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June 29, 2009

Office of Bar Counsel
Board on Professional Responsibility
District of Columbia Court of Appeals
515 5th Street NW
Building A, Suite 117
Washington, DC 20001

Re: Complaint against Jonathan M. Fredman, ODNI/PPR

Dear Sir or Madam:

NOTICE OF COMPLAINT

Velvet Revolution (“VR”), a Washington, D.C. based non-profit with a network of more than 150 organizations representing over a million members nationwide, including in Washington, D.C., herein lodges a complaint against Jonathan M. Fredman, Associate General Counsel, Central Intelligence Agency (2001-2004), Office of the Director of National, ODNI/PPR (current position); Washington DC 20511; 703-275-2990 and requests that the *Board on Professional Responsibility, District of Columbia Court of Appeals* take immediate disciplinary action against Mr. Fredman for violations of the *D.C. Rules of Professional Conduct*.

SUMMARY OF COMPLAINT

Jonathan M. Fredman breached his legal duty and violated the *D.C. Rules of Professional Conduct* by advocating for immoral and unethical “extended” or “enhanced” interrogation techniques (amounting to torture), and other policies that resulted in clear violations of U.S. and international law.

Specifically, Mr. Fredman ignored over two centuries of historical and legal precedents, fell short of the bar of the “good faith” imperative, and advanced suspect legal constructs and prescriptions for detainee interrogation well outside of legal norms, thereby providing the false cover of claimed legality for those who then engaged in acts and policies that, in fact, violated the following laws, both in letter and spirit:

- 1) The United Nations Convention Against Torture (UNCAT), Articles 1, 2, 3 and 16 (ratified in October 1994), implemented by Sections 2340-2340A of title 18 of the United States Code.
- 2) The Geneva Conventions, Article 3, (ratified in August 1955)
- 3) The Eighth Amendment against “cruel and unusual punishment”
- 4) The “Separation of Powers” constructs and imperatives of the U.S. Constitution
- 5) The United States Criminal Code, Title 18, Prohibitions Against Torture (18 USC 2340A) and War Crimes (18 USC 2441)

As the “law of the land,” these legal protections and dictates are clear. By failing to challenge the OLC memoranda ^[1] since repudiated ^[2] from the Office of Legal Counsel, Mr. Fredman accepted legal analysis that led to detainee abuses, and, evidence suggests, deaths at overseas U.S. military facilities ^[3]. In these actions Mr. Fredman impeded the administration of justice and provided the patina of legal cover for actions that violated the U.S. Constitution, the Geneva Convention, the Convention against Torture, the U.S. Criminal Code [see Applicable Law section below] and several *D.C. Rules of Professional Conduct*. Mr. Fredman acted in a manner that was illegal, extremely prejudicial, grossly incompetent and clearly immoral.

Therefore, VR calls upon the *Board on Professional Responsibility, District of Columbia Court of Appeals* to act immediately to disbar Mr. Fredman for conduct that is a travesty of justice and an affront to the rule of law and the accepted standards of professional legal and ethical conduct.

Further, because the evidence points to numerous violations of the law, VR believes that disbarment will complement steps toward open hearings in Congress and a criminal investigation by a special investigator appointed by the Department of Justice.

THE RECORD & EVIDENCE – The Role of the CIA and Jonathan M. Fredman in Torture Policy

As senior counsel within the Counterterrorism Center (CTC) at the CIA, Jonathan M. Fredman approved a policy of torture and oversaw the details of its carefully prescribed application of violence, intimidation and humiliation intended to “enhance” interrogations and aggressively coerce detainees at Guantanamo Bay (Cuba), Abu Ghraib (Iraq), Bagram AFB (Afghanistan), and “extraordinary rendition” or “black” sites in Thailand, Diego Garcia, Poland, Syria, Egypt and elsewhere.

Background and Precedence: CIA History of Torture Programs as Prelude to Post-9/11 torture at US facilities and foreign “black sites”

This post-9/11 “enhanced interrogation” program had its precedent in programs run by the CIA during the decades-long Cold War fight against non-state actors with Communist sympathies or links to the Soviet Union. Author Almeringo E. Ojeda thoroughly documents CIA instigated psychological torture programs in his book, *The Trauma of Psychological Torture*:

For 25 years, the CIA disseminated psychological torture techniques to foreign security forces as part of a broader containment initiative aimed at fortifying Third World governments against local communist subversion. First operating through the Office of Public Safety (OPS), a U.S. foreign police training program, between 1963 and 1975, and then collaborating with U.S. Army Green Berets Mobile Training Teams from 1982 to 1987" the CIA acted to apply psychological torture against non-state actors. ^[4]

The CIA first codified this approach in July 1963 in a comprehensive interrogation manual titled *KUBARK Counterintelligence Interrogation*, a systematic compilation of interrogation techniques drawn from research on the psychology of coercion produced between 1950 and 1961. In 1983 the CIA produced another manual, the *Human Resource Exploitation Training Manual-1983* adopting verbatim much of the earlier Kubark manual. Both the *Kubark Manual* and the *Human Resource Exploitation Training Manual-1983* were declassified and released as a result of FOIA requests filed by the Baltimore Sun.

