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June 29, 2009

New York and Bronx Counties:
Departmental Disciplinary Committee for the First Department
61 Broadway, 2nd Floor
New York, NY 10006

Re: Complaint against Scott W. Muller

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 the State of New York, herein lodges a complaint against Scott W. Muller, General Counsel, CIA (October 2002- July 2004); Davis, Polk & Wardwell, 450 Lexington Avenue, New York, NY 10017. Phone: 212-450-4359; Fax: 212-450-3359. New York Bar Registration Number: 1008358. VR requests the *Appellate Division of State Supreme Court* take immediate disciplinary action against Mr. Muller for violation of the *NY Rules of Professional Conduct*.

SUMMARY OF COMPLAINT

Scott W. Muller breached his legal duty and violated the *New York Rules of Professional Conduct* by legally sanctioning the 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 during his tenure as General Counsel at the CIA.

Specifically, Mr. Muller ignored over two centuries of historical and legal precedents, fell short of the bar of the “good faith” and due diligence imperative, and advanced suspect legal analysis and prescriptions for detainee interrogation well outside of legal norms, thereby perpetuated 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. Muller, in accepting to senior legal position with the CIA accepted legal analysis that led to continued detainee abuses, and, evidence suggests, deaths at overseas U.S. military facilities ^[3].

In these actions Mr. Muller 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 at least one *New York Rules of Professional Conduct*. Mr. Muller did not act in “good faith” in exercising required due diligence for his client. Rather he acted in a manner that was illegal, extremely prejudicial, grossly incompetent and clearly immoral.

Therefore, VR calls upon the *Appellate Division of State Supreme Court* [NY] to act immediately to disbar Mr. Muller 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 Scott W. Muller in Torture Policy

As General Counsel to the CIA, Scott W. Muller advanced and defended a policy of torture and a 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. In response to queries from Congress and a CIA Inspector General report, as well as opposition from senior officials in the Departments of Defense and Justice, Mr. Muller demonstrated his support for the early suspect legal findings of the Office for Legal Counsel (DoJ) that were challenged during tenure as General Counsel.

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

The CIA's 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 Acting General Counsel John Rizzo in early 2002 and continued by Scott W. Muller beginning in October of 2002 sprang from, and tapped a long history of CIA programs incorporating brutal, traumatizing, inhumane torture techniques.

Interrogation is defined by Merriam-Webster Dictionary as "formal and systematic" questioning. However, CIA questioning of spies or detainees, whether during the Cold War or post 9/11 did not stand alone. It 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 many cases overt violence.

Beginning sometime after 9/11, before his formal collaboration with the Department of Justice, Mr. Rizzo approved a program that was then 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.

The *Village Voice's* Nat Hentoff wrote that abusive interrogation policy was advanced first at Guantanamo by a team of ten lawyers who met with their military counterparts at the detention facility on October 10, 2002. At this meeting, Jonathan Fredman, a lawyer with the CIA's Counterterrorism Center and a subordinate to Mr. Rizzo advocated for, and defended the application of harsh interrogation techniques at Gitmo in direct violation of Uniform Code of Military Justice, over objections and concerns raised by lower level military lawyers:

Said Fredman: "Torture is basically subject to perception. If the detainee dies, you're doing it wrong." A military lawyer at Guantánamo, Lieutenant Colonel Diane Beaver, apprehensively noted: "We will need documentation to protect us."^[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.

The stage had been set for this exchange after Mr. Rizzo participated in a meeting of the most high-level senior Bush administration lawyers at the Guantanamo Bay facility on September 25, 2002. Legal counsel from the President's office (Alberto Gonzales), the Vice-President's office (David Addington), the Department of Defense (Michael J.

Haynes II), and the Department of Justice (Alice Fisher) along with Mr. Rizzo representing the CIA were there to observe and “green light” a brutal interrogation.^[11] That program had begun months before with Zubayhah in Thailand but was continued in a carefully prescribed program (minus waterboarding) with detainees at Guantanamo Bay, much of which was carried out before legal opinions were obtained by the CIA from the Office of Legal Counsel at the Department of Justice.

The abuse was then expanded again to Bagram in Afghanistan and Abu Ghraib prison in Baghdad, Iraq where hundreds of photos documented what had occurred.

