004, declassified in August 2009, http://graphics8.nytimes.com/packages/pdf/politics/20090825-DETAIN/2004CIAIG.pdf (accessed July 2, 2012), ("CIA OIG Report"), p. 90-91.

[339] See Senate Summary, p. 107, n. 623, citing to the account of Mohammed Shoroeiya— who also went by the name of Abd al-Karim and now goes by the name of Mohammed Ben Soud who is identified in the Senate Summary as being one of the detainees in the CIA program—in the Human Rights Watch report *Delivered Into Enemy Hands.* The Senate Summary's reference says that the full SSCI committee study, still classified, contains a photograph of a waterboard at detention site Cobalt even though there are no records of the CIA using the waterboard at that location. The waterboard device in the photograph is surrounded by buckets, with a bottle of unknown pink solution (filled two-thirds of the way to the top) and a watering can resting on the wooden beams of the board. See Senate Summary, p. 104, n. 245. In meetings between SSCI staff and the CIA in the summer of 2013, the CIA was unable to explain the presence of the board at that location as well as the buckets, the solution and watering cans. See Senate Summary, p. 51, n. 45. Ben Soud is one of three plaintffs who have brought suit against Mitchell and Jessen. See *Abdullah Salim v. Mitchell,* Civil Action No. 2:15-CV-286-JLQ, October 13, 2015, https://www.aclu.org/sites/default/files/field_document/salim_v._mitchell_-_complaint_10-13-15.pdf (accessed October 14, 2015. See also video of Human Rights Watch initial interview with Ben Soud where he describes how the CIA used the waterboard on him: Human Rights Watch video interview with Ben Soud http://hrwnews.org/distribute/2012MENA_Libya_Rendition/ (at minute 1:25). See also *Delivered Into Enemy Hands*, pp. 48-49.

[340] Spencer Ackerman, "Torture by another name: CIA used 'water dousing' on at least 12 detainees," *The Guardian*; Lindsay Wise and Jonathan S. Landay, "Despite denials, Senate torture report says waterboarding more widespread than CIA claims," *McClatchy DC.*

[341] See *Delivered into Enemy Hands*, p. 48-51. See also Senate Summary, pp. 105-108.

[342] See e.g., Senate Summary p. 43-44 (waterboarding sessions on Abu Zubaydah "resulted in immediate fluid intake and involuntary leg, chest and arm spasms" and "hysterical pleas." In at least one waterboarding session, Abu Zubaydah "became completely unresponsive, with bubbles rising through his open, full mouth." Abu Zubaydah remained unresponsive until medical intervention, when he regained consciousness and expelled "copious amounts of liquid." See also pp. 87-88 "[Khalid Sheikh Mohammed] had been subjected to more than 65 applications of the waterboarding sessions between the afternoon of March 12, 2003 and the morning of March 13, 2003. CIA records note that KSM vomited during and after the [waterboarding] procedure."

they would not be significantly harmed by the training.[343] During CIA interrogations, detainees however were subjected to repeated applications over prolonged periods of time.[344]

"Rectal Rehydration" and Other Sexual Abuse

The CIA also used "rectal rehydration" or "rectal feeding" which, as described in the Senate Summary, would amount to sexual assault, on at least five different detainees. The practice, not known to have been authorized by the OLC, involved inserting pureed food or liquid nutrients into the detainee's rectum through a tube, presumably without his consent.[345] The CIA claims this was a medically necessary procedure and not an "enhanced interrogation technique."[346] The Senate Summary, however, states the procedure was done "without evidence of medical necessity."[347] Medical experts report that use of this type of procedure without evidence of medical necessity is "a form of sexual assault masquerading as medical treatment."[348] At least three other detainees were threatened with "rectal rehydrations." Allegations of excessive force used on two detainees during rectal exams to do not appear to have been properly investigated.[349] One of those two detainees, Mustafa al-Hawsawi, was later diagnosed with chronic hemorrhoids, an anal fissure, and symptomatic

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[343] OPR Report, p. 136, n. 109.

[344] For example, during a 17 day period when the CIA used a number of "enhanced interrogation techniques" on Abu Zubaydah in combination, including walling, attention grasps, slapping, facial hold, stress positions, cramped confinement, white noise and sleep deprivation" it also waterboarded him "2-4 times a day...with multiple iterations of the watering cycle during each application." Senate Summary, p. 42. During this period Abu Zubaydah frequently "cried," "begged," "pleaded," and "whimpered," to his interrogators. Ibid. He also vomited during some waterboarding sessions. Ibid. CIA detainee Khalid Sheikh Mohammed was waterboarded at least 183 times. Senate Summary, p. 85. A medical officer later wrote of Khalid Sheikh Mohammed's water boarding sessions that he was "ingesting and aspiration [sic] a LOT of water," and that "[i]n the new technique we are basically doing a series of near drownings.'" Senate Summary, p. 86.

[345] Senate Summary, p. 100, n. 584.

[346] CIA Response, p. 55. ("The record clearly shows that CIA medical personnel on scene during enhanced technique interrogations carefully monitored detainees' hydration and food intake to ensure HVD's [High Value Detainees] were physically fit and also to ensure they did not harm themselves...Medical personnel who administered rectal rehydration did not do so as an interrogation technique or as a means to degrade a detainee but, instead, utilized the well acknowledged medical technique to address pressing health issues.")

[347] Senate Summary, p. 100.

[348] "CIA Torture Report Highlights Unnecessary Medical Procedure," Physicians for Human Rights Press Release, December 10, 2014, http://physiciansforhumanrights.org/press/press-releases/cia-torture-report-highlights-unnecessary-medical-procedure.html (accessed August 24, 2015).

[349] Senate Summary, p. 100, n. 584.

rectal prolapse.[350] Some CIA detainees have also reported having suppositories forced into their anus,[351] and other detainees have reported CIA operatives sticking fingers in their anus.[352]

Other Unauthorized Techniques

There is considerable evidence that many detainees in CIA custody were shackled with their hands above their heads for prolonged periods of time, sometimes days. This was often done while detainees were naked, at times diapered, and was often combined with sleep deprivation.[353] The OLC does not appear to have approved shackling detainees with their hands above their heads at all until the May 10, 2005 Bradbury memos. Even then, it approved the technique only in conjunction with sleep deprivation for up to two hours.[354] The CIA does not appear to have received approval from the OLC to use nudity, the abdominal slap, and dietary manipulation on detainees until at least August 26, 2004, yet it used these techniques on numerous detainees prior to these approvals.[355] The CIA contends that diapers were authorized for use on detainees only "for sanitation and hygiene purposes," but CIA records indicate in some cases the central purpose was to "cause humiliation" and "induce a sense of helplessness."[356] Similarly, the CIA represented to the OLC that nude detainees were not "wantonly exposed to other detainees or detention facility staff" but many were nevertheless kept in a central area and "walked around" by guards as a form of humiliation.[357]

Even though techniques considered "standard," such as days of sleep deprivation and "water dousing," amounted to torture or ill-treatment, the Senate Summary concludes that at least 17 detainees were subjected to "enhanced interrogation techniques" without authorization.[358]

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[350] Senate Summary, p. 100, n. 584.

[351] *El-Masri v. Former Yugoslav Republic of Macedonia*, (Application no. 39630/09), Judgment of 13 December 2012, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621 (accessed April 20, 2015), para. 21, 40, 46, 124. See *Delivered into Enemy Hands*, p. 36, n. 123.

[352] Craig S. Smith and Souad Mekhennet, "Algerian Tells of Dark Term in U.S. Hands," *New York Times*, July 7, 2006, http://www.nytimes.com/2006/07/07/world/africa/07algeria.html (accessed April 20, 2015).

[353] Senate Summary, p. 49; See also p. 53 ("Ridha al-Najjar underwent "hanging" described as "handcuffing one or both of his wrists to an overhead horizontal bar" for 22 hours each day for two consecutive days); p. 103, n. 597, p. 497, n. 2717; Several other detainees reported being shackled with their hands above their heads for significant periods while naked and diapered at a CIA detention facility in Afghanistan that can be identified in the Senate Summary as Cobalt. In one case this lasted a day and a half, on another occasion for three days, and one former detainee said he felt like it lasted for 15 days. See *Delivered into Enemy Hands*, pp. 44, 45 and 63.

[354] Bradbury Combined Techniques Memo, p. 11. The CIA appears to have separately approved this for up to four hours. See Senate Summary, p. 415; see also p. 498, n. 2723.

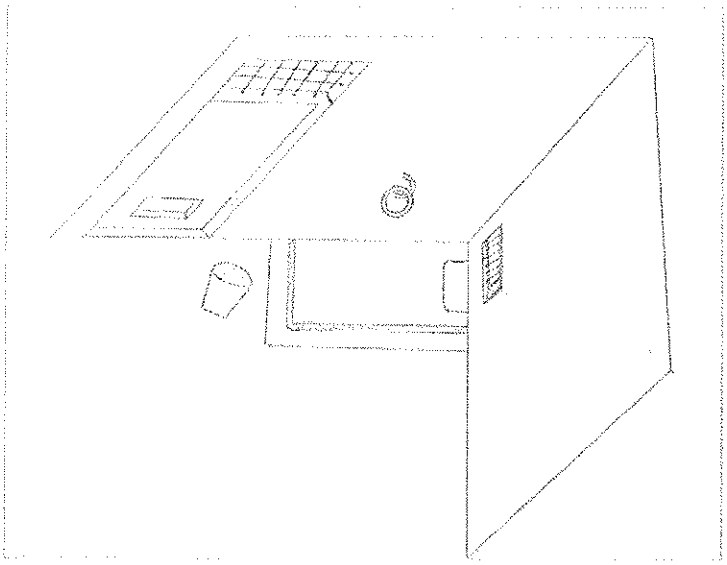
[355] Senate Summary, p. 105.

[356] Senate Summary, p. 415.

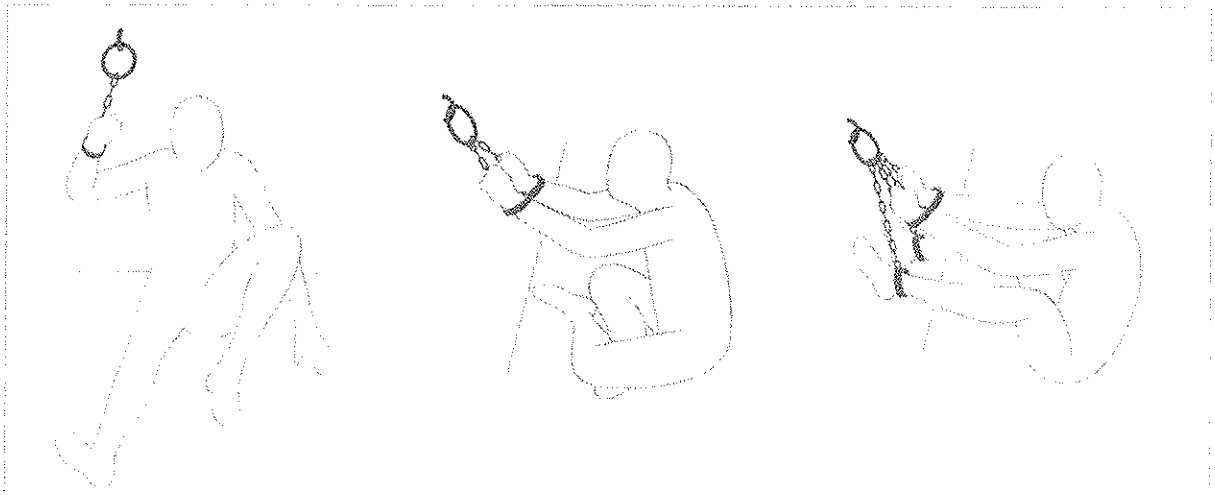
[357] Senate Summary, p. 415.

[358] Senate Summary, pp. 101-103.

Conditions of Confinement at a CIA "Black Site" as Described by Former Detainees



A sketch by Ben Soud, who formerly went by Mohammed Shoroeiya as well as Abd al-Karim, depicts his cell. © 2012 Ben Soud



Position 1 Position 2 Position 3

Four former CIA detainees, Ben Soud (formerly Mohamed Shoroeiya and Abd al-Karim), Khalid al-Sharif, Majid al-Maghrebi, and Saleh Di'iki, all said that for most of the duration of their detention at the first site in Afghanistan where they were held, they were put in one of the three positions depicted on the previous page (referred to as Positions 1, 2, and 3). They were held in these positions for varying amounts of time ranging from multiple days to months. For detailed accounts of their detention and conditions of confinement see the Human Rights watch Report *"Delivered Into Enemy Hands: US-Led Abuse and Rendition of Opponents to Gaddafi's Libya."* These illustrations were drawn based on the testimony and re-enactments of the positions by the victims. One of victims, Khalid al-Sharif, was shown the three images and said they were very accurate depictions.

Though use of unapproved techniques on even one detainee is a serious allegation, there are a number of reasons why this number might be low. First, it does not include cases in which CIA interrogators had authorization but applied the techniques in an unauthorized manner.[359] Second, the Senate Summary is based on CIA records,[360] yet the CIA kept poor records on the use of enhanced interrogation techniques at detention facility Cobalt[361] where more than half of the CIA's known 119 detainees were held.[362] Finally, the Senate Summary states that its number of 119 total detainees is a conservative estimate.[363]

Libyan Survivors' Accounts of Abuse in CIA Custody

Former detainees released from CIA custody have provided accounts of CIA detention and torture not documented in the Senate Summary. [364] One is former CIA detainee Adnan al-Libi, who is mentioned in the Senate Summary only twice. The first time, he is listed as one of several detainees threatened with rectal rehydration.[365] The second time he is referred to in three lines of text stating that he was subjected to sleep deprivation beyond what was authorized for "46.5 hours, 24 hours, and 48 hours, with a combined three hours of sleep between sessions."[366] These references do not convey the full scale of the abuse al-Libi experienced, the horrendous conditions to which he was subjected, or the pain and suffering he endured.

When Human Rights Watch interviewed al-Libi, long before the Senate Summary was released,

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[359] Senate Summary, p. 104.

[360] This includes operational cables, intelligence reports, internal memoranda and emails, briefing materials, interview transcripts, contracts, and other records. Senate Summary, Forward, p. 5 of 6.

[361] See Senate Summary, p. 51; see also Senate Summary, p. 107, n. 623 ("the full nature of CIA interrogations at detention site [] remains largely unknown. Detainees at detention site [] were subjected to techniques that were not recorded in cable traffic, including multiple periods of sleep deprivation, required standing, loud music, sensory deprivation, extended isolation, reduced quantity of foot, nudity and 'rough treatment.'" The name of the detention site in footnote 623 is blacked out but it is clear from other parts of the Senate Summary that this is detention site Cobalt. See Senate Summary, p. 51; see also p. 104, n. 610; p. 106, n. 620; it says so specifically on page 51 and in notes 245 and 620 it says that the photograph of the waterboard was taken at detention site Cobalt.

[362] Senate Summary, Findings and Conclusions, p. 10.

[363] Senate Summary, p. 14, n. 26.

[364] See for example, the harrowing account of Suleiman Abdullah Salim in a complaint filed by the American Civil Liberties Union in *Abdullah Salim v. Mitchell*, Civil Action No. 2:15-CV-286-JLQ, October 13, 2015, https://www.aclu.org/sites/default/files/field_document/salim_v._mitchell_-_complaint_10-13-15.pdf (accessed October 14, 2015). Abdullah Salim underwent extreme forms of torture at two CIA black sites and was held by the CIA for 16 months. (He was held by the US military for another four years before he was released on the basis of not posing a threat to the US). Yet he is barely mentioned in the Senate Summary other than in a few lines of text. One of these is a footnote where it states that he was one of "numerous detainees were stripped and shackled, nude, in the standing stress position for sleep deprivation or subjected to other enhanced interrogation techniques prior to being questioned by an interrogator." See Senate Summary, p. 484, n. 2639.

[365] Senate Summary, p. 100, n. 584.

[366] Senate Summary, p. 134.

he said he thought one of his sleep deprivation episodes lasted for more like 15 days, though he said he was in a windowless cell with little ability to track time with great accuracy.[367] He also said the sleep deprivation was accomplished by forcing him to stand all those days with his hands chained above his head, feet shackled to the ground so that if his legs buckled, he would have to hang from his arms in order to try and sleep—something impossible to do. He endured this while diapered and otherwise naked. Once released from the standing sleep deprivation position and allowed to shower, al-Libi said he could not move his arms and so guards had to bathe him. "I was there for 15 days, hanging from my arms, another chain from the ground. They put a diaper on me but it overflowed so there was every type of stool everywhere."[368] He said he had hallucinations and felt like he was going insane and was going to die.[369] Nor does the Senate Summary explain that, in addition to this one particular incident of sleep deprivation, the CIA held him for a total of eight months in total isolation, in pitch black windowless cells, subjected to freezing cold temperatures as well as well as nudity, painful stress positions, days of continuous sleep deprivation, dietary manipulation, and the blare of loud Western music 24 hours a day, all at the same time.[370]

Other former detainees, entirely unconnected to al-Libi, reported having heard his screams while they too were held at the facility. [371] One, Mohamed Bashmilah, identified as Mohammad al-Shomaila in the Senate Summary, is mentioned only once, in a footnote that lists the names of at least 26 detainees that the CIA for the first time admitted publicly to have wrongfully detained.[372] The summary does not mention that Bashmilah was first abducted in Jordan with the help of the US, tortured there, rendered to Afghanistan where the CIA held him in the same facility as al-Libi, in cold, dark windowless cells, with only a bucket for a toilet, chained to the floor and wall and in unsanitary conditions. He remained in the same diaper in which he was transported to the facility for 15 days before he was provided with clothes, among other examples of mistreatment.[373] He tried to kill himself three times, once by cutting himself and using his own blood to write "this is unjust" on the wall.[374] The CIA held him for 19 months before transferring him to Yemen where he was detained for nine more months before being convicted of forgery and then released.[375]

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[367] *Delivered Into Enemy Hands*, pp. 62-64.

[368] *Delivered Into Enemy Hands*, p. 63.

[369] Ibid.

[370] *Delivered Into Enemy Hands*, pp. 60-66.

[371] *Delivered Into Enemy Hands*, p. 63, fn. 221; See also Bashmilah Declaration, page 21, http://chrgj.org/wp-content/uploads/2012/07/declarationofbashmilah.pdf (accessed February 12, 2015).

[372] SSCI, p. 16, n. 32.

[373] Bashmilah Declaration, p. 15.

[374] Scott Shane, "Amid Details on Torture, Data on 26 Who Were Held in Error," *New York Times*, December 12, 2014, http://www.nytimes.com/2014/12/13/us/politics/amid-details-on-torture-data-on-26-held-in-error-.html?_r=1 (accessed February 12, 2015).

[375] Ibid.

Although the Senate Summary contains numerous descriptions of torture of detainees in CIA custody, there are evidently countless other abuses that are not documented in it. Just as the Justice Department's Durham investigation was seriously flawed by the failure to include accounts from torture survivors, the Senate Summary would have greatly benefitted from access to the survivors themselves. Any future investigation, if it is to have any credibility, needs to include in-depth interviews with those who were detained and subjected to abuse in the CIA program.

Individuals Involved in "Unauthorized" Techniques

Mitchell and Jessen are among those who could be prosecuted for use of unauthorized techniques. They were the only two interrogators permitted to take part directly in the initial application of "enhanced interrogation techniques" on Abu Zubaydah and they also were directly involved in the application of "enhanced interrogation techniques," including waterboarding, on Khalid Sheikh Mohammed and Abd al-Nashiri.[376] The Senate Summary makes clear that they applied techniques in ways that were unauthorized on many occasions.[377] Jessen also assisted CIA "Officer 1" in the interrogation of Gul Rahman (see below) who died in custody.[378]

The Senate Summary does not identify who carried out abuses that went beyond what were authorized but it does identify some by pseudonym.

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[376] Senate Summary, p. 40 ("According to CIA records, only the two CIA contractors, Swigert and Dumbar, were to have contact with Zubaydah."); see also pp. 45-46 ("A cable from Detention site Green, which CIA records indicate was authored by Swigert and Dunbar, also viewed the interrogation of Zubaydah as a success...." The cable further recommended that psychologists—a likely reference to contractors Swigert and Dunbar—"familiar with interrogation, exploitation and resistance to interrogation should shape compliance of high value captives prior to debriefing by substantive experts."); see also Senate Summary p. 65 ("As described later in this summary, [Swigert and Dunbar] had earlier subjected [Khalid Sheikh Mohammed] to the waterboard and other CIA enhanced interrogation techniques."); see also p. 84 ("Between March [REDACTED], 2003, and March 9, 2003, contractors Swigert and Dunbar, and a CIA interrogator, [REDACTED], used the CIA's enhanced interrogation techniques against [Khalid Sheikh Mohammed], including nudity, standing sleep deprivation, the attention grab and insult slap, the facial grab, the abdominal slap, the kneeling stress position, and walling."); see also p. 108, fn. 631 ("The cable also noted that CIA contractor Hammond Dumbar had arrived at the detention site and was participating in Hambali's interrogations as an interrogator.")

[377] For example, from August 4, 2002 through August 23, 2002, the CIA subjected Abu Zubaydah to "enhanced interrogation techniques" on a near 24-hour-per-day basis. [Swigert and Dunbar] placed a rolled towel around Zubaydah's neck and slammed him into a concrete wall. Senate Summary, pp. 40-41. Also, prior to his death, Jessen and CIA Officer 1 subjected Gul Rahman to "48 hours of sleep deprivation, auditory overload, total darkness, isolation, a cold shower, and rough treatment" that was not approved in advance. p. 54. Jessen was also involved in what the CIA called a "rough takedown" of Gul Rahman which involved dragging him outside, cutting off all his clothes, slapping and, punching him. Jessen stated that although it was "obvious they were not trying to hit him as hard as they could, "a couple of times the punches were forceful." Senate Summary, p. 56, no. 278. See also for example, Senate Summary pp. 83-84, 84-85; 88; 90 and 165.

[378] Senate Summary, p. 54.

Since the Senate Summary was released, Mitchell has said that the summary unfairly maligns him and Jessen.[379] For example, he said that the Senate Summary mentions a number of instances when CIA interrogators reported abuse and the use of unauthorized techniques but it does not mention that he and Jessen were the ones who reported it. Mitchell also said he was one of the interrogators who reported abuses to the CIA inspector general, initiating what resulted in a May 2004 OIG report.[380]

The Senate Summary identifies CIA "Officer 1" as being in charge of the Cobalt facility during a time when numerous detainees were subjected to "unapproved coercive interrogation techniques" and a detainee, Gul Rahman, died in CIA custody.[381] Officer 1 has been identified as Matthew Zirbel.[382] Zirbel was involved directly in the interrogation of Gul Rahman and ordered the detention conditions that led to his death.[383] Zirbel was not sanctioned for his role in Rahman's death.[384] Four months after the death, Zirbel received a bonus for his "consistently superior work."[385] The Senate Summary also identifies Officer 1, Zirbel, as the officer involved in a water dousing session that was not authorized. It resulted in the detainee "turn[ing] blue" and a physician's assistant stepping in to remove the cloth over the detainee's mouth so he could breathe.[386]

The Senate Summary also explains that a "senior debriefer" informed the CIA Inspector General that she "heard" that at detention site Cobalt someone identified as Officer 2 "hung detainees up for long periods with their toes barely touching the ground."[387] Officer 2 is also identified in the summary as having been involved in the interrogation of Abd al-Nashiri, when a number of unauthorized techniques were used.[388]

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379 Jason Leopold, "Psychologist James Mitchell Admits He Waterboarded al Qaeda Suspects," *Vice News*, December 15, 2015, https://news.vice.com/article/psychologist-james-mitchell-admits-he-waterboarded-al-qaeda-suspects (accessed April 29, 2015) where Mitchell admits his involvement in waterboarding sessions used on all three detainees.

380 Ibid.

381 Senate Summary, p. 50.

382 Ken Silverstein, "The Charmed Life of a CIA Torturer: How Fate Diverged for Matthew Zirbel, aka CIA Officer 1, and Gul Rahman," *The Intercept*, December 15, 2014, https://firstlook.org/theintercept/2014/12/15/charmed-life-cia-torturer/ (accessed April 29, 2015). Emptywheel, "Immunizing Crimes: Blankfein, Zirbel, and Arpaio, but Whither Corzine?" *Emptywheel*, September 2, 2012, https://www.emptywheel.net/2012/09/02/immunizing-crimes-blankstein-zirbel-and-arpaio-but-whither-corzine/ (accessed November 14, 2015), see "*Matt Zirbel."

383 Senate Summary, p. 54.

384 Senate Summary, p. 55.

385 Ibid.

386 Senate Summary, p. 106.

387 Senate Summary, p. 58, no. 278.

388 Senate Summary, p. 69.

For example, Officer 2 put Nashiri in a standing stress position with his hands affixed over his head for approximately two-and-a-half days; placed a pistol near Nashiri's head while blindfolded and revved a power drill near his body; slapped Nashiri multiple times on the back of the head during interrogation; implied his mother would be brought before him and sexually abused; gave Nashiri a forced bath using a stiff brush; and used improvised stress positions that caused cuts and bruises resulting in the intervention of a medical officer, who was concerned that Nashiri's shoulders would be dislocated from using the stress positions.[389]

The Senate Summary also documents that Officer 2 was not properly trained and had "anger management" issues.[390] Officer 2 is not further identified in the Senate Summary, but the *Washington Post* identified Albert El Gamil as a CIA linguist who interrogated Nashiri, subjected him to a mock execution, and put a drill to his head.[391] The CIA inspector general also reported on those events.

One senior CIA official identified as "the Deputy Chief of Alec Station" throughout the Senate Summary has been named in press reports as Alfreda Bikowsky.[392] She is reported to have participated in interrogation sessions that involved waterboarding, walling, and other techniques that amount to torture, and observed others engaged in such techniques.[393] She is also said to have advocated for the rendition of Khaled el-Masri, a German citizen the CIA wrongfully detained, and to have done so for many months after his

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[389] Senate Summary, pp. 69-70. One of the definitions of "severe mental pain or suffering" under the Torture Statute is the "threat of imminent death" or the "threat that another person will imminently be subjected to death" or "severe physical pain or suffering." See 18 U.S.C. 2340(2)(D).

[390] Senate Summary p. 68, n. 345.

[391] Adam Goldman, "The hidden history of the CIA's prison in Poland," *Washington Post*, January 23, 2004, https://www.washingtonpost.com/world/national-security/the-hidden-history-of-the-cias-prison-in-poland/2014/01/23/b77f6ea2-7c6f-11e3-95c6-0a7aa80874bc_story.html (accessed November 13, 2015).

[392] Jane Mayer, "The Unidentified Queen of Torture," *The New Yorker*, December 18, 2014, http://www.newyorker.com/news/news-desk/unidentified-queen-torture (accessed June 29, 2015); Glenn Greenwald and Peter Maass, "Meet Alfreda Bikowsky, the Senior Officer at the Center of the CIA's Torture Scandal," *The Intercept*, December 19, 2014, https://firstlook.org/theintercept/2014/12/19/senior-cia-officer-center-torture-scandals-alfreda-bikowsky/ (accessed June 29, 2015); Matthew Cole, "Bin Laden Expert Accused of Shaping CIA Deception on 'Torture' Program," *NBC News*, December 16, 2014, http://www.nbcnews.com/news/investigations/bin-laden-expert-accused-shaping-cia-deception-torture-program-n269551 (accessed June 29, 2015).

