

THE IMPACT OF EXECUTIVE BRANCH SECRECY ON THE UNITED STATES' COMPLIANCE WITH THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Shadow Report Prepared for the 53rd Session of the United Nations Committee Against Torture in Connection with its Review of the United States

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I. Reporting Organizations

OpenTheGovernment.org, a project of the Fund for Constitutional Government, is a coalition of 94 non-profit organizations dedicated to promoting transparency and opposing excessive secrecy in the United States government. Our coalition crosses party and ideological lines, and includes good-government groups, library and journalism associations, consumer advocates, labor, environmentalists, human rights and civil liberties groups, and other organizations that believe openness is essential to democratic accountability.

II. Executive Summary

When the United States last appeared before the Committee Against Torture, it was operating secret prisons where the CIA subjected terrorism suspects to enforced disappearance, torture, and cruel, inhuman and degrading treatment. President Barack Obama closed those prisons, ended that program, and banned the CIA's use of so-called "enhanced interrogation techniques." But the Obama administration has allowed the CIA, and to a lesser extent the military, to conceal information about its treatment of terrorism suspects on national security grounds.

This policy of official secrecy about torture and cruelty prevents candid reporting to the Committee, and has led to direct violations of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter "CAT" or "Convention Against Torture"), particularly:

- The obligation to provide torture victims with a right to complain of their treatment, without retaliation against the victim or witnesses, and to provide a legally enforceable means of redress, including compensation and as full a rehabilitation as possible (Articles 13 and 14)
- The obligation to ensure that statements resulting from torture are not used as evidence in court proceedings (Article 15)
- The obligation to promptly and impartially investigate victims' complaints of torture and cruel treatment, to criminalize all acts of torture, and to prosecute violations (Articles 4, 5, 6, 7, 12, 13 and 16)
- The obligation to cooperate with foreign investigations, prosecutions, and other legal proceedings concerning acts of torture (Article 9)

III. Discussion

The United States' use of torture after September 11 has been a matter of public record for many years. Since September of 2006, the United States government has officially acknowledged that the CIA detained suspected terrorists overseas and subjected them to "enhanced interrogation techniques". In 2009, President Barack Obama declassified Office of Legal Counsel memoranda that described the approved "enhanced interrogations techniques" in detail, stating that their

release was “required by the rule of law.”¹ In August of 2014, President Obama further stated that he believes, and thinks “any fair-minded person would believe,” that at least “some of these enhanced interrogation techniques ... were torture.”²

But the Executive Branch takes the position that the release of the OLC memos declassified the CIA’s “enhanced” techniques only “in the abstract.”³ Details of individual detainees’ capture, rendition, imprisonment and torture are still classified above the top-secret level.⁴ This applies not only to government documents and reports, but also to Guantánamo prisoners’ memories and descriptions of their own treatment in CIA custody. Lawyers who represent former CIA detainees in *habeas corpus* cases and military commissions must receive the highest level security clearance, and agree not to repeat their clients’ descriptions of torture at pain of prosecution. Military commissions judges admonish witnesses not to discuss the defendants’ treatment by the CIA. The courtroom has a censorship button in case the prisoners or witnesses disregard this instruction.⁵

The best hope for dismantling the wall of official secrecy that still surrounds CIA torture is an exhaustive report on the program by the Senate Select Committee on Intelligence. This spring, the committee voted to publicly release a 600-page Executive Summary of its report, and President Obama stated, “I am absolutely committed to declassifying that report.”⁶ Instead, after a declassification review effectively controlled by the CIA, the Executive Branch redacted:

- The names of the CIA contractors whose role in designing the interrogation program has been public for many years⁷
- Pseudonyms used in place of the names of the countries where the CIA operated secret prisons and “rendered” terrorism suspects, and pseudonyms of CIA officials involved in the program⁸

¹ Statement of President Barack Obama on Release of OLC Memos, April 16, 2009, available at http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos

² Josh Gerstein, *Obama: “We Tortured Some Folks,”* Politico, August 1, 2014, available at <http://www.politico.com/story/2014/08/john-brennan-torture-cia-109654.html>

³ Declaration of Leon Panetta, *American Civil Liberties Union v. Department of Defense*, 04-Civ-4151 (S.D.N.Y. June 20, 2009), ¶¶ 10, 21, available at <http://fas.org/sgp/jud/aclu-panetta.pdf>

⁴ *Id.* at ¶¶ 29, 30 (stating that CIA detention and interrogation program is a “special access program” that requires “safeguarding and access requirements that exceed those” for other top secret information.)

