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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
TUCSON DIVISION

USA

V

NO. 4:07-CR-00575-TUC-HCE

STEPHEN M. KELLY

USA

V

NO. 4:07-CR-00576-TUC-HCE

LOUIS VITALE

Memorandum in Support of Motion to Dismiss Prosecution of Non-Violent First
Amendment Protest Against Illegal Torture

Introduction

The reasons for this request for dismissal of the prosecution of Fathers Vitale and Kelly are the following:

Torture is illegal under U.S. and International Law;

Despite its illegality, the U.S. has an extensive history of use of torture in interrogations and intelligence gathering before September 11, 2001;

After September 11, 2001, the U.S. has tried politically to redefine torture to allow torture in interrogations and intelligence gathering;

After September 11, 2001, the U.S. has tried politically to redefine who are prisoners of war to allow the use of torture in interrogations and intelligence gathering;

After September 11, 2001, the U.S. has used torture in interrogations and intelligence gathering in Afghanistan, Guantanamo, and Iraq;

Legal doctrine protects non-violent protest against the illegal use of torture and this prosecution must be dismissed.

Section A. Torture is Illegal Under U.S. and International Law

United States and International law prohibits torture and other abusive treatment of persons in custody.

The United States has incorporated international prohibitions against torture into its domestic law, reporting to the Committee Against Torture that: “Every act of torture within the meaning of the Convention is illegal under existing federal and state law, and any individual who commits such an act is subject to penal sanctions as specified in criminal statutes. Such prosecutions do in fact occur in appropriate circumstances. Torture cannot be justified by exceptional circumstances, nor can it be excused on the basis of an order from a superior officer.”¹

For instance the Uniform Code of Military Justice serves as the military’s criminal code, and military personnel who abuse prisoners can be prosecuted by a court-martial under numerous provisions of the code.² In fact, military personnel have been court-martialed for abuses against detainees in the Abu Ghraib Prison in Iraq.³

¹ 1999 Initial Report of the United States to the United Nations Committee Against Torture, *available at* http://www.state.gov/www/global/human_rights/torture_index.html

² Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2000), *available at* <http://www.au.af.mil/au/awc/awcgate/ucmj.htm>. *See* 10 U.S.C. § 928 (assault); 10 U.S.C. § 918 (murder); 10 U.S.C. §924 (maiming).

³ Examples of cases where soldiers and officers involved in abuse at Abu Ghraib have been tried and criminally convicted in military courts for their criminal actions: *United States v. Specialist Jeremy Sivits*, *United States v. Specialist Armin Cruz*, *United States v. Staff Sergeant Ivan Frederick*, *United States v. Specialist Charles Graner*, *United States v. Sergeant Javal Davis*, *United States v. Specialist Roman Krol*, *United States v. Specialist Megan Ambuhl*, *United States v. Specialist Sabrina Harman*, *United States v. Specialist Lynndie England*. Smith. *See* James W. Smith, III., *A Few Good Scapegoats: The Abu Ghraib Courts Martial and the Failure of the Military Justice System*, 27 *Whittier L. Rev.* 671, 708-22 (2006). (discussing each case). *See Abu Ghraib Dog Handler Gets 6 Months*, CBS News, Mar. 22, 2006. (discussing Sergeant Smith’s

Additionally, 18 USC Section 2441, the War Crimes Act of 1996, makes it a crime for United States nationals or military officials to commit war crimes as defined in the Geneva Conventions. War crimes included violations of Article 3 to the Geneva Conventions, prohibiting “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . . outrages upon personal dignity, in particular humiliating and degrading treatment.”⁴

The United States also adopted a federal torture statute, 18 USC Section 2340A, in 1994 making it a criminal offense and provides for the prosecution of any person present in the United States who, while outside of the United States commits or attempts to commit torture. Torture under this statute is defined as “an act committed by a person acting under the color of state law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” 18 USC 2340. Anyone found guilty of committing torture under this statute can be fined or imprisoned for up to 20 years, or both, and if death results from the torture committed a person found guilty shall be sentenced to life in prison or death.

Under the Military Extraterritorial Act of 2000 military contractors working for the Department of Defense and members of the Armed Forces may be prosecuted in U.S. federal courts, for certain crimes committed while employed or accompanying United States forces overseas. 18 USC 3261-3267. Crimes covered by the act included those that would constitute an offense punishable by imprisonment for more than one year if the conduct had been engaged in within the United States. 18 U.S.C. § 3261(a). The Department of Defense has not yet issued the necessary implementing regulations required by law and so this act has not yet been tested.

The Geneva Conventions, ratified by the United States in 1955, additionally obligates the United States to abstain from committing acts of torture. The Geneva

conviction and sentence).

<http://www.cbsnews.com/stories/2006/03/22/iraq/main1430842.shtml>

⁴ Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, available at <http://www.yale.edu/lawweb/avalon/lawofwar/geneva03.htm#art3>

Convention (III) Relative to the Treatment of Prisoners of War concerns prisoner of war.⁵ Where as the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War protects civilian internees.⁶ Prisoners of war and civilian internees may be questioned but physical or moral coercion is prohibited in obtaining information.⁷

Torture or inhumane treatment of anyone protected by the Geneva Convention IV or prisoner of war is considered war crimes.⁸ Detainees in a military occupation or armed conflict are also protected by Geneva Convention Article 3, which prohibits violence against anyone, and in particular prohibits murder, mutilation, cruel treatment, torture, outrages on personal dignity, or humiliating and degrading treatment.⁹ President Bush removed protections of the Geneva Conventions from al-Qaeda and the Taliban, but ordered that detainees otherwise be treated humanely and in a manner consistent with the Geneva Conventions, to the extent appropriate and consistent with military necessity.¹⁰

The United States has also ratified the International Convention on Civil and Political Rights, as well as the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, both of which prohibit torture.¹¹ The United States signed the Convention Against Torture with certain reservations, declaring “[t]hat the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment', only insofar as the term 'cruel,

⁵ Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 17, *available at* <http://www.unhchr.ch/html/menu3/b/91.htm>.