After 9/11 it is clear that that program was re-invigorated, expanded and implemented against non-state actors tied to terrorist groups, and in the case of Iraq, a domestic insurgency. ^[5]

Thus, the so-called “enhanced” or “extended” interrogation program approved and advanced by Mr. Fredman sprang from, and tapped a long history of CIA programs incorporating brutal, traumatizing, inhumane torture techniques.

Merriam-Webster Dictionary defines *interrogation* as “formal and systematic” questioning. CIA questioning of spies or detainees, whether during the Cold War or post 9/11 was “enhanced” by a carefully crafted but frequently brutal program of psychological and physical abuse designed to coerce confessions through intimidation, threats of violence, physical abuse and mental trauma, and humiliation. While there were formal questions addressed to the detainees, they were preceded, and often followed, by a systematic program of intimidation, humiliation, and in some cases overt violence.

Beginning at the latest on October 2, 2002, Mr. Fredman advocated for a program that included torture carried out directly by CIA officers and CIA-hired contractors, as well as foreign intelligence operatives in countries participating secretly in the CIA’s Rendition program. This was in violation of any reasonable and fair reading of the applicable international and domestic law. The public record now shows that this program was introduced into CIA black sites then expanded into U.S. military prison environments, beginning at Guantanamo Bay, Cuba, and later to Bagram in Afghanistan and Abu

Ghraib in Iraq, leading to, in scores of cases, maiming, severe trauma, even death. [See unredacted Church Report documents and the Senate Armed Services Committee Report].

1) Re: CIA's top leadership gives approval to interrogation program

Stephen Grey, the award-winning author of *Ghost Plane*, quotes a former CIA official who was involved in the interrogations:

"Everything we did, down to the tiniest detail, every rendition and every technique of interrogation used against prisoners in our hands, was scrutinized and approved by headquarters." ^[6]

On March 28 a CIA team captured Abu Zubaydah in Pakistan. That Spring at an overseas CIA Rendition Program "black site", CIA contractors intervened in order to apply harsher 'techniques' which led FBI interrogator Ali Soufan to protest what he called acts of "borderline torture"^[7] that ultimately included boxed confinement that led to re-opening of wounds Zubaydah obtained during his capture.^[8] FBI Assistant Director Pasquale D'Amuro ordered Soufan's withdrawal from the interrogation and return to the U.S.. Later, FBI Director Robert Mueller would prohibit any FBI involvement in CIA-led interrogation, saying, "we don't do that,"^[9] clearly reflecting his own belief the treatment amounted to torture.

During this time, Mr. Fredman is a senior lawyer with the CTC, the counter-terrorism section and thus certainly "in the loop" relative to determination of the legality of the 'techniques' applied during Zubaydah's interrogation. This occurred several months prior to the legal arguments put forward by the Office of Legal Counsel (OLG) in the August 1, 2002 memo.

Two months after the release of the Yoo/Bybee OLG memo, Mr. Fredman met at Guantanamo Bay, Cuba with a team of ten lawyers who met with their military counterparts at the detention facility on October 2, 2002. Mr. Fredman advocated for, and defended the application of harsh interrogation techniques at Gitmo in direct violation of Uniform Code of Military Justice and the Convention Against Torture, over objections and concerns raised by lower level military lawyers.

The "Senate Armed Services Committee Inquiry into the Treatment of Detainees in U.S. Custody" summarized Mr. Fredman's involvement in their "Executive Summary and Conclusion" in this manner:

(U) [snip]... On October 2, 2002, Jonathan Fredman, who was chief counsel to the CIA's CounterTerrorist Center, attended a meeting of GTMO staff. Minutes of that meeting indicate that it was dominated by a discussion of aggressive interrogation techniques including sleep deprivation, death threats, and waterboarding, which was discussed in relation to its use in SERE training. Mr. Fredman's advice to GTMO on applicable legal obligations was similar to the

analysis of those obligations in OLC's first Bybee memo. According to the meeting minutes, Mr. Fredman said that "the language of the statutes is written vaguely... Severe physical pain described as anything causing permanent damage to major organs or body parts. Mental torture [is] described as anything leading to permanent, profound damage to the senses or personality." Mr. Fredman said simply "It is basically subject to perception. If the detainee dies you're doing it wrong."^[10]

Following that pivotal meeting at Gitmo, a Special Agent of the Naval Criminal Investigative Service named Mark Fallon, emailed a colleague to say that what he'd heard "could shock the conscience of any legal body" that might one day examine the legality of the new interrogation program.

Mr. Fredman was directly involved in policy set by the CIA and in debate over the interrogation program. Without presenting substantiating documentation he has claimed in a letter to the Senate Armed Services Committee that he twice offered to resign over his concerns about the program.^[11] And yet the fact remains he did not resign and the procedures, amounting to torture and/or cruel and degrading treatment, were implemented. So while he disputes the findings of the Senate report, Mr. Fredman produced no documents to substantiate his claims. The Senate Committee stands by its report.