⁵ Ryan J. Reilly, *Guantánamo Secret Censor Frustrates Judge in 9/11 Case*, Huffington Post, January 28, 2013, available at http://www.huffingtonpost.com/2013/01/28/Guantánamo-secret-censor_n_2568595.html

⁶ Remarks by the President to Women Members of Congress, March 12, 2014, available at <http://www.whitehouse.gov/the-press-office/2014/03/12/remarks-president-women-members-congress>

⁷ Jason Leopold, ‘Comprehensive’ CIA Torture Report Won’t Even Name Well-Known Architects of Torture Program, Vice News, August 21, 2014, available at <https://news.vice.com/article/comprehensive-cia-torture-report-wont-name-well-known-architects-of-torture-program>; Katherine Hawkins, *What the CIA Is Trying to Hide*, The Hill, August 20, 2014, available at <http://thehill.com/blogs/congress-blog/the-administration/215416-what-the-cia-is-trying-to-hide>

⁸ Greg Miller, *Senate, CIA Clash Over Redactions in Interrogation Report*, Washington Post, August 5, 2014, available at http://www.washingtonpost.com/world/national-security/senate-cia-clash-over-redactions-in-interrogation-report/2014/08/05/2f904f04-1ce0-11e4-ab7b-696c295ddfd1_story.html; Mark Mazzetti, *Senator Denounces Redactions of Report on C.I.A. Interrogation Program*, New York Times, August 5, 2014, available at http://www.nytimes.com/2014/08/06/us/redactions-of-report-on-cia-stoke-ire.html?_r=0; Mark Hosenball, *U.S.*

- Information included in previous official governmental reports on detainee abuse⁹

According to Senators, the redactions “eliminate or obscure key facts that support the report’s findings and conclusions,”¹⁰ leaving portions of the executive summary “impossible to understand.”¹¹ The report’s release has been indefinitely postponed while the administration and Senate negotiate over redactions.

Unless this situation changes, the continuing classification of the CIA’s detention and interrogation program will prevent the United States from fully complying with a number of its obligations under the Convention Against Torture.

A. The Obligation to Provide Torture Victims With a Means to Complain, an Opportunity for Rehabilitation, and a Legally Enforceable Right to Redress

The United States government’s censorship of former CIA detainees’ descriptions of their own torture, and its courts’ dismissal of virtually all civil suits brought by torture victims on secrecy grounds, lead directly to violations of Article 13 and 14 of the Convention Against Torture.

Article 13 requires states to ensure that any individual subjected to torture under their jurisdiction “has the right to complain” and have his complaint “promptly and impartially examined.” States must “ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.” Article 14 requires each state to “ensure it 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.”

General Comment 3 by the Committee Against Torture states that Article 14’s right of redress includes not only monetary compensation, but also:

- “verification of the facts and full and public disclosure of the truth” concerning victims’ torture, except to the extent that disclosure would threaten the safety of the victim, relatives or witnesses.¹²

Heightens Embassy Security, Anticipating Report on CIA Interrogations, Reuters, August 5, 2014, available at <http://www.reuters.com/article/2014/08/05/us-usa-cia-senate-security-idUSKBN0G527X20140805>

⁹ Levin Statement on CIA-Proposed Redactions in SSCI Detention and Interrogation Study, August 5, 2014, available at <http://www.levin.senate.gov/newsroom/press/release/levin-statement-on-cia-proposed-redactions-in-ssci-detention-and-interrogation-study>

¹⁰ Greg Miller, *Senate, CIA Clash Over Redactions in Interrogation Report*, Washington Post, August 5, 2014, available at http://www.washingtonpost.com/world/national-security/senate-cia-clash-over-redactions-in-interrogation-report/2014/08/05/2f904f04-1ce0-11e4-ab7b-696c295ddfd1_story.html

¹¹ Jonathan Landay and Michael Doyle, *Obama Officials, Senate Intelligence Panel Spar Over Deletions from Torture Report*, McClatchy, August 4, 2014, available at http://www.mcclatchydc.com/2014/08/04/235402_obama-officials-senate-intelligence.html?rh=1

¹² Committee Against Torture, General Comment No. 3, November 19, 2012, ¶ 16, available at http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf.