[393] Senate Summary p. 91, where she is reported to have taken part in intensive interrogation sessions that included waterboarding Khalid Sheikh Mohammed ("Mukie," Bikowsky reportedly said referring to Khalid Sheikh Mohmammed, "is going to be hatin' life on this one.") See also Senate Summary, p. 43, n. 197 where she is reported to have been present during intense waterboarding sessions of Abu Zubaydah; Matthew Cole, "Bin Laden Expert Accused of Shaping CIA Deception on 'Torture' Program," *NBC News*, December 16, 2014, http://www.nbcnews.com/news/investigations/bin-laden-expert-accused-shaping-cia-deception-torture-program-n269551 (accessed August 20, 2015).

mistaken identity was realized.[394] She was not disciplined for her role in his continued wrongful detention and was in fact promoted to run the "Global Jihad Unit."[395] The Senate Summary also accuses her of falsely reporting in CIA cables that the CIA program was much more effective than it actually was, claiming, inaccurately for example that key operatives were identified and plots thwarted as a result of enhanced interrogation techniques.[396] These cables would then serve as a "template" on which future justifications of the program were based.[397] Bikowsky reportedly now holds a senior position at the CIA equivalent to that of a general in the army.[398]

Other Criminal Charges

In addition to torture and conspiracy to torture, there are a number of other charges that US authorities could bring either on their own or along with conspiracy. These include assault, sexual abuse, murder, and war crimes. In addition, the crime of conspiracy can be brought as a stand-alone charge under the federal conspiracy statute,[399] allowing prosecutors to charge conspiracy even if the underlying offense is never completed.[400] In either case, whether charged on its own or along with another substantive offenses, the elements of conspiracy discussed above would need to be established in order to sustain the charge.

Assault

Federal law criminalizes various degrees of assault, from "simple assault," to assault with a deadly weapon, to assault that results in "serious bodily injury."[401] The assault must occur

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394 Senate Summary, pp. 128-129.

395 Matthew Cole, "Bin Laden Expert Accused of Shaping CIA Deception on 'Torture' Program," *NBC News*, December 16, 2014, http://www.nbcnews.com/news/investigations/bin-laden-expert-accused-shaping-cia-deception-torture-program-n269551 (accessed August 20, 2015).

396 Senate Summary, pp. 185-86, 191-92. The inaccurate representations included assertions that the information obtained from the use of "enhanced interrogations" saved "countless American lives inside the US and abroad" and that without the use of such techniques "we will not be able to prosecute this war." Senate Summary, p. 86.

397 Ibid.

398 Mayer, "The Unidentified Queen of Torture," *The New Yorker*; Cole, "Bin Laden Expert Accused of Shaping CIA Deception on 'Torture' Program," *NBC News*.

399 18 U.S.C. sec. 371 is the federal conspiracy statute. It states: "If two or more persons conspire either to commit any offense against the United States ... and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both."

400 *United States v. Rehak*, 589 F.3d 965, 971 (8th Cir. 2009); see also *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003)(the conspiratorial "agreement is a distinct evil, which may exist and be punished whether or not the substantive offense ensues.").

401 18 USC section 113. Simple assault (section 113(a)(5)) is defined as either a willful attempt to inflict injury upon the person of another, or by a threat to inflict injury upon the person, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm. See *United States v. Chestaro*, 197 F.3d 600, 604-05 (2d Cir. 1999)

within the special maritime and territorial jurisdiction of the US.[402] A CIA detention facility would appear to be within the "special maritime and territorial jurisdiction" of the US.[403] The crime of simple assault is "committed by either a willful attempt to inflict injury upon the person of another, or by a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm."[404] Several "standard" CIA practices would seem to amount to assault:

- Though not included among "enhanced interrogation techniques," what the CIA called "rough takedowns" were part of the CIA's program according to the Senate Summary. This involved several CIA personnel rushing simultaneously at a detainee while in his cell and while they were yelling and screaming. They then cut off all this clothes, secured him with tape, put a hood on him, slapped and punched him, and dragged him outside, up and down a corridor several times through the dirt. This caused abrasions on the detainee's hands, face and legs.[405]
- Another technique called "walling" involved shoving a detainee repeatedly into a wall that was supposed to be made out of flexible material while the defendant

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(rejecting contention that federal assault statute is void for vagueness) and *United States v. Dupree*, 544 F.2d 1050, 1051-52 (9th Cir. 1976) (same). The various other types of assault available under section 113 increase the penalty depending upon certain elements. Relevant subsections of the subsections of 113 include assault with intent to commit any felony (which includes torture under 18 USC 2340A) except murder (section 113(a)(2)), punishable by not more than 10 years and a fine; assault by striking, beating, or wounding (section 113(a)(4)) punishable by not more than one year and a fine; simple assault (section 113(a)(5)), punishable by not more than six months and a fine; and assault resulting in substantial bodily injury (section 113(a)(6)), punishable by no more than 10 years and a fine. "Substantial bodily injury" is defined as an injury that involves a temporary but substantial disfigurement or a temporary but substantial loss or impairment of the function of any bodily member, organ or mental faculty. 18 USC section 113(b)(1). "Serious bodily injury," is defined the way it is described in 18 USC 1365 to mean bodily injury which involves: a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

[402] 19 USC section 113(a).

[403] Section 18 USCS § 7 is the statute that defines special maritime and territorial jurisdiction of the United States (SMTJ). Section 7(3) states the following is SMTJ: "[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof ... for the erection of a fort, magazine, arsenal, dockyard, or other needful building." Section 7(7) also states the following is SMTJ: "[a]ny place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States." Section 7(9)(A) also states with respect to offenses committed by or against a national of the United States that the SMTJ includes: "the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership." Further, the US recently acknowledged for the purposes interpreting obligations under the Convention against Torture, that it understands any territory under its jurisdiction will extend to "all places that the State Party controls as a governmental authority." See Acting Legal Adviser McLeod: U.S. Affirms Torture is Prohibited at All Times in All Places," Opening Statement of Mary E. McLeod, Acting Legal Adviser U.S. Department of State during review by the Committee against Torture, November 12-13, 2014 – Geneva, https://geneva.usmission.gov/2014/11/12/acting-legal-adviser-mcleod-u-s-affirms-torture-is-prohibited-at-all-times-in-all-places/ (accessed February 14, 2015).

[404] *United States v. Chestaro*, 197 F.3d 600, 605 (2d Cir. N.Y. 1999) interpreting the meaning of "assault" criminalized in 18 USC sec. 113.

[405] Senate Summary, p. 190, n. 1122.

had a foam ring around his neck to prevent whiplash.[406] However, the Senate Summary states that during one of the walling sessions, James and Mitchell placed a rolled towel around Zubaydah's neck and slammed him into a concrete wall. [407]

In addition, many specific instances of conduct that would amount to assault have been reported. A non-exhaustive list includes:

- Nine of 14 detainees in CIA custody interviewed by the International Committee of the Red Cross (ICRC) alleged that they had been subjected to daily beatings during the initial period of their detention.[408] Their beatings involved "repeated slapping, punching and, less often, kicking, to the body and face, as well as a detainee having his head banged against a solid object."[409] These beatings lasted up to half an hour and were repeated throughout the day and again on subsequent days. They took place during periods ranging from one week up to two to three months.[410]
- Khaled Sheikh Mohammed, one of the detainees interviewed by ICRC, alleged that on a daily basis during the first month of interrogation in his third place of CIA detention: "if I was perceived not to be cooperating I would be placed against a wall and subjected to punches and slaps in the body, head and face."[411] Similarly, Walid bin Attash, told the ICRC that: "every day for the first two weeks [in CIA custody in Afghanistan] I was subjected to slaps to the face and punches to the body during interrogation."[412]
- The Grand Chamber of the European Court of Human Rights made a determination of fact in *El-Masri v. The Former Yugoslav Republic of Macedonia*, relying on a 2007 report conducted by the Council of Europe's Committee on Legal Affairs and Human Rights, that former detainee Khaled El-Masri was "beaten severely from all sides"

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[406] Bybee II Memo, p. 13. Bradbury Individual Techniques Memo, p. 32.

[407] Senate Summary, pp. 40-41.

[408] International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody*, (February 2007), http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf (accessed April 20, 2015), p. 13. The 14 detainees include Abu Zubaydah, Ramzi Mohammed Binalshib, Abdelrahim Hussein Abdul Nashiri, Mustafha Ahmad Al Hawsawi, Khaled Sheikh Mohammed, Majid Khan, Ali Abdul Aziz Mohammed, Walid Bin Attash, Mohammed Farik Bin Amin, Mohammed Nazir Bin Lep, Encep Nuraman, Haned Ahmad Guleed, Ahmed Khalafan Ghailani, and Mustafah Faraj Al Azibi. Ibid., p. 5.

[409] Ibid., p. 13.

[410] International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody*, p. 13 (February 2007), http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf (accessed April 20, 2015).

[411] International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody*, p. 13.

[412] Ibid.

by CIA agents, thrown to the floor after his clothes were forcibly removed, and that a suppository was forcibly inserted into his anus before being flown from Skopje Airport in Macedonia to Afghanistan.[413] After arriving in Afghanistan, the CIA drove El-Masri in a vehicle for 10 minutes, then "dragged [him] from the vehicle, slammed [him] into the walls of a room, [threw him] to the floor, kicked and beat[] him. [...] Later, he understood that he had been transferred to a CIA-run facility."[414]

- Mohamed Farag Ahmad Bashmilah described a similar beating while held in CIA custody. He said he was turned over to the CIA in the early morning hours of October 26, 2003. After a short car ride to a building at the airport in Jordan, his clothes were cut off by black-clad, masked guards wearing surgical gloves. He was beaten. Bashmilah said one guard stuck a finger in his anus.[415]
- Laid Saidi, who had been held by the CIA for 16 months, said CIA interrogators "beat me and threw cold water on me, spat at me, and sometimes gave me dirty water to drink."[416]

Sexual Abuse

At least three types of sexual abuse charges may apply to CIA actions under federal law. These include sexual abuse, aggravated sexual abuse, and abusive sexual contact. These provisions make it a crime to force anyone, while in a facility run by any federal department or agency or in the special maritime and territorial jurisdiction of the US, to engage in a sexual act or sexual contact.[417] A sexual act is defined to include, in relevant part, "the penetration, however slight, of the anal ... opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, [or] degrade."[418] Sexual contact is defined to include: "intentional touching, either directly or through the clothing, of the

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[413] *El-Masri v. Former Yugoslav Republic of Macedonia*, (Application no. 39630/09), Judgment of 13 December 2012, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621 (accessed April 20, 2015), para. 21, 40, 46, 124.

[414] *El-Masri v. Former Yugoslav Republic of Macedonia*, (Application no. 39630/09), Judgment of 13 December 2012, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621 (accessed April 20, 2015), para. 24.

[415] Mark Benjamin, "Inside the CIA's Notorious 'Black Sites,'" *Salon*, December 14, 2007, http://www.salon.com/2007/12/15/bashmilah/ (accessed April 20, 2015).

[416] Craig S. Smith and Souad Mekhennet, "Algerian Tells of Dark Term in U.S. Hands, *New York Times*, July 7, 2006, http://www.nytimes.com/2006/07/07/world/africa/07algeria.html (accessed April 20, 2015).

[417] 18 U.S.C. sec. 2241; sec. 2242; and sec. 2244. See discussion of meaning of special maritime and territorial jurisdiction of the US under 18 U.S.C. 113 in section of this report discussing the crime of assault above.

[418] 18 U.S.C. sec. 2246.

genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, [or] degrade."[419]

The CIA subjected at least five detainees to "rectal rehydration" and threatened several other detainees with the procedure.[420] "Rectal rehydration"—which in one case involved pureeing and rectally infusing a detainee's meal of humus, pasta sauce, nuts and raisins —was done for the purpose of behavior control, not out of medical necessity.[421] A chief interrogator characterized the procedure as illustrative of the interrogator's "total control over the detainee."[422] Another CIA official described the technique as helping to "clear a person's head" and being effective at getting a detainee to talk.[423] One email describing the technique said "we used the largest Ewal [sic] tube we had."[424] These statements suggest that the use of rectal rehydration was intended to abuse, harass, humiliate and degrade detainees, not for any legitimate medical purpose.

The Senate Summary indicates that CIA leadership, including General Counsel Scott Muller and CIA Deputy Director for Operations James Pavitt, was also alerted to allegations that rectal exams were conducted with "excessive force" on two detainees at detention site Cobalt in Afghanistan.[425] An unidentified CIA attorney was asked to follow-up but CIA cables do not indicate there was any resolution.[426] As noted above, one of the CIA detainees, Mustafa al-Hawsawi, was later diagnosed with chronic hemorrhoids, an anal fissure, and symptomatic rectal prolapse.[427] Hawsawi is one of five detainees accused of playing a role in the September 11 attacks and is on trial at the military commissions at Guantanamo Bay. Since he was arraigned on the charges in May 2012, he has sat on a pillow throughout the proceedings.[428] When asked about the

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[419] 18 U.S.C. sec. 2246.

[420] Senate Summary, pp. 4 and 100.

[421] Senate Summary, p. 100, n. 584; See also "Medical Practitioners Denounce 'Rectal Feeding' as 'Sexual Assault Masquerading as Medical Treatment,'" *Physicians for Human Rights*, https://s3.amazonaws.com/PHR_other/fact-sheet-rectal-hydration-and-rectal-feeding.pdf (accessed February 5, 2015).

[422] Senate Summary, p. 82.

[423] Senate Summary, p. 83.

[424] Senate Summary, p. 100, n. 584.

[425] Senate Summary, p. 100, n. 584.

[426] Ibid.

[427] Ibid.

[428] Carol Rosenberg, "Senate report confirms CIA had 'black site' at Guantánamo, hid it from Congress," *Miami Herald*, December 10, 2014, http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article4434603.html (accessed August 24, 2015).

details of what happened to his client, Walter Ruiz, Hawsawi's lawyer in the military commission proceedings, said that due to rules about classified information he was unable to discuss any facts that were not contained in the Senate Summary about his client's time in CIA custody.[429] Some CIA detainees have also reported having suppositories forced into their anus.[430] And other detainees have reported CIA operatives sticking fingers in their anus.[431]

Murder and Manslaughter

At least one detainee, Gul Rahman, died from hypothermia after being shackled overnight, half-naked, to a concrete floor at a CIA detention center in Afghanistan.[432] Rahman was taken into custody in Pakistan on October 29, 2002 and died at the CIA detention site Cobalt, on November 20, 2002.[433] CIA records state that while he was in CIA custody he was subjected to "48 hours of sleep deprivation, auditory overload, total darkness, isolation, a cold shower, and rough treatment" without approval of these techniques in advance.[434] Several former CIA officials report that Rahman's "hands were shackled over his head" and "he was roughed up and doused with water."[435] The Senate Summary states that "dehydration, lack of food, and immobility due to 'short chaining,'" were also factors that contributed to Rahman's death.[436]

Another detainee, Manadel al-Jamadi, also died just over five hours after his arrest while undergoing a CIA-led interrogation.[437] A plastic bag had been placed over his head and he

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[429] Human Rights Watch email exchange with Walter Ruiz, August 24, 2015. See also section on "Classifying Information about CIA Torture" below.

[430] *El-Masri v. Former Yugoslav Republic of Macedonia*, (Application no. 39630/09), Judgment of 13 December 2012, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621 (accessed April 20, 2015), para. 21, 40, 46, 124. See *Delivered into Enemy Hands*, p. 36, n. 123.

[431] Craig S. Smith and Souad Mekhennet, "Algerian Tells of Dark Term in U.S. Hands," *New York Times*, July 7, 2006, http://www.nytimes.com/2006/07/07/world/africa/07algeria.html (accessed April 20, 2015).

[432] Senate Summary, p. 54.

[433] Senate Summary, p. 54. See also, Adam Goldman and Kathy Gannon, "Death Shed Light on CIA 'Salt Pit,' Near Kabul," *Associated Press*, March 28, 2010, http://www.nbcnews.com/id/36071994/ns/us_news-security/t/death-shed-light-cia-salt-pit-near-kabul/ (accessed November 13, 2015). Detention site Cobalt is widely believed to have been the same as what many called the Salt Pit before the Senate Summary used the pseudonym Cobalt for it.

[434] Senate Summary, p. 54.

[435] Goldman and Gannon, "Death Shed Light on CIA 'Salt Pit,' Near Kabul," Associated Press.

[436] Senate Summary, p. 55, n. 272.

[437] John McChesney, "The Death of an Iraqi Prisoner," *NPR*, October 27, 2005, http://www.npr.org/templates/story/story.php?storyId=4977986 (accessed April 19, 2015).

was shackled with his arms behind him to a barred window five feet off the ground.[438] Military investigators deemed it a homicide due to "blunt force trauma" to the head and torso "complicated by compromised respiration" and five broken ribs.[439] Both cases were included in the Durham investigation into CIA abuses (see above) but al-Jamadi's case was not included in the Senate Summary.[440] The reason it was not included is unclear, but it is possibly because his death occurred at Abu Ghraib, a military base, not at a CIA detention center, and there was some military participation.[441] No criminal charges were ever brought in either case yet the publicly available facts indicate that either manslaughter or murder charges were viable in both cases.[442] Though the statute of limitations would likely bar charges for manslaughter today, charges for murder could still be brought since it is a capital crime and therefore not subject to a statute of limitations (see below).

War Crimes

Charges may be available under the US War Crimes Act of 1996.[443] The act provides criminal punishment for whomever, inside or outside the US, commits a war crime, if either the perpetrator or the victim is a member of the US Armed Forces or a national of the United States.[444] A "war crime" is defined as any "grave breach" of the 1949 Geneva Conventions or acts that violate article 3 common to the four Geneva Conventions of 1949

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[438] Jane Mayer, "A Deadly Interrogation," *The New Yorker*, November 14, 2005, http://www.newyorker.com/magazine/2005/11/14/a-deadly-interrogation (accessed April 19, 2015).

[439] McChesney, "The Death of an Iraqi Prisoner," *NPR*. Mayer, "A Deadly Interrogation," *The New Yorker*; See also The Constitution Project, p. 96, summarizing these two reports.

[440] Peter Finn and Julie Tate, "Justice Department to investigate deaths of two detainees in CIA custody," *Washington Post*, July 1, 2011, http://www.washingtonpost.com/politics/federal-prosecutor-probes-deaths-of-2-cia-held-detainees/2011/06/30/AGsFmUsH_story.html (accessed June 30, 2015); Jason Ryan, "DOJ: No Charges in CIA Detainee Death Investigations," *ABC News*, August 30, 2012, http://abcnews.go.com/Blotter/doj-charges-cia-detainee-death-investigations/story?id=17119715 (accessed June 30, 2015).

[441] The military charged Navy SEAL Lt. Andrew Ledford with dereliction of duty for allowing his men to punch and jab al-Jamadi with their rifle muzzles and assault for punching al-Jamadi himself. He was acquitted of all charges. See John McChesney, "Navy SEAL Cleared of Prisoner Abuse in Iraq," *NPR*, May 8, 2005, http://www.npr.org/templates/story/story.php?storyId=4670936 (accessed April 19, 2015).

[442] See 18 U.S.C. sec. 1111. Malice, as defined for purposes of second degree murder, under 18 U.S.C. sec. 1111(a) can include the mental state of either: "intent to do serious bodily injury" or "depraved heart recklessness," *United States v. Visinaiz*, 428 F.3d 1300, 1307 (10th Cir. Utah 2005). "Proof of the existence of malice for second degree murder does not require a showing that the accused harbored hatred or ill will against the victim or others. Neither does it require proof of an intent to kill or injure. Malice may be established by evidence of conduct which is 'reckless and wanton and a gross deviation from a reasonable standard of care, of such a nature that a jury is warranted in inferring that defendant was aware of a serious risk of death or serious bodily harm.'" United States v. Fleming, 739 F.2d 945, 947-948 (4th Cir. Va. 1984)(citations omitted). 18 U.S.C. sec. 1111 also requires that the crime be committed in the special maritime and territorial jurisdiction of the United States. For discussion of the meaning of special maritime and territorial jurisdiction see section discussing the crime of assault under 18 U.S.C. 113 (above).

[443] *Getting Away With Torture*, p. 49.

[444] War Crimes Act of 1996, Pub.L. 104–192, 18 U.S.C. sec. 2441.

(Common Article 3). Grave breaches include "willful killing, torture or inhuman treatment" of prisoners of war and of civilians qualified as "protected persons." Common Article 3 prohibits murder, mutilation, cruel treatment and torture, and "outrages upon personal dignity, in particular humiliating and degrading treatment."

The 2006 Military Commissions Act revised the War Crimes Act and limited the definition of war crimes, with retroactive effect.[445] As a result, humiliating and degrading treatment of detainees in US counterterrorism operations following the September 11 attacks can no longer be charged as a war crime under the statute.[446] However, the Military Commissions Act did not change liability for murder, rape, sexual assault, and torture.[447]

Defenses

Statutes of Limitations

Though much of the torture and other abuse took place many years ago, many of the available charges are not barred by statutes of limitation.[448] The statute of limitations for most federal crimes is five years,[449] but there are several exceptions to this rule that are applicable to the facts described above.

Capital Offenses

There is no statute of limitations for capital offenses, which include torture that result in death.[450] In at least two cases, the CIA's use of interrogation techniques contributed to death.[451]

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[445] Military Commissions Act of 2006, Pub.L. 109-366, 10 U.S.C. 948-949 (2006); War Crimes Act of 1996, Pub. L. 104-192, 18 U.S.C. sec. 2441 (2006).

[446] "Human Rights Watch, "Q & A: Military Commissions Act of 2006," section 16, https://www.hrw.org/legacy/backgrounder/usa/qna1006/

[447] *Getting Away With Torture*, p. 49.

[448] This statute of limitations analysis does not address attempts, or aiding and abetting.

[449] Offenses Not Capital, 18 U.S.C. sec. 3282(a).

[450] Capital Offenses 18 U.S.C. sec. 3281, see also 18 U.S.C. 2340A(a) authorizing punishment by death under the statute for torture that results in death and 18 U.S.C. 1201(a)(5) which authorizes punishment by death if death results from the kidnapping. Human Rights Watch opposes the death penalty in all circumstances as an inherently cruel and irrevocable punishment.

[451] See Murder and Manslaughter sections below.

Offenses Leading to Serious Risk of Bodily Injury or Risk of Death

The USA Patriot Act expanded the statute of limitations for a specific list of offenses from five to eight years.[452] Torture, as well as conspiracy to torture and conspiracy to kidnap persons abroad, are crimes that are included on that list.[453] While many of the offenses described above were committed more than eight years ago, the statute of limitations may well have been tolled (or extended), as discussed below.

In addition, when the commission of one of the offenses results in death or *creates a foreseeable risk of death or serious bodily injury*, there is no statute of limitations.[454]

Many of the CIA abuses and potential charges described above fit the category of offenses that create a foreseeable risk of death or serious bodily injury.[455] As previously noted, in at least one case, the CIA's use of torture resulted in death. In other cases, detainees came close to dying or it was clear they would suffer other long-term injuries.

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[452] P.L. 107-56, 115 sec. 809 (2001); see also the law codified at 18 U.S.C. sec. 3286(a), listing, among others, any provision in section 2332b(g)(5)(B) as those crimes for which the statute of limitations is extended to eight years.

[453] See Federal Law 18 U.S.C. sec. 3286(a) applying a statute of limitation of eight years for any offense listed in Federal Law 18 U.S.C. sec. 2332b(g)(5)(B), which includes the crimes of conspiracy to kidnap under 18 U.S.C. sec 956(a)(1) as well as torture and conspiracy to torture under 18 U.S.C. 2340A(a) and (c).

[454] See 18 U.S.C. sec. 3286(b) stipulating no statute of limitation for offenses listed in section 2332b(g)(5)(B) if the commission of such offense resulted in, or created a foreseeable risk of, death, or serious bodily injury to another person. Though the list of offenses to which this statute of limitation exception applies are called "terrorism offenses" in the statute, there is no requirement that they meet the definition of the term "Federal crime of terrorism" in section 2332b(g)(5)(A) and (B), just that they are one of the enumerated offenses in section 2332b(5)(B). Rather it appears that an offense must meet both requirements in 233b(g)(5)(A) and (B) in order to be considered a "Federal crime of terrorism" for sentencing enhancement purposes. The US government took the same position in *Nezirovic v. Holt*, United States District Court for the Western District of Virginia, Roanoke Division, 990 F. Supp. 2d 606, March 13, 2014. In *Nezirovic*, the government of Bosnia sought Nezirovic's extradition for allegations that he had abused unarmed civilian prisoners during the Bosnian war. Specifically, he was accused of among other things, beating them with batons, threatening them with death, forcing them to remove their clothes and crawl on the ground, to put their noses in others' anuses, and to eat grass on which others had urinated. Under the extradition treaty, extradition would have been barred if the applicable statute of limitations for the same crime in the US, the crime of torture, had expired. The US government took the position in the case that there was no bar to extradition because as one of the numerated offenses under 18 U.S.C. 2332b(g)(5)(B), there was no statute of limitation for the crime of torture under 2340A when the charged offense resulted in or created a foreseeable risk of death or serious bodily injury. The court agreed. *Nezirovic*, p. 613. See also US government brief in Nezirovic which supports this reading of the statute. Brief for Respondent-Appellee (January 03, 2014) at pp. 18-19, *Nezirovic v. Holt et al.*, 990 F.Supp. 2d 606 (2014) (7:13CV00428). See also Charles Doyle, "Statutes of Limitations in Federal Criminal Cases: An Overview," *Congressional Research Service*, October 1, 2012, https://www.fas.org/sgp/crs/misc/RL31253.pdf (accessed October 25, 2015), p. 2, n. 18 (Although the crimes [enumerated in 18 U.S.C. 233b(g)(5)(B)], were selected because they are often implicated in acts of terrorism, a terrorist defendant is not a prerequisite to an unlimited period for prosecution").

[455] "Serious bodily injury" is defined as meaning "bodily injury which involves– (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty." See section 18 U.S.C. sec. 2332(b)(g)(3) which states, as used in this section, the term "serious bodily injury" has the meaning given that term in section 1265(g)(3). "Serious bodily injury" is not defined however in 1365(g)(3) but it is defined in the next subsection, 18 U.S.C. § 1365(h)(3).

In contemplating the very first use of the approved "enhanced interrogation techniques" on Abu Zubaydah, who had been shot three times during his capture and was reportedly close to death,[456] CIA officers at the detention site where he was held wrote:

> If [Abu Zubaydah] develops a serious medical condition which may involve a host of conditions including a heart attack or another catastrophic type of condition all efforts will be made to ensure that proper medical care will be provided to [him]. In the event that [Abu Zubaydah] dies, we need to be prepared to act accordingly, keeping in mind the liaison equities involving our hosts.[457]

The memo went on to note that if Abu Zubaydah died, he would be cremated, but "regardless .... In light of the planned psychological pressure techniques to be implemented, we need to get reasonable assurances that [he] will remain in isolation and incommunicado for the remainder of his life."[458] One application of the waterboarding technique on Abu Zubaydah was so physically harmful that it induced convulsions and vomiting.[459] He later became completely "unresponsive, with bubbles rising through his open, full mouth."[460]

Another detainee was subjected to the CIA's "water-dousing"[461] technique during which a CIA officer poured cold icy water directly on the detainee's face "to disrupt his breathing."[462] The detainee "turned blue" and a physician's assistant intervened, removing the cloth over the detainee's mouth so he could breathe.[463]

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[456] Scott Shane, "Inside a 9/11 Mastermind's Interrogation," *New York Times*, June 22, 2008, http://www.nytimes.com/2008/06/22/washington/22ksm.html?pagewanted=all&_r=0 (accessed April 21, 2015).