2) Re: CIA Inspector General finds violation of Convention Against Torture, Homicides of CIA-held detainees

CIA Inspector General John Helgerson conducted an investigation into the CIA's "enhanced interrogation" in 2003 that concluded in April of 2004. According to an unnamed source cited by the New York Times in December of 2007 ^[12], the still classified but soon to be released report, concluded that the CIA's methods "appeared to constitute cruel, inhuman and degrading treatment" in violation of the Convention Against Torture, which was signed into U.S. law in 1994.

Author Jane Mayer, in a July 14, 2008 interview ^[13] with Harper's magazine's Scott Horton, said that General Helgerson "investigated several homicides alleged homicides involving CIA detainees." According to Mayer, these were forwarded to the Department of Justice for possible prosecution. The Church Report found that eight homicides resulted directly from abuse during interrogation.

3) Re: Department of Defense report ties abuse at Abu Ghraib to CIA

In August of 2004, Major General George R. Fay released his report on the role of Military Intelligence at Abu Ghraib prison in Baghdad based on interviews of 170 personnel and review of over 9,000 documents. General Fay suggested that the abuse at the prison was the result of a policy shaped by the CIA:

CIA detention and interrogation practices led to a loss of accountability, abuse,

reduced interagency cooperation, and an unhealthy mystique that further poisoned the atmosphere at Abu Ghraib.^[14]

CIA hired contractors had a direct role in the infamous instances of abuse captured in the photos that were eventually released publicly. Again, Mr. Fredman was directly involved in sanctioning CIA-led interrogations that crossed the line to torture. And while he has revealed to the Senate he twice offered to resign over the issue, he did not resign and the policies were implemented under his watch at the CTC.

Commenting in his book *The Hidden History of CIA Torture: America's Road to Abu Ghraib*, Professor Alfred C. McCoy wrote:

General Fay might have mentioned that the 519th Military Intelligence, the Army unit that set interrogation guidelines for Abu Ghraib, had just come from Kabul where it worked closely with the CIA, learning torture techniques that left at least one Afghani prisoner dead. Had he gone further still, the general could have added that the sensory deprivation techniques, stress positions, and cultural shock of dogs and nudity that we saw in those photos from Abu Ghraib were plucked from the pages of past CIA torture manuals.^[15]

4) Re: Assessment of “Torture Memos” drafted and distributed by top Bush administration lawyers.

According to the first of two May 10, 2005 “Bradbury memos” addressed from the Office of Legal Counsel (OLC) of the Department of Justice to Mr. Rizzo at the CIA, the so-called “enhanced techniques” included dietary manipulation, forced nudity, stress positions, abdominal slaps and waterboarding.^[16] The second May 10th memo addressed the use of combinations of these techniques. Together with the August 2002 memo authored by John Yoo and Jay Bybee, these memos set forth both the claim of legality and detailed guidelines for a brutal and abusive program of detainee treatment. This legal analysis, approved and advanced within the CIA by Mr. Rizzo and Mr. Fredman at CTC, gave the formal “in-writing” green light to a program that led to documented abuses and scores of deaths within the detainee/interrogation system.

Attorney Jack Goldsmith, who succeeded Jay Bybee at the OLC, later declared that the legal argument of the OLC memos rested on “one-sided legal arguments” and that their intent was to offer the CIA a “golden shield” against criminal prosecution. John Rizzo through his counsel with the OLC and other administration lawyers was a central figure in establishing the legally suspect foundation for the abusive and illegal detainee treatment, this after he had served as senior legal counsel to the CIA when waterboarding and other brutal techniques were undertaken in mid-2002 before the distribution of the August 1, 2002 OLC Memo.

A view similar to Goldsmith’s was expressed by the Navy’s general counsel, Alberto J. Mora who, upon learning of abuses at Gitmo told Pentagon superiors, including senior counsel, William J. Haynes II, that these methods were “unlawful and unworthy of the

military services," and their use placed all those involved at risk of prosecution. ^[17]

Whereas Mr. Fredman accepted and advanced the program within the CIA, the Navy's top legal officer rejected the practice and questioned its legality directly. In response to the Senate report on detainee treatment, Mr. Fredman would later claim his raised concerns about the interrogation program in contradiction to contemporaneous minutes from the meeting in question.

[*The FBI interrogator himself, Ali Soufan who employed the a non-enhanced method said, "The truth is that we got actionable intelligence from him in the first hour of interrogating him."]^[18]

Conclusions

Jonathan M. Fredman was senior counsel within the Counter-terrorism section of the CIA who advanced a program of "cruel, inhuman and degrading" treatment. This treatment followed decades of similar but hidden unlawful activity carried out by the CIA as evidenced by CIA manuals released through FOIA. The approval of so-called "enhanced interrogation" led to documented abuses of so-called "ghost detainees" in military prisons in Gitmo, Abu Ghraib, and Bagram (resulting in death in some cases) as confirmed by the Vice Admiral Albert T. Church, U.S. Army Intelligence, CIA Inspector General, and Senate Armed Service Committee reports.

