

In Cairo, the men were transferred to the custody of Egyptian security police. Once in their custody, they were subject to lengthy interrogations. While being interrogated, they were subjected to torture and other inhumane treatment, including attachment of electric cables to their testicles, frequent beatings, and threats to their wives and families. They were held incommunicado and Egyptian officials denied their repeated requests to speak with a lawyer or family members. After five weeks under these conditions, the men were finally permitted to see the Swedish Ambassador and members of their families.³²³

Mr. Agiza was subsequently sentenced to twenty-five years in prison after a six-hour trial before an Egyptian military tribunal. Agiza's request for a forensic medical examination to prove his allegations of torture was denied by the tribunal. His trial, which was observed by a Human Rights Watch trial monitor, failed to comport with any recognized standards of due process. Without any explanation, the tribunal later reduced the sentence to fifteen years imprisonment.³²⁴

Mr. Al-Zery was released after being tortured and interrogated, but at this submission he is not permitted to leave Egypt and is under constant surveillance by Egyptian security police.³²⁵

H. Failure to Conduct Prompt and Impartial Investigations (Article 12)

1. Inadequate Government Investigations into Abuse in Afghanistan, Iraq and Guantánamo

I really doubt whether the Defense Department can investigate itself, because there's a possibility the secretary himself authorized certain actions. This cries out for an outside commission to investigate.

—Retired U.S. Army General Wayne A. Dowling, May 2004.³²⁶

Torture and cruel, inhuman or degrading treatment in detention facilities in Afghanistan, Iraq and Guantánamo will continue to thrive if allegations of abuses, including deaths in custody, are not thoroughly investigated and perpetrators brought to trial. Investigations that have taken place regarding abuse of detainees in U.S. custody in Afghanistan, Iraq, and Guantánamo thus far have lacked scope and independence. The ACLU also discovered, by reviewing documents produced in the FOIA litigation, that whistleblowers were not taken seriously and were pressured to stay silent.

the treatment of deported Egyptians (May 28, 2004), available at <http://web.amnesty.org/library/print/ENGEUR420012004>.

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ Bradley Graham, *Some Seek Broad, External Inquiry on Prisoner Abuse*, WASH. POST, May 27, 2004 (Dowling headed a Pentagon task force which investigated the 1996 bombing in Saudi Arabia of a U.S. Air Force barracks).

- A civilian interrogator reported that a civilian linguist had abused a detainee during an interrogation. The interrogator’s sworn statement says that when he informed his superior, the reaction was “[m]aybe the unit won’t report the incident,” and that he was fired after reporting the incident to several supervisors. The Army later conducted an investigation into the incident and found insufficient evidence to prove or disprove the allegations. Since the accused was in Egypt at the time of the investigation, he was only interviewed through phone and email.³²⁷
- When describing the Marines’ “rough searches” of Iraqi prisoners, one Navy corpsman noted, “there was a lot of peer pressure to keep one’s mouth shut.”³²⁸

In some cases, evidence of abuse was destroyed.

- A DVD called “Ramadi Madness” included scenes of soldiers kicking a flexi-cuffed prisoner who reportedly later died and using a dead prisoner’s body to “wave hello.”³²⁹ In another instance, footage depicts soldiers joyriding in a prisoner’s van while yelling profanities at Iraqi civilians. Copies of the DVD were destroyed by a sergeant after he learned the incident was under investigation. No soldier was charged in relation to the making of the DVD or the incidents depicted in it.³³⁰

The U.S. government has initiated and completed several internal investigations into allegations of abuse in Afghanistan, Iraq, and Guantánamo.³³¹ The U.S. Report repeatedly cites the numerous investigations in the wake of the Abu Ghraib scandal to showcase the government’s seriousness in responding to abuse allegations.³³² Not one investigation, however, has had independence or a broad mandate to fully investigate prisoner abuse. A major shortcoming of the investigations was the lack of independence—all the investigations were conducted by the military itself. Other failures in the investigations include:

³²⁷ Annex B89-94, Memorandum discussing Criminal Investigative Division Report. The *Washington Post* reported that after telling his commanding officer that he had witnessed five incidences of torture and abuse of Iraqi prisoners, U.S. Sergeant Frank Ford, a counterintelligence officer stationed in Samarra, was strapped to a gurney and flown out of Iraq on the grounds that he was suffering delusions as a result of combat stress. Despite a military psychiatrist’s initial conclusion that he was stable, he was ordered to undergo psychiatric evaluation in Germany. R. Jeffrey Smith and Josh White, *Soldier who Reported Abuse was Sent to Psychiatrist*, WASH. POST, Mar. 5, 2005.