⁶ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 31, Aug. 12, 1949, *available at* <http://www.yale.edu/lawweb/avalon/lawofwar/geneva07.htm>.

⁷ Geneva Convention III, art. 13; Geneva Convention IV, art. 31.

⁸ Geneva Convention III, art. 130; Geneva Convention IV, art. 147.

⁹ Geneva Convention III, art. 3.

¹⁰ President of the United States Memorandum, Feb. 7, 2002, *See* Final Report of the Independent Panel to Review Department of Defense Detention Operations, James R. Schlesinger et al., U.S. Department of Defense, at Appendix C, *available at* <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>.

¹¹ *See* U.S. Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. S17486-01 (1990). Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, [hereinafter Convention Against Torture] *available at* <http://www.yale.edu/lawweb/avalon/diana/undocs/33198-5.html>. International Covenant on Civil and Political Rights, [hereinafter ICCPR] *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."¹²

Section B. Despite its illegality, the U.S. has an extensive history of use of torture in interrogations and intelligence gathering before September 11, 2001

Though most U.S. citizens are unaware of the country's history of the use of torture in interrogations, unfortunately it is extensive. There are scholarly books and articles about this topic, but a brief history is in order.¹³

During the Vietnam war, in 1971 testimony before the U.S. Congress, K. Barton Osborn, a military intelligence veteran, described using techniques involving starvation, electrical shocks to sexual organs of Vietnamese women and men, and "the insertion of the six inch dowel into the ear canal of one of my detainee's ears and the tapping through the brain until he died..." These efforts were part of a country-wide interrogation collection system, part of the covert "Phoenix" program instituted by the CIA that taught and used torture in interrogation ranging from electric shock, beatings, rape, even murder, resulted in the deaths of over 9000 Vietcong suspects over a 14 month period in the early 1970s. Osborn testified that these techniques of torture could be "found in the DEFENSE COLLECTION INTELLIGENCE MANUAL issued to him in training at Fort Holabird" (Maryland precursor to Fort Huachuca as center of Military Intelligence).¹⁴

¹² See The U.N. Convention Against Torture Overview of U.S. Implementation Policy Concerning the Removal of Aliens, March 11, 2004, at CRS 4, *available at* <http://www.au.af.mil/au/awc/awcgate/crs/rl32276.pdf>.

¹³ For more on this topic, see: Jennifer K. Harbury, *TRUTH, TORTURE AND THE AMERICAN WAY: The History and Consequences of U.S. Involvement in Torture* (Beacon Press 2005); Jane Mayer, "Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program," *NEW YORKER*, Feb. 14, 2005 – available online at: http://www.newyorker.com/archive/2005/02/14/050214fa_fact6 ; Alfred McCoy, *A QUESTION OF TORTURE: CIA Interrogation from the Cold War to the War on Terror* (Henry Holt 2006).

¹⁴ Alfred McCoy, *A QUESTION OF TORTURE: CIA Interrogation from the Cold War to the War on Terror* (Henry Holt 2006) pages 62-71. Specific quote of Barton at page 68.

Though U.S. involvement in Vietnam ended, U.S. involvement in torture did not, as the focus of interrogations turned to Central and South America.

Over a 26 year period, from 1966 to 1991, the U.S. Army Intelligence Center in Arizona sent out thousands of counter-insurgency manuals through what has been called “Project X”. Project X was the Army’s top-secret program for transmitting Vietnam’s lessons to South America.¹⁵

These manuals, written in Spanish, explicitly included violent counter-terror tactics instructing “motivation by fear, payment of bounties for enemy dead, false imprisonment, executions and the use of truth serum.”¹⁶

These manuals were used in teaching Latin American militaries at the U.S. Army School of the Americas (SOA) from 1966 to 1976 while it was in Panama. Later the manuals were used by the U.S. Army Southern Command in Colombia, Peru, Ecuador, El Salvador and Guatemala. When the SOA moved to Fort Benning Georgia it continued to issue hundreds of the manuals into the early 1990s to students from these and other nations such as Bolivia, Venezuela, and Honduras who enrolled in intelligence courses.¹⁷

With this brief history of the teaching and use of torture as a basis, it is time to turn to more current events.

Section C. After September 11, 2001, the U.S. has tried politically to redefine torture to allow torture in interrogations and intelligence gathering

“So the torture convention says you cannot engage in torture and it says you shall undertake not to engage in cruel, inhuman and degrading treatment. So clearly, the people who drafted the treaty thought they were two different things. And when the Congress,

¹⁵ McCoy, supra, at 78 and 86.

¹⁶ McCoy, supra, at 78 and 87.

¹⁷ McCoy, supra, at 88-99. For copies of the manuals, see:

<http://www.soaw.org/article.php?id=98>

For more details about the School of the Americas and its successor the Western Hemisphere Institute of Security Cooperation and their illegal actions, see William Quigley, “The Case for Closing the School of the Americas – WHINSEC,” 20 *BYU Journal of Public Law* 1 (2005) available online at:

<http://www.loyno.edu/~quigley/LReview-Quigley.pdf>

when the Senate adopted the treaty, it only made torture criminal. It did not criminalize cruel, inhumane and degrading treatment. So clearly, Congress thought they were different concepts. I think there is a broader category of things that people can do which are cruel, inhumane and degrading and only extreme versions of that constitute torture.”

