Robert Jackson Steering Committee
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October 22, 2010

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United States Department of Justice
1425 New York Avenue NW
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Washington, DC

Re: AG10-R0619
CLM-VRB-NCJ
Freedom of Information Act Appeal

Dear Carmen Mallon:

This is an appeal under the Freedom of Information Act, 5 US.C. § 552(a)(6). It is in response to your letter of determination dated August 25, 2010 concerning our initial FOIA request dated January 7, 2010 for the release of all ethics reports performed by the Office of Professional Responsibility (OPR) regarding the conduct of attorneys Jay Bybee and John Yoo while they served in the Office of Legal Counsel (OLC) under the Bush administration.

Thank you for sending the 11 additional pages of the final report. We are aware of the lawsuit filed by the ACLU against the Department of Justice regarding the final report. Nonetheless, we are still appealing all the redactions that appear in the OPR's report on December, 2008 (hereinafter the 2008 Report), the "2nd OPR Draft" of February 2009, and OPR's Report of July, 2009 (hereinafter the 7/09 report). Our appeal is different from the ACLU's appeal because a) our original request asked for more than just the 7/09 report and b) we have chosen to go into specific redactions in the reports whereas the ACLU adopted a more general approach.

Introduction and Methodology

Please be advised that we do not accept the terminology "draft" for the December, 2008 report, which appears to us to have been a completed report until then-Attorney General Michael Mukasey intervened, wrote a rebuttal and allowed the subjects of the investigation to go over the report. We note that the OPR's own regulations say nothing about such interventions:

> If OPR determines that professional misconduct or poor judgment occurred, it prepares a report containing its findings and conclusions, and provides that report to the Deputy Attorney General as well as the appropriate Assistant Attorney General, the Director of EOUSA, or other appropriate component head. In addition, if OPR finds professional misconduct, it will also recommend an appropriate range of disciplinary actions for consideration by the attorney's supervisors.

In light of what appears to us as an unorthodox methodology used in this case (the December 08 report even has the word "Draft" stamped on every page subsequent to its completion) we request the OIP to provide us with written evidence that justifies a subsequent assertion by Associate Deputy Attorney General David Margolis, in his opinion of January 10, 2010, that it was "in keeping with usual Department practice" to allow the subjects of an ethics investigation to review and amend the OPR's findings prior to release of a final report.

The purpose for initially filing our FOIA was to determine how and why the ethics lawyers in the OPR concluded that top OLC lawyers John Yoo and Jay Bybee had committed professional misconduct while advising the executive branch on issues concerning torture. We also, as a matter of public interest, wanted to know how the various versions of the OPR report underwent revisions after then-Attorney General Mukasey insisted in January, 2009 that the subjects of the investigation should have a chance to contest OPR's findings.

We did not know, at the time of our FOIA request dated January 7, 2010, that a senior Justice Department lawyer, Associate Deputy Attorney General Margolis, would step in and completely overrule the initial findings of the OPR lawyers. We are frankly astonished that he would feel comfortable in diluting the OPR's findings regarding John Yoo and Jay Bybee's conduct (changing a finding of professional misconduct to a finding of "poor judgment") given the record in the OPR reports not only of professional misconduct, but arguably criminal wrongdoing on these lawyers' part. By the same token, we are equally astonished that OPR did not, on its own, even address whether the enhanced interrogation techniques (i.e. torture) authorized by the White House, CIA and Department of Defense was illegal, and whether the lawyers acted unethically in counseling illegal conduct.

The actions of Yoo, Bybee and to a somewhat lesser extent, OLC's Steven Bradbury, are a matter of great public interest as made evident by the number of newspaper articles and books written about their opinions -- and how they arrived at them -- some of which are cited in the OPR reports.