- Access to medical and psychological treatment, in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, better known as the Istanbul Protocol)¹³
- Judicially enforced civil or criminal liability for the perpetrators.¹⁴

The Committee Against Torture has specifically stated that “under no circumstances may arguments of national security be used to deny redress for victims,” including through “state secrecy laws.”¹⁵

The United States’ report to the Committee Against Torture claims that it provides “various avenues” for torture victims seeking redress, including “a wide range of civil remedies.”¹⁶ But in all cases where torture victims have sued for torture by a U.S. government official or a CIA contractor, the United States’ Department of Justice has successfully argued that courts should dismiss their claims without hearing any evidence.¹⁷ In many of these cases, one of the major justifications for dismissal was an argument that hearing the victims’ case would reveal classified information and cause grave damage to national security. Several victims whose cases were dismissed on state secrets grounds appear to have been innocent of any connection to terrorism, and are suffering ongoing mental harm from their torture compounded by the lack of accountability or justice.¹⁸

With respect to former CIA detainees still held at Guantánamo, the United States has not only failed to provide redress, but has severely limited prisoners’ and witnesses’ right to complain and submit evidence of their torture. In order to obtain authorization to meet with former CIA prisoners, lawyers must obtain a high-level security clearance. Attorneys are instructed that a former black site prisoner’s statements, observations, and experiences during his period of mistreatment by the CIA remain classified, and that they risk prosecution and the loss of their clearances if they disclose the details of their clients’ torture.¹⁹ This is not an idle threat; there have been at least two criminal investigations into Guantánamo prisoners’ defense counsel and investigators for alleged unauthorized disclosures of classified information.²⁰

¹³ *Id.* at ¶¶ 11-15.

¹⁴ *Id.* at ¶¶ 17, 30.

¹⁵ *Id.* at ¶¶ 38, 42.

¹⁶ *Periodic Report of the United States America, United Nations Committee Against Torture*, August 5, 2013, ¶147, available at <http://www.state.gov/documents/organization/213267.pdf> (hereinafter “United States Third Periodic Report”).

¹⁷ *E.g. Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc); *Arar v. Ashcroft*, 85 F.3d 559 (2d Cir. 2009) (en banc); *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009); *El-Masri v. Tenet*, 416 F.3d 338 (4th Cir. 2007).

¹⁸ *Report of the Constitution Project’s Task Force on Detainee Treatment* (April 2013) at 291-293, available at <http://detaineeetaskforce.org/pdf/Full-Report.pdf> (hereinafter Constitution Project Task Force Report).

¹⁹ *See* Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture, AE 200, *United States v. Mohammad* (August 12, 2013), available at [http://www.redress.org/downloads/ksm-ii-\(ae200\(mahrbswba\)\).pdf](http://www.redress.org/downloads/ksm-ii-(ae200(mahrbswba)).pdf)

²⁰ Both investigations were closed without charges against the Guantánamo defense teams. *See* Nick Baumann and Daniel Schulman, *Spy Vs....Lawyer?*, Mother Jones, July 2010, available at <http://www.motherjones.com/politics/2010/07/john-sifton-Guantánamo-aclu>; Charlie Savage, *F.B.I. Closes Investigation Into Guantánamo Defense Aide*, New York Times, May 21, 2014, available at

The security classification regime prohibits Guantánamo prisoners and their lawyers from providing evidence of their torture in CIA custody not only to the press and public, but to:

- Members and security-cleared staff of the Congressional committees that oversee the CIA²¹
- Department of Justice officials responsible for investigating civil rights abuses and war crimes²²
- Foreign prosecutors, foreign courts, parliamentary investigations, and international courts or human rights bodies²³
- Potential witnesses who might be able to corroborate their testimony²⁴
- Licensing bodies for medical or mental health clinicians who participated in the prisoners' torture

The United States government has claimed that prisoners do have the ability to complain to the International Committee for the Red Cross (ICRC), and to Department of Defense personnel at Guantánamo.²⁵ But the ICRC is bound to keep prisoners' complaints strictly confidential, and detainees' counsel allege that the Department of Defense has not taken any action to investigate complaints of torture in CIA custody.