Prior to any legal sanctioning by the Office of Legal Counsel, Acting General Counsel Rizzo's legal section approved the a harsh program of treatment of two detainees held at a CIA rendition site, clearly in violation of U.S. and international law. Abu Zubayhah was waterboarded 83 times, despite the earlier success of the "informed" or "rapport" method of interrogation applied by FBI Agent Ali Soufan. It is not known whether Mr. Fredman directly sanctioned this treatment or was consulted for a legal analysis before it was carried out. However, as senior legal counsel at the CTC it is highly likely he was and Mr. Fredman should be compelled to address these questions directly.

Finally, in written response to the *Senate Armed Service Committee Report on Detainee Treatment*, Mr. Fredman claimed he expressed concern about the interrogation program and that he had twice offered to resign. However, the fact is Mr. Fredman did not resign. In fact he was an active co-conspirator in a program that carried out torture or degrading treatment in a number of instances, leading to the documented deaths of the most extreme detainees. In his failure to resign or protest, Mr. Fredman showed either gross negligence or willful ignorance given the clear precedence and applicable international law. Mr. Fredman advanced this program in direct violation of that law instead of resigning. Mr. Fredman has produced no evidence to substantiate his counter claims denying his countenance of this treatment while the Senate Armed Services Committee stands behind its findings.

CASE FOR DISBARMENT-District of Columbia (D.C.) Rules of Professional Conduct

The case for Mr. Fredman's disbarment is simple and clear. A lawyer should demonstrate respect for the legal system and demonstrate a high ethical and moral standard in providing legal counsel to his client. In his work for the Legal Section of the Central Intelligence Agency, Mr. Fredman did not.

Mr. Fredman's conduct is so far outside the bounds of legal practice that it falls under *D.C. Rules of Professional Conduct, Scope* (p. 4), which reads, "**The Rules do not exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.**" Mr. Fredman denied due process rights of detainees, advocated for the application of gross, violent and degrading treatment, amounting to torture in some case, and was in no way moral or ethical, by any objective measure. By twice merely offering to resign, rather than actually resigning, over claimed disagreements with the interrogation policy, Mr. Fredman demonstrated moral turpitude. Resigning his position over a clearly illegal program would have been the moral and ethical choice, if indeed he had been opposed to the program at the time. It must be noted that Mr. Fredman failed to produce documents substantiating his claims of opposition to the program and thus the Senate report based on contemporaneous minutes must be given greater credence.

Rule 3.1 B (Meritorious Claims and Contentions, p. 100) calls for lawyers "to inform themselves about the facts of their clients' cases and the applicable law" Further, legal claims are deemed frivolous if the lawyer is "unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification, or reversal of existing law." The May 2005 OLC memos ignore the question of minimal due process for the detainees, and they fail to present a valid legal argument for overturning the universally accepted definition of torture. Mr. Fredman failed to present any case law detailing previous U.S. prosecutions for waterboarding and therefore his advocacy of so-called "enhanced interrogation" was not made in "good faith" and was "frivolous" and incompetent. Moreover, there is no precedent in case law for the claims of executive power made by the OLC, and subsequently accepted by the CIA.

Rule 1.2 (e) (Scope of Representation) reads, "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning, or application of the law."

In a pivotal October 2002 meeting with top-level lawyers, as documented by contemporaneous minutes obtained by the U.S. Senate, Mr. Feldman extensively advocated extreme "interrogation" techniques, some proposed and some already in use, that are deemed by experts to be torture or degrading banned treatment. **See Exhibits C, D and E.** Therefore, Mr. Fredman violated Rule 1.2 (e) by counseling his clients to

engage in the actual application of illegal acts rather than challenging the practices in a “good faith” analysis of applicable U.S. and international law bearing on questions of interrogation and torture.

Rather than accept the definition of torture^[19] as clearly established in international law, the CIA CTC’s Legal section, under Mr. Fredman, concurred with the Department of Justice, Office of Legal Counsel, that the CIA’s methods were not “cruel, inhuman or degrading” under international law, referencing the August 1, 2002 OLC memo that attempted to re-define torture:

“The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure or permanent damage resulting in a loss of significant body functions will likely result.”

Jonathan Fredman’s legal advice demonstrated extreme disregard for well-established rule of law by advocating the violation of both the letter and spirit of the U.S. Constitution, U.S. Criminal Code and the treaties banning torture that the U.S. had signed and ratified. Mr. Fredman’s advocacy of so-called “enhanced interrogation techniques” was grossly unethical and immoral and violated Rules Rule 3.1 B and Rule 1.2 (e) and led to unlawful actions that would “shock the conscience” of those who reviewed the program. Therefore, VR calls upon the *Board on Professional Responsibility, District of Columbia Court of Appeals* to take disciplinary action against Mr. Fredman in respect of the rule of law in the United States of American and the District of Columbia.