As you well know, the Supreme Court has stated that the basic purpose of the Freedom of Information Act is "to open agency action to the light of public scrutiny" *Dep't of Air Force v Rose*, 425 US. 352, 372 (1976), accord *Dep't of State v Ray*, 502 U.S. (1991) A federal appeals court has affirmed that FOIA is "to permit the public to decide for itself whether government action is proper…"*Int'l Bhd. of Elec. Workers v. Dep't of Housing and Urban Dev*., 763 F.2d 453, 436 (D.C. Cir. 1985).

Particularly relevant to the ethics probe of the OPR, the Supreme Court in *Rose* reviewed case summaries of ethics disciplinary proceedings which a law review sought to assess with regard to the workings of the military justice system. The *Rose* court affirmed the right to look into agency or official [mis]behavior.

Case law is replete with examples in which a court has found "significant public interest" meriting disclosure, whether it be "knowing whether and to what extent the FBI investigated individuals for participating in political protests, not federal criminal activity," *Rosenfeld v DOJ*, 57 F3d 803 (9th Cir. 1995) to having "a compelling public interest in the names of contributors to the Watergate-related Townhouse" operation, *Congressional News Synidcate v DOJ,* 438 F. Supp 538 (D.D.C. 1977) to knowing about "a violation of the public trust by a government official." *Cochran v United States,* 770 F.2d 949, 956.

It is precisely for this reason -- high public interest and the value of policy debate -- that we contest all the redactions of the documents released by the Department of Justice in February, 2010 pursuant to our FOIA request.) Below, we focus on a few telling examples of documents that should be un-redacted and released because of their public interest, including:

- Dates of approval and use of enhanced interrogation techniques
- CIA's request for approval of "mock burial" or other death threats
- DOJ's refusal to provide "advance pardon" to the CIA
- Pressure from the White House
- Role of NSC in approving EITs and torture
- Excessive secrecy in OLC memo process

As will become apparent, we have found a pattern of redactions that strongly suggests an effort to conceal violations of law and/or to prevent embarrassment to the CIA rather than justifiably withhold information on the basis of FOIA Exemptions (b)(1) in the interest of national defense or foreign policy, (b)(3) in the interest of national security, (b) (5) in the interest of pre-decisional deliberative communications and attorney client privilege and (b)(6) in the interest of personal privacy. This will become evident following the timeline that unfolds below.

We have also highlighted areas of information that were redacted which have already appeared in the public domain and therefore should be un-redacted.

I. We request that you provide the specific dates of approval for the use of enhanced interrogation techniques used by the CIA in the Spring of 2002.

One issue of intense public interest is the question of when official approval of torture occurred and by whom.

In comparing the 2008 version of the OPR report with the July, 2009 report, we arrive at some startling discoveries. On page 56 of the 08 report and p. 83 of the 7/09 report, we find that the date in which Abu Zubaydah was subjected to CIA interrogation has been blacked out (i.e. redacted)**.** We request the removal of that redaction because it is already a matter of public record that Abu Zubaydah was captured on March 28, 2002 in Pakistan, that he suffered extreme injuries during the capture, that in April, 2002, President Bush commented that this high level detainee was not plotting and planning anymore," and that CIA director Tenet and Vice President Cheney advocated using Enhanced Interrogation Techniques (EITs) on him during White House policy meetings that spring.

We know that Abu Zubaydah was taken to different secret sites and, according to the International Red Cross which interviewed him, was tortured (See Mayer, *The Dark Side*, pp. 164-166). In fact, he was tortured *before* the OLC had come up with any kind of legal definition of what kind of EITs could be performed.

On April 16, 2002, according to page 19 of the 08 report, CIA attorneys described an EIT plan of "learned helplessness" because "resistance is futile and cooperation is inevitable." We note that this sentence is not included in the comparable section of the 7/09 report (around page 39-40) , but that in both reports, what follows is over two, completely blacked out pages of redactions. These apparently refer to a meeting of the National Security Council on April 16, 202 as referred to on page 40 of the 7/09 report. We ask that these redactions be removed in light of published reports in the *New York Times* that the early CIA methods during 2002 and 2003 were not designed to elicit actionable intelligence but were instead designed to break down the detainees to the point of eliciting false confessions about their supposed links to Saddam Hussein and 9/11. Since this information has been made public, we reject the application of the "sources and methods" exemption used by the CIA to justify the redactions of the EIT plan.

