



Access to Justice for Victims of Torture in the National Security Context

Under the George W. Bush administration, many hundreds of people were tortured and abused by the CIA and Department of Defense, primarily in Afghanistan, Guantánamo, and Iraq, but also in other countries after unlawful rendition. Yet, to date, there has been little accountability for abuses including torture, arbitrary detention and enforced disappearances.ⁱ

In January 2009, shortly after entering office, President Obama took important steps to dismantle the torture program. Through executive orders, President Obama ordered the CIA to close its secret prisons, banned the CIA from all but short-term transitory detention, and put the CIA under the same interrogation rules that apply to the military.ⁱⁱ But in the following years—as the ACLU and other NGOs have documented—the Obama administration undermined that early promise by thwarting accountability for torture and other abuses:

- No survivor of the U.S. torture program has had their day in court. On behalf of torture victims, the ACLU and other human rights organizations challenged the mistreatment in court in a number of lawsuits. The government succeeded in extinguishing those lawsuits based on procedural arguments.
- For example, the Obama Administration embraced the Bush Administration's claim that, by invoking "state secrets," the government can not only restrict discovery but can quash an entire lawsuit—without demonstrating the validity of their claim to a judge.
- The federal government has also used the judicially-created doctrine of qualified immunity to dismiss civil suits alleging torture; cruel, inhuman, or degrading treatment; forced disappearance; and arbitrary detention without consideration on the merits.ⁱⁱⁱ
- Efforts at criminal accountability have not resulted in criminal charges, except against lower-ranking service members and a single government contractor.
- The U.S. government has fought to keep secret many documents that would allow the public to understand the extent of the abuse.
- Even as top Bush administration officials were crafting and implementing torture policies, an untold number of U.S. service members and civilian officials risked their careers by objecting to official torture and other cruelty. The efforts of these individuals are not well known and the government has not sufficiently recognized them.
- With domestic avenues for relief closed, a number of victims of U.S. torture and abuse have filed petitions against the United States with the Inter-American Commission on Human Rights. The US government has yet to respond to any of the petitions, including one filed over six years ago on behalf of Mr. Khaled El Masri.^{iv}

In 2012, the U.S. Senate's committee on Intelligence adopted a 6,000-page report on the CIA's use of torture, the most comprehensive to date. With the anticipated release of the Senate Intelligence Committee's several hundred-page summary of the report, the United States has a critical opportunity to demonstrate its commitment to the rule of law and provide long-overdue accountability for the Bush administration's illegal torture program.

Recommendations

1. Ensure that all cases of unlawful killing, torture or other ill- treatment, unlawful detention, or enforced disappearance are effectively, independently and impartially investigated. Ensure that perpetrators including, in particular, persons in command positions, are prosecuted and sanctioned if warranted by the evidence and the law.
2. Release documents relating to the mistreatment of detainees, including:
 - a. The memorandum issued by President Bush on September 17, 2001 authorizing the CIA to establish secret overseas interrogation facilities.
 - b. Hundreds of CIA cables describing the use of waterboarding and other harsh interrogation techniques.
 - c. Over 2,000 photographs of abuse at detention facilities throughout Iraq and Afghanistan.
3. Appoint an independent body to provide compensation and rehabilitation services to those who suffered torture or other cruel, inhuman, or degrading treatment. President Obama should publicly acknowledge and apologize to the victims of U.S. torture policies.
4. Congress should permanently ban the CIA from operating any detention facility or holding any person in its custody, and subject the CIA to the same interrogation rules that apply to the military.
5. President Obama should formally honor the members of the military, the CIA, and other public servants who, when our nation went off course, stayed true to our most fundamental ideals.

ⁱ See ACLU, *A Call To Courage: Reclaiming Our Civil Liberties Ten Years After 9/11* (September 2011), available at <https://www.aclu.org/files/assets/acalltocourage.pdf>.

ⁱⁱ See Executive Order No. 13,491, 74 Fed. Reg. 4891 (Jan. 22, 2009) (Ensuring Lawful Interrogations), http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/.

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

^{iv} *El-Masri v. United States*, Petition No. 419-08, Inter-Am. Comm'n H.R. (Apr. 9, 2008), available at www.aclu.org/files/pdfs/safefree/elmasri.iachr.20080409.pdf.