According to Mr. Muller’s own testimony during his confirmation hearing^[12] he was briefed by his predecessor Mr. John Rizzo, in advance of taking questions from Senators during the hearing. We must assume these briefings detailed the waterboarding and other techniques conducted under the auspices of the CIA prior to Mr. Muller’s appointment. Mr. Muller would later seek permission from the White House to destroy videotapes of the CIA led interrogations.^[13] There is no evidence whatsoever of any changes made in extreme interrogations policy after Mr. Muller assumed the office of CIA General Counsel in October of 2002 despite the objections raised by those with far more international and national security law than Mr. Muller [see #4 below] and the fact that a simple google or encyclopedia search by Mr. Muller search would have revealed the fact that the U.S. government has prosecuted the crime of waterboarding multiple times in past decades as discussed by a former JAG officer in a well-sourced Washington Post editorial in 2007.^[14]

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^[15], the soon to be de-classified 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^[16] 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.^[17]

CIA hired contractors had a direct role in the infamous instances of abuse captured in the photos that were eventually released publicly.

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.^[18]

4) Re: Assessment of motive behind, and content 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.^[19] The second May 10th memo addressed the use of combinations of these techniques. These memos were preceded by the August 2002 memo authored by John Yoo and Jay Bybee, which originally 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 first by Acting General Counsel Mr. Rizzo, and then by Mr. Muller, 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.

Scott W. Muller succeeded Mr. Rizzo becoming General Counsel in October of 2002. Policies at the CIA did not change during his tenure, one that ended when he resigned in July of 2004. Changes in interrogation policy was only forced after Office of the Inspector General issued their report, known as the “Special Review” in May of 2004, two months before Muller’s resignation. Mr. Muller clearly demonstrated his own hands-

on roll in the CIA's ongoing interrogation program because according to a source cited by Jane Mayer in *The Dark Side*:

The source alleged that "Chertoff was on the phone" with the CIA's general counsel, Scott Muller, "almost every day. Sometimes several times a day. He had to advise them at every turn about what was criminal."^[20]

In addition to showing how closely he monitored the program, this account also demonstrates Muller's concerns over legal questions being raised in the application of the program during the time it was under intense scrutiny by the CIA's Office of Inspector General. When Helgerson's 'Special Review' was released in April of 2004 Mr. Muller took issue with its finding that the CIA program violated the Convention Against Torture. The new head of the Office of Legal Counsel, Jack Goldsmith was called upon to resolve the dispute:

Goldsmith was required to review the report in order to settle a sharp dispute that its findings had provoked between the Inspector General, Helgerson, who was not a lawyer, and the CIA's General Counsel, Scott Muller, who was. After spending months investigating the Agency's interrogation practices, the special review had concluded that the CIA's techniques constituted cruel, inhuman, and degrading treatment, in violation of the international Convention Against Torture. But Muller insisted that every single action taken by the CIA toward its detainees had been declared legal by John Yoo.^[21]

Whereas CIA's General Counsel Mr. Muller clearly concurred with, and accepted the Department of Justice original legal analysis provided by John Yoo and Jay Bybee, the Navy's General Counsel Alberto J. Mora stated definitively that the practices in question were unlawful. Upon learning of abuses at Guantanamo, Mora 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.^[22]

Whereas Mr. Muller accepted, advanced and defended the program within the CIA, Jay Bybee's replacement at the OLC, Jack Goldsmith, concurred with Mora and rejected the practices and directly challenged their legality.

The clear consensus on this issue today is that the CIA, in accepting the Yoo/Bybee analysis, got it wrong and evidence clearly shows that Mr. Muller acted consistently to cover for an illegal program after it had already been implemented. Mr. Muller defended procedures carried out on detainees, rather than apply the actual law and cite historical precedent that would have been revealed by a direct reading of applicable statutes and simple google search for previous U.S. prosecutions of those who conducted waterboarding.

[*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."^[23]

5) Re: Scott W. Muller testimony during his nomination hearing before a Senate Select Committee on Intelligence, October 9, 2002

During his testimony before the Intelligence Committee prior to his formal confirmation, Mr. Muller voiced his commitment to the rule of law:

I believe that the job of General Counsel of the Central Intelligence Agency is to provide timely, objective and independent advice to assist the DCI, the Agency and the community as a whole in accomplishing their missions effectively and doing so in a way that is fully consistent with the laws and Constitution of the United States.^[24]

In consideration of this complaint it's vital to recall that at this juncture, Mr. Rizzo and the Office of General Counsel at the CIA had already approved the use of abusive techniques in the questioning of high-value detainees. In fact, one of those detainees, according to leaked details from the CIA's Inspector General's report, had already been waterboarded a total of 83 times by CIA interrogators.