[457] Senate Summary, pp. 34-35.

[458] Senate Summary, p. 35.

[459] Senate Summary, p. 41.

[460] Senate Summary, pp. 43-44.

[461] For a definition of "water dousing" and explanation of how it was applied, see the "Waterboarding and Water Dousing" section of this report above.

[462] Senate Summary, p. 107.

[463] Senate Summary, p. 107. A linguist apparently reported this incident to the CIA inspector general. It was later referred to the Justice Department for criminal investigation but not pursued, a CIA inspector general report concluded, because the linguist's claims could not be corroborated. The detainee, Khalid Sharif, who went by the name of Abu Hazim at the time he was in CIA custody, (the name the Senate Summary uses) was interviewed for Human Rights Watch for the report *Delivered into Enemy Hands* several times in 2012. At that time he said that no US government personnel ever interviewed him for any criminal investigation regarding this abuse or any other abuse he suffered while in CIA custody. Had they done so, the account could have been corroborated.

In another case, two detainees with broken feet were forced to stand and walk on their injured legs for days while being subjected to standing sleep deprivation, despite a medical examiner recommending that they not put any weight on their broken bones for, in the case of one detainee, five weeks and in the case of another detainee, for three months.[464] With regard to one of the detainees, a CIA cable drafted days later stated that, "even given the best prognosis," the detainee would have "arthritis and limitation of motion for the rest of his life."[465]

Sexual Abuse

There is no statute of limitations for certain types of sexual abuse crimes.[466] These include the three charges discussed above as potentially applicable to "rectal rehydration": sexual abuse, aggravated sexual abuse, and abusive sexual contact.

Special Case of Conspiracy

Conspiracy, like most federal crimes, is subject to a five-year statute of limitations. But it is distinct from other offenses in that it is a continuing crime that does not end until the last co-conspirator commits the last overt act of the conspiracy.[467]

Normally, actions taken by co-conspirators to hide crimes after they are committed are not considered part of the conspiracy. However, where concealment is a central component of the purpose of the conspiracy—as appears to be the case here—the limitation period may be extended until the date of the last act or attempted act of concealment.[468]

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[464] Senate Summary, pp. 491-92.

[465] Senate Summary, pp. 491-92.

[466] Limitations: Child Abduction and Sex Offenses 18 U.S.C. §3299 which states "Notwithstanding any other law, an indictment may be found or an information instituted at any time without limitation ... for any felony under Chapter 109A..." The felonies in Chapters 109A include violations of 18 U.S.C. §2241 (aggravated sexual abuse), §2242 (sexual abuse), and §2244 (abusive sexual contact).

[467] *Fiswick v. United States*, 329 U.S. 211, 216 (1946).

[468] *Grunewald v. United States*, 353 U.S. 391, 405 (1957). "Grunewald drew a distinction between 'acts of concealment done in furtherance of the main objectives of the conspiracy,' and 'acts of concealment done after these central objectives have been attained for the purposes of covering up after the crime.' Where the latter is involved, the government must present some proof of an express original agreement to engage in the acts of concealment. However, nothing in the case law imposes a requirement that conspirators expressly agree to engage in acts of concealment where those acts are done in furtherance of the main objectives of the conspiracy. Rather, the acts of concealment committed by one co-conspirator need only have been 'foreseeable' to the other co-conspirator." *United States v. Upton*, 559 F.3d 3, 14 (1st Cir. Mass. 2009) (citations omitted).

On the facts at issue here, if prosecutors charged conspiracy using the stand-alone conspiracy statute, one of the central components of the conspiracy would be the process by which various officials sought to generate legal cover, or "authorization" for the use of "enhanced interrogation techniques," knowing those techniques were unlawful. Ongoing attempts on the part of senior White House, CIA, or other officials to conceal their involvement in manufacturing the legal cover for torture can be considered an overt act in furtherance of the conspiracy that works to extend the five-year statute of limitations.

The concealment continues to this day. As recently as December 11, 2014, two days after the SSCI report was released, former Vice President Dick Cheney reiterated the importance of OLC approval for the techniques, as if OLC approval were an independent act and not itself part of the conspiracy to commit torture: "Torture is something we very carefully avoided.... All of the techniques that were authorized by the president were, in effect, blessed by the Justice Department opinion that we could go forward with those without, in fact, committing torture."[469]

Concealment of the central component of the conspiracy, to the extent that it took place, could work to toll any statute-of-limitations issues until the present, or at least very recently. The same is true for other attempts, well documented in the Senate Summary, to keep the nature, extent and effectiveness of the abuses from the public and prosecutors.[470]

In addition, it is unclear whether the Department of Justice had full access to relevant CIA and White House records as part of the Durham inquiry—or does even today. Indeed, Senate Intelligence Committee staff drafting the report never had full access to White House or CIA files as they relate to the CIA program. The CIA asserted executive privilege on behalf of the White House in relation to more than 9,400 documents that the Senate Intelligence Committee requested for their report.[471] The CIA also refused to provide a copy of an internal review of the CIA's program (often referred to as the "Panetta Report" after then CIA director Leon Panetta) to

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[469] Interview with former Vice President Dick Cheney, "Meet the Press Transcript - December 14, 2014," http://www.nbcnews.com/meet-the-press/meet-press-transcript-december-14-2014-n268181 (accessed January 12, 2015).

[470] See, e.g., finding and conclusion number 3 of the Senate Summary titled: "The interrogations of CIA detainees were brutal and far worse than the CIA represented to policymakers and others," Senate Summary, pp. 3-4.

[471] Jonathan Landay, Ali Watkins, and Marisa Taylor, "White House withholds thousands of documents from Senate CIA probe, despite vows of help," *McClatchy*, March 12, 2014, http://www.mcclatchydc.com/2014/03/12/221033/despite-vows-of-help-white-house.html#storylink=cpy (accessed January 20, 2015).

the Senate Intelligence Committee.[472] In the event that prosecutors had full and immediate access to all CIA files on August 29, 2009 when the investigation was announced, the statute of limitations might bar prosecution under the general conspiracy statute, section 371, but it would not bar prosecution for torture, conspiracy to torture under section 2340A(c), or conspiracy to kidnap under section 956 both of which have an eight year statute of limitations and no statute of limitation when a foreseeable risk of death or serious bodily injury may result.

"Good Faith" Reliance on Counsel

As noted above, Bush, Cheney, and others have asserted that in implementing the program, they were merely relying on OLC's guidance that the techniques being employed by the CIA were lawful.[473] This suggests officials might invoke a defense of a "good faith" reliance on counsel to any criminal charges brought. But such a defense would be weak as applied to these facts.

Under US law an accused person generally cannot invoke an "advice-of-counsel" or "mistake-of-law" defense.[474] As Judge Richard Posner has noted, "If unreasonable advice of counsel could automatically excuse criminal behavior, criminals would have a straight and sure path to immunity."[475] However, advice of counsel can be relevant to certain elements of crimes, such as a requirement of knowledge or willfulness.[476] For example, as one case notes:

> Reliance on counsel's advice excuses a criminal act only to the extent it negates willfulness and to negate willfulness counsel's advice must create (or perpetuate) an honest misunderstanding of one's legal duties. If a person is

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[472] Mark Mazzetti, "Behind Clash Between C.I.A. and Congress, a Secret Report on Interrogations," *New York Times*, March 7, 2014, http://www.nytimes.com/2014/03/08/us/politics/behind-clash-between-cia-and-congress-a-secret-report-on-interrogations.html (accessed January 20, 2015).

[473] See, e.g., "Matt Lauer interviews Bush about 9/11," *NBC News*, September 11, 2006, http://www.nbcnews.com/video/nbc-news/14781377#14781377 (accessed April 20, 2015) (at minute 8:20, Lauer: "Were you made personally aware of all the techniques that were used for example against Khalid Sheikh Mohammed, and did you approve those techniques?" Bush: "I told our people, get information without torture and was assured by our Justice Department that we were not torturing...Whatever we have done is legal, that is what I'm saying, it's within the law. We had lawyers look at and say, Mr. President, this is lawful."); "Transcript: Cheney Defends Hard Line Tactics," *ABC News*, December 16, 2008, http://abcnews.go.com/print?id=6464697 (accessed April 20, 2015) ("Again, we proceeded very cautiously. We checked. We had the Justice Department issue the requisite opinions in order to know where the bright lines were that you could not cross. The professionals involved in that program were very, very cautious, very careful—wouldn't do anything without making certain it was authorized and that it was legal. And any suggestion to the contrary is just wrong.").

[474] *United States v. Sprong*, 287 F.3d 663, 665 (7th Cir. Wis. 2002) and *United States v. Benson*, 941 F.2d 598, 613 (7th Cir. Ill. 1991).

[475] *Sprong*, p. 665.

[476] *Sprong*, p. 665, *Benson*, p. 613.

> told by his attorney that a contemplated course of action is legal but subsequently discovers the advice is wrong or discovers reason to doubt the advice, he cannot hide behind counsel's advice to escape the consequences of his violation.[477]

However, a portion of the 2005 Detainee Treatment Act, which was drafted after the Abu Ghraib revelations and the release of the Torture Memos, provides that in any criminal prosecution arising out of a US person's or other agent's engagement in operational practices involving the detention and interrogation of individuals:

> that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that ... [the] agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful.[478]

This statutory defense applies only to "officially authorized" conduct that was "determined to be lawful at the time." In this case, the defense would center on the question of whether it was reasonable to believe that the CIA practices were lawful and if reliance on the advice of counsel was made in "good faith." If so, even under section 1004(a), good faith reliance would not be a complete defense but it would be an "important factor ... to consider" in assessing whether a person should have known the practices were unlawful.

This defense is weak for the following reasons:

First, it was not reasonable to believe these practices were lawful. As mentioned above, the techniques themselves were derived from the SERE program—a program designed to

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[477] *United States v. Benson*, 941 F.2d 598, 614 (7th Cir. Ill. 1991).

[478] Detainee Treatment Act of 2005, Public Law 163-109, 119 Stat. 3136, January 6, 2006, Section 1004(a), codified at 42 U.S.C. §2000dd-1(a) http://www.dni.gov/index.php/about/organization/ic-legal-reference-book-2012/ref-book-detainee-treatment-act-of-2005 (accessed August 18, 2015). This act, among other things, also prohibited "cruel, inhuman and degrading treatment or punishment," of persons in the custody of the US government, and required Department of Defense personnel to employ United States Army Field Manual guidelines when interrogating detainees.

train US special forces to endure interrogation methods used by enemies who did not abide by the Geneva Conventions; many of the techniques were already banned by the US Army Field Manual in effect at the time—a manual that describes many of the techniques as torture; and the FBI refused to participate in the program. It is reasonable that people involved should have questioned the legality of the practices. Moreover, the extensive discussion about whether the CIA was engaging in "humane" practices reveals that CIA officials concern about whether they should be engaging in the practices at all, even after they were "authorized."

Second, reliance on counsel was not "in good faith." As mentioned above, before the OLC memos were produced, the CIA and senior officials already knew that courts would almost certainly find many of the authorized techniques illegal. That is why they sought a guarantee not to prosecute from the Department of Justice Criminal Division, which refused to provide it, and very likely why the FBI refused to participate in the CIA's detention and interrogation program. Only after these rejections did Yoo add arguments to the memos about the specific intent requirement, commander-in-chief powers, and defenses to prosecution. The evidence suggests that this was done at the request of senior officials at the White House and the CIA who were concerned about the illegality of the techniques and looking for legal cover. As one legal scholar put it: "When considered as a whole, the memos reveal a sustained effort by the OLC lawyers to rationalize a predetermined and illegal result."[479] This alone suggests that any reliance was not in good faith. But numerous other signs along the way, such as Abu Zubaydah's waterboarding sessions, which generated concerns about illegality from CIA officers, provide further evidence.[480]

Finally, the statutory defense is only available to those who engaged in "specific operational practices" in connection with detention and interrogation activity. It should therefore not be available to those involved in authorizing the program. It also should not be available to those who engaged in practices that went beyond what where authorized. This would include applying techniques in a manner inconsistent or in excess with authorizations or doing so without getting prior approval as required.

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[479] David Cole, "The Torture Memos: The Case Against the Lawyers," *The New York Review of Books*, October 8, 2009 http://www.nybooks.com/articles/archives/2009/oct/08/the-torture-memos-the-case-against-the-lawyers/ (accessed January 28, 2015).

[480] Senate Summary, p. 44.

III. Repairing the Harm and Ending Torture

Obligation to Provide Redress, Compensation, and Rehabilitation

The Convention against Torture, in addition to obligating states to investigate and appropriately prosecute torture and other ill-treatment, requires them to provide redress to victims of torture and ensure that they have "an enforceable right to fair and adequate compensation."[481] This should include the means to obtain full rehabilitation to the extent possible, as well as compensation to dependents when a torture victim is deceased.[482]

As a party to the International Covenant on Civil and Political Rights (ICCPR), the United States is also obligated to "give effect to the rights" recognized by the treaty, including when those rights have been violated "by persons acting in an official capacity."[483] Specifically, the US is treaty-bound to provide an "effective remedy," including a "judicial remedy," and to ensure that competent authorities "enforce such remedies when granted."[484]

In addition to torture and ill-treatment, the ICCPR prohibits arbitrary arrest and detention, and requires states, at minimum, to provide those detained with the ability to challenge the lawfulness of detention before a court.[485] The ICCPR specifically requires that those who are the "victim of unlawful arrest or detention shall have an enforceable right to compensation."[486]

Harms from Arbitrary Detention, Torture, and Ill-Treatment

The CIA program had both short-term and long-term physical and psychological effects on detainees. Techniques such as suspension of the arms causes musculoskeletal pain, chronic severe headaches, numbness and weakness in the arms. Constant exposure to loud music

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[481] Convention against Torture, art. 14 ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.").

[482] Ibid.

[483] ICCPR, arts. 2(2) and 2(3).

[484] ICCPR, art. 2(3).

[485] ICCPR, arts. 7 and 9(1)-(4)

[486] ICCPR, art. 9(5).

causes hearing loss. And prolonged stress positions result in back pain and numbness in the legs.[487] Former detainees subjected to CIA interrogation techniques reported lasting mental health effects such as depression, anxiety, sleeplessness, post-traumatic stress disorder, feelings of hopelessness, sadness, isolation, bouts of weeping, panic attacks, nervous or explosive reactions to minor problems, memory loss, and flashbacks.[488]

Detainees in CIA custody were also subjected to long-term incommunicado detention, which itself can amount to a form of torture.[489] For their families it brought the considerable stress of not knowing the whereabouts of their relatives or even whether they were alive or dead.

One Family's Suffering

Mohammed Shoroeiya's wife Fawziya had no knowledge of her husband's whereabouts after US and Pakistani forces took him into custody during a raid on their home in Peshawar Pakistan in March 2003. She did not know that US forces sent Shoroeiya to two different "black sites" where he was detained for 16 months.[490] The US then rendered Shoroeiya back to Libya, a country from which he had fled 15 years earlier and where he feared he would be tortured, perhaps killed. It was only at this point, in August 2004, that

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[487] International Center for Transitional Justice, "U.S. Accountability and the Right to Redress," August 2010, https://www.ictj.org/sites/default/files/ICTJ-USA-Right-Redress-2010-English.pdf (accessed April 27, 2015), p. 19 (hereinafter "ICTJ Accountability and Redress Report"), summarizing findings of a number of other reports documenting the effects of abuse, torture and long-term arbitrary and incommunicado detention on former US detainees held in Iraq, Guantanamo, and Afghanistan including: Physicians for Human Rights, "Broken Laws, Broken Lives: Medical Evidence of Torture by the US," June 2008; Human Rights Watch, "Guantanamo: Detainee Accounts," 2004, http://www.hrw.org/legacy/backgrounder/usa/gitmo1004/gitmo1004.pdf (accessed April 28, 2015), pp. 23-24; Human Rights Watch, "Locked up and Alone: Detention Conditions and Mental Health at Guantanamo," June 2008, http://www.hrw.org/sites/default/files/reports/us0608_1.pdf (accessed April 28, 2015). The report also cites several detainee accounts from complaints in civil cases brought against US government officials for abuse in US detention.

[488] ICTJ Accountability and Redress Report, p. 19.

[489] See, for example, UN, "UN Special Rapporteur on torture calls for the prohibition of solitary confinement," October 18, 2011, http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11506&LangID=E#sthash.S2GGi1cj.dpuf (accessed September 28, 2015). The US has recognized prolonged incommunicado detention as torture. See, for example, US Department of State, "Human Rights Report: China," March 31, 2003, http://www.state.gov/j/drl/rls/hrrpt/2002/18239.htm (accessed September 28, 2015).

[490] *Delivered Into Enemy Hands*, pp. 34-58.

Libyan authorities informed Fawziya that her husband was alive.[491] The Libyan government then transported Fawziya and their daughter Aisha back to Libya from Pakistan. However, Shoroeiya, a known opponent of Libyan leader Muammar Gaddafi, remained imprisoned in Libya for another seven years. He was only released in 2011, along with other political prisoners in Gaddafi's jails, during the Libyan uprising of 2011. While her husband was in US and Libyan custody, Fawziya relied on the good will of neighbors and family to survive.[492] "One day they just came and took him. I didn't know what to do," Fawziya said. "I had nothing, all I had were prayers, and they told us nothing."[493] Shoroeiya said knowing the impact his absence had on his wife and child was the hardest thing about being detained, harder than the torture:

> The biggest suffering for any prisoner like myself was the situation with our families. When my daughter comes to me and says they prevented her from going to school or my wife comes to me and says she doesn't have a dime to spend, that is suffering. You asked me about the physical abuse. That was number 10 on the list of the worst things that I was going through.[494]

Many other families were left without their main breadwinner and suffered severe economic hardship. After the US released men it had detained from detention, many reported having problems adjusting to normal life, difficulty finding jobs, and problems coping with the stigma associated with their prior detention.[495]

US Failure to Comply with International Legal Obligations

Failure to Provide Compensation

Compensation can provide victims and their family members with the means to address the lasting impact of human rights violations. These can include loss of employment opportunities, education, social benefits, earning potential, harm to reputation, costs

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[491] Ibid., pp. 56-58.

[492] Ibid., pp. 56-58.

[493] Human Rights Watch Interview with Fawziya, Misrata, Libya, March 27, 2012.

[494] *Delivered Into Enemy Hands*, p. 58.

[495] ICTJ Accountability and Redress Report, p. 20.

required for legal assistance, and medical, psychological and social services.[496] Compensation, of course, is not a substitute for investigations and appropriate prosecutions, and does not address many government obligations under the Convention against Torture.[497] It can be expected that there would be significant political resistance in the United States to providing compensatory redress to former detainees because of the belief that the US "war on terror" justified the government's actions, that those detained were involved in terrorism even if not prosecuted for the crime, and that any compensation provided could be misused for terrorist activities. Such arguments do not take into account that many detainees were taken into custody unlawfully even by the CIA's own standards, that those involved in terrorist acts remain protected under international law against torture and other ill-treatment, and that measures can be put in place to prohibit funds from being used for illegal purposes.[498] Moreover, providing compensation would go a long way in helping deflate anger against the United States in many countries around the world. Regardless of the extent of these practical benefits, however, US treaty obligations require that compensation and other redress be provided without discrimination, regardless of why the person entitled to redress was detained, including whether that person was accused of terrorist acts.[499]

US Obstruction of a Right to a Remedy

In reporting to the UN Committee against Torture in 2013 about its compliance with treaty obligations, the US stated that "various avenues" exist and a "wide range of civil remedies" are available to victims of torture to obtain redress.[500] Yet virtually no individual

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[496] Ibid., p. 21.

[497] CAT, General Comment No. 3, paras. 9-10.

[498] At least 26 detainees in the CIA program were "wrongfully held," and did not meet the CIA's own standards for detention. CIA records provide insufficient information to justify the detention of many more. Senate Summary, Findings and Recommendations, p. 12.

[499] UN Committee against Torture, General Comment No. 3, "Implementation of Article 14 by States Parties," http://www1.umn.edu/humanrts/cat/general_comments/cat_gen_com3.html (accessed July 1, 2015), para. 32; see also UN Human Rights Committee, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law," General Assembly Resolution 60/147 of 16 December 2005, http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx (accessed April 28, 2015) (hereinafter "Basic Principles"), para. 8; UN Committee against Torture, General Comment No. 2, U.N. Doc. CAT/C/GC/2 (January 28, 2008), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f2&Lang=en, para. 21. See also, UN Human Rights Committee, General Comment No. 18, Non-discrimination, U.N. Doc. HRI/GEN/1/Rev.1 (1994), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6622&Lang=en (accessed August 24, 2015).

[500] "US Government, Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure, Third to fifth periodic reports of States parties due in 2011," United States of America, CAT/C/USA/3-5, http://www.state.gov/documents/organization/213267.pdf (accessed April 27, 2015), para. 147 (also

who has brought suit against US personnel or civilian contractors working for the US government with valid claims of CIA or US military post-9/11 torture have ultimately prevailed in court.

Many cases have been dismissed in court not for lack of merit but rather because the US government has blocked suits at early stages by claiming the state secrets privilege.[501] In other cases, courts have refused to weigh in, finding that the subject matter of the case touches on foreign policy or national security—issues normally within the purview of the executive branch.[502] In still other cases government attorneys have successfully argued that claims are preempted under federal law or trigger various forms of immunity.[503] These cases have set precedents making it nearly impossible for detainees to effectively sue for torture and ill-treatment in US courts.[504] To ensure that victims of arbitrary arrest and torture have a genuine right to remedy in the United States, Congress should pass legislation calling for compensation, the executive branch should initiate its own compensation mechanism, and the Department of Justice should take a different stance on the state secrets privilege.

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available as a UN Document, dated December 14, 2013 as a download here: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/USA/3-5).

[501] *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. Cal. 2010), p. 1092 ("[W]e do not reach our decision lightly or without close and skeptical scrutiny of the record and the government's case for secrecy and dismissal... We ... acknowledge that this case presents a painful conflict between human rights and national security."); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), cert. denied 552 U.S. 947 (2007) (upholding lower court's dismissal of suit on grounds that el-Masri, who alleged that he was kidnapped, illegally detained and abused by the CIA, would not be able to make his case except by using evidence barred by the state secrets privilege).

[502] *Arar v. Ashcroft*, 585 F.3d 559 (cert. denied, June 14, 2010), pp. 565, 575, 578, 580-81 (upholding lower court's dismissal of suit, on the basis that it would interfere with national security and foreign policy, by Canadian national who claimed he was sent by the United States to Syria, where he was tortured for one year until his release); see also cases brought by several former US detainees in Guantanamo, Iraq and Afghanistan blocked on the same theory which effectively would bar a suit brought by a CIA detainee on the same grounds: *Rasul v. Myers*, 563 F.3d 527, 532 n. 5 (D.C. Cir. 2009); *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85 (D.D.C. 2007), pp. 103-07, affirmed by *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011), p. 765.

[503] See, for example, *Rasul v. Myers*, 563 U.S. 527 (2009) (affirming lower court's dismissal of torture and related claims on immunity grounds); *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011) (dismissing claims on immunity grounds). See also *Saleh et al v. Titan Corporation*, Amicus Curiae Brief for the United States of America, May 2011, available at http://www.ccrjustice.org/files/09-1313%20Titan%20US%20Br%20(2).pdf (accessed May 4, 2011) (brief submitted by the Obama administration claiming that the court need not consider the case because federal preemption blocked consideration, and because there was no disagreement among lower courts requiring resolution by the Supreme Court).

[504] See ICTJ Accountability and Redress Report summarizing outcome of suits brought by former US detainees in CIA and military custody since September 11, 2001, pp. 12-17, 31-35. (See, for example, discussion of the Westfall Act under which courts have found US officials have immunity from suits for detainee abuse: "The Westfall Act protects federal employees from personal liability for torts committed within the scope of their employment; in these circumstances, it provides a defense of absolute immunity to federal officials ... Absolute immunity under the Westfall Act is available only to the extent the tort falls within the scope of official employment and does not fall within one of the law's limited exceptions. Plaintiffs have argued unsuccessfully that torture or cruel, inhuman, or degrading treatment can never be within the scope of employment.").

State Secrets Privilege

In the United States, the state secrets privilege allows the head of an executive department to refuse to produce evidence in a court case on the grounds that doing so would reveal secret information that would harm national security or foreign relations interests if disclosed.[505] Courts can test these claims to a certain extent but in most cases have deferred to government assertions about the potential harms.[506]

The US government should reconsider its position on the state secrets privilege with regard to any new litigation brought forward in light of release of the Senate Summary, as much of the information that would be at issue is now publicly available.[507]

The Obama administration's own policy regarding state secrets requires that the privilege be invoked only "when genuine and significant harm to national defense or foreign relations is at stake and only to the extent necessary to safeguard those interests."[508]

The US has now conceded far more details about US authorized torture, and released far more details on the interrogation programs than ever before. It cannot credibly claim that litigating cases about such topics would endanger US national security. Prior to the release of the Senate Summary, US government officials made alarming claims about the dangers

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[505] *United States v. Reynolds,* US Supreme Court, No. 21, March 9, 1953, 345 U.S. 1 (1953).

[506] *El-Masri v. United States,* 479 F.3d 296 (4th Cir. Va. 2007), pp. 305-306 ("Frequently, the explanation of the department head who has lodged the formal privilege claim, provided in an affidavit or personal declaration, is sufficient to carry the Executive's burden. In some situations, a court may conduct an in camera examination of the actual information sought to be protected, in order to ascertain that the criteria set forth in *Reynolds* are fulfilled. The degree to which such a reviewing court should probe depends in part on the importance of the assertedly privileged information to the position of the party seeking it. 'Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted ....' On the other hand, 'even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.' Indeed, in certain circumstances a court may conclude that an explanation by the Executive of why a question cannot be answered would itself create an unacceptable danger of injurious disclosure. In such a situation, a court is obliged to accept the executive branch's claim of privilege without further demand.").

[507] See "Letter to Attorney General Loretta Lynch from American Civil Liberties Union Legal Director Steven R. Shapiro," *ACLU,* November 5, 2015, https://www.aclu.org/sites/default/files/field_document/aclu_letter_to_lynch_on_cia_torture_lawsuit.pdf (accessed November 16, 2015).

[508] US Justice Department, "Memorandum on Policies and Procedures Governing Invocation of the State Secrets Privilege," September 23, 2009, http://www.justice.gov/sites/default/files/opa/legacy/2009/09/23/state-secret-privileges.pdf (accessed May 8, 2015), pp. 1-2. ("The Department will not defend an invocation of the privilege in order to: (i) conceal violations of law, inefficiency, or administrative error; (ii) prevent embarrassment to a person, organization or agency of the United States Government...; or (iv) prevent or delay the release of information the release of *which would not reasonably be expected to cause significant harm to national security.*" (emphasis in original)).

release of the report would pose, such as widespread anti-American protests.[509] No evidence has been put forward that those claims ultimately came true.[510] At minimum, the courts should scrutinize government claims about the need for secrecy in the CIA torture context, and allow the cases to go forward with appropriate protective orders that would bar disclosure of sensitive material.