³²⁸ Annex B95, U.S. Naval Criminal Investigative Service Report.

³²⁹ Annex B219, Excerpt from a Criminal Investigation Command Report (full record available at http://www.aclu.org/torturefoia/released/030705/8604_8702.pdf; http://www.aclu.org/torturefoia/released/030705/8703_8763.pdf; http://www.aclu.org/torturefoia/released/030705/8764_8808.pdf).

³³⁰ While the government did not release the “Ramadi Madness” DVD, claiming that copies had been destroyed, the *Palm Beach Post* has obtained a copy of the video and posted excerpts on its website, at http://www.palmbeachpost.com/localnews/content/news/epaper/2005/03/06/m16a_videoscene_0305.html.

³³¹ See Annex C for summaries of these investigations.

³³² U.S. Report, *supra* note 1, Annex, Part Two, § III(B)(2).

- No civilian investigated: No investigation examined the role of civilian leaders who had ultimate authority over detainee treatment and approved policies.
- Looking down chain of command: All but one internal report looked down the chain of command, but, that too, was limited to interviewing key civilian leadership in the Department of Defense and “[i]ssues of personal accountability” were expressly excluded from its scope.
- Cumulative reporting: The reports suffered from cumulative reporting, whereby each successive investigation was initiated with a review of the findings of previous investigations to the exclusion of necessary original research.
- Failure to investigate unlawful rendition: No report examined the practice of unlawful rendition and the Office of Inspector General’s report examining the CIA’s conduct remains classified.
- No interviews of victims: Most investigations did not interview the actual victims.³³³

Notably, the Pentagon investigations essentially concluded that treatment that followed approved policies and techniques could not have been torture or cruel, inhuman or degrading treatment because they had been *approved* by higher authorities. Both the Pentagon investigations and the U.S. Report concluded that there is no evidence to suggest that “any governmental policy directed, encouraged or condones these abuses.”³³⁴

The absence of independent and impartial investigations warrant the need for the appointment of a special counsel to investigate U.S. officials, irrespective of their rank or position, who participated in and ordered the torture and abuse of detainees in U.S. custody. An independent special commission with subpoena power should also be created to investigate the issue of prisoner abuse.

2. Inadequate Prosecution and Punishment

Despite the involvement of high-level civilian and military officials in the unlawful conduct described above, thus far only low-ranking soldiers have been held accountable. The government has refused to authorize any independent investigation into the policies and practices of torture and abuse, and no high-level official has been charged with any criminal activity in relation to the abuses.

The U.S. government has downplayed the extent of the torture and other abuse of detainees in U.S. custody, and continues to assert the position that it was simply the actions of a few rogue soldiers. While the U.S. government highlights the actions and

³³³ See generally Human Rights First, *Getting to Ground Truth: Investigating U.S. Abuse in the ‘War on Terror’* (Sept. 2004), available at http://www.humanrightsfirst.org/us_law/PDF/detainees/Getting_to_Ground_Truth_090804.pdf.

³³⁴ U.S. Report, *supra* note 1, Annex, Part Two, sec. III(B)(1).

courts-martial of those soldiers who were directly involved in the torture and abuse of Iraqi detainees in Abu Ghraib, high-ranking commanders and civilian leaders who were involved in developing and implementing the policies on the treatment of detainees in the “global war on terrorism” have not been held to account. Indeed, some of the officials who were involved in developing the policies that led to the abuse and torture of prisoners have been nominated and confirmed to higher government posts.³³⁵

No one implicated in abuse of persons in custody in Afghanistan, Iraq or elsewhere had been criminally prosecuted until reports of Abu Ghraib became public in April 2004. The U.S. Report notes that there have been more than 190 substantiated incidents which have resulted in sixty-five courts-martial, seventy-six non-judicial punishments, thirty-eight reprimands, and twenty administrative actions. But the government fails to provide any data on the kinds of abuses that have warranted courts-martials, non-judicial punishments, reprimands, and administrative actions.