NOTE: John Yoo, who worked in the Office of Legal Counsel and authored several memos advocating torture, was sued last year by torture victim, Jose Padilla. In a decision on June 12, 2009, Federal Judge Jeffrey White analyzed the law and facts in great detail and concluded that the suit could proceed and that Mr. Yoo did not have immunity because the law against the use of torture was well established. **EXHIBIT Q.**

KEY DOCUMENTS IN EVIDENCE

In order to build the case for disciplinary action against Jonathan M. Fredman, John A. Rizzo, Scott W. Muller, Stephen G. Bradbury, Jay Bybee, John Yoo, and other lawyers who advocated for, and defined so-called “enhanced interrogation,” and to examine the origins of the legal advocacy, it is necessary to review an extensive body of evidence and investigative reporting and analysis, including, but not limited to, the following documents/articles:

- 1) Memoranda prepared by lawyers in the Bush Justice Department's Office of Legal Counsel (OLC). [http://www.aclu.org/safefree/general/olc_memos.html] **Exhibits C, D, E, F, G, N and O.** See also Haynes Memo, **Exhibit I.**
- 2) The Senate Armed Services Committee Investigation (SASCI) *See*, Attachment B, Senate Armed Services Inquiry Into the Treatment of Detainees in U.S.

- Custody, released December 2008 (SASCI), pg. xxviii. **EXHIBIT K.**
<http://levin.senate.gov/newsroom/release.cfm?id=305735>
<http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf>
- 3) Senate Select Committee on Intelligence (SSCI) “Narrative on OLC opinions re. CIA Detention and Interrogation Program” released April 22, 2009.
<http://intelligence.senate.gov/pdfs/olcopinion.pdf>
EXHIBIT T
 - 4) Official transcript, Senate Select Committee on Intelligence, S-HRG 110-407; June 19, 2007. Nomination of John A. Rizzo to be General Counsel of the Central Intelligence Agency.
 - 5) The Red Cross Report on Detainee Treatment, <http://www.nybooks.com/icrc-report.pdf> **EXHIBIT J.**
 - 6) American Bar Association Resolution Against Torture, condemning “any use of torture ... *and any endorsement or authorization of such measures by government lawyers, officials and agents.*”
velvetrevolution.us/torture_lawyers/.../ABA_Torture_resolution.pdf **EXHIBIT P.**
 - 7) Emails from Deputy Attorney General James Comey to AG Gonzales warning that that the torture opinion “would come back to haunt [him] and DOJ and urged[ing] him not to allow it.” **EXHIBIT R.**
 - 8) Investigative Reporting:
 - a. *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*
 - b. “Report: Abusive tactics used to seek Iraq-al Qaida link”; Jonathan S. Landay, *McClatchy Newspapers* -- Tue, Apr. 21, 2009

1) The **OLC memoranda** offered the patina of legal sanction to the use of techniques such as waterboarding, hypothermia, stress positions, extensive sleep deprivation and confinement with stinging insects to exploit prisoner phobias.

The memos, by carefully defining parameters, clearly demonstrate that the authors of the memos were deeply engaged in the application of torture techniques, not merely giving abstract legal counsel.

2) The **Senate Armed Services Committee report** provided a detailed chronology of the process of formulation of policy respecting the treatment of prisoners, with a special focus on the introduction of torture techniques. **EXHIBIT K**

Senior officials in the U.S. government decided to use some of these harsh techniques against detainees based on deeply flawed interpretations of U.S. and international law.

[Levin, McCain Release Executive Summary and Conclusions of Report on Treatment of Detainees in U.S. Custody, December 11, 2008]

3) The **Senate Intelligence Committee memo** details the steps leading to issuance of the OLC memos and identified the Justice Department lawyers and others involved in the process. The memo details a systematic authorized program for the mistreatment and torture of persons denied rights of due process. Letter from Attorney General Eric Holder, Jr. to Senator John. D. Rockefeller IV of the SSCI forwarding declassified narrative, (April 17, 2009).] **EXHIBIT T**

4) The **Red Cross Report On Detainee Treatment** was prepared from interviews with a number of detainees and others. In short, it confirms that the types of torture techniques advocated by Mr. Bradbury we have complained about here were in fact used against many detainees. These techniques included suffocation by water, prolonged stress standing, beatings by use of a collar, beating and kicking, confinement in a box, prolonged nudity, sleep deprivation, continuous loud noises, exposure to cold temperature and cold water, threats, forced shaving, and deprivation of food. **EXHIBIT K**

5) In **testimony at a Senate hearing** on May 13, 2009, Former State Department counselor Philip Zelikow told a committee panel that Bush administration officials engaged in a ‘collective failure’ with regard to the detention and interrogation of suspected terrorists. He asserted that the torture memos were unsound because “the lawyers involved ... did not welcome peer review and indeed would shut down challenges even inside the government.” Georgetown University law professor David Luban testified that the Justice Department torture memos constituted “an ethical train wreck” because they violated constitutional, statutory and international law.