John Yoo, U.S. Office of Legal Counsel to the President of the U.S.¹⁸

“After the attacks of September 11, 2001, the White House made torture its secret weapon in the war on terror.”¹⁹

Of all the evidence demonstrating the re-definition of torture post 9-11, none is more illustrative than the now famous “torture memo” of August 1, 2002.²⁰ On August 1, 2002, a memo was sent from Jay S. Bybee, Assistant Attorney General of the U.S., to Alberto Gonzales, Counsel to the President, reviewing the legality of the use of harsh techniques in the interrogation of prisoners outside of the U.S.²¹ This memo, which should be read in its entirety by anyone concerned about what has happened to justice in the legal profession, stated:

“We conclude that Section 2340A [the Convention Against Torture] proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical. Those acts must be of an extreme nature to rise to the level of torture with the meaning of Section 2340A and the Convention. *We further conclude*

¹⁸ Interview of John Yoo on Canadian Broadcasting, November 16, 2005. Available online at: http://www.cbc.ca/fifth/badapples/interviews_yoo.html

John Yoo and other lawyers are the subject of an excellent review by Milan Marcovic, “Can Lawyers Be War Criminals?” 20 Georgetown Journal of Legal Ethics 347 (2007).

¹⁹ McCoy, *supra*, at 108. McCoy gives an excellent detailed overview of the post 9-11 political development of torture at pp 108-150.

²⁰ The best single source for comprehensive official information about the legitimization of the use of torture by the US in Afghanistan, Guantanamo and Iraq is the book – Karen J. Greenberg and Joshua L. Dratel, *THE TORTURE PAPERS: The Road to Abu Ghraib* (Cambridge University Press, 2005).

²¹ The official “Torture memo” is available online at: <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>

that certain acts may be cruel, inhuman, or degrading, but still do not produce pain and suffering with the requisite intensity to fall within Section 2340A's proscription against torture...Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death.”²²

This attempt to redefine torture certainly assisted in creating an environment permissive of torture.²³ In fact, interrogators involved in the subsequent deaths of prisoners argued precisely this - that they were approved to use extreme techniques on detainees in the war on terror because of this August 1, 2002 legal memo which authorized their harsh and coercive interrogation procedures.²⁴

Section D. After September 11, 2001, the U.S. has tried politically to redefine who are prisoners of war to allow the use of torture in interrogations and intelligence gathering

Remember that the U.S. government took and still continues to take the legal position that the prisoners at Guantanamo are not subject to the protection of prisoners of war under the Geneva Convention.²⁵

A January 9, 2002 Memo from Secretary Rumsfeld to the Chairman of the Joint Chiefs of Staff stated: “The United States has determined that Al Qaeda and Taliban individuals under the control of the Department of Defense are not entitled to prisoner of

²² August 1, 2002 Memo from Gonzales to Bush, available online at: http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf

²³ See Miri Lim, “Redefining Torture in the Age of Terrorism: An Argument Against the Dilution of Human Rights,” 13 Washington & Lee Journal of Civil Rights & Social Justice 83, 94 (2006).

²⁴ David Johnston and James Risen, “Aides Say memo Backed Coercion for Qaeda Cases,” NYTimes, June 27, 2004. Available online at: <http://www.globalexchange.org/countries/americas/unitedstates/democracy/2115.html>

²⁵ Barbara J. Falk, “The Global War on Terror and the Detention Debate: The Applicability of the Geneva Convention III,” 3 Journal of International Law and International Relations 31 (Spring 2007).

war status for purposes of the Geneva Conventions of 1949.”²⁶ This change in law and policy was backed up by another highly controversial memo from the Justice Department, which concluded: “these treaties do not protect members of the al Qaeda organization...we further conclude that the President has sufficient grounds to find these treaties do not protect members of the Taliban militia.”²⁷

The combination of re-defining torture to allow much more violent and coercive measures against prisoners with the re-definition of members of the Taliban and Al Qaeda as not entitled to legal protections against torture set the conditions for the widespread abuse and torture that followed.²⁸

²⁶ Memo available online at:

<http://f11.findlaw.com/news.findlaw.com/hdocs/docs/dod/11902mem.pdf>

²⁷ The full Justice Department memo, authored by Jay S. Bybee, is dated January 22, 2002 and is available online at:

<http://f11.findlaw.com/news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf>

²⁸ Falk, *supra*, at 59.

“A President and a Secretary of Defense who labeled detainees variably as 'enemy' or 'unlawful combatants' effectively separated out a group of persons exempt from the protections of the Geneva Conventions. White House Counsel derisively referred to the Geneva Conventions as both obsolete and inflexible, even quaint. Given the expressed need to allow for interrogation as required by the exigencies of this new kind of war, 'enemy combatants' were denied any doubt as to their status determination. None of these actions alone were directly causative but they collectively signaled a deep ambivalence toward the effectiveness and future relevance of the Geneva Conventions, which in turn was translated as both disrespect for and an outright violation of international humanitarian norms. Throughout 2003 and 2004, shocking and troubling information became known about the Guantanamo detainees: they were kept shackled and incommunicado, subject to sensory deprivation, humiliation and coercion and without access to legal counsel.

“By the time of the invasion of Iraq in March 2003 (a clearly international conflict with defined armies that met every possible condition under Geneva law), the desire for 'actionable intelligence' had already overshadowed any concern for conducting hostilities in a manner consonant with international humanitarian law. The methods of physical and psychological coercion reported by the ICRC in February 2004 -- months before the Abu Ghraib photos were displayed on American newsstands and on American television -- were part of a process that had been developed and deployed by American interrogators since 9/11, and pioneered at Guantánamo Bay.”