At an October 2013 military commission hearing in the case of the alleged perpetrators of the September 11 attacks, James Connell, an attorney for Guantánamo prisoner Ammar al-Baluchi, introduced documents from al-Baluchi's medical records. The documents themselves are not publicly available, but Connell's description of them is. According to Connell, they show that on several occasions in September and October 2006, Baluchi had described suffering a head injury

<http://www.nytimes.com/2014/05/22/us/politics/fbi-closes-investigation-into-Guantánamo-defense-lawyer.html>. The CIA also referred staff members of the Senate Select Committee on Intelligence who investigated its torture program to the Department of Justice for potential prosecution. The Department of Justice declined to launch a full-fledged criminal investigation into that incident, however, and the CIA Inspector General later concluded that the CIA referral was based on false allegations of fact. See David S. Joachim, *Justice Dept. Declines to Investigate CIA Review*, New York Times, July 10, 2014, available at http://www.nytimes.com/2014/07/11/us/politics/justice-dept-declines-to-investigate-rival-claims-of-cia-and-senate-panel.html?_r=0; CIA Inspector General, *Summary of Report*, July 31, 2014, available at <https://www.documentcloud.org/documents/1238942-cia-ig-summary-of-report.html#storylink=relat>.

²¹ See Mr. al Baluchi's Motion to Authorize Counsel to Provide Classified Information to Appropriately Cleared Members of the Legislative Branch, AE232, *United States v. Mohammad* (4 October 2013), available at [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE232\(AAA\)\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE232(AAA)).pdf).

²² Transcript of the *United States v. Mohammad* Motions Hearing Dated 10/23/2013, from 10:51 AM to 12:23 PM, 19, available at [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS23Oct2013-AM2\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS23Oct2013-AM2).pdf).

²³ See Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture, AE 200, *United States v. Mohammad* (August 12, 2013), available at [http://www.redress.org/downloads/ksm-ii-\(ae200\(mahrbswba\)\).pdf](http://www.redress.org/downloads/ksm-ii-(ae200(mahrbswba)).pdf).

²⁴ Katherine Hawkins, "You Can't Gag Someone and Then Want to Kill Them," Huffington Post, October 24, 2013, available at http://www.huffingtonpost.com/katherine-hawkins/Guantánamo-trials-torture_b_4146044.html

²⁵ United States Third Periodic Report, ¶ 155, available at <http://www.state.gov/documents/organization/213267.pdf>.

before his arrival in Guantánamo that caused auditory and visual hallucinations, delusions, headaches, and memory loss.²⁶

Connell was forbidden from publicly describing the incident that caused these symptoms. The *Washington Post* later reported that while Baluchi was held at a secret prison in Afghanistan, “CIA interrogators forcibly kept his head under the water while he struggled to breathe and beat him repeatedly, hitting him with a truncheon-like object and smashing his head against a wall.”²⁷

Connell said that in response to Baluchi’s allegations:

nothing happened. It was written down. It was recorded in medical records. There was no investigation in accordance with relevant DoD policy. There was no robust investigation of what happened. Instead, nothing happened. They just -- these records just molded away with no follow-up....²⁸

Connell also said that the ongoing classification of Baluchi’s experiences interfered with his medical care, though he could not publicly elaborate on the details.²⁹

Attorneys for accused *USS Cole* plotter Abd Al Rahim al Nashiri have also alleged that the classification regime in place at Guantánamo has compromised his medical treatment. More specifically, in April 2014 independent medical expert Dr. Sondra Crosby testified that based on her examinations of Nashiri, he suffered from chronic posttraumatic stress disorder and physical symptoms resulting from “physical, psychological and sexual torture.”³⁰ Dr. Crosby was not permitted to testify on Nashiri’s allegations of torture and sexual assault, but said that “[t]here are physical indicators that are consistent with the classified allegations.”³¹ She elaborated,

He suffers from chronic pain. He suffers from anal-rectal complaints, and all of these are documented in the unclassified records. Multiple other physical complaints, headaches, chest pain, joint pain, stomach pain. These are all symptoms that are highly prevalent in people who have suffered torture and to have chronic PTSD. These are all kind of red flags.³²

²⁶ Transcript of the *United States v. Mohammad* Motions Hearing Dated 10/23/2013, from 10:51 AM to 12:23 PM, 10-11, available at [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS23Oct2013-AM2\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS23Oct2013-AM2).pdf).