A document on Abu Zubaydah's interrogation apparently produced in January 2003 admits that "due to a misunderstanding," limits on sleep deprivation developed in conjunction with NSC and DOJ were exceeded as early as April 2002 (See http://www.aclu.org/files/assets/cia_release20100415_p19-27.pdf page 48-49http://www.aclu.org/files/assets/cia_release20100415_p19-27.pdf page 48-49http://www.aclu.org/files/assets/cia_release20100415_p19-27.pdf page 48-49http://www.aclu.org/files/assets/cia_release20100415_p19-27.pdf page 48-49).

Abu Zubaydah's pscyhological evaluation dated July 24 or 25, 2002 (http://www.aclu.org/files/torturefoia/released/082409/cia_ig/oig39.pdfhttp://www.aclu.org/files/torturefoia/released/082409/cia_ig/oig39.pdf), reveals that Zubaydah underwent the kind of "hard dislocation of expectation … following session 63" that the subsequent August 1"Techniques memo" by Jay Bybee associated with the EITs.

Zubaydah's July 25th psychological evaluation reads, "In addition, he showed strong signs of sympathetic nervous system arousal (possibly fear) when he experienced the initial 'hard' dislocation of expectation intervention following session 63."

The evaluation goes on to say, "As part of this increased pressure phase,

Zubaydah will have contact only with a new interrogation specialist, whom he has not met previously, and the Survival, Evasion, Resistance, Escape ("SERE") training psychologist who has been involved with the interrogations since they began. This phase will likely last no more than several days but could last up to thirty days. In this phase, you would like to employ ten techniques that you believe will dislocate his expectation regarding the treatment he believes he will receive and encourage him to disclose the crucial information mentioned above**.")**

We know that some time during the summer of 2002, he was waterboarded 83 times. It is a matter of deep public interest that we learn when the waterboarding first occurred, especially as there are indications (see below) that it occurred before the OLC had come up with a legal document stating that waterboarding was lawful.

As *The New York Times* noted on May 6, 2009 with regard to the long-anticipated but not yet released OPR report, "Among the questions it is expected to consider is whether the [Yoo and Bybee] memos were an independent judgment of the limits of the federal anti-torture statute or *were deliberately skewed to justify the use of techniques proposed by the CIA*." [Emphasis added]

We would argue that it is of equal interest to know whether Yoo and Bybee skewed their opinions to justify the use of techniques already performed by the CIA.

Hence, the importance of removing all redactions of dates in the documents released.

2. We request removal of all redactions concerning CIA's request for approval of "mock burial" or other death threats in the Spring of 2002.

On page 17 of the 08 report concerning interrogation techniques, we find that the section after "11). Waterboard" is completely blacked out (i.e. redacted) whereas on page 36 of the 7/09 report, we discover there is a number 12, obviously another CIA interrogation technique. But on page 174 of the 08 report, this technique—"mock burial"--appears un-redacted: "Goldsmith viewed the [August 1] Yoo Memo itself as a 'blank check' that could be used to justify additional EITs without further DOJ review. Although Yoo told us that he had concluded that the mock burial technique would violate the torture statute, he nevertheless told the client, according to Fredman and Rizzo, that he would 'need more time' if they wanted it approved."

The 08 report makes it clear that this technique, mock burial, was removed from the list sometime around July 24-26, in the week before the [August 1 Yoo] memo was finalized.