In the alternative, if the government is genuinely concerned about revealing state secrets it can offer to settle lawsuits rather than fight claims when it knows US officials have engaged in torture or other ill-treatment, or propose other types of compensation mechanisms that would assist victims with recovery.

Classifying Information about CIA Torture

Until December 2014, the US deemed all information relating to the CIA's detention and interrogation program as classified. This included even detainees' own "observations and experiences" about what happened to them in while in CIA custody.[511] The classification rule effectively barred former detainees who were still held at the Guantanamo Bay detention facility and their lawyers from making complaints about CIA torture to tribunals abroad, other third-parties, and to the outside world in general, because it

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[509] See "Dire warning over pending release of CIA torture report," *CBS News*, December 7, 2014, http://www.cbsnews.com/news/mike-rogers-releasing-senates-cia-torture-report-a-terrible-idea/ (accessed June 8, 2015); see also Erin Kelly, "Officials fear torture report could spark violence," *USA Today*, December 9, 2014, http://www.usatoday.com/story/news/politics/2014/12/08/cia-torture-report-senate-intelligence-committee/20087371/ (accessed June 8, 2015).

[510] "Feinstein calls out Torture Report Threat Assessment," *C-SPAN*, February 12, 2015, http://www.c-span.org/video/?c4527978/feinstein-calls-torture-report-threat-assessment (accessed November 12, 2015); Joshua Keating, "Why Hasn't the Torture Report Sparked Anti-American Protests?" *Slate*, December 11, 2014, http://www.slate.com/blogs/the_world_/2014/12/11/why_hasn_t_the_torture_report_sparked_anti_american_protests.html (accessed June 8, 2015).

[511] *United States v. Mohammad, et al.*, Military Commissions Trial Judiciary, Guantanamo Bay, Order of 16 December 2013 Granting Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture, AE 200ll (December 16, 2013), available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20ll%20(AE200ll).pdf (accessed May 4, 2015), paras. 7-9. See also *United States v. Mohammad, et al.*, Military Commissions Trial Judiciary, Guantanamo Bay, Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture, AE 200 (August 12, 2013), available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20ll%20(AE200(MAHRBSWBA)).pdf (accessed May 4, 2015) (Amended Protective Order 1 simply deleted the line which classified the "observations and experiences" of the defendants while in the CIA program but the bar against disclosure of information about the defendants' torture effectively remained because the US continued to control what information came to and left from the defendant at the facility and the entire CIA detention and interrogation program remained classified, even if the defendants' own observations and experiences about it did not).

would run afoul of US restrictions on classified information. About 25 detainees previously held by the CIA remain at Guantanamo.[512]

The use of classification rules to block information about torture and ill-treatment from being made public violates article 13 of the Convention against Torture, which requires states to ensure that any individual subjected to torture under their jurisdiction "has the right to complain" and have their complaint "promptly and impartially examined."[513] In a legal document submitted in several cases before military commissions at Guantanamo since release of the Senate Summary, the US government took the position that the treatment and conditions of confinement of detainees while in CIA custody was no longer classified (though identities of individuals or other governments involved and locations of CIA detention centers remained classified).[514]

However, as of this writing, court orders in the military commission cases that govern the way that classified information is handled in the military commissions , as well as cases brought on behalf of Guantanamo detainees challenging the lawfulness of their detention (known as "habeas corpus" cases), have not yet been updated. As a result, restrictions on the ability of lawyers representing detainees to discuss their clients' treatment while in CIA custody remain in place. Lawyers representing one detainee of the CIA who is still in Guantanamo, Majid Khan, submitted their notes containing information about how Khan was treated in CIA custody for declassification review and were granted permission to share that information with the

[512] See "CIA Prisoner Database," *The Rendition Project*, undated, available as a download on this page: http://www.therenditionproject.org.uk/prisoners/data.html (accessed August 25, 2015). Of the former CIA prisoners listed in the database, 33 were listed as being "detained" as of August 25, 2015, though not all of them in Guantanamo and some have since been released. One of them for example, Ahmed Ghailani, is detained at a federal prison in the US. Two others, Ridha al Najjar and Lufti al-Gharsi, were held in Afghanistan but have since been released. See Kate Clark, "The 'Other Guantanamo' (13): What should Afghanistan do with America's foreign detainees?" *Afghanistan Analysts Network*, March 2, 2015, https://www.afghanistan-analysts.org/the-other-guantanamo-13-what-should-afghanistan-do-with-americas-foreign-detainees/ (accessed August 25, 2015). Samr al-Barq is listed as being held in "administrative detention" in Israel.

[513] Convention against Torture, art. 13.

[514] Marty Lederman, "'Gag order' on Military Commission defendants substantially lifted," *JustSecurity*, http://justsecurity.org/19615/gag-order-military-commission-defendants-substantially-lifted/.

public.[515] Release of that information to the press generated stories about Khan being subjected to even more torture than is documented in the Senate Summary.[516] But a similar attempt on the part of Joseph Margulies, Abu Zubaydah's lead defense lawyer, to release his client's account of his CIA torture, was rejected in September 2015 for unknown reasons.[517]

Legislation, Other Measures

In one of the cases dismissed on state secrets grounds, *Mohammed v. Jeppesen Dataplan, Inc.*, the Ninth Circuit Court of Appeals expressed discontent that the plaintiffs were deprived of an opportunity to prove their alleged mistreatment and obtain compensation.[518] The court also noted its dismissal eliminated judicial review, "an important check on alleged abuse by government officials and putative contractors."[519] But the court also said the US government could still provide a remedy and pointed to a number of actions the US government had taken in the past in similar circumstances.[520]

For example, during World War II, the US relocated and detained more than 110,000 citizens and non-citizens of Japanese ancestry in various locations in the US.[521] The Civil Liberties Act of 1988, signed into law by President Ronald Reagan, acknowledged the fundamental injustice of the "evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II."[522] It also stated that government actions were motivated by "racial prejudice, wartime hysteria, and

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[515] David Rohde, "Exclusive: Detainee alleges CIA sexual abuse, torture beyond Senate findings," *Reuters*, June 2, 2015, http://www.reuters.com/article/2015/06/02/us-usa-torture-khan-idUSKBN0OI1TW20150602 (accessed August 25, 2015).

[516] Ibid.

[517] David Rohde, "U.S. Government Blocks Release of New CIA Torture Details," *Reuters*, September 10, 2015, http://www.reuters.com/article/2015/09/11/us-usa-cia-torture-idUSKCN0RA2RM20150911 (accessed October 25, 2015); see also Joseph Margulies, "Open the Lid on US Torture," *Al Jazeera America*, September 15, 2015, http://america.aljazeera.com/opinions/2015/9/open-the-lid-on-us-torture.html (accessed October 25, 2015); "Groups Urge End to Blocking Release of CIA Torture Details," Human Rights Watch news release, September 18, 2015, https://www.hrw.org/news/2015/09/18/groups-urge-end-blocking-release-cia-torture-details.

[518] *Mohammed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. Cal. 2010) (cert. denied May 2011), p. 1091.

[519] Ibid.

[520] Ibid.

[521] *Internet Encyclopedia Britannica*, 2014, s.v. "Executive Order 9066," http://www.britannica.com/topic/Executive-Order-9066 (accessed November 16, 2015); see also Maisie Conrat and Richard Conrat, *Executive Order 9066: The Internment of 110,000 Japanese Americans* (Los Angeles: UCLA Asian American Studies Center Press, 1992).

[522] Civil Liberties Act of 1988, 50 App. U.S.C. § 1989(a).

a failure of political leadership" rather than legitimate security concerns and gave each surviving detainee $20,000.[523]

The *Jeppesen* court pointed to settlements under this act as an example of ways the US had provided reparations for wrongful detentions of non-US citizens in the past. The Civil Liberties Act did not cover more than 2,000 Latin Americans of Japanese descent, including entire families, whom the US abducted from their countries and interned at camps in the US. They were not entitled to compensation because they were not US citizens or lawful permanent residents, a requirement under the statute. After the war the US returned many of them to Japan even though they were from Latin America, where some of them ended up homeless and starving.[524] These Latin Americans brought a class action lawsuit based on the Civil Liberties Act that ended up settling, recorded in *Mochizuki v. United States.*[525]

In denying the plaintiff's claims, the *Jeppesen* court also indicated that Congress had the power to enact private bills.[526] Generally such bills are meant to benefit solely the individuals named in them.[527] While uncommon, private bills are meant to "address claims .... founded not on any statutory authority, but upon the claim that 'the equities and circumstances of a case create a moral obligation on the part of the Government to extend relief to an individual.'"[528] The *Jeppesen* court also noted that Congress could also refer an individual claim to the Court of Federal Claims for a recommendation before enacting a private bill.[529]

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[523] Civil Liberties Act of 1988, 50 App. U.S.C. § 1989(a) and 1989b-4(a)(1).

[524] *Mochizuki v. United States*, 43 Fed. Cl. 97 (Fed. Cl. 1999).

[525] Ibid.

[526] "When national security interests deny alleged victims of wrongful governmental action meaningful access to a judicial forum, private bills may be an appropriate alternative remedy." *Mohammed v. Jeppesen*, p. 1092.

[527] "Private laws differ from public laws in that they lack general applicability and do not apply to all persons. Instead they are generally 'designed to provide legal relief to specified persons or entities adversely affected by laws of general applicability.' Private laws apply only to the person named in the law and grant a benefit from the government to that person, not otherwise authorized by law." Matthew Mantel, "Private Bills and Private Laws," *Law Library Journal* 99 (2007): 88.

[528] *Office of Pers. Management v. Richmond*, 496 U.S. 414, 431 (U.S. 1990), citing Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, Supplemental Rules of Procedure for Private Claims Bills, 101st Cong., 1st Sess., p. 2 (Comm. Print 1989).

[529] *Mohammed v. Jeppesen*, p. 1092, citing 28 U.S.C. §§ 1492, 2509(c).

No one in Congress or the executive has proposed legislation that would provide compensation to victims of CIA torture, nor has the executive offered any other way to resolve the issue.

In contrast to the US, several other countries have provided compensation to former detainees held by the CIA or the US military for which their own authorities also committed wrongdoing. They have done so even though the level of culpability may have been significantly lower than that of the US. Some of these settlements include:

- The United Kingdom has committed to mediation with those who have brought civil claims alleging UK involvement in torture and illegal renditions and wherever appropriate, to provide compensation ("[W]e are committed to mediation with those who have brought civil claims about their detention in Guantanamo. And wherever appropriate, we will offer compensation.").[530]
- The UK has already settled claims brought by 16 former Guantanamo detainees.[531]
- The UK in December 2012 settled a case with Sami al-Saadi who was unlawfully rendered by the CIA, with the cooperation of UK intelligence services, to Libya.[532] A second civil case against the UK government by a Libyan rendition victim, Abdul Hakim Belhadj, is ongoing.[533]
- In 2008 the Swedish government formally apologized for its role in the CIA's unlawful rendition of Ahmed Agiza and Muhammed Alzery to Egypt and compensated each the equivalent of $500,000.[534]

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530 Speech from David Cameron, Prime Minister to the House of Commons, "Statement on detainees," July 6, 2010, https://www.gov.uk/government/speeches/statement-on-detainees (accessed July 1, 2015).

531 "U.K. to pay millions to ex-Gitmo terror suspects," *NBC News*, November 16, 2010, http://www.nbcnews.com/id/40210747/ns/world_news-europe/t/uk-pay-millions-ex-gitmo-terror-suspects/%20-%20.VWOT2U9Viko#.VYGBMThMuUk (accessed July 1, 2015).

532 Richard Norton-Taylor, "Government pays Libyan dissident's family £2.2m over M16-aided rendition," *The Guardian*, December 13, 2012, http://www.theguardian.com/uk/2012/dec/13/libyan-dissident-mi6-aided-rendition (accessed August 25, 2015).

533 Owen Bowcott, "Abdel Hakim Belhaj wins right to sue UK government over his kidnap," *The Guardian*, October 30, 2014, http://www.theguardian.com/world/2014/oct/30/abdel-hakim-belhaj-court-kidnap-mi6-cia-torture (accessed August 25, 2015).

534 Louise Nordstrom, "Egyptian deported by CIA gets residency in Sweden," *World Post*, July 4, 2012, http://www.huffingtonpost.com/huff-wires/20120704/eu-sweden-cia-flights/ (accessed July 1, 2015); "Sweden to compensate exonerated terror suspect," *New York Times*, July 3, 2008, http://www.nytimes.com/2008/07/03/world/europe/03iht-sweden.5.14218093.html?_r=0 (accessed November 16, 2016).

- In 2007, the Canadian government apologized for its role in the unlawful rendition of Maher Arar to Syria by the CIA in 2002 and paid him a settlement of C$9.7 million.[535] (Arar brought suit in the US earlier, but his case was dismissed on grounds that the judicial branch should not weigh in on US rendition policy— according to the court, a foreign relations issue within the purview of the executive branch).
- In 2010, Australia paid out an undisclosed settlement to Mamdouh Habib, a former Guantanamo detainee.[536] Habib is an Australian national who was arrested in Pakistan shortly after the September 11 attacks, secretly taken to Egypt, where he was tortured for seven months, and then transferred to Guantanamo Bay, where he was held until January 2005.[537]

In addition to these settlements, the European Court of Human Rights has ruled against Poland for its role in the detention and torture of two former detainees in CIA custody, Abu Zubaydah[538] and Abd al-Nashiri.[539] It also ruled against Macedonia for its role in the abduction and torture of Khaled el-Masri.[540] A US federal court had dismissed el-Masri's case on state secrets grounds in 2006 and his appeals were all denied.[541] The European Court ordered Poland and Macedonia to pay €250,000 and €60,000 respectively. Poland has paid out its settlement to Abu Zubaydah and al-Nashiri.[542] Macedonia was due to pay within three months of the judgment on December 12, 2012.[543]

Guarantee of Non-Repetition, Satisfaction, and the Right to Truth

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535 Ian Austen, "Canada to Pay $9.75 Million to Man Tortured in Syria," *New York Times*, January 27, 2007, http://www.nytimes.com/2007/01/27/world/americas/27canada.html?_r=0 (accessed November 16, 2015).

536 Natalie O'Brien, "Australian official saw Egyptians torture Habib," *Sydney Morning Herald*, February 13, 2011, http://www.smh.com.au/national/australian-official-saw-egyptians-torture-habib-20110212-1ardt.html (accessed April 29, 2015).

537 Ibid.

538 European Court of Human Rights, *Case of Husayn (Abu Zubaydah) v. Poland*, (no. 7511/13), Judgment of 24 July 2014, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146047 (accessed November 16, 2015).

539 European Court of Human Rights, *Case of Al-Nashiri v. Poland*, (no. 28761/11), Judgement of 24 July 2014, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146044 (accessed November 16, 2015).

540 European Court of Human Rights, *El-Masri v. The Former Yugoslav Republic of Macedonia*, (no. 39630/09), Judgement of December 13, 2012, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621.

541 *El-Masri v. United States*, 479 F.3d 296.

542 "Poland pays $250,000 to victims of CIA rendition and torture," *The Guardian*, May 15, 2015, http://www.theguardian.com/world/2015/may/15/poland-pays-250000-alleged-victims-cia-rendition-torture (accessed August 25, 2015).

543 European Court of Human Rights, *El-Masri v. The Former Yugoslav Republic of Macedonia*, para. 273(12).

The right to redress encompasses the concepts of "effective remedy" and "reparation," which not only include restitution, compensation, and rehabilitation but also "guarantees of non-repetition" and "satisfaction."[544]

With regard to non-repetition, the Committee against Torture has interpreted the Convention against Torture to provide that states are obligated to combat impunity for violations, including by taking measures such as "establishing effective clear instructions to public officials on the provisions of the Convention, especially the absolute prohibition of torture"; "civilian oversight of military and security forces"; "establishing systems for regular and independent monitoring of all places of detention"; providing training for security forces and health and legal professionals on human rights law, including specific training on the Istanbul Protocol (on documentation of torture); and "reviewing and reforming laws contributing to or allowing torture and ill-treatment."[545] A UN General Assembly resolution sets out more general measures for victims of serious human rights and international humanitarian law violations.[546]

Though then-President George W. Bush disclosed the CIA rendition, detention, and interrogation program in 2006 and moved a number of prisoners from CIA custody to Guantanamo, the program did not officially end until President Barack Obama issued executive order 13491 on his second day in office. This order barred the CIA from operating detention facilities and from holding detainees on all but a temporary, transitory basis; required all US personnel to abide by the Army Field Manual for Intelligence Interrogations; and required that the International Committee of the Red Cross have prompt access to all laws-of-war detainees.[547]

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[544] UN Committee against Torture, General Comment No. 3 (Implementation of Article 14 by States Parties), http://www1.umn.edu/humanrts/cat/general_comments/cat_gen_com3.html (accessed July 1, 2015), para. 2; UN General Assembly Resolution 60/147, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law," December 2005, http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx (accessed April 28, 2015), para. 18 ("In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.").

[545] UN Committee against Torture, General Comment No. 3, http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf (accessed November 16, 2015), para. 18.

[546] See Basic Principles, para. 23.

[547] "Executive Order 13491 – Ensuring Lawful Interrogations," The White House, January 22, 2009, https://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations (accessed May 2, 2015).

These are important measures. But Obama's executive order is not adequate to ensure non-repetition in the future—particularly when inaction on investigations and prosecutions sends the message to those responsible for torture that the law will not be enforced. Upon the release of the Senate Summary, CIA Director John Brennan made significant admissions about mistakes the CIA had made in running, operating, reporting on, and promoting the program. However, he also said whether the techniques had some value was "unknowable." And when asked what was to stop future policy makers from using them again, he said the CIA was not currently contemplating reinstating the detention program or using "enhanced interrogation techniques" but he deferred to "policymakers in future times" regarding whether they might need to be used again in a similar type of "crisis."[548]

There remains a very real danger that US officials will again view torture as a viable policy option. Obama's executive order, like all executive orders, can be revoked by future presidents. Several 2016 presidential candidates have defended the "enhanced interrogation techniques" and said or implied that they would use them again.[549] US presidential candidate Jeb Bush, when asked whether he would contemplate using "enhanced interrogation techniques" if he were elected, did not rule out the possibility and also said that waterboarding was not torture.[550]

The best way to ensure that torture and other ill-treatment will not be used in the future is by prosecuting past unlawful acts. Strengthening existing legislation against torture

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548 "TRANSCRIPT: CIA Director John Brennan Addresses Senate's Report on CIA Interrogation Program," *ABC News*, December 11, 2014, http://abcnews.go.com/International/transcript-cia-director-john-brennan-senates-report-cia/story?id=27539690&singlePage=true (accessed July 1, 2015).

549 Kaili Joy Gray, "Donald Trump And Fox & Friends: It's Cool, Sydney Hostage-Takers, CIA Was 'Just Following Orders,'" *Wonkette*, December 15, 2014, http://wonkette.com/569220/donald-trump-and-fox-friends-its-cool-sydney-hostage-takers-cia-was-just-following-orders#iweGwD3WVS1CKQic.99 (accessed October 25, 2015); Heather Digby Parton, "Ben Carson's sick torture rationale: Is this 2016's most deluded contender?" *Salon*, February 20, 2015, http://www.salon.com/2015/02/20/ben_carsons_sick_torture_rationale_is_this_2016s_most_deluded_contender/ (accessed October 25, 2015); Michael Isikoff, "Carly Fiorina Defends Bush-era Torture and Spying, Calls for More Transparency," *Yahoo Politics*, September 28, 2015, https://www.yahoo.com/politics/carly-fiorina-defends-bush-era-torture-and-spying-130015256041.html?soc_src=social-sh&soc_trk=tw (accessed October 25, 2015); James Q. Lynch, "Rick Perry won't rule out torture to protect Americans from domestic terrorism," *The Gazette*, May 20, 2015, http://thegazette.com/subject/news/government/rick-perry-wont-rule-out-torture-to-protect-americans-from-domestic-terrorism-20150520 (accessed July 1, 2015).

550 Trip Gabriel, "Jeb Bush Says He Won't Rule Out Waterboarding in Interrogations," *New York Times*, August 14, 2015, http://www.nytimes.com/politics/first-draft/2015/08/14/jeb-bush-says-he-wont-rule-out-waterboarding-in-interrogations/ (accessed August 25, 2015).

would also establish clearly that the US government does not intend to engage in such practices again.

On June 16, 2015, the US Senate passed an amendment proposed by senators John McCain and Dianne Feinstein to a defense spending bill (the National Defense Authorization Act for Fiscal Year 2016) that if it becomes law, could codify much of what is in Obama's executive order 13491.[551] The amendment passed in the Senate by a vote of 78-21.[552] The entire bill was then vetoed by Obama over other issues, but a similar provision remained in the compromised version bill which, as of this writing, was expected to be signed into law by the President.[553] It provides that any individual detained by the US in an armed conflict can only be interrogated in ways outlined by the US Army Field Manual on Intelligence Interrogations. It also requires review and updating of the manual within three years to ensure that it reflects current best practice and complies with all US legal obligations and requires that the International Committee of the Red Cross get "notification of, and prompt" access to, all prisoners held by the US in any armed conflict.[554] It is already clear under US law that torture and other ill-treatment is illegal but this requirement would help to more specifically restrain the physical action certain US interrogators could take.[555]

However, it is also impossible to know for sure how future administrations will interpret its obligations under the provisions. Additionally, an exemption for the FBI, the Department of Homeland Security, and other federal "law enforcement entities" was added to the compromised version of the bill.

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[551] "US: Support Anti-Torture Legislation," Human Rights Watch news release, June 16, 2015, http://www.hrw.org/news/2015/06/16/us-support-anti-torture-legislation.

[552] Julian Hattem, "Senate votes to ban use of torture," *The Hill*, June 16, 2015, http://thehill.com/policy/national-security/245117-senate-votes-to-permanently-ban-use-of-torture (accessed November 12, 2015).

[553] Rebecca Shabad, "White House expects President Obama to sign defense bill," *CBS*, November 10, 2015, http://www.cbsnews.com/news/white-house-expects-president-obama-to-sign-defense-bill/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+cbsnews%2Ffeed+(CBSNews.com) (accessed November 12, 2015).

[554] "US: Support Anti-Torture Legislation," Human Rights Watch news release.

[555] Though the Interrogation Manual bars many forms of abusive treatment, its Appendix M still allows some abusive forms of sleep and sensory deprivation. For example, it permits limiting detainees to only four hours of sleep every 24 hours, permitting 40 hours of sleep deprivation at a time, potentially over an extended period. US officials have said that Appendix M would not be applied in a way that allows for such abuse but the text as written would still permit such practices. During the next Defense Department review process, the US should remove the provisions in Appendix M that allow for abuse through isolation or sleep and sensory deprivation that can amount to torture or ill-treatment.

IV. International Accountability Mechanisms

The US government's failure to conduct adequate criminal investigations into allegations of torture and other serious abuses committed by US nationals in the context of the CIA's rendition, detention, and interrogation program has opened the door to investigations and prosecutions by national judicial authorities outside the United States.[556]

Investigations to date have targeted both US officials and those from other countries since a number of European countries provided support to the CIA program, in particular by allowing US officials to establish secret prisons known as "black sites" on their territory or to use their airports and airspace to conduct rendition flights. Several investigations have also focused on allegations of torture and other serious abuses committed outside of the context of the CIA program, principally around torture and ill-treatment of detainees held at Guantanamo Bay; in Iraq (especially at Abu Ghraib prison); and in Afghanistan. In addition, the International Criminal Court (ICC) has opened a preliminary examination into the situation in Afghanistan and is assessing whether to open a formal investigation, including into allegations of detainee abuse by members of the US armed forces.

Jurisdiction over criminal offenses normally depends on a link between the prosecuting state and the crime. Most often this link is territorial, meaning that the crime occurred in the state that is prosecuting the crime. In other instances, the link is that the alleged perpetrator or the victim is a national of that country.[557] However, judicial authorities of third countries may also investigate and prosecute the most serious international crimes—including war crimes, torture, crimes against humanity, and genocide—even where the crimes took place elsewhere and neither the accused nor the victims are nationals of that state. Such cases are pursued under the international law principle of "universal jurisdiction," which embodies the idea that certain crimes are so egregious that every state has an interest and corresponding duty in bringing perpetrators to justice.[558]

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[556] See section of this report titled "Justice Department Inquiry into CIA Torture" in the "Background" section above.

[557] These are known as "active personality" or "passive personality" jurisdiction.

[558] For more information on universal jurisdiction, see Human Rights Watch, *The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad*, November 1, 1998, http://www.hrw.org/en/reports/1998/11/01/pinochet-precedent; *Universal Jurisdiction in Europe: The State of the Art*, vol. 18, no. 5(D), June 2006, http://www.hrw.org/sites/default/files/reports/ijo606web.pdf; *The Long Arm of Justice: Lessons from Specialized War*

Universal jurisdiction provides an important safety net for ensuring accountability when serious crimes cannot or will not be effectively prosecuted in the state where the crimes were committed or before an international criminal tribunal. For certain crimes, including war crimes, and torture, international treaties and customary international law place an affirmative duty on states to exercise universal jurisdiction and prosecute suspects who come onto their territory, unless the state decides to extradite them to face trial elsewhere.[559]

The principle of universal jurisdiction has existed for centuries. However, its application to human rights abuses and war crimes only began to gain real momentum in the past two decades, with the arrest of former Chilean President Augusto Pinochet in the United Kingdom in 1998 on charges of torture committed in Chile.[560] Since then, more and more governments, particularly in Europe, have been willing to use domestic universal jurisdiction laws to ensure that those responsible for torture, war crimes, and other international crimes do not escape justice.[561] At the same time, most cases brought to trial under universal jurisdiction

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Crimes Units in France, Germany, and the Netherlands, September 2014, http://www.hrw.org/sites/default/files/reports/IJ0914_ForUpload.pdf.

559 The Convention against Torture—ratified by the United States and 157 other countries—provides that "[t]he State Party in the territory under whose jurisdiction a person alleged to have committed [torture] is found shall ... if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution." Each of the four Geneva Conventions of 1949 relating to war crimes, which the United States and virtually every country have ratified, has a similar provision. The International Convention for the Protection of All Persons from Enforced Disappearance contains a similar provision. See Convention against Torture; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted August 12, 1949, 75 UNTS 31, entered into force October 21, 1950, art. 49, https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4825657B0C7E6BF0C12563CD002D6B0B&action=openDocument; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted August 12, 1949, 75 UNTS 85, entered into force October 21, 1950, art. 50, https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=2F5AA9B07AB61934C12563CD002D6B25&action=openDocument; Geneva Convention relative to the Treatment of Prisoners of War, adopted August 12, 1949, 75 UNTS 135, entered into force October 21, 1950, art. 129, https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=77CB9983BE01D004C12563CD002D6B3E&action=openDocument; Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted August 12, 1949, 75 UNTS 287, entered into force October 21, 1950, art. 146, https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument ; International Convention for the Protection of All Persons from Enforced Disappearance, adopted December 20, 2006, G.A. Res. 61/177, U.N. Doc. A/61/448, entered into force December 23, 2010, art. 9, http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx. All UN member states have ratified treaties with obligations to exercise jurisdiction over foreigners suspected of committing certain crimes abroad against other foreigners. Amnesty International, "International Law Commission: The obligation to extradite or prosecute (aut dedere aut judicare)," February 3, 2009, http://www.amnesty.org/en/library/info/IOR40/001/2009/en (accessed March 23, 2015), pp. 74-98. See also International Law Commission, "Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic 'The obligation to extradite or prosecute (*aut dedere aut judicare*)', Study by the Secretariat," U.N. Doc. A/CN.4/630, June 18, 2010, http://legal.un.org/ilc/documentation/english/a_cn4_630.pdf (accessed March 24, 2015).