²⁷ Greg Miller, Adam Goldman, and Ellen Nakashima, *CIA Misled on Interrogation Program*, *Senate Report Says*, *Washington Post*, March 31, 2014, available at http://www.washingtonpost.com/world/national-security/cia-misled-on-interrogation-program-senate-report-says/2014/03/31/eb75a82a-b8dd-11e3-96ae-f2c36d2b1245_story.html.

²⁸ Transcript of the *United States v. Mohammad* Motions Hearing Dated 10/23/2013, from 10:51 AM to 12:23 PM, 11, available at [http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS23Oct2013-AM2\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS23Oct2013-AM2).pdf).

²⁹ *Id.* at 20-21.

³⁰ Transcript of the *United States v. Al Nashiri* Motions Hearing Dated 4/24/2014, from 9:06 AM to 10:33 AM, 34, 50, 55, available at [http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20\(TRANS24April2014-AM1\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(TRANS24April2014-AM1).pdf)

³¹ *Id.* at 49

³² *Id.* at 55

Dr. Crosby testified that despite these red flags, and the public reports that Nashiri had been waterboarded at a CIA black site, “I have not seen a trauma history in any medical records that I have reviewed.”³³ As a result of this failure to inquire, she said, “Mr. al Nashiri has not been properly diagnosed or treated, to my knowledge, up until this time.”³⁴

Nashiri’s attorney Richard Kammen attributed this to the ongoing, high-level classification of Nashiri’s torture:

The medical staff probably is doing their best, I suspect, under a framework that we don't know about that if we could fully explore, we would find they've been essentially told don't go there.³⁵

The failure of medical personnel to inquire into, document, or provide adequate treatment for torture contradicts the United States’ claims in paragraph 101 of its Third Periodic Report. The failure to investigate credible evidence of torture raised during military commissions contradicts paragraph 155 of the Third Periodic Report. More generally, the United States efforts to classify CIA torture victims’ memories is a clear, direct breach of Article 13’s right to complain and Article 14’s right to redress. The absence of any legally enforceable civil remedy for torture victims who have been released is also a violation of Article 14.

B. The Obligation to Ensure That Statements Made as a Result of Torture Are Not Used as Evidence in Court Proceedings

Article 15 of the Convention Against Torture requires states to “ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

The United States’ Military Commissions Act of 2009 contains a similar exclusion. Any statement “obtained by the use of torture or by cruel, inhuman, or degrading treatment” is inadmissible except in prosecutions for the acts of torture and cruelty through which the statement was obtained.³⁶ Statements from the accused can only be admitted if the prosecution shows that they were made voluntarily, or during lawful combat operations that led to his capture.³⁷

Guantánamo military commissions prosecutors have stated that they will not rely on any statements that former CIA prisoners made while in CIA custody. But they have sought to admit statements that prisoners made to an FBI “clean team” after their arrival at Guantánamo, despite defense arguments that the lingering effects of torture made any subsequent confessions

³³ *Id.* at 52

³⁴ Transcript of the *United States v. Al Nashiri* Motions Hearing Dated 4/24/2014 from 10:52 AM to 11:20 AM, 10-11, available at [http://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20\(TRANS24April2014-AM2\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20(TRANS24April2014-AM2).pdf)

³⁵ Transcript of the *United States v. Al Nashiri* Motions Hearing Dated 4/27/2014 from 3:12 PM to 4:09 PM, available at [http://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20\(TRANS27April2014-PM2\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20(TRANS27April2014-PM2).pdf)

³⁶ 10 U.S.C. §948r, available at <http://www.law.cornell.edu/uscode/text/10/948r>