Notably, the U.S. has never enforced 18 U.S.C. § 2340A to prosecute U.S. officials or agents suspected of engaging in torture outside the U.S. Nor has the U.S. prosecuted anyone under the War Crimes Act 18 U.S.C. § 2441, which criminalizes war crimes committed by anyone inside or outside the U.S., or by anyone who is a member of the armed services or a U.S. national. Under the War Crimes Act, a war crime includes “grave breaches” of the Geneva Conventions or Common Article 3 of the Geneva Conventions which prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . . outrages upon personal dignity, in particular humiliating and degrading treatment.”

There have also been very few prosecutions for homicide in relation to the number of deaths of Afghans and Iraqis in U.S. custody. For instance, most of the implicated personnel in the deaths of Mullah Habibullah and Dilawar at the Bagram detention facility, who died in December 2002 after guards kned them repeatedly in the legs while each was shackled to the ceiling, were brought before non-judicial administrative hearings instead of courts-martial.³³⁶ Out of twenty-seven soldiers and officers recommended for criminal charges fifteen were prosecuted. Five of those plead guilty to assault and other crimes; the stiffest punishment has been five months in a military prison. A soldier convicted of maiming, assault and other crimes was sentenced to a demotion in rank and honorably discharged. Despite plea agreements in exchange for testimony or information against other soldiers, the prosecution failed to gain evidence for convictions—four former guards accused of assaulting detainees were all acquitted in courts-martial and charges against a fifth former guard were dropped.³³⁷

³³⁵ White House Counsel Alberto Gonzales was nominated and confirmed as Attorney General in 2005. Assistant attorney general Jay S. Bybee, author of the now discredited August 2002 memorandum, was nominated and confirmed judge in the U.S. Court of Appeals for the Ninth Circuit. See Seth Stern, *The Brains Behind the Executive Power Muscle*, CQ WEEKLY, Feb. 25, 2006; Charles Babington, *Senate Confirms Gonzales as Attorney General*, WASH. POST, Feb. 3, 2005.

³³⁶ Tim Golden, *Abuse Cases Open Command Issues at Army Prison*, N.Y. TIMES, Aug. 8, 2005; Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005.

³³⁷ Tim Golden, *Years After 2 Afghans Died, Abuse Case Falters*, N.Y. TIMES, Feb 13, 2006.

The case against the only officer to face criminal charges was dropped in January 2006 by the U.S. Army due to insufficient evidence to support the charges. Captain Christopher Beiring had been charged with lying to investigators and being derelict in his duties, in part by neglecting to order his soldiers to stop chaining detainees by the arms at the request of military interrogators who wanted to deprive detainees of sleep before questioning. The judge overseeing the pretrial inquiry sharply criticized the prosecutor's case for having failed to present sufficient evidence to support the charges.³³⁸ The judge highlighted the problems in the prosecution's attempt to hold soldiers accountable for breaking rules at Bagram detention center, which the defense successfully argued were not clear at all.³³⁹ In particular although an order was given to treat detainees humanely, internal military files in the case showed that soldiers and officers at Bagram differed as to what specific guidelines were applicable.³⁴⁰

Punishments for deaths of Afghans and Iraqis in U.S. custody have been unusually light, giving the impression that future crimes of torture, including murder, would not be severely punished.

- Reprimand for homicide: In January 2006, a senior army interrogator, Chief Warrant Officer Lewis F. Welshofer Jr. was convicted of negligent homicide and negligent dereliction of duty in the death of Iraqi Mowhoush, and was reprimanded and fined \$6,000.³⁴¹ Mowhoush died after soldiers put him head-first into a sleeping bag, tied an electrical cord around him, straddled him, and covered his mouth.³⁴² At this writing, Welshofer is the highest-ranking army officer to be tried on murder charges. An autopsy report listed "asphyxia due to smothering and chest compression" as the cause of death and cites bruises from impact with a blunt object.³⁴³ During court hearings evidence emerged that the detainee was questioned by CIA contractors and was allegedly beaten with a hose, slapped, and punched. Mowhoush had several broken ribs and bruising. Two soldiers initially charged with murder in the case were given immunity in exchange for their cooperation. The CIA's involvement remains unaddressed. The defense argued that Welshofer was interpreting an email from superiors sent in August 2003, three months before Mowhoush died. The email, from Captain William Ponce, said: "The gloves are coming off, gentlemen . . . we want these individuals broken. Casualties are mounting."³⁴⁴
- Three years for shooting an unarmed detainee: Private Edward Richmond was charged with the premeditated murder of Muhamad Husain Kadir, an Iraqi

³³⁸ Tim Golden, *Case Dropped Against U.S. Officer in Beating Deaths of Afghan Inmates*, N.Y. TIMES, Jan. 8, 2005.