560 See Human Rights Watch, *The Pinochet Precedent*.

561 According to a 2012 survey conducted by Amnesty International, 163 states have some form of universal jurisdiction legislation in place, with courts in at least 85 countries able to exercise universal jurisdiction over the crime of torture and at least 136 countries able to do so for war crimes. Amnesty International, "Universal Jurisdiction: A Preliminary Survey of

have involved low- and mid-level suspects from less powerful countries.[562] In 2008, US prosecutors notably secured a first conviction under its Torture Act, which allows cases based on universal jurisdiction to prosecute torture committed abroad, against the son of former Liberian dictator Charles Taylor, Charles "Chuckie" Taylor, Jr.[563] The trial of former Chadian dictator Hissène Habré in Senegal, which began on July 20, also marks the first time in history that a former head of state is prosecuted by the domestic courts of another country and the first universal jurisdiction case to proceed to trial in Africa.[564]

Human Rights Watch has compiled a review, set forth below, of criminal investigations initiated abroad into torture and other serious abuses committed as part of the CIA program or by US armed forces since the 9/11 attacks.[565] Many of these investigations do not make a distinction between US military and CIA abuses, so we have included investigations regardless of whether the military or the CIA was the dominant focus. Nearly all of the cases have been initiated by victims and civil society groups, and all have occurred in Europe. Many European civil law jurisdictions, unlike most common law countries like the US, allow victims and in some cases nongovernmental organizations to file criminal complaints directly with the courts, thereby triggering the opening of a judicial investigation.[566] Many criminal complaints filed by private parties have not resulted in actual investigations. Italy is the only country to have brought a case to trial, which eventually resulted in the final *in absentia*

Legislation around the World – 2012 Update," October 9, 2012, https://www.amnesty.org/download/Documents/24000/ior530192012en.pdf (accessed June 3, 2015), pp. 2, 12-13.

[562] Over the past two decades, universal jurisdiction cases have been brought before the courts of Argentina, Austria, Belgium, Canada, Denmark, Finland, France, Germany, the Netherlands, Norway, Senegal, Spain, Sweden, Switzerland, the United Kingdom, and the United States. Human Rights Watch, *Universal Jurisdiction in Europe; The Long Arm of Justice*, annexes. See also Redress and International Federation for Human Rights (FIDH), "Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union," December 2010, http://www.redress.org/downloads/publications/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union.pdf (accessed March 24, 2015).

[563] Chuckie Taylor was actually a US citizen who was initially arrested while attempting to enter the US for a passport violation. See "First Verdict for Overseas Torture: Decision in Trial of Ex-Liberian President's Son Significant for Justice," Human Rights Watch news release, October 30, 2008, http://www.hrw.org/news/2008/10/30/us-first-verdict-overseas-torture.

[564] "Hissène Habré Trial to Begin July 20: Former Chad Dictator Charged with Crimes against Humanity," Human Rights Watch news release, May 13, 2015, http://www.hrw.org/news/2015/05/13/senegal-hissene-habre-trial-begin-july-20.

[565] This list is restricted to criminal cases and does not discuss other civil cases and inquiries that are underway or have been completed.

[566] For more information, see Human Rights Watch, *The Legal Framework for Universal Jurisdiction in France*, September 2014, http://www.hrw.org/sites/default/files/related_material/IJ0914France_3.pdf, pp. 4-6. The European Center for Constitutional and Human Rights (ECCHR), the Center for Constitutional Rights (CCR), the International Federation for Human Rights (FIDH), and the Open Society Justice Initiative (OSJI) have been the most active nongovernmental organizations (NGOs) in terms of filing criminal complaints against US officials for alleged torture and other serious abuses.

convictions of CIA officers and a US air force colonel, as well as several Italian officers.[567] The trial brought to light important information that was tempered by being *in absentia,* which raises serious fair trial concerns.[568]

Nearly all of the other criminal investigations initiated against US nationals to date have been closed. However, a criminal investigation in France is progressing slowly. And Germany's federal prosecutor's office is considering whether to open an investigation into senior members of the Bush administration following the filing of a new complaint by the European Center for Constitutional and Human Rights (ECCHR) in December 2014, shortly after the release of the Senate Summary.

Mounting evidence of involvement by governments in Europe in the CIA program—underscored by the Senate Summary—and growing pressure from civil society groups, and court judgements, led several countries to open criminal investigations into complicity by their nationals. This includes Poland where the investigations have languished, and in Lithuania where investigations were opened briefly, closed for a number of years, and then reopened when the Senate Summary was made public. UK authorities have initiated four separate investigations, two of which remain open.

Overall, these cases are an important reminder to the US government that legal avenues for accountability are not just available in the United States, and that US officials involved in the CIA program are not free and clear just because the US government has thus far been unwilling to bring cases.

However, as discussed below, European efforts at investigating the CIA program have faced political pressure from the US and actions by US authorities to block investigations. European governments will need to demonstrate greater commitment and persistence if these cases are to proceed to indictments and prosecutions.

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[567] Malaysia also held criminal proceedings before a commission, but the commission is not part of the national judicial system, so its judgment was "merely declaratory in nature." *Prosecutor v. George W. Bush & 7 Others*, Kuala Lumpur War Crimes Commission, Case No. 2-CTH-2011, Judgment, May 11, 2012, http://criminalisewar.org/tribunal/Judgement%20KLWCT%20May%202012.pdf (accessed April 30, 2015), para. 23.4. "Bush and Associates Found Guilty of Torture," Kuala Lumpur Foundation to Criminalise War press release, May 11, 2012, http://criminalisewar.org/2012/press-release-bush-and-associates-found-guilty-of-torture (accessed April 30, 2015).

[568] Trials *in absentia* compromise the ability of an accused to exercise their rights to a legal defense under article 14 of the International Covenant on Civil and Political Rights. Those rights compromised include the right to be present during the trial, the right to defend oneself through counsel of choice, and the right to examine witnesses.

European governments should also ensure that accountability extends to those non-US nationals who bear responsibility for torture and other serious abuses committed in connection with the CIA rendition, detention, and interrogation program. A study by the Open Society Justice Initiative (OSJI) in 2013 found that 54 foreign countries provided support of some form to the CIA program, with 21 of those countries being within Europe.[569] The active participation of European countries in the CIA program has been widely confirmed.[570] Each of these countries should ensure that thorough and impartial criminal investigations are carried out to establish the responsibility of not only US officials over whom their courts may have jurisdiction, but also their own nationals. Toward this end, European and other countries that may have been complicit or participated in the CIA program should request a copy of the full Senate report with minimal redactions.[571]They should also inform the US government that they have no objections to the report publicly naming their country.

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[569] Open Society Justice Initiative (OSJI), "Globalizing Torture: CIA Secret Detention and Extraordinary Rendition," February 2013, http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf (accessed June 4, 2015).

[570] See UN Human Rights Council, "Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances represented by its Chair, Jeremy Sarkin" ("UN Joint Study on Secret Detention"), U.N. Doc. A/HRC/13/42, February 19, 2010, http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf (accessed June 4, 2015), para. 159; UN Human Rights Council, Report on the promotion and protection of human rights and fundamental freedoms while countering terrorism, U.N. Doc. A/HRC/10/3, February 4, 2009, http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.3.pdf (accessed June 16, 2015), para. 52; Parliamentary Assembly of the Council of Europe, "Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states," June 12, 2006, http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=11527&lang=en (accessed June 15, 2015); Parliamentary Assembly of the Council of Europe, "Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report," June 11, 2007, http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=11555&lang=en (accessed June 15, 2015); European Parliament Resolution of 11 February 2015 on the US Senate report on the use of torture by the CIA (2014/2997(RSP)), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0031+0+DOC+XML+V0//EN (accessed June 17, 2015); European Parliament Resolution of 10 October 2013 on alleged transportation and illegal detention of prisoners in European countries by the CIA (2013/2702(RSP)), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0418+0+DOC+XML+V0//EN (accessed June 4, 2015); European Parliament Resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries: follow-up of the European Parliament TDIP Committee report (2012/2033(INI)), http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0309&language=EN&ring=A7-2012-0266 (accessed June 4, 2015); Human Rights Watch, *Delivered into Enemy Hands*; OSJI, "Globalizing Torture: CIA Secret Detention and Extraordinary Rendition"; Amnesty International, "Partners in Crime: Europe's Role in US Renditions," June 14, 2016, http://www.amnesty.eu/static/documents/2006/Partners_in_crime_14062006.pdf (accessed June 15, 2006); International Committee of the Red Cross (ICRC), "ICRC Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody," February 2007, http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf (accessed June 17, 2015).

[571] This is consistent with the European Parliament Resolution of 11 February 2015 on the US Senate report on the use of torture by the CIA.

A number of countries may be in a position to exercise jurisdiction over US and foreign officials for their role in serious abuses committed as part of the CIA program and related mistreatment of persons in detention. Victims and witnesses, and other relevant evidence, may be located within their jurisdiction, which may oblige national authorities to investigate and prosecute the offenses.

Germany may provide a useful model as to how prosecutorial authorities can be proactive under the principles of universal jurisdiction. German prosecutors now have the ability to conduct broad preliminary investigations known as "structural investigations." These are aimed at cataloguing crimes (as opposed to focusing on specific individuals), gathering details about them, and identifying potential victims and witnesses and other evidence to facilitate future criminal proceedings before national courts or elsewhere.[572] This could help lay the groundwork for investigation of specific individuals should they enter Germany.

In addition, possible suspects from the US or elsewhere may be present in or travel to Europe or other countries that may have jurisdiction over them, thereby providing an opportunity for their arrest and, provided there is sufficient evidence, prosecution. National immigration, police, and judicial authorities should prepare for this eventuality, be vigilant to the identity of persons traveling to their countries, and work together to ensure that police and prosecutors are given an adequate opportunity to consider investigation and prosecution where suspects arrive on their territory. Human Rights Watch and four other nongovernmental organizations (NGOs) have sought a meeting of war crimes prosecutors from EU countries to discuss the Senate Summary and efforts to ensure accountability for CIA-related abuses.[573]

The ICC may also prove to be a path toward some accountability for US abuses committed in Afghanistan. The ICC is conducting a preliminary examination into alleged international crimes by all parties in Afghanistan. Should it decide to open a formal investigation in Afghanistan, it will need to consider including US abuses as part of its investigation.

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[572] For more information, see Human Rights Watch, *The Long Arm of Justice*, p. 60.

[573] Letter from Human Rights Watch, Redress, FIDH, ECCHR, and TRIAL to members of the EU Genocide Network, "Discussing Ongoing and Potential Investigations and Prosecutions Following the Release of the US Senate Intelligence Committee Report Summary," April 20, 2015, http://www.hrw.org/news/2015/04/20/letter-members-eu-genocide-network-discussing-ongoing-and-potential-investigations-a.

Given the confidential nature of judicial investigations, particularly when cases are at an early stage, it is possible that judicial authorities in other countries have investigated or are pursuing similar investigations, but the information is not available publicly. The information provided below is therefore not necessarily an exhaustive list of all criminal cases that have occurred or are pending in foreign jurisdictions.

Investigations and Prosecutions of US Officials

Italy

In November 2009, a court in Milan convicted 23 Americans and two Italian military intelligence officers for aiding and abetting in the abduction of Egyptian cleric Hassan Mustafa Osama Nasr (known as Abu Omar). The cleric had been kidnapped as he was walking down the street in Milan in February 2003 in what is believed to have been a joint operation by the CIA and Italian military intelligence. He was allegedly put on a plane and flown to an air base in Germany and then on to Egypt, where he claims to have been repeatedly tortured.[574]

The case, which Italian prosecutors initiated in 2003 despite strong opposition from US authorities, was brought against 26 Americans—all but one of whom were CIA officers—and seven Italian military intelligence officers.[575] None of the Americans were ever arrested or present during the trial.[576] Criminal proceedings moved forward slowly, in part due to Italian authorities' successive attempts to block the case due to concerns over its effect on US-Italian relations. The Italian government successfully challenged much of the evidence on the grounds that it might endanger national security, and refused to seek the extradition of the American defendants.

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574 "Italy/US: Italian Court Rebukes CIA Rendition Practice," Human Rights Watch news release, November 4, 2009, http://www.hrw.org/news/2009/11/04/italyus-italian-court-rebukes-cia-rendition-practice; "CIA agents guilty of Italy kidnap," *BBC News*, November 4, 2009, http://news.bbc.co.uk/2/hi/europe/8343123.stm (accessed March 30, 2015); John Hooper, "Italian court finds CIA agents guilty of kidnapping terrorism suspect," *The Guardian*, November 4, 2009, http://www.theguardian.com/world/2009/nov/04/cia-guilty-rendition-abu-omar (accessed April 1, 2015); Rachel Donadio, "Italy Convicts 23 Americans for C.I.A. Renditions," *New York Times*, November 4, 2009, http://www.nytimes.com/2009/11/05/world/europe/05italy.html?_r=0 (accessed April 1, 2015).

575 Of all the cases surveyed for this report, this is the only instance in which prosecutors opened an investigation on their own initiative without a complaint having been filed by the victim or an NGO.

576 Human Rights Watch expressed concern at the time over trials *in absentia*, which do not afford defendants an adequate opportunity to present a defense as required by the International Covenant on Civil and Political Rights, article 14. See "Italy/US: Italian Court Rebukes CIA Rendition Practice," Human Rights Watch news release. Italian law allows *in absentia* trials when there are reasons to believe the accused are aware of the trial, and are willingly refusing to participate.

The trial court convicted 22 of the CIA agents, two of the Italian military intelligence officers, and a US air force colonel. It also handed down penalties ranging from five to eight years, with the CIA's Milan station chief, Robert Seldon Lady, receiving the most serious sentence. The court ruled that the three other American defendants in the case were protected by diplomatic immunity, including the CIA's Rome station chief, Jeffrey Castelli.[577] It also dismissed charges against the five remaining Italians in the case, including the former head of Italy's military intelligence service, Gen. Nicolò Pollari, on the grounds that the evidence against them was protected by the state secrecy doctrine.[578]

In December 2010, the Milan appeals court upheld all of the convictions but increased the sentences given to the Americans.[579] In September 2012, Italy's highest court affirmed the convictions but overturned the acquittal of the five Italians and ordered them to face a new trial.[580] In February 2013, two separate trials by the appeals court led to convictions of the five Italians and three US citizens who had previously been acquitted.[581] Italy's highest court overturned the convictions of the five Italians in February 2014, again on the basis of the state secrecy doctrine. In March 2014, the same court upheld the three remaining CIA agents' convictions.[582]

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577 Human Rights Watch believes the court's interpretation of diplomatic immunity was overly broad and should not have been interpreted to protect officials responsible for grave international crimes such as torture. Ibid.

578 Human Rights Watch took issue with the court's interpretation of the state secrecy doctrine. Ibid.

579 The appeals court gave Lady a nine-year prison term and seven-year terms to the other Americans. It slightly decreased the prison terms of the Italian military intelligence officers, from three years to two years and eight months. Amnesty International, "Italy/USA: Supreme Court orders re-trial of former high-level intelligence officials and upholds all convictions in Abu Omar kidnapping case," September 21, 2012, https://www.amnesty.org/download/Documents/20000/eur300152012en.pdf (accessed March 30, 2015).

580 "Italy/US: Ruling on CIA Case Highlights US Inaction," Human Rights Watch news release, September 20, 2012, http://www.hrw.org/news/2012/09/20/italyus-ruling-cia-case-highlights-us-inaction; Amnesty International, "Italy/USA: Supreme Court orders re-trial of former high-level intelligence officials and upholds all convictions in Abu Omar kidnapping case."

581 The appeals court sentenced the CIA's Rome station chief Castelli to seven years in prison and the two other CIA agents to six years. It sentenced Italy's military intelligence head Pollari to 10 years, his deputy head Marco Mancini to nine years, and the three other Italian military intelligence agents to six years each. "Italy: Continue Efforts Toward Justice for CIA Abuses," Human Rights Watch news release, July 20, 2013, http://www.hrw.org/news/2013/07/20/italy-continue-efforts-toward-justice-cia-abuses; "Italy's ex-spy chief convicted over 2003 CIA rendition," *BBC News*, February 12, 2013, http://www.bbc.com/news/world-europe-21435632 (accessed March 30, 2015); Alison Sacriponte, "Italy court convicts 3 Americans for 2003 rendition kidnapping," *Jurist*, February 2, 2013, http://jurist.org/paperchase/2013/02/italy-court-convicts-3-americans-for-2003-rendition-kidnapping.php (accessed March 30, 2015).

582 Judith Sunderland, "Dispatches: Italy Stands Alone on Justice for CIA Abuses," Human Rights Watch dispatches, March 12, 2014, http://www.hrw.org/news/2014/03/12/dispatches-italy-stands-alone-justice-cia-abuses.

Regardless of whether any of the US nationals serves prison time, the case marked the first trial of US officials for CIA-related abuses post-9/11. Italian judicial authorities appear to have issued European Arrest Warrants, which are only valid in Europe, for all those convicted *in absentia*.[583] In July 2013, former CIA's Milan station chief Robert Seldon Lady was detained briefly in Panama on an Italian arrest warrant, and the Italian justice ministry pursued an extradition request—the only time it has done so.[584] Panamanian authorities refused the extradition request and released Lady. In October 2015, Sabrina De Sousa, a former CIA agent convicted in the case, was detained by authorities on a European Arrest Warrant issued in Italy at an airport in Lisbon as she was trying to leave the country.[585] She was released from detention shortly thereafter and is out of custody while her extradition case is pending.[586]

Germany

Three criminal complaints have been filed in Germany. While Germany allows victims and NGOs to file criminal cases directly, the prosecution has wide discretion to decline to pursue them.[587] The federal prosecutor's office declined to initiate an investigation in the first two cases, but has yet to decide on the third. In addition, state prosecutors issued warrants against 13 CIA agents in relation to the unlawful rendition of German national Khaled el-Masri from Macedonia in early 2004, but Germany has not taken further steps.

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[583] Abu Omar currently has a case pending against Italy before the European Court of Human Rights for its role in his abduction and mistreatment and its failure to hold those persons responsible for the crimes against him accountable. Abu Omar challenges Italian judicial authorities' decision not to convict five Italian officials on the basis of the state secrecy doctrine and its failure to request the extradition of the US officials convicted in the case. "Italy: Court set for CIA terror abduction human rights complaint," Council of Europe news release, June 1, 2015, http://www.humanrightseurope.org/2015/06/italy-court-set-for-cia-terror-abduction-human-rights-complaint (accessed August 17, 2015). See also European Court of Human Rights, *Nasr v. Italy*, (44883/09), Application of Osama Mustafa Hassn Nasr and Nabila Ghali of 6 August 2009, available at http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-113123. For more information, see Human Rights Watch, *The Legal Framework for Universal Jurisdiction in Germany*, September 2014, http://www.hrw.org/sites/default/files/related_material/IJ0914German_0.pdf.

[584] Judith Sunderland, "Dispatches: Italy Stands Alone on Justice for CIA Abuses"; Greg Miller and Karen DeYoung, "Panama releases former CIA operative wanted by Italy," *Washington Post*, July 19, 2013, http://www.washingtonpost.com/world/national-security/panama-releases-former-cia-operative-wanted-by-italy/2013/07/19/c73ebc12-f083-11e2-a1f9-ea873b7e0424_story.html (accessed March 30, 2015).

[585] Jason Leopold, "Former CIA Officer Detained in Europe While Trying to Clear Her Name in Rendition Case," *Vice News*, October 8, 2015, https://news.vice.com/article/former-cia-officer-detained-in-europe-while-trying-to-clear-her-name-in-rendition-case (accessed November 6, 2015).

[586] Ibid.

[587] For more information, see Human Rights Watch, *The Legal Framework for Universal Jurisdiction in Germany*, September 2014, http://www.hrw.org/sites/default/files/related_material/IJ0914German_0.pdf.

2004 Complaint

In November 2004, CCR[588] assisted four Iraqis in filing a criminal complaint against then-US Defense Secretary Donald Rumsfeld, former CIA Director George Tenet, and a number of other current and former senior military officials,[589] for alleged torture and other ill-treatment amounting to war crimes suffered at the hands of US armed forces in the Abu Ghraib prison in Iraq.[590] US officials expressed concern over the case, warning that "frivolous lawsuits" could adversely affect the US relationship with Germany.[591] Through the US embassy, Rumsfeld also informed German authorities that he would not take part in an upcoming Conference on Security Policy in Munich if the case proceeded.[592]

On February 10, 2005, just days before Rumsfeld was scheduled to speak at the security conference in Munich, the federal prosecutor's office announced that it would not pursue an investigation.[593] The office justified its decision on the grounds of subsidiarity, asserting that there were no indications the US was refraining from investigating and prosecuting the crimes in the US. Emphasizing that the US had a closer connection to the alleged crimes, the federal prosecutor's office said that it need not look at whether Rumsfeld was himself under investigation in the United States or whether the exact same crimes were being investigated.[594] ECCHR and CCR challenged the decision, but the

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588 The complaint was filed by ECCHR executive director Wolfgang Kaleck when working for CCR, prior to ECCHR's founding.

589 These officials included Lt. Gen. Ricardo Sanchez, Commander of the Combined Joint Task Force Seven at Abu Ghraib; Maj. Gen. Walter Wojdakowski, Dep. Commanding Gen. of the Combined Joint Task Force Seven at Abu Ghraib; Brig. Gen. Janis Karpinski, Commander of the 800th Military Police Brigade at Abu Ghraib; Lt. Col. Jerry Phillabaum, Commander of the 320th Military Police Brigade at Abu Ghraib; Col. Thomas Pappas, Commander of the 205th Military Intelligence Brigade at Abu Ghraib; Lieutenant Colonel Stephen L. Jordan, Chief of the Joint Interrogation Debriefing Center at Abu Ghraib; Maj. Gen. Geoffrey Miller, Commander of the Joint Task Force at Guantanamo; and Under Sec. of Defense for Intelligence Stephen Cambone.

590 The complaint alleged that the torture and ill-treatment of detainees amounted to a war crime under the German Code of Crimes against International Law. For more details on the case, see European Center for Constitutional and Human Rights (ECCHR), "Rumsfeld torture cases," undated, http://www.ecchr.eu/en/our_work/international-crimes-and-accountability/u-s-accountability/rumsfeld.html (accessed March 23, 2015).

591 "Lawsuit against Rumsfeld threatens US-German Relations," *Deutsche Welle*, December 14, 2004, http://www.dw.de/lawsuit-against-rumsfeld-threatens-us-german-relations/a-1427743 (accessed June 3, 2015).

592 Adam Zagorin, "Exclusive: Charges Sought Against Rumsfeld Over Prison Abuse," *Time*, November 10, 2006, http://content.time.com/time/nation/article/0,8599,1557842,00.html (accessed April 29, 2015); "Pentagon concerned about legal complaint in Germany against Rumsfeld, others," *Agence France Presse*, December 13, 2004.

593 "Germany Won't Prosecute Rumsfeld," *Deutsche Welle*, February 10, 2005. See also "Keine deutschen Ermittlungen wegen der angezeigten Vorfälle von Abu Ghraib/Irak," Federal Prosecutor's Office press release, February 10, 2005, https://www.generalbundesanwalt.de/de/showpress.php?newsid=163 (accessed March 23, 2015).

594 The federal prosecutor's office argued that the *complex* of crimes was under investigation so it need not look at whether the same accused and the exact same crimes were the subject of criminal proceedings in the US. "Keine deutschen Ermittlungen wegen der angezeigten Vorfälle von Abu Ghraib/Irak," Federal Prosecutor's Office press release.

appeals court declared the request for review inadmissible, including on the basis that the prosecutor did not abuse discretion in declining to move forward.[595]

In July 2006, the UN Special Rapporteur on the independence of judges and lawyers sent a letter to German authorities expressing concern over the prosecutor's decision. Noting the "strong political pressure" exerted by the US and the questionable timing of the decision, the letter alleged a violation of the independence of the judiciary.[596] The Special Rapporteur underlined that there were no indications that US judicial authorities were actually investigating the alleged crimes, with the exception of low-ranking officers, or had any intention to look at criminal responsibility of senior military officials. He also took issue with the prosecutor's cursory decision dismissing the complaint.[597]

2006 Complaint

In November 2006, just days after Rumsfeld had resigned as defense secretary, CCR[598] filed another complaint with the German federal prosecutor's office on behalf of Guantanamo detainee Mohammed al-Qahtani and 11 Iraqis who had been held at Abu Ghraib.[599] The complaint targeted Rumsfeld, Tenet, and other current and former senior military officials,[600] but also included current and former government attorneys Alberto Gonzales, William Haynes, David Addington, John Yoo, and Jay Bybee.[601] Like the earlier complaint, it alleged that the defendants had committed war crimes by justifying, ordering, and implementing abusive interrogation policies that resulted in torture of the 12 individuals.

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595 *CCR et al. v. Donald Rumsfeld et al.*, Higher Regional Court of Stuttgart, Case No. 5 Ws 109/05, Decision, September 13, 2005, http://www.ecchr.eu/de/unsere-themen/voelkerstraftaten-und-rechtliche-verantwortung/usa/rumsfeld.html?file=tl_files/Dokumente/Universelle%2520Justiz/%2520Entscheidung_OLG_Stuttgart_Klageerzwingungsverfahren.pdf (accessed March 23, 2015). See also Katherine Gallagher, "Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture," *Journal of International Criminal Justice*, vol. 7, no. 5 (2009): 1105-1106, http://jicj.oxfordjournals.org/content/7/5/1087.full.pdf+html (accessed April 30, 2015).

596 UN Commission on Human Rights, Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/4/25/Add.1, April 5, 2007, pp. 96-98.

597 Ibid., pp. 97-98.

598 The complaint was filed by ECCHR executive director Wolfgang Kaleck when working for CCR, prior to ECCHR's founding.

599 CCR, "German War Crimes Complaint against Donald Rumsfeld, et al." undated, http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld-et-al (accessed March 30, 2015).

600 These officials included Under Sec. of Defense for Intelligence Stephen Cambone; Lt. Gen. Ricardo Sanchez, commander of Combined Joint Task Force Seven at Abu Ghraib; Maj. Gen. Geoffrey Miller, commander of Joint Task Force Guantanamo; Col. Thomas Pappas, commander of the 205th Military Intelligence Brigade at Abu Ghraib; Maj. Gen. Walter Wojdakowski, deputy commanding general of Combined Joint Task Force Seven at Abu Ghraib; Maj. Gen. Barbara Fast, senior intelligence officer at Abu Ghraib; and Col. Marc Warren, staff judge advocate for Coalition Forces in Iraq.

601 CCR, "German War Crimes Complaint against Donald Rumsfeld, et al."

The complaint documented how no meaningful investigations had taken place in the US or Iraq and provided lengthy submissions. It was supported by numerous human rights and civil society organizations, international legal scholars, and a former UN Special Rapporteur on Torture. In addition, former Army Brig. Gen. Janis Karpinski, who had been a defendant in the 2004 case in relation to her role as commander of the 800th Military Police Brigade at Abu Ghraib, submitted written testimony in support and offered to appear as a witness.[602]

On April 27, 2007, the federal prosecutor's office again decided not to open an investigation. This time the federal prosecutor focused less on the issue of subsidiarity and more on whether there were sufficient links to Germany to merit an investigation. She concluded that none of the suspects resided in Germany or could be expected to come there.