Section E. After September 11, 2001, the U.S. has used torture in interrogations and intelligence gathering in Afghanistan, Guantanamo, and Iraq

“The ...Project has documented over 330 cases in which U.S. military and civilian personnel are credibly alleged to have abused or killed detainees. These cases involve more than 600 U.S. personnel and over 460 detainees. Allegations have come from U.S. facilities throughout Afghanistan, Iraq and at Guantánamo Bay.... No U.S. military officer has been held accountable for criminal acts committed by subordinates under the doctrine of command responsibility. That doctrine provides that a superior is responsible for the criminal acts of subordinates if the superior knew or should have known that the crimes were being committed and failed to take steps to prevent them or to punish the perpetrators. Only three officers have been convicted by court-martial for detainee abuse; in all three instances, they were convicted for abuses in which they directly participated, not for their responsibility as commanders.”

Human Rights Watch and NYU Law School – 2006²⁹

Afghanistan

The results of the re-definition of torture and the re-definition of who is entitled to prisoner of war protections began in Afghanistan soon after 9-11.

Detainees held by U.S. forces in Afghanistan are known to have endured mistreatment and torture. Some were killed while in detention, others were kicked and beaten. Prisoners have been kept in shackles for weeks, kept awake for extended periods of time, forced to stand or kneel in painful positions for long periods. Others were doused with freezing water in the winter. The U.S. consistently refused detainee’s access to lawyers, family members, journalists, or members of human rights groups.³⁰

Publicly released autopsy and death reports of 44 detainees held in U.S. facilities in Afghanistan and Iraq demonstrate that many U.S. interrogations resulted in death of

²⁹ The Detainee Abuse and Accountability Project is a joint undertaking of NYU Law School’s Center for Human Rights and Global Justice, Human Rights Watch and Human Rights First. This quote is from the summary of the April 2006 report, available online at: http://hrw.org/reports/2006/ct0406/1.htm#_Toc133381851

³⁰ “ENDURING FREEDOM:” Abuses by U.S. Forces in Afghanistan. March 2004 Report of Human Rights Watch. Available online at: <http://hrw.org/reports/2004/afghanistan0304/>

the detainee. Detainees were hooded, gagged, strangled, and beaten with blunt objects. CIA, Navy Seals and Military Intelligence personnel are implicated in the reports.³¹

Guantanamo

Prisoners who survived Afghanistan were sent to Guantanamo Bay Cuba, where U.S. officials said they were outside the protections afforded by U.S. legal system.

In late 2004 the International Red Cross charged that U.S. military intentionally engaged in methods “tantamount to torture” against prisoners at Guantanamo. Interrogators used psychological and physical coercion. Investigators found evidence of humiliating acts, temperature extremes, stripping prisoners to underwear in maximum air conditioning while enduring loud music through two loudspeakers, use of force positions and some beatings. Doctors and other personnel at the prison provided interrogators information about prisoners’ mental health and vulnerabilities in what the ICRC called a “flagrant violation of medical ethics.”³²

A US military investigation found that from 2002 onward US interrogators in Afghanistan were stripping detainees, isolating them for long periods, using stress positions, exploiting fear of dogs and using sleep and light deprivation. Such techniques, annually condemned by the US State Department when occurring in other countries, have also been used in Guantánamo.³³

Amnesty International has issued numerous reports on human rights violations at Guantanamo.³⁴ They describe the situation of one prisoner, Mohamed al Qahtani. “Mohamed al-Qahtani, a Saudi Arabian national, was kept in complete isolation in Guantánamo for three months in late 2002 and early 2003. He was forced to wear a woman’s bra. He had a thong placed on his head. He was tied by a leash, led around the

³¹ “U.S. Operatives Killed Detainees During Interrogations in Afghanistan and Iraq.” ACLU Report, October 24, 2005. Available online at: <http://www.aclu.org/intlhumanrights/gen/21236prs20051024.html>

³² Kate Randall, “International Red Cross Charges Systematic Abuse,” NYT, December 2, 2004. Available online at: <http://www.wsws.org/articles/2004/dec2004/irc-d02.shtml>

³³ Amnesty International, “Close Guantanamo – A Symbol of Injustice.” January 1, 2007 report available online at: <http://web.amnesty.org/library/Index/ENGAMR510012007>

³⁴ Available online at: <http://web.amnesty.org/library/Index/ENGAMR510012007>

room and forced to perform dog tricks. He was made to dance with a male interrogator while wearing a towel "like a burka". He was forced to stand for long periods. His hair and beard were forcibly shaved during interrogation. He was strip-searched in front of women. He was sexually humiliated, and subjected to sexual insults about his female relatives. He had water repeatedly poured over his head. He was subjected to hooding, loud music, white noise, and to extremes of heat and cold. He was forced to urinate in his clothing. All this happened while Mohamed al-Qahtani was interrogated for 18-20 hours a day for 48 out of 54 consecutive days."³⁵

Amnesty also reports at least 17 children have been held at Guantanamo – one who ultimately hanged himself. Only 5 percent were even captured by US forces – 86 percent were arrested by Pakistani or Afghanistan-based Northern Alliance forces and turned over to US custody, often for a reward of thousands of dollars. More than 40 suicide attempts have occurred, three men died of apparent suicide in June 2006.³⁶

Of the 775 held at Guantanamo since it was opened, one has been convicted – David Hicks agreed to plead guilty in exchange for a 9 month sentence after 5 years of imprisonment and an agreement not to speak to the media for a year and not to sue the U.S. Government.³⁷

From the earliest days of Guantanamo, there is an eyewitness account by a decorated Army Sergeant trained at Fort Huachuca of sexual taunting by a female interrogator who performed a strip-tease and smearing menstrual blood on the face of a devout Muslim prisoner who was chained to the floor.³⁸ Mental torture, pornography,

³⁵ Amnesty Report Guantanamo, *supra*. This treatment is confirmed by the U.S. Army investigation. See "Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility," April 1, 2005. Available online at: <http://www.defenselink.mil/news/Jul2005/d20050714report.pdf>

³⁶ Amnesty Report Guantanamo, *supra*.