³³⁹ Golden, *Years After 2 Afghans Died, Abuse Case Falters*, *supra* note 337.

³⁴⁰ *Id.*

³⁴¹ *Iraq General's Killer Reprimanded*, BBC WORLD SERVICE, Jan. 24, 2006.

³⁴² Eric Schmitt, *Army Interrogator is Convicted of Negligent Homicide*, N.Y. TIMES, Jan. 23, 2005.

³⁴³ Annex B96-104, Autopsy Report. *See also* Arthur Kane, *Iraqi General Beaten 2 Days Before Death*, DENVER POST, Apr. 5, 2005.

³⁴⁴ Dan Glaister, *US officer guilty of killing Iraqi general during questioning*, GUARDIAN UNLIMITED, Jan. 23, 2006.

civilian, in February 2004. Although premeditated murder carries a potential life sentence, during the court-martial the charge was reduced to voluntary manslaughter and Richmond was sentenced to three years in prison. The soldier allegedly shot Kadir, an unarmed detainee who was handcuffed, in the back of the head. It was alleged that the soldier had stated that he wanted to kill an Iraqi.³⁴⁵ By contrast, in March 2003, Sergeant Hasan Akbar, a black Muslim, was sentenced to death by court-martial for the premeditated murder of two fellow U.S. soldiers in Kuwait despite evidence by the defense that Akbar was mentally ill.³⁴⁶

- Three years for killing a wounded teenager: In December 2004, a soldier pled guilty to killing a wounded Iraqi teenager, and was sentenced to three years.³⁴⁷ In contrast, Sergeant Oscar Nelson was sentenced to seven years in prison for the involuntary manslaughter of a fellow U.S. soldier in a driving accident.³⁴⁸
- Written reprimand for murder: An investigation found probable cause to believe that the commander and three other members of Operational Detachment-Alpha 343, 3rd Special Forces Group, had committed the offenses of murder and conspiracy when they lured Mohamed Sayari, an Afghan civilian, into a roadblock, then detained and killed him. Investigation further found probable cause to believe that a fifth Special Forces soldier had been an accessory after the fact and that the team's commander had instructed a soldier to destroy incriminating photographs of Sayari's body. No Article 32 hearing (investigation into allegations) or court-martial convened. One soldier was given a written reprimand. None of the others received any punishment at all.³⁴⁹

Documents released through the ACLU FOIA litigation reveal numerous examples of inadequate criminal investigations, lack of prosecution, or inappropriate administrative reprimands, rather than criminal prosecution.

- Inadequate investigation: Senior Psychological Operations (PsyOps) officers in Afghanistan reported witnessing indiscriminate assaults by Special Forces on civilian during raids, in May 2004, in the villages of Gurjay and Sukhagen. Abuses included hitting and kicking villagers in the head, chest, back and stomach and threatening to shoot them. An investigation into the allegations was closed,

³⁴⁵ Gregg K. Kakesako, *Schofield Soldier gets 3-year term in Shooting*, HONOLULU STAR BULLETIN, Aug. 6, 2004.

³⁴⁶ *Sergeant Sentenced to Death for Killing Two Officers in Kuwait*, ASSOCIATED PRESS, Apr. 29, 2005.

³⁴⁷ Paul Garwood, *GI Gets to 3 Years for Killing Iraqi Teen*, ASSOCIATED PRESS, Dec. 11, 2004.

³⁴⁸ Foster Klug, *Army Sergeant Sentenced to Seven years in Prison for Humvee Crash in Iraq that Killed Soldier*, ASSOCIATED PRESS, Sept. 3, 2003.

