

**SECRETS AND LIES:
UNCOVERING THE TRUTH
ABOUT TORTURE**

By: Amrit Singh*

I. Introduction

In October of 2003, long before the Abu Ghraib scandal broke, the ACLU and other groups filed a Freedom of Information Act (“FOIA”) request with numerous federal agencies, seeking records related to the torture and abuse of detainees held in United States custody abroad and the rendition of detainees to foreign intelligence services since September 11, 2001. Since that time, the United States government has continued to thwart the ACLU’s efforts to uncover who was responsible for detainee abuse. It has also persisted in portraying the abuse of detainees as the work of a handful of low-ranking soldiers while apparently shielding higher-ranking officials and the systemic nature of the abuse from public scrutiny. This article describes the ACLU’s efforts to uncover the entire truth about who was ultimately responsible for the torture and abuse of detainees held in United States custody in Iraq, Afghanistan, Guantanamo Bay and elsewhere abroad.

II. Legal Proscriptions against Torture, Cruel, Inhuman or Degrading Treatment or Punishment and Rendition

On October 7, 2003, the ACLU and other groups¹ filed a FOIA request with the Department of Defense and other federal agencies,² seeking records related to government conduct which appeared, from press accounts, to be in violation of international and domestic

law. One among many such accounts appeared in a December 2002 Washington Post article which described the abuse of detainees held at a United States air base in Bagram, Afghanistan; a criminal investigation into the deaths of two detainees held there, and the United States’s rendition of detainees to other countries known to employ torture.³

Numerous provisions under international and United States law prohibit the practice of torture, cruel, inhuman or degrading treatment or punishment. The Convention Against Torture (“CAT”) prohibits, without exception, the use of torture and the infliction of other cruel, inhuman or degrading treatment or punishment.⁴ The United States ratified this treaty in 1994, subject to the reservation that the United States would “prevent ‘cruel, inhuman or degrading treatment or punishment,’ only insofar as [such treatment] is prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”⁵

Section 2340A of Title 18 criminalizes the commission of torture by a U.S. national outside the United States. It provides that “[w]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.” 18 U.S.C. § 2340A(a).

Furthermore, it is a criminal offense for U.S. nationals to commit war crimes. 18 U.S.C. § 2441 (2000).

Similarly, the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, to which the United States is a party, provides that prisoners of war “must at all times be humanely treated” and that “[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant

* Amrit Singh is a staff attorney with the ACLU Immigrants’ Rights Project.

or disadvantageous treatment of any kind.” Geneva Convention [III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Arts. 13, 17, 6 UST 3316, 3328, 75 UNTS 135, 150. The Fourth Geneva Convention provides similar protections for civilian detainees in international armed conflicts.

The International Covenant on Civil and Political Rights (“ICCPR”), ratified by the United States in 1992 subject to a reservation similar to the one invoked by the United States in ratifying CAT, similarly provides: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁶

Rendition of detainees to countries known to employ torture is also prohibited under domestic and international law. The CAT provides that “[n]o State Party shall expel, return (‘refouler’) or extradite a person to another State whether there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁷ This provision is implemented in United States law by the Foreign Affairs Reform and Restructuring Act of 1998, which states that “[i]t shall be 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, regardless of whether the person is physically present in the United States.”⁸

To determine whether the United States government was honoring its obligations under domestic and international law, the ACLU and other groups requested records regarding (1) the treatment of individuals apprehended after September 11, 2001, and held by the United States at military bases or detention facilities outside the United States; (2) the deaths of such individuals; and (3) the rendition of these and other individuals to countries known to employ torture or illegal interrogation methods.

III. Documents that are “more of an embarrassment than a secret”

On April 28, 2004, almost six months after the ACLU filed its FOIA request, CBS News released pictures of United States soldiers torturing detainees at Abu Ghraib prison in Iraq. Those pictures would undoubtedly have been records responsive to the ACLU’s FOIA request. Nonetheless, at the time the CBS story broke, none of the federal agencies had provided the ACLU with a meaningful response to its FOIA request. Indeed, the only records released to the ACLU by the agencies as of that time were summary talking points used by State Department personnel in communicating with the media regarding detainees held at Guantanamo Bay.