³⁷ BBC News. "Hicks to serve nine months jail." March 31, 2007. Available online at: <http://news.bbc.co.uk/2/hi/americas/6512945.stm>

³⁸ Erik Saar, *INSIDE THE WIRE*, *supra*, at 219-228.

Numerous other sources have reported incidents involving female interrogators who smeared fake menstrual blood on a devout Muslim detainee. See Physicians for Human Rights, at 25, 27; Anne Applebaum, *Blaming the Messenger*, *Wash. Post*, May 18, 2005, at A17; Carol D. Leonnig, *Desecration of Koran Had Been Reported Before*, *Wash. Post*, May 18, 2005, at A12; Neil A. Lewis & Eric Schmitt, *Inquiry Finds Abuses at Guantánamo Bay*, *N.Y. Times*, May 1, 2005, at 35. The United States has confirmed

verbal abuse, shavings, beatings and deaths in the interrogation process have also been documented.³⁹

Even a 2005 investigation by the U.S. Army into FBI allegations of detainee abuse at Guantanamo found instances of: female interrogator who took off her battle dress uniform top in interrogations; female interrogators who rubbed up against restrained prisoners; female interrogators who ran fingers through the detainee's hair and put perfume on him; female interrogators who straddled a prisoner held down by MPs; female interrogator massaging and rubbing knee, back, and shoulders of inmates; female interrogator wiped "menstrual blood" on a detainee during interrogation; use of extremely loud music; use of extreme temperature changes to make detainees uncomfortable; use of sleep disruption and deprivation; use of duct tape to wrap around the head and mouth and under the chin of a detainee; detainees "short shackled" to the floor requiring prisoner to lay in fetal position or in painful crouch; use of military dogs to intimidate prisoners.⁴⁰

Iraq

One of the main problems that lead to the abuses and torture in Iraq was the confusion, that, according to official reports like the Schlesinger Report, "interrogation techniques intended only for Guantanamo came to be used in Afghanistan and Iraq."⁴¹

Thus, the illegal techniques used at Afghanistan and Guantanamo (where the US said the Geneva Conventions do NOT apply) migrated to Iraq (where the Geneva

only one such incident. See Carol D. Leonnig & Dana Priest, Detainees Accuse Female Interrogators, Wash. Post, Feb. 10, 2005, at A1 (indicating that in January 2005, "a Pentagon spokesman confirmed it had verbally reprimanded one female interrogator" for one such incident in early 2003).

³⁹ See Letter from Mozzam Begg, detailing his treatment at Guantanamo available online at: <http://www.commondreams.org/views04/1004-23.htm>

See also Saar, supra, at 99-104; 172-174; 180; 189-190; and 192.

⁴⁰ "Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility," April 1, 2005. Available online at:

<http://www.defenselink.mil/news/Jul2005/d20050714report.pdf>

⁴¹ Schlesinger Report, supra, at 9, 72.

Conventions DO apply). As Professor Mestrovic of Texas A&M points out: “The ‘poison’ from Guantanamo Bay...was injected into Abu Ghraib and the rest of Iraq.”⁴²

The use and approval of torture in interrogations by the US military and civilian contractors working for the military in Iraq is well documented.⁴³

In early 2004, the media began to report news that United States military personnel and contractors working for military intelligence had abused detainees in Iraq.⁴⁴ Pictures of Iraqi detainees being abused at Abu Ghraib Prison in Iraq started appearing online and in major newspapers and magazines internationally.⁴⁵

From the start it was clear that military intelligence was involved. “Military Intelligence and the CIA controlled Cellblocks 1A and 1B, the Abu Ghraib prison buildings where torture was taking place. Military Intelligence put pressure on Military Police to “set the conditions” (i.e. abusively prepare detainees) for interrogation.”⁴⁶

⁴² Mestrovic, *supra*, at 69.

⁴³ The best single source for comprehensive official information about the legitimatization of the use of torture by the US in Afghanistan, Guantanamo and Iraq is the book – Karen J. Greenberg and Joshua L. Dratel, *THE TORTURE PAPERS: The Road to Abu Ghraib* (Cambridge University Press, 2005).

Other good sources of information about the use of torture in Iraq include: Mark Danner, *TORTURE AND TRUTH: America, Abu Ghraib, and the War on Terror* (New York Review of Books 2004); Karen J. Greenberg, *THE TORTURE DEBATE IN AMERICA*, (Cambridge University Press 2006); Seymour Hersh, *CHAIN OF COMMAND: The Road from 9/11 to Abu Ghraib* (Harper 2004); Janis Karpinski and Steven Strasser, *ONE WOMAN’S ARMY: The Commanding General of Abu Ghraib Tells Her Story* (Miramax 2005); Tony Lagouranis and Allen Mikaelian, *FEAR UP HARSH: An Army Interrogator’s Dark Journey Through Iraq* (NAL Caliber 2007); Tara McKelvey, *MONSTERING: Inside America’s Policy of Secret Interrogations and Torture in the Terror War* (Carroll & Graf 2007); S.G. Mestrovic, *THE TRIALS OF ABU GHRAIB: An Expert Witness Account of Shame and Honor* (Paradigm 2007); Steven Strasser, *THE ABU GHRAIB INVESTIGATIONS: The Official Reports of the Independent Panel and the Pentagon on the Shocking Prisoner Abuse in Iraq* (Public Affairs NY 2004);

⁴⁴ See James Risen, *The Struggle for Iraq: Treatment of Prisoners; G.I.’s Are Accused of Abusing Iraqi Captives*, N.Y. Times, Apr. 29, 2004, at A15.