³⁴⁹ See Army Criminal Investigative Division Investigation Records, Case No. 0114-02-CID369-23525, available at http://www.aclu.org/torturefoia/released/745_814.pdf; http://www.aclu.org/torturefoia/released/815_853.pdf; http://www.aclu.org/torturefoia/released/854_907.pdf; http://www.aclu.org/torturefoia/released/908_963.pdf; http://www.aclu.org/torturefoia/released/964_1040.pdf.

citing failure to “prove or disprove” the offenses because the victims and villagers could not be interviewed.³⁵⁰

- Using fake names to thwart investigations: In a U.S. Army file, an investigator states that he was unable to continue an investigation into claims that a detainee captured by Task Force 6-26 in Tikrit, Iraq, was stripped, humiliated and physically abused until he passed out, because the unit accused of the abuse is part of the Special Access Program (SAP). A memorandum included in the report states that “fake names were used by the 6-26 members” and that the unit claimed to have a computer malfunction which resulted in the loss of 70 percent of their files. The memorandum concludes, “Hell, even if we reopened [the investigation] we wouldn’t get any more information than we already have.”³⁵¹

- Non-judicial punishments for offenses in Iraq:
 - A detainee was hit repeatedly with closed fists during questioning. Punishment: Forfeiture of one month pay.
 - A detainee was handed a shovel and told, at rifle point, to begin digging his own grave. M-4s were fired in his vicinity for intimidation purposes. Punishment: Forfeiture of one month pay.
 - A detainee was hit in the stomach with a fist after an escape attempt. Punishment: Reduction in rank suspended; forfeiture of pay of \$250 pay per month for two months but forfeiture in excess of \$100 suspended; extra duty for fifteen days.
 - After an escape attempt, detainee was slapped on the face with an open hand and struck in the body with a bottle of water while restrained. Punishment: Extra duty for fourteen days suspended; writing assignment as corrective training.
 - An Army officer influenced soldiers to lie on sworn statements in an effort to cover up the pushing of two detainees off the Samarra bridge, and the subsequent drowning death of one. Punishment: written reprimand.³⁵²

- No punitive action taken for broken jaw: A commander’s inquiry report into the broken jaw of a high-school boy states that the victim was told “to say that I’ve fallen down and no one beat me.” (The boy’s mouth had to be wired shut and he could eat only through a straw because of his broken jaw). The report concluded that the broken jaw was caused either as a result of a blow by a U.S. soldier or a collapse due to “complete muscle failure” from being excessively exercised. It found that “abuse of detainees in some form or another was an acceptable practice and was demonstrated to the inexperienced infantry guards almost as guidance” by 311th Battalion Military Intelligence personnel. Personnel “were striking the detainees,” and evidence suggested that the 311th Military Intelligence personnel

³⁵⁰ See, Army Criminal Investigative Division Investigation Records, Case No. 0064-2004-CID369-69280, available at http://www.aclu.org/torturefoia/released/021605/5702_5814.pdf.

³⁵¹ Annex B105, Excerpt from Army Criminal Investigative Command Investigation Number 0213-2004-CID259-80250 (full record available at <http://www.aclu.org/projects/foiasearch/pdf/DOD044418.pdf>).

³⁵² Annex B106-109, Article 15 Investigation records.

and/or translators “engaged in physical torture of the detainees.” It was recommended that no punitive action be taken against the Commander of the Battalion.³⁵³

- Mock executions not punished: An investigation established probable cause to believe that a Lt. Col. had issued a death threat and fired his pistol next to the head of a detainee (an Iraqi police officer suspected of being part of a plot to assassinate U.S. troops) during an interrogation, and that four enlisted soldiers and a female civilian interpreter had punched and kicked the detainee “numerous times while they were interrogating him.” Statements in the file indicate that the beatings lasted for approximately an hour and that, during this period, a soldier (or the translator) brandished a knife at the detainee and told him that she would cut him with it. The soldiers, all from 2-20th Field Artillery Bn., 4th Inf. Div., received non-judicial punishments. None were discharged, and even the non-judicial punishments—such as reduction in rank—were mostly “suspended,” i.e., would not go into effect unless the soldier committed another offense within six months. There is no indication that the interpreter was sanctioned or recommended for investigation or prosecution.³⁵⁴
- Investigation closed despite witness: A U.S. soldier filed a sworn statement that he “saw what I think were war crimes” and that his “chain of command did nothing to stop these war crimes, and allowed them to happen.” The soldier reported physical assaults by U.S. troops on detainees held at Camp Red in Baghdad, the use of prolonged hooding, exposure to the elements, and excessive restraints. Though the soldier witnessed the abuse, the investigation was closed due to “insufficient evidence.”³⁵⁵
- Failure to investigate ICRC report on abuse: An investigation was initiated on June 21, 2004 at the request of Criminal Investigation Division Head Quarters into allegations contained in a February 10, 2004, ICRC report. The request included an excerpt from the ICRC report reflecting twenty-five detainees’ allegations that, at the Al-Baghdadi Air Base, coalition forces forced them to sit on their knees with hands cuffed behind their backs for long periods of time; frequently beat them on various parts of their bodies, including their genitals, while they were hooded; and subjected them to sleep deprivation. The report further explained that “a method described in the allegations consisted in forcing [detainees] to lie face down, their hands cuffed behind their back and shackled to their ankles for two to three hours. While in this position, soldiers would allegedly insert in their mouths cloths full of dust and hot pepper. One [detainee] arrested on 21 August alleged that he had been hooded, beaten and placed naked in front