After the CBS story broke, a spate of press reports referencing records related to detainee abuse confirmed that the government was continuing to withhold additional documents responsive to the FOIA request. Accordingly, on June 2, 2004, the ACLU and other requesters filed a lawsuit against the Department of Defense and other federal agencies challenging their failure to timely process and release records responsive to their FOIA request and seeking preliminary relief.⁹

While the lawsuit was pending, in response to intense public scrutiny, a few documents related to the abuse of detainees were leaked to the press while others were released by the government outside the FOIA context. These documents suggest that the abuse of detainees in Iraq, Afghanistan and Guantanamo may be linked to policies and procedures formulated and implemented by high-ranking government officials. The documents also suggest that the government is continuing to withhold other records that reveal who was ultimately responsible for the abuse of detainees held in United States custody abroad.

One document, leaked by the Washington Post in June of 2004, appears to prepare the legal groundwork for the abuse of detainees held in United States custody. It is an August 1, 2002 memorandum from Assistant Attorney General, Jay S. Bybee, to White House

Counsel Alberto R. Gonzales, providing the views of the Office of Legal Counsel on the standards of conduct under the CAT as implemented by 18 U.S.C. § 2340-2340A. The memorandum advises that only pain like that accompanying “death, organ failure or the permanent impairment of a significant body function” qualifies as “torture” under 18 U.S.C. § 2340-2340A,¹⁰ and that the infliction of severe mental or physical pain is unlawful only if the infliction of pain is the offender’s “precise objective.”¹¹ Thus, it observes that “even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith.”¹² The memorandum finds sufficient basis in the events of September 11, 2001 for defendants facing criminal prosecutions for torturing their victims to assert the defenses of necessity and self-defense.¹³ It concludes that “[i]f a government defendant were to harm an enemy combatant during an interrogation in manner that might arguably violate Section 2340A . . . we believe he could argue that his actions were justified by the executive branch’s constitutional authority to protect the nation from attack.”¹⁴

Similarly, in another memorandum dated January 25, 2002, White House Counsel Gonzales advises President Bush that the Geneva Convention III on the Treatment of Prisoners of War did not apply to al Qaeda and Taliban detainees.¹⁵ He notes that “[i]n my judgment this new paradigm [of the war against terrorism] renders *obsolete* Geneva’s strict limitations on questioning of enemy prisoners and renders *quaint* some of its provisions . . .”¹⁶ (Emphasis added)

Other documents released outside the FOIA context show the high level of operational control exercised over the use of interrogation techniques by high ranking officials like Defense Secretary Donald Rumsfeld. Records reveal that on December 2, 2002, at the recommendation of William J. Haynes, DOD

General Counsel, Secretary Rumsfeld approves a set of interrogation techniques for use on detainees held at Guantanamo Bay.¹⁷ Among other techniques, he authorizes the removal of clothing; forced grooming; using detainees’ individual phobias, such as fear of dogs, to induce stress; and use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finder, and light pushing. In another memorandum dated January 15, 2003, addressed to Commander, U.S. Southern Command, Secretary Rumsfeld rescinds approval of some of the techniques that he had previously approved on December 2, 2002¹⁸. In the same memorandum, Secretary Rumsfeld states, “[s]hould you determine that particular techniques in either of these categories are warranted in an individual case, *you should forward that request to me.*”¹⁹ (Emphasis added).

While a few documents relating to detainee abuse have made their way into the public domain, the bulk of records that shed light on who was ultimately responsible for the abuse of detainees held in United States custody remain hidden from public view. In an order dated September 15, 2004, recognizing the “glacial pace at which the defendant agencies have been responding to plaintiffs’ request,” Judge Hellerstein opined that “[i]f the documents are more of an embarrassment than a secret, the public should know of our government’s treatment of individuals captured and held abroad.”²⁰

IV. Disclosures thus far

Subsequent to Judge Hellerstein’s September 15, 2004 order, defendant agencies disclosed some records responsive to plaintiffs’ FOIA request, most of which were heavily redacted. The few records that were disclosed by defendant agencies confirm that the abuse of detainees at Abu Ghraib was systemic and routine while raising grave questions about how

these techniques came to become so commonly accepted.

One document, dated May 19, 2004, shows that F.B.I. agents observed the abuse of detainees at Abu Ghraib prison from October through December of 2003, but did not believe that such treatment rose to the level of misconduct or mistreatment. The FBI agents observed: (1) a detainee with an empty nylon sand bag placed over his head and draped in a shower curtain, who was handcuffed to a waist high railing while being subjected to sleep deprivation and light slapping on his back; (2) military personnel “retraining” an allegedly “mentally ill” detainee who was “spread eagle” on a mattress on the floor, yelling and flailing; (3) a detainee, either naked or wearing boxer shorts, lying prone on the wet floor; (4) detainees who were ordered to strip and then placed in isolation with no clothes; (5) an MP shouting at a detainee who did not understand directions; (6) detainees wearing hoods while escorted on prison grounds.²¹

