



AMERICAN CIVIL LIBERTIES UNION

**Lack of U.S. Accountability and Remedy for
Torture and Ill-Treatment in the Name of Counterterrorism**

**Submission to the Human Rights Council, 16th Session
March 17, 2011**

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

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

This submission addresses the U.S. government's efforts to stymie meaningful accountability for torture, including its (1) failure to comprehensively investigate and criminally prosecute officials responsible for the creation and implementation of the Bush-era torture program; (2) practice of securing the dismissal of civil suits brought by torture victims by asserting the state secrets privilege and claiming effective immunity from suit; and (3) opposition to full transparency regarding the use of torture during the Bush administration.

During the November 2010 Universal Periodic Review (UPR) of the United States, numerous governments articulated their concern that the U.S. government is promoting impunity rather than accountability for torture.¹ The government of Brazil expressed concern about "the persistent impunity" of officials responsible for torture under the United States' counterterrorism policy, and recommended that "the U.S. take[] measures to ensure . . . the accountability of those responsible for such acts."² Brazil also expressed concern about "the lack of reparation and rehabilitation of the victims of

torture,” and recommended that “the U.S. takes measures to ensure reparation to victims of acts of torture under United States’ control.”³ The government of Norway recommended that the U.S. government investigate acts of torture and ill-treatment of detainees by military or civilian personnel.⁴ In an advance question submitted to the United States, Mexico asked about the mechanisms in place to punish torture.⁵ The Russian Federation called on the United States to “[c]onduct [a] thorough and objective investigation of facts concerning [the] use of torture against imprisoned persons in the secret prisons of United States of America and detainees of the detention centres in Bagram and Guantanamo” and to “bring those who are responsible for these violations to justice.”⁶

At the UPR session, Harold Hongju Koh, the U.S. State Department Legal Adviser, assured the assembled nations that the United States was committed to abiding by the ban on torture and inhumane treatment—which explicitly requires nations to carry out criminal investigations of torture allegations, prosecute perpetrators, and make reparations to victims. He stated, “Notwithstanding recent public allegations, to our knowledge, all credible allegations of detainee abuse by United States forces have been thoroughly investigated and appropriate corrective action has been taken.” While investigation is a step in the right direction, the reality remains that there have been only a few prosecutions of mainly low-level military personnel; no senior military officials have been prosecuted for abuses committed by forces under their command. Senior civilian and CIA officials responsible for torture and abuse have received complete impunity.

The United States’ persistent failure to ensure accountability for torture violates U.S. obligations under ratified treaties and other international law to investigate and prosecute civilian and military leaders who ordered and approved the use of torture.

I. Failure to Comprehensively Investigate and Criminally Prosecute Torture

The U.S. government has failed to comprehensively investigate and criminally prosecute Bush administration officials who planned, authorized, and committed torture, despite clear documentation of these serious crimes. In April 2009, the Obama administration released Justice Department memos that exposed a torture program that was conceived and developed at the highest levels of the Bush administration. Justice Department lawyers wrote legal opinions meant to justify torture; senior civilian and military officials authorized torture; and CIA and military interrogators used torture—at Guantánamo, in the CIA’s black sites, and elsewhere. Government documents show that hundreds of prisoners were tortured in U.S.-run detention facilities, and that more than one hundred were killed, many in the course of interrogations. Through Freedom of Information Act (FOIA) lawsuits, the ACLU uncovered approximately 150,000 pages of formerly-secret government documents related to the abuse and torture of prisoners in U.S. custody overseas. Leaked confidential reports by the International Committee of the Red Cross (ICRC) of its interviews with detainees transferred to Guantánamo and other U.S.-held

detainees provided incontrovertible documentation of the use of torture and abuse by the United States.⁷

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

Following the ACLU's repeated requests to Attorney General Eric Holder and his two predecessors to appoint an independent prosecutor with a full mandate to investigate and prosecute credible allegations of torture,⁸ Attorney General Eric Holder announced in August 2009 that he had ordered an investigation into incidents involving CIA interrogations. The Attorney General characterized Assistant U.S. Attorney John Durham's investigation, however, as a "preliminary review" meant "to gather information to determine whether there is sufficient predication to warrant a full investigation of a matter." While the current scope of the sealed Durham investigation is unclear, thus far none of the architects of the torture program has been charged with any crime. In addition, with respect to the criminal investigation, the administration has offered a type of immunity to interrogators who relied on the torture memos while also declining, at least so far, to investigate those who wrote the memos or authorized torture.