⁴⁵ See *In Pictures: New Abu Ghraib Images*, BBC News, available at http://news.bbc.co.uk/2/hi/in_pictures/4716280.stm. See *More Images of Abuse at Abu Ghraib*, CNN, available at <http://www.cnn.com/2006/WORLD/meast/02/15/abughraib.photos/>.

⁴⁶ WAR AND OCCUPATION IN IRAQ: A New NGO Report (June 2007) Chapter 5. Abuse and Torture of Prisoners, page 2, citing Taguba Report, *infra*, at pp 18-19 and

Military Intelligence also supervised numerous private military contractors, including employees of Titan and CACI International. Some employees of these private contractors, working under supervision of Military Intelligence, had previously worked in U.S. prisons where they had records of criminal abuse of prisoners.⁴⁷

There are a number of official investigations into the abuses and uses of torture by U.S. Military, Military Intelligence, and private contractors in Iraq.

The “Taguba Report” is the name given to the Article 15-6 Investigation of the 800th Military Police Brigade, U.S. Department of the Army, March 2004.⁴⁸

The “DAIG Report” was issued July 21, 2004 by the Inspector General of the U.S. Department of the Army regarding Detainee Operations Inspections.⁴⁹

The “Schlesinger Report” was issued August 24, 2004 by an independent panel headed by James R. Schlesinger for the U.S. Department of Defense.⁵⁰

The “Fay-Jones Investigation” was issued August 2004 by LTG Anthony R. Jones of the U.S. Army, another Article 15-6 Investigation of Abu Ghraib Prison and the 205th Military Intelligence Brigade.⁵¹

The “Church Report” was issued On March 7, 2005 by Admiral A.T. Church for the Department of Defense inquiry into Detainee Interrogation Operations and Techniques.⁵²

Other important reports include the Report of the International Committee of the Red Cross (ICRC) released February 2004⁵³ and the 2005 Report of Physicians for Human Rights.⁵⁴

ICRC Report, *infra*, at p 13. Full report is available at:

<http://www.globalpolicy.org/security/issues/iraq/occupation/report/index.htm>

⁴⁷ WAR AND OCCUPATION IN IRAQ, *supra*, Chapter 5, pages 2-3.

⁴⁸ Available online at: http://hrw.org/reports/2006/ct0406/1.htm#_Toc133381851

⁴⁹ Available online at:

<http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/index.html>

⁵⁰ Available online at: <http://www.cbsnews.com/htdocs/pdf/0824dodreport.pdf>

⁵¹ Available online at: <http://www4.army.mil/ocpa/reports/ar15-6/AR15-6.pdf>

⁵² Available online at:

http://www.aclu.org/images/torture/asset_upload_file625_26068.pdf

⁵³ Available online at:

http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.htm

⁵⁴ Break Them Down, Systematic Use of Psychological Torture by U.S. Forces.

Available online at: <http://physiciansforhumanrights.org/library/report-2005-may.html>

These reports are the best evidence of what they say, but for purposes of this memorandum, summaries are in order.

TAGUBA REPORT. The Taguba Report, found between October 2003 and December 2003 “numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees.”⁵⁵ General Taguba reported this abuse to be intentional and to include such acts as punching, slapping, kicking detainees, jumping on their naked feet, videotaping and photographing naked male and female detainees, forcibly arranging detainees in various sexually explicit positions for photographing, forcing detainees to remove their clothing and keeping them naked for several days at a time, forcing naked male detainees to wear women’s underwear, forcing groups of male detainees to masturbate themselves while being photographed or videotaped, arranging naked male detainees in a pile and then jumping on them, positioning naked detainees on a MRE Box with a sandbag on his head and attaching wires to his fingers toes and penis to simulate electric torture, writing “I am a Rapist” on the leg of a detainee alleged to have forcibly raped a 15-year-old fellow detainee and then photographing him naked, placing a dog chain or strap around a detainees neck and having a female soldier pose for a picture, a male MP guard having sex with a detainee, using military working dogs without muzzles to intimidate and frighten detainees and in at least one case biting and severely injuring a detainee and taking photographs of dead Iraqi detainees.⁵⁶ Written confessions from suspects, witness statements, and written statements from detainees supported these factual findings.⁵⁷ Detainees described additional abuses, such as military personnel breaking chemical lights and pouring the phosphoric liquid on detainees, threatening detainees with a charged 9mm pistol, pouring cold water on naked detainees, beating detainees with a broom handle and chair, threatening male detainees with rape, and sodomizing a detainee with a chemical light and perhaps a broomstick.⁵⁸

⁵⁵ *Id.* at 16.

⁵⁶ *Id.* at 16-17. Witness statements regarding the abuse can be found on pages 17-19 of the Taguba Report.

⁵⁷ *Id.* at 17.

⁵⁸ *Id.* at 17.

The Taguba Report additionally stated that previous detainee abuse had occurred in May 2003 at the Bucca Theater Internment Facility in Iraq.⁵⁹

SCHLESINGER REPORT. The Schlesinger Report specifically stated that detainees were abused during interrogations and that there were five cases of detainee death as a result of interrogation abuses.⁶⁰ The report starts with these two sentences: “The events of October through December 2003 on the night shift of Tier 1 at Abu Ghraib prison were acts of brutality and purposeless sadism. We know these abuses occurred at the hands of both military police and military intelligence personnel.”⁶¹

FAY-JONES REPORT. Both Major Generals Anthony Jones and George Fay conducted investigations into the 205th Military Intelligence Brigade stationed at Abu Ghraib Prison, both reports find that abuse occurred, with the Jones Report stating that twenty seven military intelligence personnel allegedly requested, encouraged, condoned or solicited military police to abuse detainees or abused detainees themselves.⁶² Some of these violent or sexual abuses of detainees occurred during interrogations⁶³, such as the use of dogs, sleep deprivation, and isolation as interrogation techniques.⁶⁴ The Fay Report gave detailed descriptions of 44 instances of detainee abuse at Abu Ghraib⁶⁵, such as military intelligence using sensory deprivation and isolation as an interrogation technique,⁶⁶ interrogating a nude detainee,⁶⁷ the unauthorized interrogation and alleged assault of a female detainee,⁶⁸ an interrogator directing the partial removal of a detainees clothing and failing to report the incident,⁶⁹ and military intelligence personnel directing

⁵⁹ *Id.* at 40.