Thus, given the circumstances, Mr. Muller had a vested interest in what Mr. Rizzo later called "an aggressive, expansive reading" from the Office of Legal Counsel. The implications of anything other than a retroactive legal sanctioning (by the OLC) of the "cruel, inhuman and degrading treatment" cited by CIA IG Helgerson, would possibly mean criminal culpability for Mr. Rizzo, and others who were directly involved prior to Mr. Muller arrival at the CIA.

Mr. Muller's position on the 'enhanced interrogation' program would be put to the test early in his tenure following a meeting with then Chairwoman of the House Intelligence Committee, Rep. Jane Harmon. In a letter responding to questions about the legality of the program he described to Rep. Harmon in their meeting Mr. Muller inferred his concurrence with, and acceptance of, Executive Office legal opinions as referenced in a letter to Rep. Jane Harmon in which he failed to fully respond to Rep. Harmon's queries.^[25] This was followed by a far more explicit defense by Mr. Muller when he was confronted with the Inspector General's 'Special Review' completed in April of 2004, roughly a year later. Entirely aside from pending investigations and criminal culpability, this testimony exposed his duplicity and lack of due diligence relative to established and applicable law.

The record is now clear and the legal counsel and maneuverings of the Bush lawyers has now been sufficiently exposed. As a result Mr. Muller has been directly implicated in abuse of detainees amounting to torture, or at minimum acts prohibited by the Convention Against Torture.

Through the course of his public testimony on October 9, 2002 at his Senate confirmation hearing, Mr. Muller expressed extraordinary deference and respect for international law and the U.S. Constitution. However, in practice, even when challenged by those with far more experience in international and national security law, Mr. Muller fell in line with

those who chose to ignore it, and defended actions which have been increasingly deemed unlawful.

Summary

Scott W. Muller, from October of 2003 until July of 2004 was the top lawyer within the legal section of the CIA that advanced a program of “cruel, inhuman and degrading” treatment following decades of similar 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” and other 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. This policy continued through Mr. Muller’s entire tenure as the senior most lawyer within the CIA and was only curtailed following the release of the CIA’s Inspector General Report on May 7, 2004, after which, two months later, Mr. Muller resigned his position.

Even after being challenged by those with far more national security law experience including Rep. Jane Harmon, the Navy’s Alberto Mora and the DoJ’s Jack Goldsmith, Mr. Muller stood in defense of inhumane, degrading treatment this esteemed group of lawyers and officials deemed unlawful. In doing so, he violated his own sworn testimony and commitment to the rule of law and U.S. Constitution expressed during his confirmation hearings.

CASE FOR DISBARMENT-New York Rules of Professional Conduct

The case for Mr. Muller’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, and in particular in his utter lack of diligence, Mr. Muller did not.

Rule 1.3 (Diligence) reads:

- (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
- (b) A lawyer shall not neglect a legal matter entrusted to the lawyer.

Ignoring established historical and legal precedent and established U.S. law, Mr. Muller failed to confirm the legality of waterboarding by close examination of the applicable law and historical precedent. Even the most cursory of google searches or review of the historical record would have revealed the fact that the U.S. Department of Justice has for decades considered waterboarding to be a crime and had in fact prosecuted those who carried out waterboarding. If he had done so, he could not have, in good conscience,

defended the interrogation program as he did in response to the ‘Special Review’ by the Inspector General of the CIA. If he in fact confirmed waterboarding as a crime and defended it nevertheless then we have a serious ethical breach in addition to a failure of diligence.

Senator McCain addressed the enormity of the issue of waterboarding in an interview with George Stephanopoulos of ABC News:

"Anyone who says they don't know if waterboarding is torture or not has no experience in the conduct of warfare and national security. This is a fundamental about America. It isn't about an interrogation technique. It isn't about whether someone is really harmed or not. It's about what kind of a nation we are. We are a nation that takes the moral high ground. If we engage in a practice that was invented in the Spanish inquisition, which was used by Pol Pot in Cambodia in that great genocide, is now being used on Buddhist monks in Burma, and we're going to be the same as that? How do we keep the moral high ground in the world? I would never use that, and find some other practices."^[26]

After becoming General Counsel the questions and doubts concerning the legality of the CIA's interrogation program was likely his highest priority as evidenced by his frequent calls to Michael Chertoff, the head of the Criminal Division within the DoJ. Scrutiny greatly intensified once the Inspector General began his inquiry. And yet Mr. Muller failed to conduct his own full review of the legality of the policies and practices approved by his predecessor relative to possible violations of US law against torture, or if he did such findings never saw the light of day. And thus the program continued under his legal watch, unchallenged by the senior lawyer at the CIA, who could have shut it down with sound legal basis and established historical precedent. However, instead Mr. Muller stood up to defend the program repeatedly and sought repeated assurances from the DoJ that it was legal.