The CIA's request to have "mock burial" approved is of utmost public interest given public reports that when FBI interrogator Ali Soufan saw the "coffinlike box" CIA planned to use with Abu Zubaydah—which others described was to be used for "mock burial"—he told them it was borderline torture**.** (See "Ali Soufan Breaks His

Silence," *Newsweek,* April 25, 2009 http://www.newsweek.com/id/195089/page/1http://www.newsweek.com/id/195089/page/1 .) According to *Newsweek*, **t**he threats to use mock burial occurred in May 2002, months before DOJ refused to approve the technique around July 24-26**.** Moreover, the request to use "mock burial" may factor into DOJ's refusal to give advance declination to prosecute CIA interrogators, given DOJ withdrawal of FBI's agents in response to CIA's threatened use of the technique.

We request that all redactions of appearances of the terms "mock burial" and "mock execution" be removed, including the entire paragraph after No. 12 on page 36 of the 7/09 report. The redaction on page 37 of the 7/09 report follows the passage reading, "CIA personnel were concerned that they might face criminal liability for employing some EITs." A short redaction follows, then the words "concluded that most of the proposed techniques were lawful, but they had not made a determination with respect to the [lawfulness} of waterboarding and [redacted, presumably No. 12, mock burial] and recommended asking the Department's Office of Legal Counsel for guidance on the legality of all the proposed techniques. [A redaction of approximately ten lines follows] We request, as a matter of deep public interest, the removal of the readactions on page 37.

3. We request removal of redactions concerning DOJ's refusal to provide the CIA an "advance pardon" in July 2002.

The confirmation that CIA tried to get "mock burial" approved—which an Agent from FBI had already told interrogators was borderline torture—makes it more important for the public to know deliberations between DOJ and CIA that took place in July 2002.

By July 12, John Yoo's legal memo titled "bad things opinion" ended up being discussed by him with White House Counsel Alberto Gonzales on that same day, and possibly with Counsel to the Vice President, David Addington, and the FBI, CIA and NSC on July 13. Yoo's draft said that torture had to amount to physical pain of such intensity that it is likely to be accompanied by "serious physical injury, such as organ failure, impairment of bodily function, or even death."

We ask that the redactions following the above-described meetings in both the 08 (pp. 24-25) report and 7/09 report (pp. 46-47) be removed as a matter of public interest, as Yoo told OPR investigators that "none of the attendees" at the July 13th meeting provided "any feedback or comments at this meeting." But in fact, the critical issue of whether there would be "advance declination to prosecute" came up at this time according to a subsequent interview with Michael Chertoff, the head of the Justice Department's criminal division, who told the group that his Department would not provide this advance declination. In addition, Daniel Levin, then Chief of Staff for FBI, stated that the FBI would not participate in any interrogation using the EITs under discussion.

Some of this material has already been made public. For example, a narrative developed by the Senate Intelligence Committee in conjunction with CIA and NSC

(http://intelligence.senate.gov/pdfs/olcopinion.pdfhttp://intelligence.senate.gov/pdfs/olcopinion.pdf) reveals that CIA also "provide[d] an overview of the proposed interrogation plan for Abu Zubaydah. Soufan's objections to the treatment of Zubaydah *set off high level discussions at DOJ leading up to and including the July 13 meeting.*" [Emphasis added] This flies in the face of Yoo's assertions to OPR investigators that there was no feedback from higher-ups. All the more reason that the redactions on page 46-47 of the 7/09 report be removed.

Given the fact that the CIA was still requesting to use a technique -- mock burial -- they had first threatened to use a month and a half earlier in response to which FBI—and DOJ more generally--objected, the public has a right to know more about the CIA's ongoing concern that its interrogators might be subject to criminal liability, about its effort to protect its interrogators, and about the refusal of the Criminal Division of the Justice Department to provide this effective "advance pardon" for "future conduct that might violate federal law" as described on page 49 of the 7/09 report.

Of great interest to the public is Yoo's subsequent drafting, following the refusal of the Justice Department to provide an "advance pardon," of a memo on "defenses" to charges of violation of the torture statute, including "good faith" (as a defense to "specific intent to torture") and the powers of the "Commander in Chief" sections in his memo. Here again is evidence of Yoo trying to provide legal cover for the CIA.