The prosecutor also concluded that any investigation was likely to be unsuccessful because US authorities would not cooperate with the case.[603] She said: "To resolve possible accusations, investigation on the scene and in the United States of America would be unavoidable. Because the German investigative authorities have no executive powers abroad, this could only occur through legal assistance. But such requests are obviously futile—especially if we consider the legal and security situation in Iraq."[604]

The complainants filed a challenge with the court, asserting that an investigation could take place even in the absence of the accused, but the petition for review was again dismissed. The court held that, while the possibility of former US officials coming to Germany could not be excluded, it was not a sufficient basis to compel an investigation.[605]

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[602] Testimony of Former US Brigadier General Janis Karpinski, Former Head of Abu Ghraib, for the German criminal procedure against DOD Donald Rumsfeld and others, October 26, 2005, http://ccrjustice.org/files/abu%20KarpinskiTestimony2006.pdf (accessed April 30, 2015).

[603] "Kein Ermittlungsverfahren wegen der angezeigten Vorfälle in Abu Ghraib/Irak und in Guantánamo Bay/Kuba," Federal Prosecutor's Office press release, April 27, 2007, http://www.generalbundesanwalt.de/de/showpress.php?themenid=9&newsid=273, English translation, https://www.fidh.org/International-Federation-for-Human-Rights/americas/usa/USA-Guantanamo-Abu-Ghraib/GERMAN-FEDERAL-PROSECUTOR-S-OFFICE (accessed June 10, 2015). Criminal Complaint against Donald Rumsfeld et al., Federal Supreme Court of Kalrsruhe, Case No. 3 ARP 156/06-2, Decision, April 5, 2007, http://ccrjustice.org/files/ProsecutorsDecision.pdf (accessed March 23, 2015).

[604] Criminal Complaint against Donald Rumsfeld et al., Federal Supreme Court of Kalrsruhe, Case No. 3 ARP 156/06-2, Decision, April 5, 2007, p. 7.

[605] *Derweesh et al. v. Donald Rumsfeld et al.*, Higher Regional Court of Stuttgart, Case No. 3 ARP 156/06-2, Decision, April 21, 2009, http://ccrjustice.org/files/Beschluss%20OLG%20Stuttgart.pdf (accessed March 23. 2015).

2014 Complaint

On December 17, 2014, following the release of the Senate Summary, ECCHR filed a third complaint against Rumsfeld, Tenet, and other "alleged perpetrators in senior positions within the Department of Defense, the Department of Justice, the CIA and other departments" with German federal prosecutors.[606] Unlike the 2004 and 2006 complaints, this complaint has not been filed on behalf of specific victims. The allegations are similar to those contained in the earlier complaints, namely that US authorities conceived of and implemented a program of torture that was carried out by CIA, military, and other US officials.[607]

The federal prosecutor's office has not yet decided whether to open an investigation. Since the 2004 and 2006 cases were dismissed, universal jurisdiction has gained growing acceptance in Germany, as evidenced by the creation of a specialized war crimes unit in 2009 and the opening of broad preliminary investigations—known as "structural investigations"—into grave crimes committed abroad, including in Libya and Syria, which have little direct link to Germany.[608] In addition, as discussed above, the federal prosecutor's office has changed its internal policy and now only exercises discretion where a suspect is not ever likely to come to Germany *and* where no potential victims and witnesses can be identified in the country.[609] German officials told Human Rights Watch in March 2014, prior to the filing of the most recent complaint, that the earlier *Rumsfeld* cases might be decided differently now.[610] Victims and witnesses to certain US abuses committed in Iraq and Guantanamo are believed to be living in Germany. Federal prosecutors should open a structural investigation and take steps to gather and preserve evidence that could be used in later criminal proceedings in Germany or elsewhere.

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606 "Criminal complaint against Bush era architects of torture," ECCHR, http://www.ecchr.eu/en/our_work/international-crimes-and-accountability/u-s-accountability/germany.html (accessed November 6, 2015).

607 Criminal Complaint by ECCHR against George Tenet, Donald Rumsfeld, et al., Karlsruhe Federal Court of Justice, December 17, 2014, (accessed November 6, 2015).

608 See also "DR Congo: German Court Convicts Two Rwandan Rebel Leaders," Human Rights Watch news release, September 28, 2015, https://www.hrw.org/news/2015/09/28/dr-congo-german-court-convicts-two-rwandan-rebel-leaders. In addition, for more information on "structural investigations" and the work of specialized war crimes units in Germany, see Human Rights Watch, *The Long Arm of Justice*, pp. 52-55, 58-60.

609 Ibid., pp. 58-59. Human Rights Watch interview with German officials, March 18, 2014. See also "Zehn Jahre Völkerstrafgesetzbuch," German Parliament, November 7, 2012, http://dip21.bundestag.de/dip21/btd/17/113/1711339.pdf (accessed April 30, 2015), question 11.

610 Human Rights Watch interview with German officials, March 18, 2014.

Khaled El-Masri Case

In June 2004, Munich state prosecutors opened a criminal investigation into allegations that German national Khaled el-Masri had been a victim of the CIA rendition, detention, and interrogation program. El-Masri's case was one of the most documented unlawful rendition and torture cases, and it was the first such case to be heard by the European Court of Human Rights (ECtHR).

In December 2003, Macedonian border guards arrested el-Masri while he was crossing by bus into Macedonia from Serbia. He was detained in Macedonia for several weeks and then turned over to CIA agents and flown to Afghanistan, where he was tortured for several months. Eventually the CIA dropped him off in Albania without charging him with any crime and he returned to Germany.[611]

In January 2007, Munich prosecutors issued arrest warrants for 13 CIA agents on charges of wrongful imprisonment and causing serious bodily harm to el-Masri.[612] The case was initiated at the state level, rather than the federal level, because the allegations did not include torture as a war crime.[613] The case strained US-Germany relations, with prosecutors citing lack of cooperation from US authorities.[614] US diplomatic cables released by WikiLeaks revealed that US authorities warned German officials that pursuing the arrest warrants and extradition of those accused would "have a negative impact on our bilateral relationship."[615] In the end, the German government never sought the suspects'

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[611] For more information, see European Court of Human Rights, *El-Masri v. The Former Yugoslav Republic of Macedonia*, (39630/09), Judgment of 13 December 2012, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621. See also "Litigation: El-Masri v. Macedonia," OSJI, last modified January 23, 2013, http://www.opensocietyfoundations.org/litigation/el-masri-v-macedonia (accessed March 31, 2015).

[612] "Germany issues arrest warrants for suspected CIA agents," *The Guardian*, January 31, 2007, http://www.theguardian.com/world/2007/jan/31/usa.germany (accessed March 23, 2015); Mark Landler, "German Court Seeks Arrest of 13 C.I.A. Agents," *New York Times*, January 31, 2007, http://www.nytimes.com/2007/01/31/world/europe/31cnd-germany.html?_r=0 (accessed April 20, 2015); "Germany Issues Arrest Warrants for 13 CIA Agents in El-Masri Case," *Der Spiegel*, January 31, 2007, http://www.spiegel.de/international/el-masri-kidnapping-case-germany-issues-arrest-warrants-for-13-cia-agents-in-el-masri-case-a-463385.html (accessed March 23, 2015).

[613] Torture may be considered a constituent act of war crimes or crimes against humanity under German law but is not defined as a separate crime. It can therefore only be prosecuted as an "ordinary" crime and falls within the jurisdiction of state prosecutors. Human Rights Watch, *The Legal Framework for Universal Jurisdiction in Germany*, p. 1.

[614] Craig Whitlock, "German Lawmakers Fault Abduction Probe," *Washington Post*, October 4, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/10/03/AR2006100301449.html (accessed March 30, 2015).

[615] US State Department cable, "Al-Masri Case – Chancellery Aware of USG Concerns," February 6, 2007, https://wikileaks.org/plusd/cables/07BERLIN242_a.html (accessed April 30, 2015); Letta Taylor (Human Rights Watch), "Time to Clean House on Torture," commentary, *The Guardian*, December 3, 2010, http://www.hrw.org/news/2010/12/03/time-clean-house-torture.

extradition. While prosecutors have taken no further steps, the arrest warrants remain outstanding, which means that the suspects could face arrest if they travel to Germany or other European countries.[616]

On December 12, 2012, the ECtHR found that el-Masri had been tortured and held Macedonia responsible for his torture and ill-treatment both within the country itself and after his transfer to US authorities.

In December 2014, after the release of the Senate Summary, ECCHR wrote to the German Minister of Justice to urge Germany to request the extradition of the 13 CIA agents and to seek an apology and compensation for el-Masri from US authorities.[617] In July 2015 ECCHR filed a criminal complaint with the German federal prosecutor against Alfreda Bikowsky, a CIA agent connected to el-Masri's CIA rendition, torture, and continued detention months after his mistaken identity had been realized.[618] The complaint was connected to its December 17, 2014 complaint against Tenet, Rumsfeld and others. In October it made another submission in support of the complaint.[619] Should the German federal prosecutor not launch a criminal investigation, ECCHR plans to file a criminal complaint against Bikowsky with the Munich state prosecutor that issued the arrest warrants for the 13 CIA officials charged in el-Masri's case.[620]

France

Victims and NGOs have filed criminal complaints in France in connection with alleged torture and other abuses in Guantanamo, Iraq, and Afghanistan. Under French law, victims and other affected parties, including nongovernmental organizations, can file a criminal

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[616] ECCHR, "Piecing together the puzzle: making US torturers in Europe accountable," September 2014, http://www.statewatch.org/analyses/no-256-torture-schuller-fajana.pdf (accessed March 23, 2015).

[617] "Germany must enforce criminal prosecution of CIA agents and demand an apology and compensation for CIA victim El Masri," ECCHR news release, December 15, 2014, http://www.ecchr.de/el_masri_case.html (accessed June 9, 2015). Amnesty has supported ECCHR's call to re-open the investigation into its own role in the CIA torture program. Amnesty International, "Breaking the Conspiracy of Silence: USA's European 'Partners in Crime' Must Act After Senate Torture Report," January 2015, https://www.amnesty.org/download/Documents/212000/eur010022015en.pdf (accessed April 30, 2015), p. 23.

[618] Elisabeth Braw, "German human rights group files complaint against CIA 'Queen of Torture,'" *Al Jazeera America*, October 19, 2015, http://america.aljazeera.com/articles/2015/10/19/in-germany-cia-official-charged-with-torture.html (accessed November 6, 2015).

[619] Ibid. See also "Criminal complaint against Bush era architects of torture," ECCHR, http://www.ecchr.eu/en/our_work/international-crimes-and-accountability/u-s-accountability/germany.html (accessed November 6, 2015).

[620] Elizabeth Braw, "German human rights group files complaint against CIA 'Queen of Torture,'" *Al Jazeera*.

complaint directly with investigative judges rather than passing through prosecutors to ensure that a judicial investigation is opened.[621] An investigation remains pending in one case, but prosecutors declined to open an investigation against former Defense Secretary Donald Rumsfeld on the grounds that he had immunity.

Guantanamo Detainees Case

In November 2002, the parents of two French citizens who were detained at Guantanamo, Nizar Sassi and Mourad Benchellali, filed a criminal complaint before French courts alleging unlawful detention by US officials.[622] A judge in Lyon declined to investigate, which was upheld by an appeals court. In January 2005, however, France's highest court reversed the decision, and an investigation was opened in June 2005.[623]

In June 2006, a third French citizen, Khaled Ben Mustapha, who had also been held at Guantanamo, joined the case, alleging that he had been a victim of kidnapping and torture by US officials.[624] In January 2012, the investigative judge submitted a formal request to US authorities for access to the Guantanamo Bay detention center, all documents relevant to the detention of the three French citizens, and the names of anyone who had contact with them during their detention.[625] The US never responded to the request.[626]

In February 2014, the former detainees' lawyer filed an expert report aimed at establishing the criminal responsibility of former Guantanamo commander Geoffrey Miller and

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[621] For more information, see Human Rights Watch, *The Legal Framework for Universal Jurisdiction in France*, September 2014, http://www.hrw.org/sites/default/files/related_material/IJ0914France_3.pdf, pp. 4-6.

[622] The complaint did not name specific defendants, which is permitted under French law. "La plainte des familles de Mourad Benchellali et Nizar Sassi doit être à nouveau examinée," *mLyon*, January 4, 2005, http://www.mlyon.fr/19116-la-plainte-des-familles-de-mourad-benchellali-et-nizar-sassi-doit-etre-a-nouveau-examinee.html (accessed April 21, 2015).

[623] European Court of Human Rights, *Sassi and Benchellali v. France*, (21015/05), Judgment of 27 September 2005, available at http://jurisprudence.cedh.globe24h.com/0/0/france/2007/09/27/sassi-et-benchellali-c-france-82780-21015-05.shtml; Letter from Patrick Baudouin, lawyer for the complainants and Honorary President of FIDH, to Jean-Claude Marin, Public Prosecutor, Office of the Prosecutor of the Paris Court of Appeal, October 25, 2007, https://www.fidh.org/IMG/pdf/plainteFINALE25oct07.pdf (accessed April 21, 2015), pp. 11-12.

[624] As authorized under French law, Khaled Ben Mustapha's complaint also did not name specific defendants. "Plainte d'un ancien détenu français de Guantanamo pour enlèvement et torture," *NewsML*, June 23, 2006, http://newsml.cwi.nl/internal/data/NewsFeed_FR-2006/06/23/afp.com-20060623T163612Z-TX-SGE-JWM75.xml (accessed April 21, 2015).

[625] "French Court Investigating U.S. Torture: Summon Former Gitmo Commander," CCR press release, April 2, 2015, http://ccrjustice.org/newsroom/press-releases/french-court-investigating-u.s.-torture%3A-summons-former-gitmo-commander (accessed April 21, 2015).

[626] Ibid.; ECCHR, "Piecing together the puzzle: making US torturers in Europe accountable," September 2014.

requested that Miller be subpoenaed to testify.[627] In April 2014, the investigative judges declined the request on the grounds that US authorities would not cooperate or make Miller available for questioning. The former detainees appealed this decision.[628] On April 2, the appeals court reversed the decision and ordered the lower court to summon Miller to explain his role in the alleged abuse of the former detainees.[629]

Rumsfeld Case

In late October 2007, on the eve of a visit by Donald Rumsfeld to Paris for an event on foreign policy, the International Federation for Human Rights (FIDH), ECCHR, CCR, and the French League for Human Rights filed a complaint with French prosecutors alleging that Rumsfeld bears criminal responsibility for torture and other ill-treatment committed in US-run detention facilities in Guantanamo, Iraq, and Afghanistan.[630] Former Army Brigadier General Janis Karpinski submitted written testimony in support of the complaint as she had in Germany a year earlier.[631] Rumsfeld traveled to Paris as planned and faced no judicial consequences.[632]

The following month, the Paris district prosecutor formally dismissed the complaint without addressing the merits. Relying on an opinion from the foreign ministry, he concluded that Rumsfeld had immunity from prosecution based on his former position as US defense secretary.[633] The NGOs urged the general prosecutor to reconsider this

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627 CCR and ECCHR, Joint Expert Opinion before the Appeals Court in Paris (Tribunal de Grande Instance, Cour d'Appel de Paris), Case No. 2275/05/10, February 26, 2014, http://ccrjustice.org/files/MILLER-DOSSIER-FINAL_en_20140226_public.pdf (accessed March 23, 2015).

628 "Rights Groups Urge French Appeals Court to Subpoena Former Guantánamo Commander in Torture Investigation," CCR press release, March 5, 2015, http://ccrjustice.org/home/press-center/press-releases/rights-groups-urge-french-appeals-court-subpoena-former-guant-namo (accessed June 10, 2015).

629 "French Court Investigating U.S. Torture: Summon Former Gitmo Commander," CCR press release.

630 Letter from Patrick Baudouin, lawyer for the complainants and Honorary President of FIDH, to Jean-Claude Marin, Public Prosecutor, Office of the Prosecutor of the Paris Court of Appeal, October 25, 2007. For a summary of the case, see CCR, "French War Crimes Complaint against Donald Rumsfeld, et al." undated, http://ccrjustice.org/ourcases/current-cases/french-war-crimes-complaint-against-donald-rumsfeld (accessed March 23, 2015).

631 Testimony of Former US Brigadier General Janis Karpinski, Former Head of Abu Ghraib, for the French criminal procedure against former American Secretary of Defense Donald Rumsfeld, October 24, 2007, https://www.fidh.org/IMG/pdf/doc_20_-_Karpinski_Testimony.pdf (accessed April 30, 2015).

632 "Visite mouvementée de Donald Rumsfeld à Paris," *Courrier International*, October 26, 2007, http://www.courrierinternational.com/article/2007/10/26/visite-mouvementee-de-donald-rumsfeld-a-paris (accessed June 15, 2015).

633 Letter from Jean-Claude Marin, Public Prosecutor, Office of the Prosecutor of the Paris Court of Appeal, to Patrick Baudouin, lawyer for the complainants and Honorary President of FIDH, November 16, 2007, http://www.fidh.org/IMG/pdf/reponseproc23nov07.pdf (accessed March 23, 2015).

decision, but in February 2008 he confirmed the granting of immunity on the grounds that the alleged conduct could not "be dissociated" from Rumsfeld's official function.[634]

The prosecutors' decisions rested on an interpretation of the International Court of Justice's (ICJ) decision in the *Arrest Warrant (Democratic Republic of Congo v. Belgium)* case and another decision by France's highest court.[635] The ICJ ruled that certain foreign government officials are entitled to temporary immunity from prosecution by foreign states, even with regards to grave international crimes. Many advocates, including Human Rights Watch, interpret the judgment not to bar later prosecutions for grave international crimes, however. In addition, the prosecutors' decisions to grant Rumsfeld immunity ignore contrary international precedent, including the *Nuremberg* and *Pinochet* cases, which have held that torture and war crimes cannot be legitimate functions of a government official, and numerous international tribunal statutes, which unequivocally state that official capacity does not exempt a person from criminal responsibility for grave international crimes.[636]

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[634] Letter from Patrick Baudouin, lawyer for the complainants and Honorary President of FIDH, to Jean-Claude Marin, Public Prosecutor, Office of the Prosecutor of the Paris Court of Appeal, November 23, 2007, http://www.fidh.org/IMG/pdf/courrier_REPONSE_FIDH-LDH-CCR-ECCHR-JCMARIN-23nov07.pdf (accessed March 23, 2015); Letter from Jean-Claude Marin, Public Prosecutor, Office of the Prosecutor of the Paris Court of Appeal, to Patrick Baudouin, lawyer for the complainants and Honorary President of FIDH, February 27, 2008, http://ccrjustice.org/files/Rumsfeld_FrenchCase_%20Prosecutors%20Decision_02_08.pdf (accessed March 23, 2015).

[635] *The Democratic Republic of Congo v. Belgium*, International Court of Justice, Judgment, February 14, 2002, http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=121&p3=4 (accessed March 23, 2015); *In the Appeal of the Prosecutor General*, Supreme Court of France, Criminal Chamber, Case No. 00-87.215, Judgment, March 13, 2001, http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007070643 (accessed March 23, 2015). See also "A retrograde decision and a dangerous precedent!" FIDH news release, March 14, 2001, https://www.fidh.org/International-Federation-for-Human-Rights/north-africa-middle-east/libya/A-retrograde-decision-and-a (accessed March 23, 2015).

[636] *The United States v. Otto Ohlendorf*, IV, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 ("Nuremberg Judgment"), 1950, p. 411; *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet*, House of Lords, [2000] 1 A.C. 147, Opinion of Lord Browne-Wilkinson, March 24, 1999, http://www.bailii.org/uk/cases/UKHL/1999/17.html (accessed March 30, 2015). See also Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002; Statute of the International Tribunal for the Prosecution of Persons Responsible for Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (ICTY Statute), adopted by Security Council May 25, 1993, U.N. Doc. S/RES/827; Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), adopted by Security Council November 8, 1994, U.N. Doc. S/Res/955; Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), August 8, 1945, http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b39614 (accessed May 25, 2015).

Spain

Spanish judicial authorities have opened three cases into alleged torture and other serious abuses, but all three have either been stayed or dismissed (appeals are pending in all three cases). US authorities vigorously opposed the cases.[637] US diplomatic cables in 2009 suggest that US embassy officials, joined by some members of Congress, tried to influence the Spanish judicial process in order to obtain the dismissal of the cases, and that Spanish officials bowed to pressure by US officials.

"The Bush Six"

In March 2009, the Association for the Dignity of Spanish Prisoners filed a criminal complaint against six former Bush administration lawyers, including Alberto Gonzales, David Addington, William Haynes, John Yoo, Jay Bybee, and Douglas Feith. The complaint alleged that the US government committed torture and war crimes against several former Guantanamo detainees, including five individuals who were either Spanish citizens or residents of Spain,[638] as a result of the legal advice provided by the six defendants.[639] Investigative judge Baltasar Garzón, who issued the historic arrest warrant against Pinochet in 1998, found the case admissible. However, following opposition from Spain's Attorney General, Garzón submitted the case for reassignment to another judge.[640]

Since Spanish courts have subsidiary jurisdiction (meaning they can only hear cases in which the courts of the country where the crimes occurred have not initiated criminal proceedings), the new investigative judge sent a formal request to US authorities in May 2009 asking for confirmation of whether an investigation into the allegations was being

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[637] Giles Tremlett, "Wikileaks: US pressured Spain over CIA rendition and Guantánamo torture," *The Guardian*, December 1, 2010, http://www.theguardian.com/world/2010/nov/30/wikileaks-us-spain-guantanamo-rendition (accessed June 3, 2015).

[638] The Spanish detainees represented by the Association for the Dignity of Spanish Prisoners included Hamed Abderrahman Ahmed, Reswad Abdulsam, Lahcen Ikassrien, Jamiel Abdul Latif al Banna, and Omar Deghayes.

[639] Criminal Complaint by CCR against Alberto Gonzales, David Addington, William Haynes, John Yoo, Jay Bybee, and Douglas Feith, Madrid National Court, March 17, 2009, https://ccrjustice.org/sites/default/files/assets/Bush%20Six_complaint_spanish_0.pdf (accessed May 25, 2015); Human Rights Watch, *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees*, July 2011, http://www.hrw.org/sites/default/files/reports/us0711webwcover_1.pdf, pp. 100-101; Gallagher, "Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture"; Julian Borger and Dale Fuchs, "Spanish Judge to Hear Torture Case against Six Bush Officials," *The Guardian*, March 29, 2009, http://www.theguardian.com/world/2009/mar/29/guantanamo-bay-torture-inquiry (accessed April 28, 2015).

[640] US State Department cable, "Garzon opens second investigation into alleged US Torture of Terrorism Detainees," May 5, 2009.

conducted.[641] After the judge set a deadline for the US to respond,[642] US authorities finally answered on March 1, 2011, asserting that they had completed several prosecutions and that Assistant US Attorney John Durham was continuing his investigation into alleged detainee abuse. The US also claimed that there was no basis for prosecuting Yoo or Bybee as they had already been investigated and cleared of responsibility by an ethics body.[643] The Spanish judge stayed proceedings and sent the case to the US Department of Justice for further action asking only that the US inform it, at the relevant time, of the measures it ultimately may adopt as a result of the case's transfer.[644] The Association for the Dignity of Spanish Prisoners, joined by two additional NGOs, challenged the decision but both the appeals court and the Supreme Court denied the appeal.[645] In March 2013, the Association filed a petition for review with the Spanish Constitutional Court, which remains pending.[646]

Guantanamo Detainees Case

In April 2009, just weeks after the "Bush Six" complaint had been filed, Judge Garzón opened a preliminary investigation into related allegations concerning Guantanamo. The investigation named no specific defendants, but focused on allegations put forward by four of the former Guantanamo detainees named in the "Bush Six" case: Hamed Abderrahman Ahmed, Lahcen Ikassrien, Jamiel Abdul Latif al Banna, and Omar

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[641] Central Court for Preliminary Criminal Proceedings Number Six, Madrid National Court, Case No. 134/2009, Decision (Preliminary Investigation), May 4, 2009, unofficial English translation, http://ccrjustice.org/files/Bush%20Six%20Order%20Rogatory%20Letter%20English%20(2).pdf (accessed March 30, 2015).

[642] Central Court for Preliminary Criminal Proceedings Number Six, Madrid National Court, Case No. 134/2009, Judicial Order (Preliminary Investigation), January 28, 2011, unofficial English translation, http://ccrjustice.org/files/28%20January%202011%20Order%20English.pdf (accessed March 30, 2015).

[643] Central Court Number Six for Preliminary Criminal Proceedings, Madrid National Court, Case No. 134/2009, US Department of Justice Response (Preliminary Investigation), March 1, 2011, http://ccrjustice.org/files/US%20Letters%20Rogatory%20Response%20March%201,%202011%20-%20ENG.pdf (accessed March 30, 2015).

[644] Central Court for Preliminary Criminal Proceedings Number Six, Madrid National Court, Case No. 134/2009, Judicial Order (Preliminary Investigation), April 13, 2011, unofficial English translation, http://ccrjustice.org/files/13%20April%202011%20Order%20ENG.pdf (accessed March 30, 2015).

[645] Spanish Supreme Court of Justice, Criminal Chamber, Case No. 1916/2012, Decision, December 20, 2012, unofficial English translation, http://ccrjustice.org/files/2012-12-20%20Spanish%20National%20Court%20Decision%20Final%20English.pdf (accessed March 30, 2015).

[646] Petition to the Spanish Constitutional Court, March 22, 2013, unofficial English translation, http://ccrjustice.org/files/2013-03-22%20ENG%20Application%20for%20amparo%20[2][1][971][0978.pdf (accessed March 30, 2015).

Deghayes.[647] The Human Rights Association of Spain (APDHE) is a civil party in the case.[648]

In May 2009, Judge Garzón issued formal requests to US and UK authorities to determine whether any investigations were pending with respect to the four individuals.[649] Neither country responded.[650]

Meanwhile, in October 2009, Spain's Parliament amended its laws to restrict jurisdiction to cases with a demonstrated link to Spain. Consequently, cases would only be admissible where the victim is a Spanish national, the suspect is present in Spain, or some other legitimizing link to the country exists.[651] The change in law did not mean an end to the Guantanamo investigation, however, as one of the victims was a Spanish citizen, another was a Spanish resident, and Spain had previously requested the extradition of all four in connection with an unrelated criminal case.[652] Even without these links, Judge Garzón found that jurisdiction would have existed because of Spain's international obligations to investigate and prosecute both torture and war crimes.[653]

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[647] The investigation targeted those who "approved [the] systematic plan of torture and ill-treatment." Central Court for Preliminary Criminal Proceedings Number Five, Madrid National Court, Case No. 150/2009, Judicial Order (Preliminary Investigation), April 27, 2009, unofficial English translation, http://ccrjustice.org/files/Unofficial%20Translation%20of%20the%20Spanish%20Decision%2004-27-2009_0.pdf (accessed March 30, 2015).

[648] Asociación Pro Derechos Humanos de España (APDHE), "Qué Hacemos," undated, http://www.apdhe.org/tras-la-reforma-de-la-justicia-universal-el-juzgado-central-de-instruccion-no-5-de-la-audiencia-nacional-decide-proseguir-con-la-investigacion-del-caso-de-genocidio-en-el-sahara-occidental-y-del-cas/ (accessed August 18, 2015).