<http://www.washingtonpost.com/wp-dyn/content/article/2009/05/13/AR2009051301281.html>

6) **Investigation Reporting:** Select reporting from credible sources further suggests that following the attacks of 9/11/01, a host of controversial and illegal policies were advanced persistently and systematically by a small group of lawyers to serve narrow policy goals and political ambitions, with a primary aim of vastly amplifying the power of the Presidency, in direct threat to the system of checks and balances elucidated in the U.S. Constitution.

a) **Jane Mayer, The Dark Side:** In her award-winning book, Harpers reporter Jane Mayer writes that John Yoo, working in the Office of Legal Counsel, was a prominent member of the War Council and advanced a concerted campaign to establish an entirely new post-9/11 legal regime already well developed prior to the attacks. Mr. Bybee was head of the Office of Legal Counsel thus ultimately responsible for it’s work product. Any objective analysis of this body of work

leads to the obvious conclusion that these lawyers methodically advanced an agenda entirely antithetical to the U.S. Constitution and a host of historical and legal precedents, with legal opinion and advocacy that effectively buried American ideals and the rule of law.

b) **Jonathan Landey of McClatchy in his article *Report: Abusive tactics used to seek Iraq-al Qaida link*** reported on the intense pressure put on the CIA and military interrogators to use of extreme interrogation tactics including the use of waterboarding, on scores of occasions, in an effort to produce intelligence from detainee confessions that al-Qaeda was linked to the regime of Iraqi President Hussein. Pressure came from the Vice-President's office. The head of the "War Council" was David Addington, the Vice-President's Chief of Staff.

c) May 29, 2009 statement by General David Petraeus, discussing torture of detainees, said, "When we have taken steps that have violated the Geneva Conventions, we rightly have been criticized, so as we move forward I think it's important to again live our values, to live the agreements that we have made in the international justice arena and to practice those."

<http://www.harpers.org/archive/2009/06/hbc-90005079> (Article and Video)

d) May 31, 2009, General Ricardo Sanchez, in an interview with MSNBC, stated that the use of torture on detainees, constituted a "war crime," and that a "truth commission" is necessary to address the "institutional failure" of those charged with decision making and accountability. http://www.huffingtonpost.com/jack-hidary/general-rick-sanchez-call_b_209573.html (Article and Video)

ENDNOTES

[1] See *ProPublica's* comprehensive list of legal memoranda on controversial Bush policies regarding detentions, interrogations and warrantless wiretapping. <http://www.propublica.org/special/missing-memos>.

A detailed listing of torture related legal memoranda is available here: <http://www.aclu.org/safefree/torture/torturefoia.html> Exhibit A

The most recently declassified memos from Yoo's *Office of Legal Counsel* can be found here: http://www.aclu.org/safefree/general/olc_memos.html

[2] See April 15, 2009, *Memorandum to the Attorney General Re. The Withdrawal of Office of Legal Counsel Opinions* mentioning the legal opinions expressed in dated memoranda written by Jay S. Bybee, Assistant Attorney General and Steven G. Bradbury, Principal Deputy Assistant Attorney General. [http://media.mcclatchydc.com/smedia/2009/04/16/16/Taylor-OLCops_withdrawal.source.prod_affiliate.91.pdf]

The TIMES Online reported:

"Jack Goldsmith, who succeeded Jay Bybee - the author of many of these memos - at the Office of Legal Counsel, has since declared that they had 'no foundation' in any source of law and rested on 'one-sided legal arguments'. **Their purpose, he said, was to provide the CIA with a 'golden shield' against criminal prosecution of agents.** After all, the US prosecuted waterboarding as torture when the Japanese used it against American troops during Second World War."
[http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6116281.ec]

John Yoo, who worked under Jay Bybee, was the principal author of the most important of the memos now under scrutiny.

[3] Unredacted Church Report Documents (Previously Classified) (2/11/2009)

<http://www.aclu.org/safefree/torture/38710lgl20090211.html>

<http://www.aclu.org/torturefoia/released/021109.html>

These reports from the Criminal Investigation Division of the Dept. of Justice detail the deaths of a number of detainees at Bagram Air Force Base in Afghanistan and at prisons in Iraq. Thus far, 21 homicides have been confirmed, eight of which resulted from abusive interrogation techniques.

November, 2002: Afghan detained in Kabul freezes to death in CIA custody.

http://www.nytimes.com/2007/12/30/washington/30intel.html?pagewanted=3&_r=1

[4] Almerindo E. Ojeda, *The Trauma of Psychological Torture*, Praeger, 2008; p. 24

[5] Ibid.

[6] Stephen Grey, *Ghost Plane: The True Story of CIA Torture*; St. Martin's Press, 2006

[7] Ali Soufan, Testimony, House Judiciary Committee, May 13, 2009

http://judiciary.senate.gov/hearings/testimony.cfm?id=3842&wit_id=7906

[8] International Committee of the Red Cross Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody International Committee of the Red Cross, February 2007. <http://www.nybooks.com/icrc-report.pdf>

See **EXHIBIT J**

[9] U.S. Department of Justice, Office of the Inspector General, "A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq," May 2008; pp. 67-70. NOTE: "Thomas" in the text is Ali Soufan.