³⁵³ Annex B110-114, Excerpt from Records relating to Army Regulation 15-6 Investigation (full record available at <http://www.aclu.org/projects/foiasearch/pdf/DODDOA026578.pdf>).

³⁵⁴ See Report of Investigation Number 0152-03-CID469-60212, available at http://www.aclu.org/torturefoia/released/105_167.pdf.

³⁵⁵ Annex B115-117, Excerpt from Criminal Investigation Command Report No. 0353-2003-CID093-45256 (full record available at http://www.aclu.org/torturefoia/released/709_744.pdf).

of an air conditioning machine while cold water was thrown on his body. A dog, initially with a muzzle, attached [sic] him with its paws and then bit him on the right thigh (according to the examination of the ICRC doctor, he had marks compatible with a dog bite).” The investigating office opened an investigation, but closed it within two days on the basis that the ICRC report did not include the names of any victims and that ICRC did not disclose the names of the victims to the Coalition. The investigation was subsequently reopened and closed again because “the identity of the victim could not be ascertained.” There is no indication that Criminal Investigation Division attempted to examine the medical or detainee records of Al-Baghdadi Air Base during the period in question, or to interview personnel or detainees who were located there at that time.³⁵⁶

No criminal investigations appear to have been conducted for abuses committed in CIA-run secret detention facilities around the world or in connection with illegal rendition of persons to third countries where persons were tortured.

Moreover, no CIA officers have been charged in relation to alleged mistreatment, with the exception of a CIA contractor who is charged with the death of a detainee in Afghanistan.³⁵⁷ In January 2006, the Department of Justice disclosed that, since the conflict began in Afghanistan, nineteen referrals have been made to the U.S. Attorney’s office regarding allegations against civilians who have engaged in torture and abuse.³⁵⁸ Except for one CIA contractor, no CIA employees have been indicted. The *New York Times*, citing current and former intelligence and law enforcement officials, reported in October 2005 that federal prosecutors do not intend to bring criminal charges in several cases involving the handling of detainees by the CIA, including the case of a death by hypothermia of an Afghan detainee held by the CIA in the “Salt Pit.”³⁵⁹

The CIA cases are being supervised by U.S. Attorney Paul J. McNulty, who has been nominated by the White House to be Deputy Attorney General, the number two position at the Department of Justice. While some low ranking military soldiers have been prosecuted, no CIA employee allegedly engaged in unlawful activity has been indicted.

³⁵⁶ Annex B118-137, Memorandum regarding Criminal Investigation Command Investigation (Aug. 3, 2004).

³⁵⁷ R. Jeffrey Smith, *Interrogator Says U.S. Approved Handling of Detainee Who Died*, WASH. POST, Apr. 13, 2005.

³⁵⁸ Letter from William E. Moschella, Assistant Attorney General to Senator Richard Durbin (Jan. 17, 2005), available at <http://www.aclu.org/safefree/detention/23910leg20060117.html>; Letter from Senator Richard Durbin to Alberto Gonzales, Attorney General (Nov. 3, 2005), available at <http://www.aclu.org/safefree/detention/23912leg20051103.html>.

³⁵⁹ Douglas Jehl and Tim Golden, *CIA is Likely to Avoid Charges in Most Prisoner Deaths*, N.Y. TIMES, Oct. 23, 2005.