Another document, a psychological assessment report examining factors contributing to the abuse at Abu Ghraib, finds a principal contributing factor to be the soldiers’ immersion in an unfamiliar “Islamic culture” and the “association of Muslims with terrorism,” which created “misperceptions that can lead to the fear or devaluation of a people.” The report faults the chain of command for the lack of training and supervision and for creating an “I can get away with this” mentality. The report recounts several incidents of abuse, including the rape of a juvenile. It also notes “collaboration” among military personnel and even officers in sustaining or condoning the abuse. “[T]he MI unit seemed to be operating in a conspiracy of silence,” it adds.²²

In another document, a September 2003 duty officer’s log for Abu Ghraib, the officer observes that a detainee “was stripped down per M/I he is naked [sic] and standing tall in his cell.”²³

While the disclosure of these records represents improvement on the government’s response prior to the filing of the FOIA lawsuit, they only highlight the urgent need for a complete explanation of why detainee abuse was authorized or condoned. The similarity of abuse techniques observed in three geographically distinct locations--Guantanamo, Iraq and Afghanistan-- suggests that the abuse was the result of a policy sanctioned from above, and not the work of a few wayward soldiers.

V. Conclusion

The ACLU’s attempts to uncover the truth about who was responsible for the torture of detainees held in United States custody abroad have met with continued opposition from the defendant agencies who continue to withhold documents responsive to the FOIA request. Notwithstanding the government’s attempts to stonewall the process, the ongoing FOIA litigation will strive to deliver to the public the truth about who was ultimately responsible for detainee abuse.

Endnotes

¹ These groups include the Center for Constitutional Rights, Physicians for Human Rights, Veterans for Common Sense and Veterans for Peace.

² The October 2003 FOIA request was filed simultaneously with the Department of Defense (including its components, the Departments of the Army, Navy, and Air Force, and the Defense Intelligence Agency), the Department of Justice (including its components, the Federal Bureau of Investigation and Office of Intelligence Policy and Review), the Department of State, and the Central Intelligence Agency.

³ Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, Wash. Post, Dec. 26, 2002, at A01. See also Carlotta Gall, *Death of an Afghan in Custody*, N.Y. Times, Mar. 4, 2003; Barbara Starr, *Afghan detainees’ deaths ruled*

homicides, CNN.com, Mar. 5, 2003.

⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 1, S. Treaty Doc. No. 100-20 (1998), 1465 U.N.T.S. 85.

⁵ 136 Cong. Rec. S 17486-01, 1990 WL 168442.

⁶ The ICCPR, art. 7, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171. The United States ratified this provision subject to the reservation that the term “cruel inhuman or degrading treatment or punishment” means such treatment that is prohibited by the Fifth, Eighth, and/or Fourteenth Amendments. *See* 138 Cong. Rec. S 4781-01 (1992).

⁷ CAT, art. 3.

⁸ Pub. L. No. 105-277, § 2242(b), 112 Stat. 2681 (1999) (codified as Note to 8 U.S.C. § 1231).

⁹ On May 25, 2004, Plaintiffs filed a second FOIA Request, reiterating their request for records sought in their first FOIA request. On July 5, 2004, Plaintiffs filed an amended complaint, challenging the agencies’ failure to process their second FOIA request in an expedited manner.

¹⁰ *See* Memorandum of Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, at 1, August 1, 2002.

¹¹ *Id.* at 3.

¹² *Id.* at 4.

¹³ *Id.* at 2.

¹⁴ *Id.* at 46.

¹⁵ *See* Memorandum from Alberto R. Gonzales to the President, Decision Re Application Of the Geneva Convention on Prisoners Of War To the Conflict With Al Qaeda and the Taliban at 1, Jan. 25, 2002.

¹⁶ *Id.* at 2.

¹⁷ *See* Memorandum from William J. Haynes II to Secretary of Defense, *Counter-Resistance Techniques*, Dec. 2, 2002.

¹⁸ *See* Memorandum from Secretary Rumsfeld to Commander USSOUTHCOM, Jan. 15, 2003.

¹⁹ *See Id.*

²⁰ *See ACLU v. Department of Defense*, 04 Civ. 4151, Judge Hellerstein’s Order, Sep. 15, 2004.

²¹ *See* <http://www.aclu.org/torturefoia/released/45.pdf>.

²² *See* <http://www.aclu.org/torturefoia/released/t1.pdf>.

²³ *See* <http://www.aclu.org/torturefoia/released/t37.pdf>.