<http://www.usdoj.gov/oig/special/s0805/final.pdf>

See Excerpt – **EXHIBIT S**

[10] “Senate Armed Services Committee Inquiry into the Treatment of Detainees in U.S. Custody”, Released December 11, 2008,
<http://levin.senate.gov/newsroom/release.cfm?id=305735>
See **EXHIBIT K**

Executive Summary & Conclusion

<http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf>

Here follows the longer treatment of Mr. Fredman’s activity released by the Senate Committee:

Senate Armed Services Committee Hearing: The Origins of Aggressive Interrogation Techniques; “Part I of the Committee’s Inquiry into the Treatment of Detainees in U.S. Custody”; released June 17, 2008
<http://levin.senate.gov/senate/statement.cfm?id=299242>

CIA Provides Advice to U.S. Southern Command’s JTF-170 on Interrogations

On September 25, 2002, just days after GTMO staff returned from that training, a delegation of senior Administration lawyers, including Jim Haynes, General Counsel to the Department of Defense, John Rizzo, acting CIA General Counsel, David Addington, Counsel to the Vice President, and Michael Chertoff head of the Criminal Division at the Department of Justice, visited GTMO. An after action report (TAB 6) produced by a military lawyer after the visit noted that one purpose of the trip was to receive briefings on “intel techniques.”

On October 2, 2002, a week after John Rizzo, the acting CIA General Counsel visited GTMO, a second senior CIA lawyer, Jonathan Fredman, who was chief counsel to the CIA’s CounterTerrorism Center, went to GTMO, attended a meeting of GTMO staff and discussed a memo proposing the use of aggressive interrogation techniques. That memo had been drafted by a psychologist and psychiatrist from GTMO who, a couple of weeks earlier, had attended the training given at Fort Bragg by instructors from the JPRA SERE school.

While the memo remains classified, minutes from the meeting where it was discussed are not. Those minutes (TAB 7) clearly show that the focus of the discussion was aggressive techniques for use against detainees.

When the GTMO Chief of Staff suggested at the meeting that GTMO “can’t do sleep deprivation,” LTC Beaver, GTMO’s senior lawyer, responded “Yes we can – with approval.” LTC Beaver added that GTMO “may need to curb the harsher operations while [International Committee of the Red Cross] is around.”

Mr. Fredman, the senior CIA lawyer, suggested it’s “very effective to identify [detainee] phobias and use them” and described for the group the so-called “wet towel” technique, which we know as waterboarding. Mr. Fredman said “it can feel

like you're drowning. The lymphatic system will react as if you're suffocating, but your body will not cease to function."

And Mr. Fredman presented the following disturbing perspective of our legal obligations under anti-torture laws, saying "It is basically subject to perception. If the detainee dies you're doing it wrong."

[11] November 17, 2008 letter from Jonathan M. Fredman to the Senate Armed Services Committee. <http://washingtonindependent.com/42166/fredman-memo>

[12] Scott Shane and Mark Mazzetti, "Tapes by C.I.A. Lived and Died to Save Image" The New York Times, December 30, 2007
http://www.nytimes.com/2007/12/30/washington/30intel.html?pagewanted=1&_r=1

[13] Scott Horton, "Six Questions for Jane Mayer, Author of The Dark Side," Harpers, July 14, 2008. <http://www.harpers.org/archive/2008/07/hbc-90003234>

[14] Major General George R. Fay, U.S. Army; AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th MI Brigade. The following excerpt from the Generals' report address the CIA culpability according to General Fay for the abuses at Abu Ghraib:

(4) (U) The term Other Government Agencies (OGA) most commonly referred to the Central Intelligence Agency (CIA). The CIA conducted unilateral and joint interrogation operations at Abu Ghraib. The CIA's detention and interrogation practices contributed to a loss of accountability and abuse at Abu Ghraib. No memorandum of understanding existed on the subject interrogation operations between the CIA and CJTF-7, and local CIA officers convinced military leaders that they should be allowed to operate outside the established local rules and procedures. CIA detainees in Abu Ghraib, known locally as "Ghost Detainees," were not accounted for in the detention system. With these detainees unidentified or unaccounted for, detention operations at large were impacted because personnel at the operations level were uncertain how to report or classify detainees.
[p. 43 of 177, fay82504.pdf]

(4) (U) Interaction with OGA and other agency interrogators who did not follow the same rules as U.S. Forces. There was at least the perception, and perhaps the reality, that non-DOD agencies had different rules regarding interrogation and detention operations. Such a perception encouraged Soldiers to deviate from prescribed techniques.
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SUBJECT: (U) AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th MI Brigade

The lack of OGA adherence to the practices and procedures established for accounting for detainees eroded the necessity in the minds of Soldiers and civilians for them to follow Army rules.

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(1) (U) Although the FBI, JTF-121, Criminal Investigative Task Force, ISG and the Central Intelligence Agency (CIA) were all present at Abu Ghraib, the acronym “Other Government Agency” (OGA) referred almost exclusively to the CIA. CIA detention and interrogation practices led to a loss of accountability, abuse, reduced interagency cooperation, and an unhealthy mystique that further poisoned the atmosphere at Abu Ghraib.