4. We request removal of all redactions regarding White House pressure on John Yoo from the White House during the summer of 2002.

According to the DOJ Inspector General Report on detainee interrogations, FBI agent Steven Gaudi learned before he left in June 2002 that the techniques used on Abu Zubaydah had been approved "at the highest levels. " This is confirmed on p. 33 of the final OPR report. Moreover, the FBI's Ali Soufan revealed to *Newsweek* in April 2009 that "the aggressive techniques [of April 2002] already had gotten approval from the 'highest levels in Washington,' adding that a CIA official even waved a document in front of Soufan, saying the approvals 'are coming from Gonzales,' a reference to Alberto Gonzales, then the White House counsel and later the attorney general "

Because the White House's approval of torture occurred as early as April 2002 and is already a matter of public record, it follows that the public has a deep interest in whether the White House pressured John Yoo two months later to come up with a particular conclusion that would indemnify Gonzales and others of wrongdoing, especially since it was clear that the Department of Justice was not going to provide an advance declination of prosecution.

The final OPR Report provides evidence (p. 51-52) that John Yoo added two new sections to what would become known as the August 1 Bybee Memo on acceptable forms of interrogation. Yoo added the sections after meeting with White House Counsel Alberto Gonzales and Vice President Cheney's counsel, David Addington. The two new sections addressed concerns as to "What would happen in a case where an interrogator went 'over the line' and inadvertently violated the statute."

Yoo added sections on "the constitutional authority of the President" regarding torture and possible defenses to the torture statute."

We ask that all redactions be removed from pp. 61 to 65 of the final OPR report as a matter of public interest because on those pages, we see reference, from OPR lawyer's interviews, to mounting pressure from the White House to get the "Bybee Memo of August 1," with all its defenses, finalized**.** We note that VP Cheney's counsel, David Addington, played a "very active role" in the drafting of the memo, and that on July 31 "the White House wants both memos signed and out tomorrow." [Followed by a page-long redaction on p. 61-62]

It is a matter of public interest to know who was involved and why there was so much pressure on Yoo and Bybee to produce a memo on possible defenses at that time. As noted by the *New York Times* on February 20, 2010 after the OPR reports were released, "The [final OPR report] does not specify who demanded that the memorandum be signed that night." Earlier, on April 22, 2009, the *New York Times* stated that "Mr. Cheney, whose top legal adviser, David S. Addington, was closely consulting with Mr. Yoo about legal justification, strongly endorsed the program. Mr. Bush also gave his approval, *though what details were shared with him is not known*. With that, the CIA had the full support of the White House to begin its harshest interrogations…Though some former officials expressed regret that **s**uch a momentous decision was made so quickly without vital information or robust debate, none were willing to be quoted by name." [Emphasis added].

It is clear in the final OPR report that there was pressure from the White House "to have it signed tonight" despite misgivings by OLC's Patrick Philbin that "defenses should [not] have been included in the memorandum", that in fact the defenses section "suggests that maybe there is something wrong."

Due to the foregoing, we ask that the redactions on p. 61 and 62 of the 7/09 report be removed for reasons of well-documented public interest.

Once Bybee signed the August 1 memo, we are faced with another two whole pages of redactions (pp. 65-66). Of note, discussion of those pages appears unredacted in Jay Bybee's second response, page 28-29, describing Jonathan Fredman's cable to Abu Zubaydah's interrogation team, quoting from John Yoo's July 13 memo on the torture statute. We ask that these redactions be removed as a matter of public interest.

Lawyers for the OPR concluded that Yoo and Bybee skewed their opinions to achieve a desired result for their client. Assistant Attorney General David Margolis concluded they simply used "bad judgment." The public needs to have more information on this issue to determine the validity of Mr. Margolis's conclusion, which, if allowed to stand, will exonerate Yoo, Bybee and their superiors of not only misconduct, but any suspected criminal conspiracy to violate the torture statutes.