3. Lack of Independent Oversight of Jails and Prisons in the United States

The United States has no independent prison monitoring body.³⁶⁰ Responsibility for outside oversight of detention facilities varies from state to state; most jurisdictions have few, if any, monitoring mechanisms. In most cases, prisoner complaints are investigated by the institutions themselves, through internal grievance mechanisms that necessarily lack independent, outside scrutiny. In some states, an Ombudsperson can receive complaints from prisoners, but they too are not independent and are affiliated with the state. Those states that have independent, external monitoring bodies authorized to conduct regular inspections of jails and prisons have inadequate resources to monitor effectively. Moreover, local jails tend to escape outside oversight more than state facilities. Some states have established state jail standards by which to evaluate the conditions in their jails, but compliance with such standards is largely un-enforced.

In some cases where a government investigative agency has found abuse, no criminal prosecutions have taken place. For instance, despite the documented abuse of non-citizen “special interest” detainees by correctional officers at the Metropolitan Detention Center in Brooklyn, New York, as discussed above, not one government official has been prosecuted.³⁶¹ Instead, the Federal Bureau of Prisons fired two detention officers, suspended two for 30 days, and demoted one officer.³⁶²

In the absence of independent monitoring mechanisms, the federal judiciary has become a national prison oversight body. But, since 1996, despite a growing prison population, the Prison Litigation Reform Act has made it difficult for prisoners to secure legal remedies for abuse (see discussion above).

The United States argues that “various non-governmental organizations continue to employ advocacy and litigation to draw attention to sub-standard conditions in the nation’s prisons,”³⁶³ but that does not absolve the government of its obligation to enforce nationwide standards on conditions of confinement. For instance, it was only after the ACLU brought the following lawsuits that the prison facilities agreed to end cruel and inhuman practices:

- *Jones’El v. Berge*: In 1999, Wisconsin opened the Supermax Correctional Institution in a remote part of the state, where conditions included twenty-four hour illumination and “bed checks” in which prisoners were awakened hourly throughout the night. Prisoners were locked in their windowless cells for all but four hours a week. They received no outdoor exercise. Because of a lack of

³⁶⁰ The U.S. government has not ratified the Optional Protocol to the Convention Against Torture, which would allow independent monitors to inspect prison facilities in countries that have ratified the optional treaty.

³⁶¹ OIG Supplemental Report, *supra* note at 290, at 22, 24, 25, 38, 43, 47.

³⁶² Nina Bernstein, *Held in 9/11 Net, Muslims Return to Accuse U.S.*, N.Y. TIMES, Jan. 23, 2006.

³⁶³ U.S. Report, *supra* note 1, ¶ 92.

appropriate ventilation, the cells were unbearably hot in the summer—a condition particularly dangerous to prisoners prescribed psychotropic medications. All visits, except with lawyers, were conducted via video screen. Some prisoners were allowed only one six minute telephone call per month. These conditions were particularly devastating to mentally ill prisoners, whose condition was exacerbated and who often attempted self-harm or suicide. In October 2001, the ACLU obtained an injunction requiring removal of mentally ill prisoners from the supermax, and evaluation of other prisoners to see if they required removal.³⁶⁴ This injunction resulted in the removal of over thirty mentally ill prisoners from the facility. In March 2002, the remaining issues were settled with entry of a consent decree (agreement between parties approved by court) and a court monitor was appointed.³⁶⁵

- *Connecticut Office of Protection and Advocacy for Persons with Disabilities v. Choinski*: This case was filed in August 2003 to challenge the conditions under which mentally ill prisoners were held at Connecticut’s supermax facility, on behalf of an independent agency empowered under federal law to protect the rights of persons with disabilities. The parties reached a tentative settlement in March 2004, which was approved by the state legislature. Under the settlement, prisoners with serious mental illness may not be housed in supermax facilities, and mental health treatment will be improved both in the supermax and in the facility where mentally ill prisoners are sent. In September 2005, the court approved the settlement and the ACLU is monitoring its implementation.³⁶⁶
- *Joslyn v. Armstrong*: In 2001, the ACLU filed suit against Connecticut’s Commissioner of Corrections, seeking to remove Connecticut prisoners from Virginia’s notorious supermax facility, the Wallens Ridge State Prison, located in a remote corner of western Virginia. Prisoners at the time were routinely tied down in five-point restraints, for up to forty-eight hours, for trivial offenses such as kicking a cell door. Staff at the prison routinely shocked prisoners with stun guns for minor offenses such as insulting staff or refusing to kneel. One Connecticut prisoner died after being repeatedly shocked; another committed suicide. In July 2001, Connecticut agreed to remove its prisoners from Wallens Ridge and not to send Connecticut prisoners there in the future.³⁶⁷

³⁶⁴ *Jones’El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001).