The ACLU has advocated that the prosecutor's mandate in the ongoing criminal investigation include the conduct and decisions of senior government officials. Although interrogators who violated the law should be held accountable, the criminal investigation must reach not only the interrogators but the senior officials who authorized torture.

Notably, following the UPR review, in response to a reporter's question about former President Bush's disclosure in his memoir that he personally authorized the waterboarding of Khalid Sheikh Mohammed and Abu Zubaydah, Mr. Koh merely said the Durham investigation is "ongoing." The Department of Justice has made clear that waterboarding is torture and, as such, a crime under the federal anti-torture statute. For Mr. Durham's current investigation into detainee interrogations to be credible and thorough, it is critically important that it encompass the conduct and decisions of former President Bush and other senior officials responsible for Bush administration torture policies.⁹

Moreover, despite the voluminous evidence that senior Bush administration officials authorized torture, the only people who have been held accountable for this maltreatment of prisoners are low-ranking soldiers. To date, over 600 individuals have been accused with having abused prisoners, yet only about 10 of them have received prison terms of more than one year. Even more troubling, the highest-ranking officer prosecuted for the abuse of prisoners was a Lieutenant Colonel, Steven Jordan, who was court-martialed in 2006 for his role in the Abu Ghraib scandal, but acquitted in 2007. Only one government contractor has been charged for any crime related to interrogation, and that indictment was in June 2004.

No government official has been charged in relation to the CIA's torture program, which was plainly authorized by the Bush administration's most senior officials. Numerous prisoners were transferred to torture at secret CIA prisons overseas. At least five individuals are alleged to have died in CIA custody. No one at all has been held to account.

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

II. Dismissal of Civil Suits Seeking Justice and Remedy for Torture Survivors

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

The federal government has invoked the judicially-created doctrine of qualified immunity to successfully secure the dismissal of civil suits—alleging torture; cruel, inhuman or degrading treatment; forced disappearance; and arbitrary detention—without consideration of the merits.¹⁰ In addition, civil cases alleging torture, cruel, inhuman or degrading treatment, and extra-judicial killings by private military contractors face procedural hurdles and defenses, resulting in dismissal.¹¹

Most problematically, the U.S. government has intervened in cases that allege forced disappearance and torture by U.S. officials and U.S.-based corporations to assert the "state secrets" privilege and to have these cases dismissed without any consideration of unclassified, publicly available information substantiating victims' allegations. Courts by and large have accepted the government's assertions.¹² The U.S. government's "state secrets" tactic to dispose of lawsuits, claiming that any discussion of a lawsuit's accusations would endanger national security, has allowed the government not only to restrict discovery but to quash entire lawsuits.¹³

For example, the U.S. government invoked the common-law "state secrets" privilege to squelch a lawsuit brought by the ACLU in April 2006. The lawsuit concerned the secret detention of German citizen Khaled El-Masri, and it sought compensation for his unlawful detention and torture by U.S. agents in Afghanistan.¹⁴ Mr. El-Masri's rendition to illegal detention and torture represents the most widely known example of a publicly acknowledged program. High-level government officials have publicly discussed the rendition program, and Mr. El-Masri's allegations have been the subject of widespread

media reports in the world's leading newspapers and news programs, many of them based on the accounts of government officials. The CIA's Office of Inspector General determined there had been no legal justification for Mr. El-Masri's rendition and essentially concluded that the agency acted illegally.

After the U.S. government invoked the "state secrets" privilege, however, a judge dismissed the case, accepting the CIA's claim that simply holding proceedings would jeopardize state secrets,¹⁵ and the U.S. Court of Appeals for the Fourth Circuit upheld the lower court decision.¹⁶ In October 2007, the U.S. Supreme Court refused to review Mr. El-Masri's case, denying Mr. El-Masri's only real chance for justice before domestic courts.¹⁷

Having exhausted domestic remedies, in April 2008, the ACLU filed a petition with the Inter-American Commission on Human Rights (IACHR) on behalf of Mr. El-Masri, arguing, *inter alia*, that due to the application of the state secrets doctrine, Mr. El-Masri was deprived of the right of effective access to a court and that his right to a remedy for the human rights violations he suffered had been violated.¹⁸ Despite repeated requests from the Commission, to date, the U.S. government has not responded to the petition.