[649] Central Court for Preliminary Criminal Proceedings Number Five, Madrid National Court, Case No. 150/2009, Decision (Preliminary Investigation), May 26, 2009, unofficial English translation, http://ccrjustice.org/files/May%202009%20Letter%20Rogatory%20English.pdf (accessed March 30, 2015).

[650] "Spanish Investigations into the United States Torture Program," European Center for Constitutional and Human Rights, http://www.ecchr.eu/en/our_work/international-crimes-and-accountability/u-s-accountability/spain.html (accessed August 16, 2015).

[651] Spanish courts also have jurisdiction where the defendant is a Spanish national. Permanent Mission of Spain to the United Nations, declaration pursuant to para. 3 of General Assembly Resolution 67/98 of 14 December 2012, "The scope and application of the principle of universal jurisdiction," No. 094 FP, April 29, 2013, http://www.un.org/en/ga/sixth/68/UnivJur/Spain_E.pdf (accessed March 30, 2015).

[652] The four former Guantanamo detainees had all been criminally charged in Spain but were acquitted at trial, at least in part due to the use of torture and other forms of serious abuse to which they had been subjected at Guantanamo. For more information, see CCR, "The Spanish Investigation into U.S. Torture," undated, http://ccrjustice.org/spain-us-torture-case (accessed March 30, 2015); "Spanish Investigations into the United States Torture Program," ECCHR, last modified June 25, 2013, http://www.ecchr.de/spain-600.html (accessed March 30, 2015).

[653] Central Court for Preliminary Criminal Proceedings Number Five, Madrid National Court, Case No. 150/2009, Decision (Preliminary Investigation), January 27, 2010, unofficial English translation, http://ccrjustice.org/files/National%20Court%20Madrid%20Decision%201.27.10_English_0.pdf (accessed March 30, 2015).

The public prosecutor appealed Garzón's decision to proceed with the investigation, but the Supreme Court's Criminal Chamber rejected the appeal.[654] In May 2010, the case was reassigned following Garzón's suspension from his judicial function for having tried to investigate Franco-era abuses.[655]

In January 2011, CCR and ECCHR, both of whom later joined the case as formal parties,[656] requested that former Guantanamo commander Geoffrey Miller be subpoenaed to explain his role in the alleged torture of the detainees.[657] A year later, with still no response from US or UK authorities, the new judge on the case issued a ruling reaffirming the court's jurisdiction over the case without deciding on the subpoena request.[658]

In March 2014, Spain's Parliament again amended its law to restrict jurisdiction following a diplomatic row with China.[659] The new law introduced an extensive set of requirements related to the nationality of the suspect and victims and the suspect's status in the country, placing Spain in breach of its international legal obligations to extradite or prosecute certain offenses like torture and war crimes.[660] Despite this change, the judge presiding over the *Guantanamo* case ruled, in April 2014, that the investigation should

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[654] Spanish Supreme Court of Justice, Criminal Chamber, Case No. 66/2010, Decision, April 6, 2011, unofficial English translation, http://ccrjustice.org/files/Resolution%20High%20Court-%2017%20May%202011%20-ENG.pdf (accessed March 30, 2015).

[655] Garzón faced criminal charges for investigating cases of illegal detention and enforced disappearances committed during the Spanish Civil War, despite Spain's 1977 amnesty law. For more information on the case, see "Spain: Garzón Trial Threatens Human Rights," Human Rights Watch news release, January 13, 2012, http://www.hrw.org/news/2012/01/13/spain-garz-n-trial-threatens-human-rights.

[656] The court admitted CCR and ECCHR to represent two of the former detainees on January 10, 2013. Central Court for Preliminary Criminal Proceedings Number Five, Madrid National Court, Case No. 150/2009, Decision (Preliminary Investigation), January 10, 2013, unofficial English translation, http://ccrjustice.org/files/2013-01-10%20Order%20re%20CCR%20and%20ECCHR.pdf (accessed March 30, 2015).

[657] Criminal Complaint by CCR and ECCHR against Geoffrey Miller, Central Court for Preliminary Criminal Proceedings Number Five, Madrid National Court, Case No. 150/2009, Criminal Complaint, January 4, 2011, unofficial English translation, http://ccrjustice.org/files/FINAL%20Spanish%20Miller%20Submission.pdf (accessed June 9, 2015).

[658] Central Court for Preliminary Criminal Proceedings Number Five, Madrid National Court, Case No. 150/2009, Decision (Preliminary Investigation), January 13, 2012, unofficial English translation, http://ccrjustice.org/files/2012-01-13%20AUTO%20GUANTANAMO%20(Eng).pdf (accessed March 30, 2015).

[659] Human Rights Watch, "UN Universal Periodic Review submission: Spain," May 2014, http://www.upr-info.org/sites/default/files/document/spain/session_21_-_january_2015/hrw_-_human_rights_watch.pdf; Jim Yardley, "Spain Seeks to Curb Law Allowing Judges to Pursue Cases Globally," *New York Times*, February 10, 2014, http://www.nytimes.com/2014/02/11/world/europe/spanish-legislators-seek-new-limits-on-universal-jurisdiction-law.html?_r=0 (accessed March 30, 2015).

[660] Human Rights Watch, "UN Universal Periodic Review submission: Spain."

proceed in light of Spain's obligations under the Convention against Torture and the Geneva Conventions.[661] Spain's National Court upheld this decision in November 2014.[662]

However, in May 2015, in a case against Chinese officials involving abuses in Tibet, Spain's Supreme Court issued a new decision interpreting in a more restrictive manner the legislative changes on universal jurisdiction.[663] Citing that ruling, on July 17, 2015, Spain's National Court dismissed the entire Guantanamo case.[664] The complainants have lodged an appeal against the decision.[665]

CIA Flight Investigations

Spanish authorities launched a civil investigation in November 2005 into claims that CIA planes carrying detainees had made secret stopovers on Spanish soil, but concluded that the flights were legal.[666] Around the same time, a judge in Mallorca, where US planes are alleged to have landed, opened a criminal investigation. In light of the torture allegations, he deferred the case to the National Court. In June 2006, Judge Ismael Moreno of the National Court opened a criminal investigation targeting the 13 US officials who were on board the flight that rendered Khaled el-Masri, which allegedly stopped in Spain before continuing on to Macedonia to abduct el-Masri.[667] A group of Spanish lawyers and other professionals from

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[661] Central Court for Preliminary Criminal Proceedings Number Five, Madrid National Court, Case No. 150/2009, Decision (Preliminary Investigations), April 15, 2014, unofficial English translation, http://ccrjustice.org/files/15April2014_No.5_Decision_Ordering_case_to_proceed_ENG.pdf (accessed March 30, 2015).

[662] "El juez Ruz logra respaldo para investigar las torturas de Guantánamo," *El País*, November 13, 2014, http://politica.elpais.com/politica/2014/11/13/actualidad/1415882427_280141.html (accessed June 9, 2015).

[663] Spanish Supreme Court, 2nd Chamber in Criminal Matters, Ruling No. 296/2015, May 6, 2015, http://supremo.vlex.es/vid/571092402 (accessed August 20, 2015).

[664] Central Court for Preliminary Criminal Proceedings Number Five, Madrid National Court, July 17, 2015, unofficial English translation, http://ccrjustice.org/sites/default/files/attach/2015/08/2015-07-17_UJSpain_NationalCourtDecision2_eng.pdf (accessed August 20, 2015).

[665] "Former Detainees and Human Rights Groups Appeal Spain's Decision to Discontinue Guantánamo Investigation," *Center for Constitutional Rights*, July 23, 2015, http://ccrjustice.org/home/press-center/press-releases/former-detainees-and-human-rights-groups-appeal-spain-s-decision (accessed August 16, 2015).

[666] "Spain probes 'secret CIA flights,'" *BBC News*, November 15, 2005, http://news.bbc.co.uk/2/hi/europe/4439036.stm (accessed June 3, 2015); "Spain court launches investigation into CIA rendition flights," *Jurist*, June 12, 2006, http://jurist.org/paperchase/2006/06/spain-court-launches-investigation.php (accessed June 3, 2015).

[667] The opening of the investigation happened just days after a Council of Europe report named Spain as one of a number of countries through which CIA flights transited. "Spain court launches investigation into CIA rendition flights," *Jurist*; "Spain doesn't object to secret flights," *El País*, December 3, 2010, http://elpais.com/m/elpais/2010/12/03/inenglish/1291357242_850210.html (accessed June 3, 2015).

Mallorca and the APDHE are civil parties in the case.[668] Later that year, media reports revealed that additional US planes had made stopovers elsewhere in Spain.[669]

The most challenging aspect of the case proved to be determining the identity of the US officials on the flight. A Spanish national police investigation identified a list of 13 suspects and, in May 2010, led to the issuance of arrest warrants for these individuals on charges of using false documents to enter the country.[670] Judge Moreno continued his efforts to confirm the suspects' identities, including by sending judicial cooperation requests to German and UK authorities in October 2012.[671]

Judge Moreno later broadened the investigation to address whether four senior Spanish officials should also be held criminally responsible for authorizing US stopover flights in the country.[672] In November 2013, despite opposition from civil parties, prosecutors requested dismissal of both investigations.[673] Judge Moreno dismissed the investigation into the Spanish officials, and stayed the investigation into the CIA officials in September 2014. An appeals court upheld his ruling in November 2014 on the grounds that the allegations against the Spanish officials were insufficient to establish that they knew that the CIA detainees were being abused, and that Spanish authorities had—at

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668 "Spain doesn't object to secret flights," *El País*; APDHE, "Qué Hacemos," http://www.apdhe.org/tras-la-reforma-de-la-justicia-universal-el-juzgado-central-de-instruccion-no-5-de-la-audiencia-nacional-decide-proseguir-con-la-investigacion-del-caso-de-genocidio-en-el-sahara-occidental-y-del-cas/.

669 "Spain doesn't object to secret flights," *El País*.

670 Prosecutors, who had requested the issuance of arrest warrants, asserted that the UK-based NGO Reprieve was in possession of the names of the 13 CIA agents. Jeff Stein, "Spanish prosecutors want 13 CIA agents arrested," *Washington Post*, May 12, 2010, http://voices.washingtonpost.com/spy-talk/2010/05/spanish_prosecutors_want_13_ci.html (accessed June 8, 2015); "Spain doesn't object to secret flights," *El País*.

671 These officials included Miguel Nadal, then-Secretary of State for Foreign Affairs; Miguel Aguirre de Cárcer, then-Director General of Foreign Policy for North America in the Foreign Affairs Ministry; Javier Jiménez-Ugarte, former Secretary General for Defense Policy in the same ministry; and Ramón Gil-Casares, former cabinet director of foreign policy for the prime minister. The cooperation requests appear to have been directed at asking foreign judicial authorities to share information and interview persons who might know the identity of the US officials under investigation. US officials later described this collaboration between Spanish and German judicial authorities as particularly worrisome because it "complicate[s] our [US] efforts to manage this case at a discreet government-to-government level." Giles Tremlett, "Wikileaks: US pressured Spain over CIA rendition and Guantánamo torture," *The Guardian*, December 1, 2010.

672 José María Irujo, "Solicitada la imputación de cuatro españoles por los vuelos de la CIA," *El País*, November 6, 2013, http://politica.elpais.com/politica/2013/11/06/actualidad/1383747636_079062.html (accessed June 8, 2015).

673 Prosecutors based their request on the grounds that the court had been unable to confirm the true identity of the 13 CIA agents. Ibid.

least for now—exhausted all leads and been unable to conclusively identify the CIA agents involved.[674] The civil parties have appealed the case to the Supreme Court.[675]

Switzerland

In February 2011, CCR and ECCHR prepared criminal complaints against former President Bush on behalf of two persons who had allegedly been tortured during their detention at Guantanamo Bay. However, the complaints were never filed as Bush cancelled his trip to Geneva.[676]

Canada

In September 2011, CCR and the Canadian Center for International Justice (CCIJ) called on the Canadian minister of justice and attorney general to open a criminal investigation against former President Bush for his alleged role in authorizing and overseeing the "administration's well-documented torture program."[677] Bush was expected to go to Canada the following month to attend an economic summit.[678] A week before Bush's planned visit, the NGOs publicly expressed their intention to assist torture survivors in

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[674] Spain Court of Appeals, Case No. 346/2014, Decision, November 17, 2014, http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=7354188&links=%22336/2014%22&optimize=20150422&publicinterface=true (accessed June 9, 2015). See also M.F., "El juez archiva la investigación de un vuelo de la CIA que hizo escala en Palma," *El País*, September 8, 2014, http://politica.elpais.com/politica/2014/09/08/actualidad/1410185663_522922.html (accessed June 8, 2015); Fernando J. Pérez, "La Audiencia Nacional da carpetazo a la investigación de los vuelos de la CIA," *El País*, January 12, 2015, http://politica.elpais.com/politica/2015/01/12/actualidad/1421074069_148757.html (accessed June 8, 2015).

[675] Mateo Balin, "Los querellantes piden al Supremo reabrir la causa de los 'vuelos de la CIA,'" *La Rioja*, February 20, 2015 http://www.larioja.com/nacional/201502/20/querellantes-piden-supremo-reabrir-20150220005656-v.html (accessed June 8, 2015).

[676] Swiss law requires the presence of the suspect before a criminal investigation can be opened. Swiss Criminal Code of December 1937, art. 6, http://www.admin.ch/ch/e/rs/3/311.0.en.pdf (accessed March 30, 2015). Draft complaint against George W. Bush prepared by CCR and ECCHR, undated, http://ccrjustice.org/files/FINAL%207%20Feb%20BUSH%20INDICTMENT.pdf (accessed April 30, 2015). See also Ewen MacAskill, "George Bush calls off trip to Switzerland," *The Guardian*, February 6, 2011, http://www.theguardian.com/law/2011/feb/06/george-bush-trip-to-switzerland (accessed April 30, 2015).

[677] Letter from CCR and the Canadian Centre for International Justice (CCIJ) to Robert Douglas Nicholson, Minister of Justice and Attorney General of Canada, September 29, 2011, http://ccrjustice.org/files/2011.09.29%20Cover%20Letter%20to%20Canadian%20Minister%20of%20Justice.pdf (accessed March 30, 2015); Draft indictment against George W. Bush pursuant to the Canadian Criminal Code and the Convention against Torture, prepared by CCR and CCIJ, September 29, 2011, http://ccrjustice.org/files/2011.09.29%20Bush%20Canada%20Indictment.pdf (accessed March 30, 2015).

[678] "Canada: Don't Let Bush Get Away With Torture," Human Rights Watch news release, October 12, 2011, http://www.hrw.org/news/2011/10/12/canada-don-t-let-bush-get-away-torture.

filing a formal criminal complaint if the minister failed to initiate an investigation.[679] On October 20, 2011, the day of his expected arrival, CCIJ lodged a criminal complaint against Bush with the Surrey provisional court in British Columbia, where the summit was to be held.[680] Within hours, the prosecutor stayed the proceedings.[681] Bush attended the summit and no further steps were taken in the case.[682]

In April 2012, CCR and CCIJ reported the incident to the UN Committee against Torture.[683] The committee urged Canada to take steps to exercise universal jurisdiction over persons alleged to be responsible for torture but did not mention the Bush visit.[684]

In November 2012, the same two NGOs—acting on behalf of four persons alleged to have been victims of torture at US-run military facilities in Afghanistan and Guantanamo Bay—filed an individual complaint with the UN Committee against Torture, arguing that Canada had violated its international obligations by failing to arrest Bush.[685] In response, Canada asserted that it had insufficient evidence in its possession at the time to justify charging Bush and that it did not expect to receive assistance from US authorities.[686] Both parties have submitted additional responses to the committee. One was a letter from the NGOs alerting the committee to Bush's planned visit to Toronto in

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679 Letter from CCR and CCIJ to Robert Douglas Nicholson, Minister of Justice and Attorney General of Canada, October 14, 2011, http://ccrjustice.org/files/CCR%20CCIJ%20Follow%20up%20Letter%20s.pdf (accessed March 30, 2015).

680 In Canada, such a complaint is known as an "information." See Submission by Mathew J. Eisenbrandt, Legal Director of CCIJ, October 20, 2011, http://ccrjustice.org/files/2011-10-20%20Court%20Information%20AS%20FILED.pdf (accessed March 30, 2015).

681 Court order of stay of proceedings, October 20, 2011, http://ccrjustice.org/files/2011-10-20%20Court%20Stay%20of%20proceedings.pdf (accessed March 30, 2015); Letter from Andrew MacDonald, Deputy Regional Crown Counsel, to Matthew Eisenbrandt, Legal Director of CCIJ, October 24, 2011, http://ccrjustice.org/files/2011-10-24%20Letter%20from%20Attorney%20General%20Staying%20the%20Case.pdf (accessed March 30, 2015).

682 "George W. Bush draws protesters at B.C. appearance," *CBC News*, October 20, 2011, http://www.cbc.ca/news/canada/british-columbia/george-w-bush-draws-protesters-at-b-c-appearance-1.1097491 (accessed August 19, 2015).

683 CCR and CCIJ, "Submission of the Center for Constitutional Rights and the Canadian Centre for International Justice to the Committee against Torture on the Examination of the Sixth Periodic Report of Canada: The Case of George W. Bush and Canada's Violation of Its Obligations under the *Convention Against Torture*," undated, http://ccrjustice.org/files/CCR-CCIJ%20CAT%20CANADA%20Report%20re%20Bush.pdf (accessed March 30, 2015).

684 UN Committee against Torture, "Consideration of reports submitted by States parties under article 19 of the Convention, Concluding observations of the Committee against Torture, Canada," CAT/C/CAN/CO/6, June 25, 2012, http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.CAN.CO.6.doc (accessed March 30, 2015).

685 *Hassan bin Attash, Sami el-Haji, Muhammed Khan Tumani and Murat Kurnaz v. Canada*, Complaint to the UN Committee against Torture, November 14, 2012, http://ccrjustice.org/files/CAT%20Canada%20Petition%20.pdf (accessed March 30, 2015).

686 Permanent Mission of Canada to the United Nations, Submission of Canada regarding the admissibility and merits of the communication to the UN Committee Against Torture, Communication No. 536/2013, October 7, 2013 http://ccrjustice.org/files/Canada%20Response%20to%20CAT.pdf (accessed April 30, 2015).

May 2014.[687] However, no action was taken during Bush's visit and the committee has not yet issued findings in the case.[688]

Investigations Focused on European Complicity

Poland

In March 2008, the district prosecutor's office in Warsaw opened a criminal investigation into CIA-related abuses committed on Polish territory, although the scope of the investigation has never been disclosed.[689] The investigation appears to be limited to Polish involvement.[690] The investigation has languished for years, partly due to unexplained changes in staffing, the transfer of cases from Warsaw to another city, claims of inadequate cooperation from US authorities, and invocation of the "state secrets" doctrine.[691] In September 2015 the Polish prosecutor announced that the US rejected four further requests for documents and information, including requests for statements from witnesses still in US custody in Guantanamo.[692]

Three men who are held at Guantanamo Bay—Abd al-Rahim al-Nashiri, Zayn al-Abidin Muhammed Husayn (Abu Zubaydah), and Walid bin Attash—have been granted formal

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[687] Letter from CCR and CCIJ to the UN Committee against Torture, May 8, 2014, http://ccrjustice.org/files/FINAL%20submission%20to%20CAT%20Canada%20May%202014%20a.pdf (accessed April 30, 2015).

[688] CCIJ, "George W. Bush and the "War on Terror," undated, http://www.ccij.ca/cases/george-w-bush/ (accessed August 19, 2015).

[689] In September 2012, the European Parliament "deplore[d] the lack of official communication on the scope, conduct and state of play of the investigation [and] call[ed] on the Polish authorities to conduct a rigorous inquiry with due transparency, allowing for the effective participation of victims and their lawyers." European Parliament Resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries: follow-up of the European Parliament TDIP Committee report, (2012/2033/ (INI)). See also European Parliament Resolution of 10 October 2013 on alleged transportation and illegal detention of prisoners in European countries by the CIA, (2013/2702 (RSP)); UN Joint Study on Secret Detention, para. 118; UN Human Rights Committee, "Concluding Observations of the Human Rights Committee: Poland," U.N. Doc. CCPR/C/POL/CO/6/ (2010), October 27, 2010, available at http://www1.umn.edu/humanrts/hrcommittee/poland2010.html (accessed June 5, 2015).

[690] The investigation appears to be aimed only at Polish officials' potential involvement in CIA-related abuses. Christian Lowe and Pawel Sobczak, "After U.S. torture report, Poland asks what its leaders knew," *Reuters*, December 12, 2014, http://www.reuters.com/article/2014/12/12/us-usa-cia-torture-poland-insight-idUSKBN0JQ1QQ20141212 (accessed April 30, 2015).

[691] Some have suggested that Polish authorities have prevented the investigation from moving forward. Amnesty International, "Breaking the Conspiracy of Silence," p. 10; OSJI, "Globalizing Torture: CIA Secret Detention and Extraordinary Rendition," pp. 99-102.

[692] "US refuses more requests from Poland for assistance in CIA secret prisons probe," *Associated Press*, September 22, 2015, http://www.foxnews.com/us/2015/09/22/us-refuses-more-requests-from-poland-for-assistance-in-cia-secret-prisons-probe/ (accessed October 26, 2015).

victim status in the case.[693] Fellow Guantanamo detainee Mustafa al-Hawsawi also sought victim status but was turned down.[694] Bin Attash and al-Hawsawi currently face charges before a US military commission for their alleged involvement in planning the September 11, 2001 attacks, and al-Nashiri faces charges for his alleged involvement in planning an attack against the *USS Cole*—a US Navy warship docked in a Yemen harbor in October 2000. Abu Zubaydah does not face any charges.

In March 2012, a confidential source reported to the media that former Polish intelligence chief Zbigniew Siemiątkowski had been charged in the case. Siemiątkowski acknowledged being questioned, but the prosecutor's office refused to confirm whether he faces charges.[695] In early February 2013, the Polish minister of justice made a statement suggesting that the decision to charge Siemiątkowski had been made "hastily," adding that the case "needs [to] be addressed with extreme restraint."[696] After human rights groups expressed concern over the statement—in particular whether it revealed a lack of prosecutorial independence—the prosecutor general stated that there had been "no official confirmation that they [prosecutors] had charged anybody."[697] Less than two weeks later, a Polish newspaper reported that the charges against Siemiątkowski would soon be dropped.[698] The prosecutor's office confirmed that an investigation was underway but would not indicate whether it was looking into Siemiątkowski's role.[699]

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693 According to an interview that Janusz Śliwa, deputy prosecutor in Krakow, gave Amnesty International, the granting of "injured person," or victim, status in criminal proceedings means that there is a "likelihood" that a person has suffered a crime in Poland. Amnesty International, *Unlock the Truth: Poland's Involvement in CIA Secret Detention*, June 2013, http://www.amnesty.org.uk/sites/default/files/2013_unlock_the_truth_-_polands_involvement_in_cia_secret_detention.pdf (accessed April 30, 2015), p. 16.

694 The prosecutor rejected the application for victim status in March 2014. Al-Hawsawi appealed the decision, but the prosecutor again declined the request in December 2014. Amnesty International, "Breaking the Conspiracy of Silence," p 10. The Redress website says Polish law prevents them from disclosing the grounds for the decision. See Redress, "Mustafa al-Hawsawi," undated, http://www.redress.org/case-docket/al-hawsawi-case-1.

695 Amnesty International, *Unlock the Truth*, p. 16.

696 Ibid., pp. 17-18; Interview with Jarosław Gowin ("Rozmowa dnia: Jarosław Gowin"), Polish Radio 1 ("Polskie Radio"), February 5, 2013 (accessed April 29, 2015).

697 Amnesty International, *Unlock the Truth*, p. 18; Ewe Siedlecka, "Seremet: Let's not confuse life with film" ("Seremet: Nie mylmy życia z filmem"), *Gazeta Wyborcza*, April 28, 2013, http://wyborcza.pl/1,76498,13812229,Seremet__Nie_mylmy_zycia_z_filmem.html#ixzz2RqYAF4Do (accessed April 29, 2015).

698 Amnesty International, *Unlock the Truth*, p. 18; "Polish Prosecutors to Drop Charges in CIA Jail Inquiry-Report," *Reuters*, February 19, 2013, http://www.reuters.com/article/2013/02/19/us-poland-cia-siematkowski-idUSBRE91IoMT20130219 (accessed April 29, 2015).

699 "Polish Prosecutors to Drop Charges in CIA Jail Inquiry-Report," *Reuters*.

Al-Nashiri and Abu Zubaydah have both brought Poland before the ECtHR for its failure to investigate the abuses committed against them during their time in US custody. In July 2014, the ECtHR ruled that Poland had authorized a CIA black site to be used on its soil and that Polish authorities bore responsibility for the two men's torture and unlawful rendition.[700] It found that Polish authorities had failed to properly investigate the abuses despite national authorities' assertions that their 2008 investigation remained ongoing. The court ordered Poland to pay Abu Zubaydah and al-Nashiri €100,000 (about $112,000) in damages.[701] Poland sought to appeal the decision, but its request was denied.[702]

Following the release of the Senate Summary in December 2014, Polish prosecutors announced that they would request the full version of the committee's study for their investigation.[703] They appear to have done so, but in June 2015 Polish judicial authorities said that the US was refusing to comply with the request.[704]

Lithuania

In January 2010, following a parliamentary investigation that confirmed the existence of two black sites and that Lithuanian airports and airspace had been used for CIA-related flights, the prosecutor general's office opened a criminal investigation.[705] One year later,

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[700] "Poland: Landmark Rulings on CIA Torture Complicity," Human Rights Watch news release, July 24, 2014, https://www.hrw.org/news/2014/07/24/poland-landmark-rulings-cia-torture-complicity. Both men continue to be held by US authorities at Guantanamo Bay. Human Rights Watch was the first to present evidence identifying locations in Poland and Romania as CIA black sites. "Human Rights Watch Statement on U.S. Secret Detention Facilities in Europe," Human Rights Watch news release, November 6, 2005, https://www.hrw.org/news/2005/11/06/human-rights-watch-statement-us-secret-detention-facilities-europe.

[701] The court also awarded Abu Zubaydah €30,000 euros (about $34,000) in costs and expenses. European Court of Human Rights, *Al-Nashiri v. Poland*, (28761/11), Judgment of 24 July 2014, available at http://hudoc.echr.coe.int/webservices/content/pdf/003-4832205-5894802 (accessed April 29, 2015); European Court of Human Rights, *Husayn (Abu Zubaydah) v. Poland*, (7511/13), Judgment of 24 July 2014, available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146047 (accessed April 29, 2015).

[702] Nikolaj Nielsen, "European Court Confirms Polish Complicity in CIA Rendition," *EU Observer*, February 18, 2015, https://euobserver.com/justice/127697 (accessed April 29, 2015).

[703] "After U.S. torture report, Poland asks what its leaders knew," *Reuters*, December 12, 2014.

[704] Christian Lowe and Wojciech Zurawski, "Poland says Washington stonewalling CIA jail investigation," *Reuters*, June 12, 2015, http://www.reuters.com/article/2015/06/12/us-usa-cia-torture-poland-idUSKBN0OS1N220150612 (accessed June 13, 2015).