³⁶⁵ Order and Settlement Agreement, *Jones’El v. Berge*, No. 00-C-421-C, (W.D. Wis. 2002), available at <http://www.aclu.org/FilesPDFs/order%20and%20settlement%20agreement.pdf>. Subsequently, the state refused to implement a provision of the settlement that required air conditioning of the prison as the only way to protect prisoners from excessive heat and humidity in view of the prison’s design. The trial court issued an order enforcing the consent decree in November 2003, and the state appealed to the U.S. Court of Appeals for the Seventh Circuit. In July 2004, the Seventh Circuit affirmed the trial court order. *Jones’El v. Berge*, 374 F.3d 541 (7th Cir. 2004). The ACLU is continuing to monitor implementation at the prison, now renamed the Wisconsin Secure Program Facility.

³⁶⁶ Settlement Agreement *Connecticut Office of Protection and Advocacy for Persons with Disabilities v. Choinski*, No. 303CV1352, (D.Ct. Mar. 8, 2004), available at <http://www.aclu.org/FilesPDFs/-f07s2zl.pdf>.

³⁶⁷ ACLU, *Bowing to ACLU Lawsuit, CT Officials Will Move Prisoners Out of Notorious Virginia “Supermax,”* (July 24, 2001), available at <http://www.aclu.org/prison/conditions/14757prs20010724.html>.

- *Moore v. Fordice*: In 1999, the ACLU agreed to represent all Mississippi prisoners with HIV who were held in a segregated unit at Parchman and who were dying in great numbers as they were being denied the HIV “cocktail” (triple-drug therapy including a protease inhibitor). Following an evidentiary hearing, the district court found that the medical care was grossly defective, and entered an injunction requiring the State to provide HIV care consistent with Center of Disease Control guidelines, including triple-drug therapy. The district court nevertheless rejected the prisoners’ request to make the ACLU National Prison Project their class counsel, and shortly thereafter issued a gag order prohibiting the ACLU from communicating with any Mississippi prisoner about medical care or any other conditions of confinement. In November 2000, the U.S. Court of Appeals for the Fifth Circuit reversed the trial court, lifted the gag order, and ordered the ACLU substituted as counsel.³⁶⁸ The district court later granted the plaintiffs’ motion to bar the State’s long-standing policy of excluding all prisoners with HIV from work release and other programs, and eventually found that HIV care for the plaintiffs had been transformed as a result of the litigation.

The ACLU believes that the absence of independent monitoring bodies to oversee federal, state, and local, prisons and jails, and the lack of enforceable nationwide standards on conditions of confinement, contribute directly to the ongoing abuse and mistreatment of prisoners.

I. Limitations on the Rights of Redress and Remedy (Articles 13, 14)

1. Redress for Violations Outside the United States

Victims of torture by U.S. officials outside the United States in the “global war on terrorism” face significant legal hurdles to redress in U.S. courts. Most victims from Afghanistan and Iraq have no remedy in their home countries or countries of residence, and the U.S. government continues to argue that they have no remedy in United States’ courts. For instance, Iraqi victims of torture cannot seek redress in Iraqi courts against U.S. personnel. A blanket immunity agreement, Coalition Provisional Authority (“CPA”) Order 17, issued June 27, 2003, covers all foreign personnel in the U.S.-led CPA grants immunity for “local courts and any form of arrest or detention other than by persons acting on behalf of their parent states.”³⁶⁹ The immunity agreement will continue in effect after transfer of political power to the Iraqi government.

Victims who have accessed U.S. courts to date have not prevailed in legal actions before lower U.S. federal courts, although these cases are subject to appeal to higher courts. In February 2006, for instance, in a case brought by former Guantánamo detainees against Secretary of Defense Rumsfeld and other members of the U.S. military seeking redress from torture, a federal court held that the proper defendant to the suit is the United States

³⁶⁸ *Gates v. Cook*, 234 F.3d 221 (5th Cir. 2000).

³⁶⁹ State Dept. Washington File, *Immunity For Coalition Personnel To Be Extended*, June 24, 2004, available at <http://www.defendamerica.mil/articles/jun2004/a062504d.html>; see also Robin Wright, *U.S. Immunity in Iraq Will Go Beyond June 30*, WASH. POST, June 24, 2004.