⁶⁰ Final Report of the Independent Panel to Review Department of Defense Detention Operations, James R. Schlesinger et al., U.S. Department of Defense, at pages 5, 12-13

⁶¹ page 5.

⁶² Major Generals Anthony Jones & George Fay, Article 15-6 Investigation of the Abu Ghraib Detention Facility and the 205th Military Intelligence Brigade, Aug. 23, 2004 *available at* <http://www.news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>.

⁶³ *See* Jones Report executive summary.

⁶⁴ *See* Jones Report at 13.

⁶⁵ *See* Fay Report at 71-94.

⁶⁶ *Id.* at 96.

⁶⁷ *Id.* at 96.

⁶⁸ *Id.* at 97.

⁶⁹ *Id.* at 97.

the military police to place a detainee in solitary confinement, which the military police did after stripping and placing a hood on the detainee's head.⁷⁰

CHURCH REPORT. The Church Report found “[s]eventy-one substantiated cases of detainee abuse involving 121 victims and six deaths. Another 130 cases remained open as of Sept. 30, 2004. Guantanamo is the site of eight of the 71 substantiated and closed abuse cases. All incidents were relatively minor, although two involved sexually suggestive behavior by female interrogators. Afghanistan is the site of three of the 71 substantiated and closed abused cases. One of those three was a death. The other two were minor abuses. Iraq is the site of the remaining 60 cases. Five were deaths. Twenty-six were serious abuses. Twenty-nine were minor abuses.”⁷¹

ICRC REPORT. The report of the International Committee of the Red Cross found brutality causing death or serious injury, physical and psychological coercion during interrogations, excessive and disproportionate use of force against prisoners, particularly prisoners who were interrogated because they were deemed to have high intelligence value.⁷²

PHYSICIANS FOR HUMAN RIGHTS REPORT. In 2005, Physicians for Human Rights found Iraqi detainees had been abused by U.S. military personnel in the use of military working dogs to instill fear, sensory deprivation, sleep deprivation, isolation, forced nudity, sexual humiliation, mock executions, and the threat of violence or death towards loved ones) and concluded that “there is strong evidence that psychological torture remains in use today.”⁷³

At the national level, there is now evidence of a wide-ranging cover up of the full approval of these illegal actions. For example, General Taguba, who authored the investigative report in Abu Ghraib has been forced out of the military for blowing the

⁷⁰ *Id.* at 97.

⁷¹ <http://www.slate.com/features/whatistorture/MilitaryReports.html>.

⁷² “Report on the Treatment by the Coalition Forces of Prisoners of War and other protected persons in Iraq.” Executive Summary.

⁷³ Break Them Down, Systematic Use of Psychological Torture by U.S. Forces, by Physicians for Human Rights, available online at: <http://physiciansforhumanrights.org/library/documents/reports/break-them-down-the.pdf>

whistle. See Seymour Hersh, “The General’s Report: How Antonio Taguba, who investigated the Abu Ghraib scandal, became one of its casualties.” June 25, 2007.⁷⁴

Section F. Legal doctrine protects non-violent protest against the illegal use of torture and this case should be dismissed

Clearly the First Amendment protects the act of bringing a letter in opposition to torture to a government official – the prosecution does not suggest otherwise.

The prosecutor suggests that the place that this protest occurred makes the defendants’ conduct illegal. The prosecution suggests that walking up towards the guardhouse at Fort Huachuca to deliver a letter opposing torture, then kneeling and praying in the driveway, is a criminal act.

While reasonable time, place, and manner restrictions apply to the exercise of the First Amendment, the prosecution has not alleged that the actions of defendants in any way disrupted government actions. The role of place in limiting otherwise protected First Amendment activities remains one in dispute.⁷⁵ But the First Amendment need not provide the basis for shielding defendants from prosecution.

Fort Huachuca has been repeatedly mentioned in the reports and investigations into torture. “A telling reference to Fort Huachuca is buried in the Fay report on Abu Ghraib. A five-member U.S. Army Mobile Training Team from Fort Huachuca was sent to the Iraq prison, the report says, “to conduct an overall assessment of interrogation operations, present training and provide advice and assistance.” One of the mobile team members, identified as SFC Walters, told the Fay panel that he “may have contributed to the abuse at Abu Ghraib.” When questioned by a military contract employee for ideas on how to get the prisoners to talk, the report says, “Walters related several stories about the use of dogs as an inducement.” Walters also gave advice about how detainees are most susceptible during the first few hours after capture: “The prisoners are captured by soldiers, taken from their familiar surroundings, blindfolded and put into a truck and

⁷⁴ Available online at:

http://www.newyorker.com/reporting/2007/06/25/070625fa_fact_hersh

⁷⁵ Thomas P. Crocker, “Displacing Dissent: The Role of ‘Place’ in First Amendment Jurisprudence,” 75 Fordham Law Review 2587 (April 2007).

brought to this place (Abu Ghraib); and then they are pushed down a hall with guards barking orders and thrown into a cell, naked; and that not knowing what was going to happen or what the guards might do caused them extreme fear.” But the report concludes that it “is unclear and likely impossible to definitively determine” the extent to which “word of mouth” techniques were passed to the interrogators in Abu Ghraib by the Mobile Training Team from Fort Huachuca.”⁷⁶