For the same reasons, we ask for removal of the redaction that spans page 38-39 of the 7/09 report on the basis of public interest, which precedes the sentence, "Bellinger concluded that Yoo was 'under pretty significant pressure to come up with an answer that would justify [the program] and …there was significant pressure on the Department to

conclude that the program was legal…"

The importance of the removal of these redactions cannot be overstated. As *The New York Times* stated in an editorial back in December, 2008 following the release of a report by the bipartisan Senate Armed Service Committee and at the time the first OPR report was to be released, "These [torture] policies deeply harmed America's image as a nation of laws and may make it impossible to bring dangerous men to real justice. The report said the interrogation techniques were ineffective , despite the administration's repeated claims to the contrary…It would be irresponsible for the nation and a new administration to ignore what has happened."

Indeed, the new president repudiated the use of torture immediately upon taking office, yet another sign of the public interest in this matter.

5. We request removal of redactions that further conceal the excessive secrecy surrounding the writing of the Bybee memo

There are multiple instances in the final OPR Report where there are discussions of compartmentalization to keep stakeholders unaware of the process and/or where John Yoo and Jennifer Koester are working outside of the official OLC process. All these sections are heavily redacted. In similar documents, however, similar details on Bush Administration counter-terrorism programs remain unredacted (for example, see the Combined Inspector General Report on the President's Surveillance Program (http://www.fas.org/irp/eprint/psp.pdfhttp://www.fas.org/irp/eprint/psp.pdf), page 10, 14, 19, 26, and 30 for descriptions of how, for example, John Ashcroft was misinformed about the interrogation program. Therefore, we ask that discussion of this compartmentalization be unredacted.

For example, in both the 08 report (p. 18) and the 7/09 report (pp. 38) we learn that the U.S. State Department was not informed of the CIA interrogation program and that Assistant AG Bellinger, by the Spring of 2002, complained to John Yoo that he was not included in OLC opinions that affected national security. We ask that the redactions that occur in that paragraph on p. 38 be removed as a matter of public interest, especially in light of the secretive nature of the OLC opinions and the importance of FOIA's mission to foster openness and transparency to dispel secrecy.

We note that Jonathan Friedman's role in briefing Gitmo personnel on CIA's techniques, which is redacted in footnote 68 on page 75 of the 7/09 report, is not redacted in the Senate Armed Services Committee Report (http://armed services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf), pages xvii, 3, 53-56. Since Fredman's attendance and many details of his statements are in the public domain, we ask that any redactions hiding discussion of his role at that October 2, 2002 be removed.

Similar to Yoo's sharing of opinions between CIA and DOD (while denying it), the so-called "Bullet Points" created by CIA General Counsel Scott Muller and the OLC

on the legality of detention and interrogation techniques (discussed in the 7/09 report beginning on page 100) appear to have been an effort by the CIA to bypass normal OLC process (and potentially adopt the more permissive March 2003 DOD opinion on EITs for their own operations). On page 116, for example, John Yoo stated the bullet points were not the official view of OLC, yet the CIA may have tried to use them to shield detainee abuse. We ask that redactions on page 101, 102, 106-110 be removed. Indeed, the use of the Bullet Points to claim that CIA interrogators were immune from all prosecution save for torture or war crimes may figure in DOJ's non-prosecution of CIA abuse in the past. Thus, for public interest, we ask that these passages be revealed.

Military Interrogations based on the SERES method

As evidenced by Item no. 6 in our January 7 FOIA request, we are interested in all written warnings from 2001 on from SERES trainers that the methods of using SERE techniques were ineffective in eliciting the truth and designed more to elicit false confessions. This is a matter of public interest, of which much has been written. *The New York Times* on April 22nd, 2009 devoted a large article to the SERES program, quoting a SERES psychologist as saying "I think helplessness would make someone more compliant but I do not think it would lead reliably to more truth-telling." -Due to the obvious public interest in this matter, we request that all redactions be removed from the OPR reports concerning the SERES methods.