³⁷ *Id.*

involuntary.³⁸ Military commissions' rules also allow prosecutors to introduce as evidence statements that contain multiple levels of hearsay, and do not require them to prove that statements by witnesses other than the defendant were voluntary. Defense counsel and human rights groups have raised concerns that these rules allow "prosecutors to launder evidence obtained by torture" or cruelty.³⁹

Defense lawyers have credibly alleged that the government refuses to turn over crucial evidence about the CIA torture program to the defense, although defense counsel hold the highest security clearances possible. Instead, the prosecution has offered summaries of classified evidence that the CIA determines that defense lawyers have a "need to know." Defense counsel have said these summaries are "false," "misleading," and "woefully inadequate for any meaningful presentation in a capital trial."⁴⁰

Without declassification of the CIA program, or a dramatic change in the government's willingness to provide defense counsel with exculpatory evidence, there is a serious risk that evidence derived from torture or cruelty will be used as evidence in military commissions cases. There is an even greater risk that the defense counsel will be deprived of evidence needed to defend their clients against a death sentence.

C. The Obligation to Promptly and Impartially Investigate Complaints of Torture, and Prosecute Violators

In April 2013, after a two year examination of the then publicly available evidence, the Constitution Project's bipartisan, independent Task Force on Detainee Treatment found:

The Convention Against Torture requires each state party to "[c]riminalize all acts of torture, attempts to commit torture, or complicity or participation in torture," and "proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction." The United States cannot be said to have complied with this requirement.

No CIA personnel have been convicted or even charged for numerous instances of torture in CIA custody — including cases where interrogators exceeded what was authorized by the Office of Legal Counsel, and cases where detainees were tortured to death. Many acts of unauthorized torture by military forces have also been inadequately investigated or prosecuted.⁴¹

³⁸ E.g. Government Response to Defense Motion to Suppress Custodial Statements Made By The Accused, AE314A, *United States v. Al Nashiri* (September 19, 2014), available at [http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20\(AE314A\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(AE314A).pdf)

³⁹ Laura Pitter, *Sins of Commission*, Foreign Policy, November 11, 2011, available at http://www.foreignpolicy.com/articles/2011/11/10/abd_al_rahim_al_nashiri_Guantánamo_bay

⁴⁰ Redacted Transcript of the Closed Session Dated June 14, 2013, *United States v. Al Nashiri*, 19, available at <https://www.scribd.com/doc/149295188/Al-Nashiri-II-TRANS14June2013-ClosedSession>

⁴¹ Constitution Project Task Force Report at 22, available at <http://detainee-taskforce.org/pdf/Full-Report.pdf>

The last active criminal investigation into the CIA's treatment of prisoners, a probe into the homicides of Gul Rahman and Manadel al-Jamadi by agency personnel, was closed over two years ago. On August 30, 2012, Attorney General Eric Holder announced that no one would be charged for either death because "the admissible evidence would not be sufficient to obtain and sustain conviction beyond a reasonable doubt."⁴² The U.S. government has not provided further details about the basis for this conclusion, or its previous decision not to open full investigations into the CIA's treatment of nearly 100 other prisoners. The Department of Justice similarly declined to provide any explanation for its earlier decision to close a criminal investigation into the CIA's destruction of video evidence of torture.

In response, United Nations Special Rapporteur on Torture Juan Mendez denounced the failure to prosecute any CIA agents as "a refusal to accept an obligation in international law that the United States has. Unfortunately, there has been no serious investigation."⁴³

The Constitution Project's Task Force on Detainee Treatment wrote that:

Without being in a position to examine the evidence or the reasons prosecution was declined, it is difficult to dismiss Durham's investigations as not "serious," or comment on prosecutors' disposition of any individual case. But there is no question that many acts of torture or complicity in torture have resulted in no prosecution, no conviction, or a disproportionately low sentence.⁴⁴

One reason for this is the existence of secret Office of Legal Counsel (OLC) "torture memos" advising the CIA that its brutal techniques were lawful. But there have been no prosecutions even in cases where CIA personnel went beyond what OLC authorized, and/or where the OLC's legal advice relied on false representations of fact from the intelligence community. A major explanation for the lack of accountability in those cases may be the ongoing classification of the CIA torture program. U.S. prosecutors have limited ability to disclose classified information to witnesses or to a grand jury, or introduce it in court, without the consent of the agency that originally classified the information.⁴⁵