While Mr. El-Masri has received no remedy, the CIA officers determined by the Office of Inspector General to be responsible for his mistaken detention and torture have been promoted. The CIA analyst who pushed for Mr. El-Masri's rendition now has one of the premier jobs in the CIA's Counterterrorism Center, running the CIA's Global Jihad unit dedicated to disrupting al-Qaida.¹⁹ The lawyer who signed off on Mr. El-Masri's rendition is now legal advisor to the CIA's Near East division.²⁰

The U.S. government invoked the "state secrets" privilege in another lawsuit brought by the ACLU in 2007. The ACLU filed a federal lawsuit against Jeppesen DataPlan, Inc., a subsidiary of Boeing Company, on behalf of five victims of the CIA's extraordinary rendition program. The suit charges that Jeppesen knowingly participated in these renditions by providing critical flight planning and logistical support services to aircraft and crews used by the CIA to forcibly disappear these five men to torture and illegal detention. According to published reports, Jeppesen had actual knowledge of the consequences of its activities.²¹

Shortly after the suit was filed, the government intervened and asserted the "state secrets" privilege, claiming further litigation would undermine national security interests, even though much of the evidence needed to try the case was already public. The trial court accepted Bush administration claims that the "state secrets" privilege allowed them to put an end to the entire proceedings. After three judges from the federal appeals court reversed that ruling, the Obama administration asked for a hearing before the full appeals court, asserting again the right to quash a lawsuit against a company that was a knowing accomplice to torture. In September 2010, an 11-judge *en banc* panel of the Ninth Circuit federal appeals court dismissed the lawsuit, accepting the Obama administration's argument that the case could not be litigated without disclosing state secrets. In

December 2010, the ACLU filed a petition for *certiorari* with the Supreme Court, asking the Court to review the decision dismissing the lawsuit.²²

The state secrets doctrine is not the only mechanism the Obama administration has invoked to extinguish civil suits by torture survivors. In *Rasul v. Rumsfeld*, a suit brought by former Guantánamo detainees seeking redress for torture, abuse, and religious discrimination, the Obama administration argued, remarkably, that the government defendants were immune from suit because, at the time that the abuse occurred, established law did not clearly prohibit torture and religious discrimination at Guantánamo. In *Arar v. Ashcroft*, the administration argued that the Constitution provided no cause of action to an innocent man who had been identified by the United States as a terrorist, rendered to Syria for torture, and not released until ten months later when it was determined that he was not a terrorist after all. In that case, the administration also argued to the courts that affording Mr. Arar a judicial remedy “would offend the separation of powers and inhibit this country’s foreign policy,” and impermissibly involve the courts in assessing “the motives and sincerity” of the officials who authorized Mr. Arar’s rendition.²³

Most recently, in *Padilla v. Rumsfeld*, a federal court dismissed a lawsuit filed against former Defense Secretary Donald Rumsfeld and other current and former government officials for their roles in the unlawful detention and torture of U.S. citizen Jose Padilla. South Carolina federal judge Richard Mark Gergel held that Mr. Padilla had no right to sue for constitutional violations during his nearly four-year imprisonment, and that Rumsfeld and the other defendants “are entitled to qualified immunity regarding all claims of alleged constitutional violations arising out of Mr. Padilla’s detention as an enemy combatant.”²⁴

The Obama administration has sometimes suggested that civil suits are unnecessary because the Justice Department has the authority to investigate allegations that government agents violated the law.²⁵ But civil suits, of course, serve purposes that criminal investigations do not: they allow victims their day in court, and they provide an avenue through which victims can seek compensation from perpetrators.

III. Lack of Transparency Regarding Past Torture and Abuse

The U.S. government has fought to keep secret hundreds of records relating to the Bush administration’s rendition, detention, and interrogation policies. This secrecy has shielded government officials from accountability for developing and implementing national security policies that violate international law. The United States’ lack of transparency not only precludes accountability for U.S. officials, but it also makes it more difficult for citizens of other countries—including Egypt, Tunisia, and Libya—to hold officials or former officials of their own countries accountable for harm that those governments caused to their own citizens while cooperating with the United States. Moreover, this secrecy has kept secret some of the documents that would allow the public to better understand how the torture program was conceived, developed, and implemented.