(2) (U) CIA detainees in Abu Ghraib, known locally as “Ghost Detainees,” were not accounted for in the detention system. When the detainees were unidentified or unaccounted for, detention operations at large were impacted because personnel at the operations level were uncertain how to report them or how to classify them, or how to database them, if at all. Therefore, Abu Ghraib personnel were unable to respond to requests for information about CIA detainees from higher headquarters. This confusion arose because the CIA did not follow the established procedures for detainee in-processing, such as fully identifying detainees by name, biometric data, and Internee Serial Number (ISN) number.

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[15] Alfred W. McCoy, *The Hidden History of CIA Torture: America's Road to Abu Ghraib*, p. 87 of 177; Owl Books, 2006.

[16] The full list of techniques taken directly from in May 10th 2005 Bradbury memos:

- 1) Dietary manipulation
- 2) Forced nudity
- 3) Attention grasp
- 4) Walling
- 5) Facial hold
- 6) Facial slap
- 7) Abdominal slap
- 8) Cramped confinement
- 9) Wall standing
- 10) Stress positions
- 11) Water dousing
- 12) Sleep deprivation
- 13) Waterboarding

[17] Phillippe Sands, *The Green Light*, Vanity Fair, May 2008

[18] See Ali Soufan testimony here:
<http://emptywheel.firedoglake.com/2009/05/13/soufans-narrative>

and here:

http://judiciary.senate.gov/hearings/testimony.cfm?id=3842&wit_id=7906

[19] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the United Nations General Assembly in 1984 and entered into force on June 26, 1987.

It defines torture as any act by which: “severe pain or suffering, whether physical or mental; is intentionally inflicted on a person; for such purposes as”:

- a) obtaining from him/her or a third person information or a confession
- b) punishing him/her for an act s/he or a third person has committed or is suspected of having committed
- c) intimidating or coercing him/her or a third person,
- d) or for any reason based on discrimination of any kind;

When such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*

<http://www.amnestyusa.org/war-on-terror/reports-statements-and-issue-briefs/torture-and-the-law/page.do?id=1107981>

The Convention Against Torture is implemented by Sections 2340-2340A of title 18 of the United States Code.

APPLICABLE LAW PROHIBITING TORTURE

The U.S. Constitution -- The Supreme Law of the Land

As the initial U.S. report to the *UN Convention against Torture* wrote:

“...the protections of the right to life and liberty, personal freedom and physical integrity found in the Fourth, Fifth and Eighth Amendments to the United States Constitution provide a nationwide standard of treatment beneath which no governmental entity may fall.” [49, p. 13, Initial Report submitted by the United States to the *Convention against Torture* in 1999 (CAT/C/28/Add.5)]

U.S. citizens are guaranteed these protections. Jose Padilla is one example of a U.S. citizen who was held without charge for several years, and subject to the extreme interrogation techniques advocated by Mr. Fredman. Citizens of other countries are similarly protected when in United States custody. The Eighth Amendment specifically prohibits cruel and unusual punishment.

The Geneva Convention (1949) EXHIBIT H

Common Article 3 of the *Geneva Conventions* broadly prohibits "violence to life and person," and specifically prohibits "mutilation, cruel treatment and torture" including "outrages upon personal dignity, in particular humiliating and degrading treatment".

These terms include "other forms of cruel, inhuman and degrading treatment or punishment."

The drafters of common Article 3 avoided a detailed list of prohibited acts in order to ensure that it had the broadest possible reach, leaving no loophole.

[<http://www.amnestyusa.org/war-on-terror/reports-statements-and-issue-briefs/torture-and-the-law/page.do?id=1107981>]

The **Army Field Manual** on detainee treatment and interrogation is predicated on the Geneva Convention and specifically requires humane treatment of prisoners and detainees. **EXHIBIT B**

UN Convention Against Torture (1994)

Adopted by the United Nations in 1984, the Convention requires states to take effective measures to prevent torture within their borders. The United States ratified the Convention against Torture in October 1994 and it entered into force for the United States on November 20, 1994. To date there are over 146 nations that are party to the convention. **EXHIBIT H.**

Article 2(2) of the Convention states that:

"No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

***Hamdan v. Rumsfeld* (2002) -- Due Process and Legal Protections**

The Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), held that the Geneva Conventions are applicable to accused members of al-Qaeda. Thus, due process and protections apply to all detainees in U.S. custody, including those in military prisons (Guantanamo, Abu Grahیب, Bagram) as well as so-called "black sites" in Poland, Diego Garcia and elsewhere.

U.S. Criminal Code – EXHIBIT M

TITLE 18 § 2340A. Torture

(a) Offense.— Whoever 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.

(b) Jurisdiction.— There is jurisdiction over the activity prohibited in subsection (a) if—
(1) the alleged offender is a national of the United States; or
(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy.— A person who conspires to commit an offense under this section shall

be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

TITLE 18 § 2441. War crimes

(a) Offense.— Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances.— The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) Definition.— As used in this section the term “war crime” means any conduct—
(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

Sincerely,



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