The CIA has been extremely reluctant to declassify evidence of torture even in non-criminal contexts. In 2011, while the Justice Department's criminal investigation was still pending, the CIA and Justice Department successfully opposed disclosure of a single word of a 98-page investigation into Manadel al-Jamadi's death under the Freedom of Information Act. The CIA claimed that it had "conducted a line-by-line review of this document" and determined that no meaningful portion of it could be released. It made the same determination for 10 other internal reports on detainee abuse.⁴⁶

⁴² Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees, August 12, 2012, available at <http://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees>

⁴³ Constitution Project Task Force Report at 331, available at <http://detaineeetaskforce.org/pdf/Full-Report.pdf>

⁴⁴ *Id.* at 331.

⁴⁵ *Id.* at 331.

⁴⁶ *Id.* at 331.

Given this level of secrecy, the Constitution Project Task Force on Detainee Treatment concluded, “it is difficult to see how prosecutors could investigate intelligence officers without either the cooperation of the CIA, or the president’s willingness to override the CIA on classification decisions.”⁴⁷

Secrecy also posed an obstacle in military prosecutions for torture, particularly those involving abuses by Joint Special Operations Command (JSOC) task forces in Iraq and Afghanistan. In April 2005, an Army Criminal Investigative Division (CID) team wrote that it had been unable to investigate over 20 cases of alleged detainee mistreatment in Iraq because of suspects’ and witnesses’ involvement in “Special Access Programs (SAP) and/or the classification of the unit they were assigned to during the offense. Attempts by Special Agents...to be ‘read on’ to these programs ha[ve] been unsuccessful.”⁴⁸ Another CID file states that an investigation failed because the detainee was captured and interrogated by a secretive JSOC Task Force that used “fake names,” and had allegedly suffered “a major computer malfunction which resulted in them losing 70 percent of their files.”⁴⁹

The criminal prohibition on torture cannot be enforced, and criminal investigations into allegations of torture cannot be truly independent, if intelligence services can destroy evidence and use the classification power to ensure impunity.

D. The Obligation to Cooperate With Foreign Investigations

Article 9 of the Convention Against Torture requires states to “afford one another the greatest measure of assistance” in court proceedings regarding the offense of torture, “including the supply of all evidence at their disposal necessary for their proceedings.” But the United States has declined to provide evidence or cooperate with court proceedings regarding torture allegations in Italy, Spain, Germany, Poland, the United Kingdom, and before the Inter-American Court of Human Rights and the European Court of Human Rights.⁵⁰ The U.S. government has not only refused to provide evidence from government documents or officials, but has put pressure on countries to close investigations, and prevented detainees and their counsel from submitting evidence.⁵¹

In response, in 2013 the European Parliament passed a resolution that:

Calls on the US Government to cooperate with all requests from EU Member States for information with regard to the CIA programme, and especially requests for extradition; urges the US Government to stop using draconian protective orders which prevent lawyers acting for Guantánamo Bay detainees from

⁴⁷ *Id.* at 332.

⁴⁸ *Id.* at 93.

⁴⁹ *Id.* at 94.

⁵⁰ *Id.* at 186, 196-200.

⁵¹ *Id.* at 186, 196-200.

disclosing information regarding any detail of their secret detention in Europe.⁵²

This call was disregarded. Nevertheless, the European Court of Human Rights (ECHR) found in July of 2014 that the CIA had tortured Abu Zubaydah and Abd al Rahim al Nashiri at a black site in Poland.⁵³ The European Court found that Poland had failed to promptly or thoroughly investigate credible allegations of torture on its soil, and that this failure could

be explained in only one conceivable way...the nature of the CIA activities on Polish territory and Poland's complicity in those activities were to remain a secret shared exclusively by the intelligence services of the two cooperating countries.⁵⁴

Disregarding requests for evidence in torture investigations, pressuring foreign countries to drop investigations, and preventing victims and their counsel from submitting evidence are clear violations of Article 9 of the torture convention.

IV. Recommendations

All of the violations of the Convention Against Torture discussed above flow from a single source: the decision to allow the United States' intelligence services to classify evidence of torture, even the victims' memories of it. If torture is a state secret, impunity inevitably follows.