[705] Lithuanian authorities claimed that they had been unable to determine whether the site was used to hold prisoners due to lack of cooperation from US authorities. "Lithuania asks U.S. to say if CIA Tortured Prisoners There," *Reuters*, December 10, 2014, http://www.huffingtonpost.com/2014/12/10/lithuania-cia-torture_n_6300540.html (accessed April 30, 2015); OSJI, "Globalizing Torture: CIA Secret Detention and Extraordinary Rendition," pp. 90-93; "Lithuania: Reopen Investigation Into Secret CIA Prisons," Human Rights Watch news release, June 25, 2013, https://www.hrw.org/news/2013/06/25/lithuania-reopen-investigation-secret-cia-prisons.

the case was abruptly closed for lack of evidence.[706] Prior to its discontinuance, Amnesty International and Reprieve had brought information to the attention of the prosecutor's office, including allegations that Abu Zubaydah had been held in one of the country's black sites and tortured.[707] Abu Zubaydah then filed an application against Lithuania before the ECtHR in July 2011.[708] The case is pending, and the European Parliament has since called on Lithuania to reopen its investigation in light of new evidence.[709]

In September 2013, a new complaint was filed by Redress and the Human Rights Monitoring Institute (HRMI) on behalf of another former CIA detainee, Mustafa al-Hawsawi, alleging that he too had been held and tortured by the CIA at a black site in the country.[710] In October 2013, the prosecutor's office decided not to open an investigation. Redress and HRMI appealed this decision, and they secured a favorable decision by the Vilnius Regional Court in January 2014 that affirmed al-Hawsawi's right to an investigation of his claims. In February 2014, the prosecutor general's office opened a formal investigation.[711]

Following the release of the Senate Summary in December 2014, the prosecutor general's office claims to have sent a formal request for legal assistance to US authorities.[712] In April

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[706] The prosecutor general's office said some materials gathered during the investigation constituted a state secret and could not be used for prosecution purposes. Amnesty International Submission to the UN Universal Periodic Review, "Lithuania: Homophobic Legislation and Accountability for Complicity in US-led rendition and secret detention programs," October 2011, https://www.amnesty.org/download/Documents/32000/eur530012011en.pdf (accessed April 30, 2015), pp. 5-7.

[707] Ibid., pp. 6-7.

[708] European Court of Human Rights, *Abu Zubaydah v. Lithuania*, (45454/11), Judgment of 14 July 2011, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115816 (accessed April 30, 2015).

[709] European Parliament Resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries; European Parliament Resolution of 10 October 2013 on alleged transportation and illegal detention of prisoners in European countries by the CIA; "Lithuania: Reopen Investigation Into Secret CIA Prisons," Human Rights Watch news release.

[710] Letter from Carla Ferstman, Director of Redress, and Natalija Bitiukova, Deputy Director of the Human Rights Monitoring Institute (HRMI) to Lithuanian Prosecutor General Darius Valys, "Request for an investigation concerning suspicion of criminal offences committed in Lithuania against Mr Mustafa al-Hawsawi," September 13, 2013, http://www.redress.org/downloads/casework/final-lithuania---investigation-request.pdf (accessed June 4, 2015).

[711] "Prosecutor Launches New Investigation into Lithuania CIA Rendition Claims," Redress press release, February 20, 2014, http://www.redress.org/downloads/lithuania-investigation-press-release---final.pdf (accessed April 30, 2015); "Lithuania Opens CIA Rendition Investigation," Amnesty International public statement, February 21, 2014, http://www.amnesty.eu/content/assets/Reports/21022014_Lithuania_CIA_rendition_investigation_public_statement.pdf (accessed April 30, 2015). For more information on the case, see Redress, "Mustafa al-Hawsawi," undated, http://www.redress.org/case-docket/al-hawsawi-case-1 (accessed June 1, 2015).

[712] The prosecutor's office declined to comment on the specific contents of the request. "Lithuania Parliament Urged to Once Again Probe CIA Prison," *Baltic News Service*, December 29, 2014, http://en.delfi.lt/lithuania/foreign-affairs/lithuanian-parliament-urged-to-once-again-probe-into-cia-prison.d?id=66776060 (accessed April 30, 2015). See also Amnesty International, "Breaking the Conspiracy of Silence: USA's European 'Partners in Crime' Must Act After Senate Torture Report," January 2015, https://www.amnesty.org/download/Documents/212000/eur010022015en.pdf (accessed April 30, 2015), pp. 17-18.

2015, it announced the reopening of its initial investigation and included al-Hawsawi's claim in the investigation.[713] The investigation remains ongoing at the time of writing.

Romania

Successive Romanian governments have denied hosting a secret prison.[714] In May 2012, the Open Society Justice Initiative (OSJI) filed a criminal complaint with the Romanian general prosecutor on behalf of Abd al-Rahim al-Nashiri, alleging that he had been held at a black site within the country and tortured there.[715] The general prosecutor acknowledged the complaint, assigned it a case number, and said he would review it, but nothing has since happened.[716] OSJI subsequently lodged an application against Romania before the ECtHR.[717] The case is pending.

After the release of the Senate Summary, former Romanian president Ion Iliescu and former intelligence chief Ioan Talpes admitted that Romania did in fact host the site.[718] The current government claims to have no knowledge of the secret prison, but in December 2014 a ministry of justice official said that there was an ongoing judicial investigation in Romania into the allegations.[719] It is unclear whether this is the same case initiated by OSJI.

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[713] "Lithuanian Prosecutors Restart Investigation into Secret CIA Jail," *Reuters*, April 2, 2015, http://rt.com/news/246365-lithuania-restart-probe-cia/ (accessed April 30, 2015); "Lithuania Reopens CIA 'Black Site' Investigation," *Agence France Presse*, April 3, 2015, http://www.globalpost.com/article/6505193/2015/04/02/lithuania-reopens-cia-black-site-investigation (accessed August 18, 2015).

[714] In 2008, a superficial parliamentary inquiry concluded that no CIA detention centers had existed in Romania and that no US flights had transited through the country. OSJI, "Globalizing Torture: CIA Secret Detention and Extraordinary Rendition," pp. 103-06; Amnesty International, "Breaking the Conspiracy of Silence," p. 13.

[715] OSJI, "Litigation: Al-Nashiri v. Romania," updated August 6, 2012, http://www.opensocietyfoundations.org/litigation/al-nashiri-v-romania (accessed June 4, 2015).

[716] OSJI, "Globalizing Torture: CIA Secret Detention and Extraordinary Rendition," p. 106.

[717] European Court of Human Rights, *Adb al-Rahim Husseyn Muhammad al-Nashiri v. Romania*, (33234/12), Judgment of June 1, 2012, available at http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-113814 (accessed June 4, 2015).

[718] "Former Romania president admits allowing CIA site," *Al Jazeera*, April 27, 2015, http://www.aljazeera.com/news/2015/04/romania-president-admits-allowing-cia-site-150427140351035.html (accessed August 18, 2015); "Romanian ex-spy chief acknowledges CIA had 'black prisons' in country," *The Guardian*, December 14, 2014, http://www.theguardian.com/world/2014/dec/14/romania-cia-black-prisons-ioan-talpes (accessed August 18, 2015).

[719] "U.S. torture report puts Romania's role under scrutiny," *Reuters*, December 16, 2014, http://www.aol.com/article/2014/12/16/u-s-torture-report-puts-romanias-role-under-scrutiny/21117326/ (accessed August 18, 2015).

Macedonia

Despite strong evidence to the contrary, Macedonian authorities long denied any involvement in the rendition of Khaled el-Masri. In October 2008, el-Masri filed a formal request for a criminal investigation with the Skopje prosecutor's office. The prosecutor took no steps in the case before the statute of limitations for the crimes expired.[720] In September 2009, el-Masri then filed an application against Macedonia before the ECtHR. On December 12, 2012, the ECtHR found in favor of el-Masri. The court found that he had been subjected to torture and ill-treatment both within Macedonia and after his transfer to US authorities, and held Macedonia responsible for its role.[721]

United Kingdom

In addition to a shelved public inquiry into allegations of UK complicity in the CIA torture program[722] and the settlement of several civil claims for damages,[723] UK police and prosecutors have opened three criminal investigations, one of which remains open, and established a joint panel to examine possible criminal cases, the status of which is unclear.

British Criminal Investigations

The UK government opened the first investigation, known as "Operation Hinton," in November 2008, which focused on the alleged involvement of UK Security Service (MI5)

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[720] OSJI, "Globalizing Torture: CIA Secret Detention and Extraordinary Rendition," pp. 94-95.

[721] European Court of Human Rights, *El-Masri v. The Former Yugoslav Republic of Macedonia*, pp. 58-60.

[722] The Intelligence and Security Committee (ISC) conducted a first flawed investigation in 2007 which concluded that the UK has no involvement in rendition or torture, an outcome criticized by the UK Parliamentary Joint Human Rights Committee. The prime minister announced the launch of a judge-led inquiry in July 2010, but the inquiry was ultimately boycotted by civil society groups, including Human Rights Watch, over its weak powers and lack of independence. It was shelved by the government in January 2012 citing ongoing investigations but a second inquiry was promised. The Detainee Inquiry completed its preliminary report in June 2012 but the UK government did not publish it until December 2013. Government of the United Kingdom, "The Report of the Detainee Inquiry," December 2013, http://www.detaineeinquiry.org.uk/wp-content/uploads/2013/12/35100_Trafalgar-Text-accessible.pdf (accessed June 4, 2015). That same month, the UK government announced the ISC would take over responsibility for the investigation rather than establishing an independent inquiry as it had promised. The ISC commenced its investigation in September 2014, which is ongoing. See "UK: Broken Promise on UK Torture Inquiry," Human Rights Watch news release, December 21, 2013, http://www.hrw.org/news/2013/12/21/uk-broken-promise-torture-inquiry (accessed August 18, 2015); Amnesty International, "Breaking the Conspiracy of Silence," pp. 19-20.

[723] OSJI, "Investigations into CIA Renditions," November 2013, http://www.opensocietyfoundations.org/fact-sheets/investigations-cia-renditions (accessed June 4, 2015); OSJI, "Globalizing Torture: CIA Secret Detention and Extraordinary Rendition," pp. 115-16.

officers in the rendition and torture of Binyam Mohamed by US authorities.[724] The Crown Prosecution Service concluded that UK officials had involvement in his case but that there was "insufficient evidence" to bring criminal charges. The second investigation, known as "Operation Iden" and opened in June 2009, looked into the actions of UK Secret Intelligence Service (MI6) officers who interrogated suspects at the US-run prison in Bagram, Afghanistan. It too was closed for "insufficient evidence."[725]

In January 2012, a third criminal investigation—which has become known as "Operation Lydd"—was opened to look into allegations that UK security service officers from MI5 or MI6 were involved in the unlawful rendition and torture of former Libyan opposition figures Abdullah al-Sadiq (known as Abdul Hakim Belhadj) and Sami Mostefa al-Saadi.[726] Both men had filed complaints in November 2011 after the release of classified documents uncovered by Human Rights Watch in Libya that exposed UK officials' role in their rendition.[727] The investigation appears to be moving forward, with the police having handed prosecutors a file of evidence in October 2014.[728] Also in January 2012, police and prosecutors announced the establishment of a joint panel to examine other allegations of UK complicity in US rendition and torture.[729] The status of the joint panel and any other potential investigations beyond the Libya case is unclear.[730]

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724 OSJI, "Globalizing Torture: CIA Secret Detention and Extraordinary Rendition," p. 116.

725 Ibid., pp. 116-117.

726 "UK: Broken Promise on UK Torture Inquiry," Human Rights Watch news release; OSJI, "Globalizing Torture: CIA Secret Detention and Extraordinary Rendition," p. 117.

727 Human Rights Watch, *Delivered into Enemy Hands: US-Led Abuse and Rendition of Opponents to Gaddafi's Libya*, September 6, 2012, http://www.hrw.org/sites/default/files/reports/libya0912webwcover_1.pdf, pp. 97-99, 104-06. Both men, along with Belhadj's wife who was also rendered to Libya, have pursued civil claims. Belhadj and his wife's claims are still ongoing. Amnesty International, "Breaking the Conspiracy of Silence," pp. 20-21; Redress, "Belhaj v Jack Straw, former Head of Counter-Terrorism at MI6, Sir Mark Allen, the Secret Intelligence Service (MI6) and the Security Service (MI5)," undated, http://www.redress.org/case-docket/belhadj-v-jack-straw-and-others (accessed June 4, 2015). The UK government paid al-Saadi £2.23 million to settle his lawsuit. OSJI, "Globalizing Torture: CIA Secret Detention and Extraordinary Rendition," p. 117.

728 Owen Bowcott and Richard Norton-Taylor, "Police hand Libyan abduction evidence to Crown Prosecution Service," *The Guardian*, October 31, 2014, http://www.theguardian.com/uk-news/2014/oct/31/met-libya-abduction-rendition-cps (accessed June 4, 2015).

729 Ian Cobain, "Police to investigate MI6 over rendition and torture of Libyans," *The Guardian*, January 12, 2012, http://www.theguardian.com/world/2012/jan/12/libya-rendition-torture-abduction-mi6 (accessed June 4, 2015).

730 Ian Cobain, "MI6 to be investigated over treatment of three more terror suspects," *The Guardian*, April 23, 2013, http://www.theguardian.com/world/2013/apr/23/mi6-al-qaida-investigation (accessed October 26, 2015).

Scottish Criminal Investigation

In May 2013, an online database[731] mapping CIA renditions worldwide revealed that airports in Scotland were used to refuel CIA planes used in renditions.[732] These revelations prompted Scottish police to open a criminal investigation, which was pending at writing.[733] The release of the Senate Summary brought renewed attention to the investigation and led Scottish police to request access to the full, un-redacted version of the report.[734]

Portugal

Information handed over by European parliamentarian Ana Gomes prompted Portugal's general prosecutor's office to launch a criminal investigation in February 2007 into US stopover flights that allegedly carried CIA rendition victims.[735] Prosecutors closed the investigation in May 2009 due to lack of evidence. Gomes tried to appeal the decision on the grounds that the investigation had been inadequate and had not included all relevant testimony, but the prosecutor's office denied the request in September 2009.[736]

Potential Investigation by the International Criminal Court

In addition to the cases before national jurisdictions in Europe, the International Criminal Court (ICC) may be another potential forum for holding US officials accountable for post-9/11 abuses. In late 2014, the ICC prosecutor said that her office is considering whether to pursue an investigation into torture and other serious abuses allegedly committed by US armed forces in Afghanistan between 2003 and 2008.

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731 The Rendition Project, "Rendition Flights," undated, http://www.therenditionproject.org.uk/flights/index.html (accessed June 10, 2015).

732 It does not appear that detainees were on board those aircrafts but rather that the aircrafts were refueling on their way to and from rendition operations in other countries. Billy Briggs, "Scottish Police Investigating British Role in CIA Kidnapping, Torture," *MintPress News*, June 2, 2015, http://www.mintpressnews.com/scottish-police-investigating-british-role-in-cia-kidnapping-torture/206099/ (accessed June 4, 2015); Ian Cobain and James Ball, "New light shed on US government's extraordinary rendition program," *The Guardian*, May 22, 2013, http://www.theguardian.com/world/2013/may/22/us-extraordinary-rendition-programme (accessed June 4, 2015).

733 Craig McDonald, "Revealed: Police investigate evidence that six CIA torture flights landed in Scotland," *Daily Record*, June 22, 2014, http://www.dailyrecord.co.uk/news/scottish-news/revealed-police-investigate-evidence-six-3741550 (accessed June 5, 2015).

734 If the request is granted, the full version of the report could reveal significant new information that was withheld at the request of UK officials. Billy Briggs, "Scottish Police Investigating British Role in CIA Kidnapping, Torture"; Craig McDonald, "Rendition experts fear police were too quick to clear CIA torture flights landing in Scotland," *Daily Record*, April 19, 2015, http://www.dailyrecord.co.uk/news/scottish-news/rendition-expert-fears-police-were-5546817 (accessed June 5, 2015).

735 "Portugal Probes Alleged CIA Flights," *Washington Post*, February 5, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/02/05/AR2007020501454.html (accessed June 5, 2015).

736 OSJI, "Globalizing Torture: CIA Secret Detention and Extraordinary Rendition," p. 103.

This announcement came in the context of the preliminary examination into Afghanistan that the ICC prosecutor initiated in 2007.[737] Her jurisdiction is limited to war crimes, crimes against humanity, and genocide committed within the country or by Afghan nationals from May 1, 2003 onwards.[738] The main focus of the examination appears to be crimes committed by pro- and anti-government forces, including the Taliban, the national intelligence service, the police, and the army. However, the prosecutor is also looking at "alleged abuse of detainees committed by international forces."[739]

In December 2014, just before the Senate Summary was released, a report on the ICC prosecutor's investigative activities singled out US officials as potential targets: "In particular, the alleged torture or ill-treatment of conflict-related detainees by US armed forces in Afghanistan in the period 2003-2008 forms another potential case identified by the Office."[740] The report says her office is looking at whether the "enhanced interrogation techniques" meet the threshold of gravity to fall within her jurisdiction and the "relevance and genuineness" of any steps to investigate and prosecute the alleged offenses by US authorities.[741] During a media interview in March 2015, the prosecutor said, "We're looking at the [US Senate] report very, very closely. And we will determine what to do, especially if it relates to our jurisdiction in Afghanistan."[742]

While the US has not ratified the Rome Statute and is not a party to the ICC, the court would still have jurisdiction over US nationals with respect to crimes committed in Afghanistan since Afghanistan has ratified the treaty and the abuses took place on Afghan

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737 The ICC has also opened a preliminary examination into alleged war crimes committed by officials of the United Kingdom, which is an ICC state party, involved in detainee abuse in Iraq. Since Iraq is not a party to the ICC, the ICC's authority only reaches to nationals of ICC members who are implicated in crimes committed in Iraq, and not to any national implicated in crimes committed on Iraq's territory, as is the case with Afghanistan. For more information on the preliminary examination, see Office of the Prosecutor, International Criminal Court, "Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq," May 13, 2014, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-iraq-13-05-2014.aspx (accessed November 16, 2015).

738 Afghanistan ratified the Rome Statute on February 10, 2003. Office of the Prosecutor, International Criminal Court, "Report on Preliminary Examination Activities 2014," December 2, 2014, http://www.icc-cpi.int/iccdocs/otp/otp-pre-exam-2014.pdf (accessed March 30, 2015), paras. 75-76.

739 Ibid., para. 94.

740 Ibid.

741 Ibid., paras. 95-96.

742 James Reinl, "Int'l Criminal Court Studying CIA Report 'Very, Very Closely,'" *Reader Supported News*, March 6, 2015, http://readersupportednews.org/news-section2/318-66/28925-intl-criminal-court-studying-cia-torture-report-very-very-closely (accessed March 26, 2015).

soil. If the prosecutor finds that the crimes rise to the level of war crimes and that US prosecutorial authorities are not adequately investigating the alleged offenses, she could open a formal investigation.

The ICC should continue efforts to monitor whether US authorities are pursuing meaningful and effective criminal investigations and trials into detainee abuse allegedly committed by members of the US armed forces in Afghanistan between 2003 and 2008. If US authorities fail to pursue accountability for abuses and the alleged crimes meet the other criteria necessary for the ICC prosecutor to exercise jurisdiction in Afghanistan, her office should consider opening a formal investigation into US-related abuses as part of a broader investigation into crimes committed in Afghanistan.

Recommendations

To the US President

- Support the Attorney General's appointment of a special prosecutor to conduct a thorough, independent, and credible criminal investigation into the CIA rendition, detention, and interrogation program that examines the conduct of those who authorized and implemented torture and other abuse by the CIA, including conduct that may have purportedly been authorized.
- Acknowledge wrongdoing and formally apologize to victims of torture conducted or authorized by the US. In the absence of congressional action, establish an independent body to administer claims and provide appropriate redress, including compensation and rehabilitation.
- Declassify the full Senate Intelligence Committee Report on the CIA's detention and interrogation program, redacting only what is strictly necessary to protect national security. Improve declassification procedures more generally to ensure that only truly sensitive sources and methods remain classified and that the declassification process proceeds more quickly.
- Declassify entirely the CIA rendition, detention, and interrogation program rather than selective aspects or elements of it as is the current practice.
- Support legislative initiatives to require all US government agencies, including the CIA, to use only interrogation techniques listed in the Army Field Manual on Intelligence Interrogations.
- Instruct all relevant government agencies to initiate a review of their role in the CIA program as described in the full Senate Intelligence Committee report to identify mistakes made, lessons learned, and best practices going forward.
- Institute reforms at the CIA that provide more open congressional hearings on CIA policy and practice, stronger CIA reporting requirements to Congress, greater oversight from other divisions of the executive branch, and a bolstered CIA Office of the Inspector General.

To the Department of Justice

- The Attorney General should appoint a special prosecutor to conduct a thorough, independent, and credible criminal investigation and bring charges where warranted concerning CIA torture and other crimes. The investigation should look into the conduct of those who authorized and implemented the CIA program as well as those who went beyond what was authorized. In conducting such an investigation, ensure all relevant witnesses, including victims of the alleged torture and ill-treatment, are interviewed and all relevant physical evidence is collected and examined.
- Do not invoke the state secrets privilege in civil litigation concerning US torture except when absolutely necessary to prevent genuine harm to US national security and, even then, apply the privilege as narrowly as possible. Use of the privilege should not prevent the provision of appropriate redress to victims of US torture.

To the US Congress

- Enact legislation that would acknowledge wrongdoing, apologize, and provide redress, including compensation and rehabilitation, to victims of US torture and other abuse.
- Enact legislation that would prohibit the CIA from holding individuals in detention except immediately after a lawful arrest and ensuring their prompt transfer to an authorized detention authority.
- Revise Appendix M to the US Army Field Manual on Intelligence Interrogations to prohibit the use of abusive sleep and sensory deprivation techniques.

To Countries that Provided Support to the CIA Rendition Program

- Ensure impartial and independent criminal investigations of complicity in torture and other criminal offenses allegedly committed in the country by national or US officials in connection with CIA renditions or interrogations, and prosecute those implicated in crimes.
- Request a minimally redacted copy of the full Senate Intelligence Committee Report from the US government and provide it to prosecutorial authorities.

- Inform the US government that country officials do not object to the country or its nationals being named or identified in any information released to the public related to the CIA's rendition, detention, and interrogation program.
- Press US authorities to initiate meaningful criminal investigations in the United States and prosecute those responsible for torture and other serious abuses since 9/11.

To All Foreign Governments

- Exercise jurisdiction, including universal jurisdiction, as provided under domestic and international law, to investigate and, evidence permitting, prosecute US officials alleged to have been involved in criminal offenses against detainees in violation of international law.
- When permitted under domestic law, gather evidence to facilitate future prosecution of US officials should such officials enter their territory.
- Take measures to ensure that all relevant national agencies, including immigration, police, and prosecutorial authorities, are able to monitor, investigate, and prosecute US officials and others implicated in CIA torture should they enter the country.
- Call for a side meeting of the European Network of Contact Points in respect of persons responsible for genocide, crimes against humanity, and war crimes (known as the EU Genocide Network) to discuss investigations of torture and other abuses by US officials since 9/11.

To Specific National Authorities in the Following Countries

France

- Enforce the appellate court decision to issue a summons for former Guantanamo commander Gen. Geoffrey Miller and take all necessary steps to seek his appearance for questioning before French judicial authorities in connection with the ongoing investigation.

Germany

- Federal prosecutors should open a "structural investigation" to gather all evidence of US-related abuses committed post-9/11 that is available within the country and that may be used in future criminal proceedings in Germany or elsewhere.

- Request the extradition of the 13 CIA agents against whom arrest warrants have been issued in connection with the rendition of Khaled el-Masri.

Italy

- Judicial authorities should pursue legal avenues that would allow its European Arrest Warrants for the 26 US nationals convicted *in absentia* in connection with the rendition of Hassan Mustafa Osama Nasr (Abu Omar) to remain valid;
- The Ministry of Justice should pursue the extradition of all 26 Americans and afford them a retrial if they are extradited.

Lithuania, Macedonia, Poland, and Romania

- Prosecutors should conduct impartial and independent criminal investigations of complicity in torture and other criminal offenses allegedly committed in their countries by national and US officials in connection with CIA renditions or interrogations, and prosecute those implicated in crimes. Such investigations should include national and US government officials.

Portugal

- Prosecutors should reopen criminal investigations in connection with CIA torture in light of the Senate Summary.

Spain

- Judicial authorities should reopen the criminal investigation in the "Bush Six" case because the US Department of Justice has taken no further steps to investigate and prosecute those alleged to be responsible for abuse of detainees at Guantanamo.
- Judicial authorities should ensure that the second criminal investigation into alleged abuse of detainees at Guantanamo proceeds based on the Spanish nationality of one of the victims.

United Kingdom

- Prosecutors should conduct impartial and independent criminal investigations of complicity in torture and other criminal offenses allegedly committed in the country

by national and US officials in connection with CIA renditions or interrogations, and prosecute those implicated in crimes.

- Scottish police should expand their ongoing criminal investigation into CIA rendition flights to include US officials.

To the European Parliament, the Parliamentary Assembly of the Council of Europe, and UN Experts and Bodies

- Monitor the implementation of recommendations made in prior reports to countries identified as having supported the CIA rendition, detention, and interrogation program.
- Continue to call on countries that supported the CIA program to investigate and prosecute all those responsible for CIA torture and other abuses in their country, including national and US officials.
- Encourage police and judicial authorities in different countries to strengthen cooperation with respect to ongoing or future investigations and prosecutions of CIA torture and other offenses.
- Call on the European Genocide Network to convene a side meeting to discuss investigations of torture and other abuses by US officials since 9/11.
- Press US authorities to initiate meaningful criminal investigations and prosecute those responsible for torture and other serious abuses committed since 9/11.

To the Office of the Prosecutor of the International Criminal Court

- Continue to monitor whether US authorities pursue credible and impartial criminal investigations and prosecutions of detainee abuse allegedly committed by members of the US armed forces in Afghanistan between 2003 and 2008.
- Consider opening a formal investigation into US-related abuses in Afghanistan if no criminal proceedings take place in the US and other relevant criteria are met to establish jurisdiction.

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NO MORE EXCUSES

A Roadmap to Justice for CIA Torture

Following the attacks on the United States on September 11, 2001, the US Central Intelligence Agency (CIA) operated a global, state-sanctioned program in which it abducted scores of people throughout the world, held them in secret detention—sometimes for years—or "rendered" them to various countries, and tortured or otherwise ill-treated them.

Many detainees were held by the CIA in pitch-dark windowless cells, chained to walls, naked or diapered, for weeks or months at a time. The CIA forced them into painful stress positions that made it impossible to lie down or sleep for days, to the point where many hallucinated or begged to be killed to end their misery. To date, no one has been held accountable for these abuses that amount to crimes under US and international law.

No More Excuses: A Roadmap to Justice for CIA Torture provides a path forward. The report sets out a detailed analysis of the various criminal charges available and challenges claims put forward by the US Justice Department that prosecutions for torture are not legally possible. It also outlines steps the US should take to provide compensation and rehabilitation to victims of torture; and steps other countries should take to pursue their own criminal investigations into CIA torture.

Human Rights Watch calls on the United States to appoint a special prosecutor to conduct a thorough, credible criminal investigation of those who authorized and implemented the CIA program as well as those who committed acts of torture beyond what was purportedly authorized. The US should also acknowledge wrongdoing, apologize, and provide redress to victims of torture.

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EXHIBIT J-JAMES AFFIDAVIT

http://www.dispatch.com/content/stories/local/2011/02/03/no-action-against-army-psychologist-guantanamo.html

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