To take just a few of many possible examples, the U.S. government has fought to keep secret: a directive in which President Bush authorized the CIA to establish secret prisons overseas; the Combatant Status Review Transcripts in which former CIA prisoners describe the abuse they suffered in the CIA's secret prisons; records relating to the CIA's destruction of videotapes that depicted some prisoners being waterboarded;²⁶ and cables containing communications between the CIA's secret prisons and officials at CIA headquarters. The current administration also reversed its decision to comply with a court decision ordering the release of photos depicting the abuse of prisoners in Iraq and Afghanistan. The current administration also has supported legislation granting the Secretary of Defense unprecedented authority to conceal evidence of misconduct, including photographs depicting the abuse of prisoners in Defense Department custody, and it has argued that the CIA's authority to withhold information concerning "intelligence sources and methods" extends even to methods that are illegal.

IV. Recommendations

The ACLU calls on the U.S. government to take the following measures to create a public record of the Bush administration's policies and their consequences; to obtain recognition and compensation for torture victims; to ensure that government officials who violated the law are held to account; and to reduce the likelihood that the abuses of the last administration are repeated by the current administration, or by a future one:

Ensure that the Durham investigation includes the highest levels of government: Ensure that the criminal investigation by Assistant U.S. Attorney John Durham includes all senior civilian and military government officials who authorized and facilitated torture. Ensure that, where there is credible evidence that U.S. federal law was violated, criminal charges are filed against all persons who committed torture or abuse or conspired to commit those crimes against detainees held or questioned by the United States.

Congress should investigate the role of the Bush White House in the use of torture and abuse: Although the House and Senate Judiciary Committees have held numerous hearings on the role of the Department of Justice in the use of torture and abuse, and the Senate Armed Services Committee and the Senate Select Committee on Intelligence have conducted extensive investigations into the use of torture and abuse by the Department of Defense and the Central Intelligence Agency, respectively, no congressional committee has conducted a comprehensive investigation into the central, commanding, and coordinating roles of officials in the White House under President Bush. A congressional committee should hold comprehensive oversight over the role of the Bush White House.

End abuse of the "state secrets" privilege: Congress should pass legislation that creates procedures to prevent the abuse of the state secrets privilege and protect the rights of those seeking redress through our court system.

Restore government transparency: Release critical documentation of torture and abuse, sought under the Freedom of Information Act (FOIA).

Provide reparations or other compensation to victims of U.S. torture: Establish a U.S. fund for reparations or other compensation to victims of torture and abuse in U.S. custody or control.

¹ Brazil, Norway, and the Russian Federation recommended the U.S. take measures to address persistent impunity, including by means of comprehensive investigations, criminal prosecutions, and reparations or other redress for torture survivors. Mexico submitted an advance question inquiring about government efforts to ensure accountability for torture. In addition, the Democratic People's Republic of Korea, Venezuela, Bolivia, Libya, Cuba, and Nicaragua recommended that the U.S. take measures to prosecute and punish perpetrators of torture.

² Draft Report of the Working Group on the Universal Periodic Review, United States of America, Ninth Session (Nov. 2010), para. 92.148; Intervention by H.E. Ambassador Maria Nazareth Farani Azevêdo, Permanent Representative of Brazil, Universal Periodic Review, Nov. 5, 2010.

³ Draft Report of the Working Group on the Universal Periodic Review, United States of America, Ninth Session (Nov. 2010), para. 92.148; Intervention by H.E. Ambassador Maria Nazareth Farani Azevêdo, Permanent Representative of Brazil, Universal Periodic Review, Nov. 5, 2010.

⁴ Draft Report of the Working Group on the Universal Periodic Review, United States of America, Ninth Session (Nov. 2010), para. 92.139.

⁵ Advance Questions to the United States of America, Add.3.

⁶ Draft Report of the Working Group on the Universal Periodic Review, United States of America, Ninth Session (Nov. 2010), para. 92.147.

⁷ See, e.g. International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody*, Feb. 2007, available at

<http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>; Mark Danner, *The Red Cross Torture Report: What it Means*, N.Y. REVIEW OF BOOKS, Apr. 30, 2009, available at <http://www.nybooks.com/articles/archives/2009/apr/30/the-red-cross-torture-report-what-it-means/>.