If the United States is to comply with its obligations under the Convention, this cover-up must end. Accordingly, the Committee should recommend that the United States:

1. Declassify the Senate Select Intelligence Committee's full 6700-page report on the CIA's former detention and interrogation program.
2. End the use of national security classification to censor former prisoners' descriptions of their own torture and ill-treatment, as well as descriptions given to attorneys or medical or mental health personnel.
3. Comply fully with its discovery obligations to produce evidence regarding the CIA torture program in the Guantánamo military commissions.

⁵² European Parliament Resolution on Alleged Transportation and Illegal Detention of Prisoners in European Countries by the CIA, B7-0379/2013 (adopted October 10, 2013), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2013-0379&language=EN>

⁵³ Judgment, *Abu Zubaydah v. Poland*, European Court of Human Rights (July 24, 2014), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146047#{"itemid":\["001-146047"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146047#{); Judgment, *Al Nashiri v. Poland*, European Court of Human Rights (July 24, 2014), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146044#{"itemid":\["001-146044"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146044#{). One of Nashiri's counsel before the ECHR, Nancy Hollander, has been denied authorization to represent her client in the Guantánamo military commissions. The government has refused to explain why; her co-counsel have credibly alleged that this is a form of retaliation for her participation in the ECHR proceedings.

⁵⁴ *Abu Zubaydah v. Poland*, *supra*, at ¶ 484; *Al Nashiri v. Poland*, *supra*, at ¶ 490.

4. Declassify all CIA inspector generals' reports regarding the agency's treatment of prisoners after September 11.
5. Declassify all reports and criminal investigative files regarding torture and ill treatment by Joint Special Operations Command Task Forces in Iraq and Afghanistan.
6. Immediately end the designation of the CIA's former rendition, detention and interrogation program as a "Special Access Program," and conduct a thorough declassification review of the evidence about the program with a view to disclosing as much evidence as possible.
7. Clarify, through legislation or other means, that evidence regarding torture and cruel, inhuman or degrading treatment is not an "intelligence source and method" under U.S. law, and cannot be properly classified.
8. Release other countries from any agreements to conceal the CIA's rendition, detention and interrogation program, and refrain from future agreements to classify evidence of torture or cruel treatment.

V. Suggested Questions

1. Were the officials who prepared the United States' report to the Committee Against Torture given access to all relevant information about past and present detainee interrogations, detentions, and transfers by the intelligence community? If not, why not? What restrictions were placed on the delegation's reporting regarding intelligence operations?
2. What is the justification for censoring torture victims' descriptions of their own treatment? How is this policy compliant with Articles 13 and 14 of the Convention Against Torture?
3. There have been two criminal investigations into former CIA detainees' defense lawyers for allegedly mishandling or disclosing classified information, and a separate criminal referral of Senate intelligence committee staff in connection with their investigation of CIA torture. The CIA is also known to have improperly searched and read the emails of Senate staff. Journalists, Guantánamo detainees' lawyers, and human rights researchers have expressed fears that their investigations of abuses by the U.S. intelligence community place them at risk of government surveillance, and their sources at risk of prosecution. What reassurances can you give the committee that the United States will not prosecute or surveil anyone for investigating or exposing torture?
4. What effect did the ongoing classification of information on the CIA's treatment of detainees and the deaths of Manadel al-Jamadi and Gul Rahman have on the decision not to prosecute CIA officers for those homicides?
5. With regard to the United States' compliance with Article 9 of the Convention Against Torture,

- a. Why has the United States declined all requests for assistance in torture investigations pursuant to Mutual Legal Assistance Treaties?
 - b. How is refusing to allow former CIA detainees' to submit evidence regarding their own treatment consistent with Article 9?
 - c. Counsel for former CIA detainees now held at Guantánamo have stated that they could face criminal prosecution and other repercussions for submitting evidence of their clients' torture in U.S. custody to international bodies such as this Committee. Is that accurate? If so, how is it consistent with Article 9?
6. If other countries adopted the United States' view that evidence of torture by the security services was a state secret, and that victims' descriptions of their own treatment were classified, how could the prohibition on torture ever be enforced?