This includes p. 45 in the 08 report, which includes a ¾ page redaction following a description of the JTF [joint task force] of military interrogators, who wanted to use aggressive interrogation techniques "adapted from the SERE training program" as opposed to more traditional rapport-building methods used by the FBI to obtain information. The redactions occur immediately after a statement that "According to FBI observers, the JTF interrogators were 'inexperienced and poorly trained, and as a result were able to obtain little useful intelligence.'" This sentence, while present in the 08 report, is not visible in the 7/09 report. We therefore ask that the redactions on page 70-71 of the 7/09 report be removed.

There is also reference to the SERE program on page 56 of the 09 report, followed by a redaction. The Senate Armed Services Committee revealed that the entity that oversees SERES prepared a variety of documents in response to requests from DOD General Counsel Jim Haynes, apparently for use in preparation of the OLC memos. Included in those documents was a memo [http://www.washingtonpost.com/wp-srv/nation/pdf/JPRA-Memo_042409.pdf] that warned that torture yields unreliable information. In addition, this passage is of particular importance because it appears the packet of information at issue may have disappeared inexplicably from OLC's SCIF (see Declaration of David J. Barron, September 21, 2009 http://www.aclu.org/national-security/vaughn-declaration-david-j-barron-olc-regarding-olc-documentshttp://www.aclu.org/national-security/vaughn-declaration-david-j-barron-olc-regarding-olc-documents). For citizens to gain a better understanding both of the cooperation between DOD and CIA on the interrogation program, and for insight into how documents disappeared from a SCIF, it is of high public interest to remove the redaction of the paragraph on page 56.

The removal of these redactions is especially important in light of the fact that Vice President Dick Cheney, according to *The New York Times* on April 22, 2009, defended the SERES-type EITs as producing "an invaluable treasure trove of information on Al Qaeda" whereas, in the 7/09 OPR report, p. 74, General Alberto Mora, General Counsel of the United States Navy, was not convinced of their value, writing a memorandum to Pentagon counsel William Haynes "stating his belief that some of the EIT's constitute cruel and unusual treatment or torture and that use of the techniques would violate domestic and international law."

We ask that the 6-line redaction in the 7/09 Report on page 82 be removed under the heading "Implementation of the CIA Program," especially as the first unredacted sentence that follows it states "other agency personnel [explained] to the CIA's Office of Inspector General [CIA OIG} that they were concerned "about human rights abuses at CIA facilities."

We note that on pages 58-59 of the 08 report and pp. 85-86 of the 7/09 report, large redactions follow a section describing the waterboarding of Abd Al Rahm Al Nashiri in November, 2002, followed by the sentence, "While EITs were being administered, several unauthorized techniques were also used on Al-Nashiri," followed by another one line redaction, and the words "to frighten Al Nashiri by cocking an unloaded pistol next to the prisoner's head while he was shackled in." We ask that these long redactions be removed as a matter of public interest.

The redactions following the 183 waterboarding sessions of Khalid Sheikh Mohammed (KSM) are even more extensive (pp. 60-62 in the 08 report; pp. 88-90 in the 7/09 report), leaving only a sentence un-redacted describing an interrogator as threatening KSM with the words, "If anything else happens in the United States, we're going to kill your children." Given the enormous publicity about the pending trial of KSM, the alleged mastermind of 9/11, it is of extreme importance to the public to have these sections be un-redacted, especially as much – but not all—of his torturing has been described by author Jane Mayer (pp 270-278 in *The Dark Side)*, including expressions of doubts by some about the reliability of his information. "While [CIA director] Tenet continued to assure the White House that Mohammed's interrogation in particular had been a gold mine of invaluable intelligence, a few officers began to question the reliability of his coerced confessions." (p. 277).

In both the 08 and 7/09 reports, there are large redactions under the heading "CIA referrals to the [Criminal Division of the Justice] Department." This section deals with the "unauthorized interrogation technique" employed by a CIA interrogator, with the Department head, Michael Chertoff, commenting that "the CIA was correct to advise them because the use of a weapon to frighten a detainee could have violated the law." He said the Criminal Division's decision would rest on "the facts that you gather and present to them."