The Schlesinger Report also confirms that interrogators and techniques from Guantanamo and Afghanistan circulated to Abu Ghraib. “During July and August 2003, the 519th Military Intelligence Company was sent to Abu Ghraib to conduct interrogations operations.”⁷⁷

Additionally, defendant Vitale has already filed a memorandum in this matter titled, Opposition to Government Motion in Limine to Prevent Raising Defenses. That memorandum, which is by reference incorporated into this motion to dismiss, details the doctrine of necessity and the use of international law as a defense to protest against illegal governmental conduct. Specifically, this Court is asked to review the following sections of the previously filed memo: Section I – Training at Fort Huachuca Violates International Law; III. Defenses of Necessity and International Law; Section V. International Law Applies; Section VI. International Law and the Legal Responsibility of Training at Fort Huachuca; Section VII. International Law Creates A Right to Prevent Crime; and Section IX. Necessity Defense. These laws, reviewed in light of the facts of torture outlined above, support the dismissal of this prosecution.

Conclusion – Not Just a Few Bad Apples

S.G. Mestrovic is Professor of Sociology at Texas A&M. He served as an expert witness at the International Court of the Tribunal for Yugoslavia in the Hague as well as at the Abu Ghraib courts martial of Javal Davis, Sabrina Harman and Lynndie England.

⁷⁶ James Hodge and Linda Cooper, “Roots of Abu Ghraib in CIA Techniques,” NCR, November 5, 2004. Available online at:

http://ncronline.org/NCR_Online/archives2/2004d/110504/110504a.php

⁷⁷ at page 9 et seq.

He wrote an insightful book about his experiences with the soldiers at Abu Ghraib and concluded:

“The government’s few rotten apples theory is problematic but persistent. No matter how many new cases of abuse are investigated and prosecuted, with regard to Abu Ghraib and elsewhere, the government can always blame the abuse on a few individuals. This theory relies on magical thinking to explain facts that are inconsistent with it. The abuse at Abu Ghraib was part of a widespread *pattern* of abuse and climate of abuse at Guantanamo Bay, in Afghanistan, and elsewhere in Iraq. The abuse has continued and, by some reports, increased at geographically distant locations since the discovery of abuse at Abu Ghraib. Magical thinking would have one believe that corrupt soldiers at Abu Ghraib, Guantanamo Bay, and other locations spontaneously invented remarkably similar methods of committing abuse that included forced nudity, pyramid stacking, yelling, sleep deprivation, stress positions and so on. More magical thinking is required to explain away the observation that some of these methods bear remarkable resemblance to interrogation techniques gone awry. And still more magical thinking is required to explain the fact that officers, who bear command responsibility, and who knew or should have known of this abuse, are cut out of the picture almost entirely. At the courts martial that I witnessed, the various defense teams requested the testimony of dozens of officers and were granted the testimony of only two officers. I have not exhausted the many other resorts to magical thinking that are required to maintain the theory of the few rotten apples as the explanation for the abuse at Abu Ghraib and elsewhere.”⁷⁸

Within the last few days, there has been yet another development. One of the U.S. prosecutors in the Nuremberg trials has condemned what is going on at Guantanamo, including the use of torture.

“The U.S. war crimes tribunals at Guantanamo have betrayed the principles of fairness that made the Nazi war crimes trials at Nuremberg a judicial landmark, one of the U.S. Nuremberg prosecutors said on Monday. ‘I think [U.S. Supreme Court Justice] Robert Jackson, who’s the architect of Nuremberg, would turn over in his grave if he knew what was going on at Guantanamo,’ Nuremberg prosecutor Henry King Jr. told

⁷⁸ S.G. Mestrovic, *THE TRIALS OF ABU GHRAIB: An Expert Witness Account of Shame and Honor* (2007) at pages 45-46.

Reuters in a telephone interview. "It violates the Nuremberg principles, what they're doing, as well as the spirit of the Geneva Conventions of 1949." ⁷⁹

History will decide if the use of torture and the abuse of prisoners are just – defendants assume history will decide that justice should triumph. History will make the final decision about whether citizen resistance to torture and protests like the ones engaged in by defendants in this matter will have any impact on policies and practices of the U.S. and other nations. History will illuminate and judge all who touched this issue, just as it has in prior scandals of injustice. This case offers the legal system an opportunity to make a clear statement about the illegality and injustice of torture and to offer history writers the hope that justice will ultimately prevail.

Therefore, defendants urge this Court to put justice first and dismiss this prosecution. History will approve.

s/ William P. Quigley, Pro Hac Vice
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⁷⁹ Jane Sutton, "Nuremberg prosecutor says Guantanamo trials unfair," June 11, 2007, Reuters. Available online at: <http://www.alertnet.org/thenews/newsdesk/N6B384799.htm>

King, 88, served under Jackson, the U.S. Supreme Court justice who was the chief prosecutor at the trials created by the Allied powers to try Nazi military and political leaders after World War Two in Nuremberg, Germany. "The concept of a fair trial is part of our tradition, our heritage," King said from Ohio, where he lives. "That's what made Nuremberg so immortal -- fairness, a presumption of innocence, adequate defense counsel, opportunities to see the documents that they're being tried with." "To torture people and then you can bring evidence you obtained into court? Hearsay evidence is allowed? Some evidence is available to the prosecution and not to the defendants? This is a type of 'justice' that Jackson didn't dream of," King said."

Certificate of Service

I certify that I electronically filed this pleading with the Clerk of Court so that copies will be served on all counsel this day and I emailed this pleading to opposing counsel Evan R. Seamone. s/ William P. Quigley