⁸ See ACLU Press Release and Letter, *ACLU Asks Justice Department to Appoint Independent Prosecutor to Investigate Torture*, Mar. 18, 2009, available at <http://www.aclu.org/national-security/aclu-asks-justice-department-appoint-independent-prosecutor-investigate-torture>.

⁹ See ACLU Press Release and Letter, *ACLU Asks Holder to Investigate Bush for Violation of Torture Statute*, Nov. 11, 2010, available at <http://www.aclu.org/national-security/aclu-asks-holder-investigate-bush-violation-torture-statute>.

¹⁰ See, e.g. *Rasul v. Myers*, 563 F.3d 527, 528 (D.C. Cir. 2009) (no reasonable government official would know that Guantanamo detainees had due process rights or a right to be free from "cruel and unusual punishment" as provided by the Fifth and Eighth Amendments to the U.S. Constitution); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. N.Y. 2009) (government argued qualified immunity, but court did not rule on it); *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007).

¹¹ See, e.g., *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009) (Alien Tort Statute claim dismissed on ground that non-state actors cannot be liable. This decision grants unwarranted immunity for private contractors through an erroneous conclusion equating them with armed forces—a perversion of International Humanitarian Law rules and principles of distinction between combatants and civilians).

¹² See, e.g., *Mohamed v. Jeppesen Dataplan*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008), rev'd, 563 F.3d 992 (9th Cir. Cal. 2009), reh'g en banc granted, 586 F.3d 1108 (9th Cir. Cal. 2009); *El-Masri v. Tenet*, 479 F.3d 296 (4th Cir. Va. (2007).; *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. N.Y. 2009) (government asserted state secret privilege, but court did not rule on it).

¹³ Scott Shane, *Invoking Secrets Privileges Becomes a More Popular Legal Tactic by U.S.*, N.Y. TIMES, Jun. 4, 2006.

¹⁴ See, e.g. Complaint, *Khaled El-Masri v. George J. Tenet*, No. 05-cv-1417 (E.D. Va., filed Dec. 6, 2005), available at http://www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf; see also

Brief for Plaintiff, Statement of Khaled El-Masri, *Khaled El-Masri v. George J. Tenet*, No. 05-cv-1417 (E.D. Va., filed Dec. 6, 2005), *available at*

<http://www.aclu.org/safefree/extraordinaryrendition/22201res20051206.html>.

¹⁵ *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006).

¹⁶ *El-Masri v. U.S.*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S.Ct. 373 (2007).

¹⁷ *El-Masri v. U.S.*, 128 S.Ct. 373 (2007).

¹⁸ Petition Alleging Violations of the Human Rights of Khaled El-Masri by the United States of America with a Request for an Investigation and Hearing on the Merits at 77-85, April 9, 2008, *available at*

<http://www.aclu.org/safefree/torture/348371gl20080409.html>.

¹⁹ Associated Press, *At CIA, Grave Mistakes, Then Promotions*, Feb. 9, 2011, *available at*

<http://www.npr.org/templates/story/story.php?storyId=133618326>.

²⁰ *Id.*

²¹ Jane Mayer, *Outsourcing: The C.I.A.'s Travel Agent*, THE NEW YORKER, Oct. 30, 2006.

²² Petition for Writ of Certiorari, *Mohamed et al. v. Jeppesen DataPlan, Inc.* (U.S. filed Dec. 7, 2010), *available at* <http://www.aclu.org/files/assets/2010-12-7-JeppesenCertPetition.pdf>.

²³ Brief in Opposition to Petition for Certiorari, *Arar v. Ashcroft*, No. 09-923 (May 12, 2010).

²⁴ See ACLU press release, *In a Blow to the Rule of Law, Court Dismisses Lawsuit to Hold Former Government Officials Accountable for Torture of Jose Padilla*, Feb. 17, 2011, *available at*

<http://www.aclu.org/national-security/blow-rule-law-court-dismisses-lawsuit-hold-former-government-officials-accountable>.

²⁵ See, e.g. Brief of the United States, *Padilla v. Yoo*, No. 09-16478 (9th Cir. Dec. 3, 2009).

²⁶ Nearly three years after he was appointed to investigate the destruction of at least 92 videotapes showing CIA interrogators waterboarding and using other torture on detainees, Special Prosecutor John Durham declined to file charges against those responsible for the destruction of the videotapes.