In so doing, relative to Rule 1.3 and the imperative of exercising “diligence” for his client, Mr. Muller was grossly negligent. To fail to conduct due diligence in a case involving as grave a question as torture is egregious indeed, however, to fail to do so after admitting under oath to his own lack of experience in national security law is particularly egregious.^[27]

In so doing, Mr. Muller clearly violated Rule 1.3 (b) of the New York Rules of Professional Conduct. Therefore, VR calls upon the *Appellate Division of State Supreme Court* to take disciplinary action against Scott W. Muller, and revoke his license to practice law in the State of New York.

KEY DOCUMENTS IN EVIDENCE

In order to build the case for disciplinary action against 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) Memo released by the Senate Intelligence Committee
<http://intelligence.senate.gov/pdfs/olcopinon.pdf>
- 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, Exhibit J.
- 6) 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).]

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 J

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.

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/387101gl20090211.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>
- [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>
- [10] Nat Hentoff, A CIA Lawyer's Smoking Gun, Village Voice, July 8th 2008 at 10:28am
<http://www.villagevoice.com/2008-07-09/news/a-cia-lawyer-s-smoking-gun/>
- [11] Phillippe Sands, The Green Light, Vanity Fair, May 2008
- [12] S.Hrg. 107-841, Nomination of Scott W. Muller to be General Counsel of the Central Intelligence Agency, Hearing before the Select Committee on Intelligence, U.S. Senate, 107th Congress, Second Session; October 9, 16, 2002.
- [13] Mark Mazzetti, "C.I.A. Was Urged to Keep Interrogation Videotapes," *The New York Times*, December 8, 2007; See also History Commons profile of Scott W. Muller;
http://www.historycommons.org/entity.jsp?entity=scott_muller_1
- [14] Evan Wallach, "Waterboarding Used to Be a Crime," Sunday, November 4, 2007; Page B01, The Washington Post. <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/02/AR2007110201170.html>
- [15] 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
- [16] 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>
- [17] 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.
[p. 24 of 177]

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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.
[p. 73 of 177]

(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.

[p. 87 of 177]

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

[19] 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

[20] Jane Mayer, *The Dark Side: The Inside Story of How The War on Terror Turned into a War on American Ideals*; p. 154. Doubleday, July 2008.

[21] Jane Mayer, *The Dark Side: The Inside Story of How The War on Terror Turned into a War on American Ideals*; p. 288. Doubleday, July 2008.

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

[23] See Ali Soufan testimony here:

<http://emptywheel.firedoglake.com/2009/05/13/soufans-narrative>

[24] S.Hrg. 107-841, Nomination of Scott W. Muller to be General Counsel of the Central Intelligence Agency, Hearing before the Select Committee on Intelligence, U.S. Senate, 107th Congress, Second Session; October 9, 16, 2002.

[http://www.fas.org/irp/congress/2002_hr/100902muller.html]

[25] Letter from Scott W. Muller to Rep. Jane Harmon:

http://www.house.gov/apps/list/press/ca36_harman/mullerletter.pdf. Letter from Jane Harmon to Scott W. Muller:

http://www.house.gov/apps/list/press/ca36_harman/harmanletter.pdf

[26] Massimo Calabresi, "Squeezing Mukasey on Torture," *TIME*, Tuesday, Oct. 30, 2007; <http://www.time.com/time/nation/article/0,8599,1677612,00.html>

[27] S. Hrg. 107-841. Responding to a question about his experience from Senator Rockefeller Mr. Muller admitted: "I have no direct intelligence or national security

experience.”

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. Muller. 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)

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 L.

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."

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the United Nations General Assembly in 1984:

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.

***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

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.

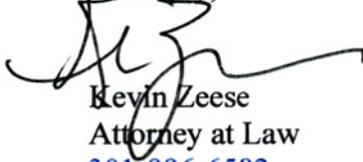
TITLE 18 § 2441. War crimes

(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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