But we are not privy to the facts. Instead, what follows is 4 ½ pages of redactions.

One of these references was left un-redacted in other documents released with the OPR Report. Footnote 28 on page 29 of Jay Bybee's final response describes the declination decision pertaining to the detainee Gul Rahman who was killed at the Salt Pit in November 2002. "Notably, the declination memorandum prepared by the CIA's

Counterterrorism Section regarding the death of Gul Rahman provides a correct explanation of the specific intent element and did not rely on any motivation to acquire information. Report at 92. If [redacted] manager of the Saltpit site, did not intend for Rahman to suffer severe pain from low temperatures in his cell, he would lack specific intent under the anti-torture statute. And it is also telling that the declination did not even discuss the possibility that the prosecution was barred by the Commander-in-Chief section of the Bybee memo." We ask that all references to Gul Rahman's death and the decision not to prosecute be uncovered in all versions of the OPR Report.

In the 08 report, the OPR makes a recommendation that "the declination decision with respect to the death of [redacted] be reexamined." In the 7/09 report, the words "*with respect to the death of*" have also been redacted. The public has a vital interest in knowing who died and whether the OPR was suggesting that CIA interrogators who had committed unauthorized EITs be criminally prosecuted. In light of Attorney General Eric Holder's decision to appoint a Special Prosecutor to look into interrogations that were not authorized, this is a matter of great public interest and public policy. For similar reasons, we ask for the removal of the redactions on pages 69-71 in the 08 report (a total of 3 pages) and pages 106 through 111 (a total of 5 pages) in the 7/09 report under the heading "The CIA Request for Reaffirmation."

As noted earlier, we have focused on the preceding examples to demonstrate that there is a) great public interest in the matters that have been redacted and b) to show a pattern to these redactions, namely, that wherever the question of criminal liability shows up, the redactions often follow. We suspect that the CIA has played a large role in insisting on the redactions, not because of any national security concerns or even concerns about protected legal communications or pre-decisional deliberations but rather, to cover-up their deep involvement in what can arguably be called a conspiracy to commit war crimes involving CIA personnel, top leaders in the Bush administration, and the top lawyers in the OLC. John Yoo's role in skewing the laws against torture to please his superiors is particularly notable. The CIA's own chief counsel, John Rizzo, admitted that Yoo was happy to have waterboarding approved and in fact, "was willing to find a way to achieve the desired result." (7/09 report, p. 227.)

The effort to cover-up and continue the abusive techniques is tracked through the remaining sections of the OPR report, including memos written in 2005 by Assistant Attorney General and OLC head Steve Bradbury "with the goal of allowing the ongoing CIA program to continue (7/09 report, p. 241). Bradbury came under "great pressure" from the Vice President Cheney and his chief counsel, David Addington, to produce said memos, with OLC's John Bellinger admitting to the OPR lawyers that there was "tremendous pressure placed on the Department to conclude that the program was legal and could be continued." (p. 242)

The OPR concluded that "Yoo put his desire to accommodate the client above his obligation to provide thorough, object and candid legal advice, and that he therefore committed intentional professional misconduct." (p. 254) As for Jay Bybee, though not as intimately involved in drafting the memos, "his signature had the effect of authorizing a program of CIA interrogation that many would argue violated the torture statute, the War Crimes Act, the Geneva Convention, and the Convention Against Torture, and he endorsed legal analyses that justified acts of outright torture under certain circumstances,

and that characterized possible prosecutions under the torture statute as unconstitutional infringements on the President's war powers." The OPR found Bybee to have acted in "reckless disregard of his obligation to provide thorough, objective and candid legal advice."

> The public has a right to make up its own mind about what their government has done in their name. That is the purpose of the Freedom of Information Act. As *The New York Times* stated in an editorial on October 26, 2009, "we do not take seriously the [now-Obama Administration's] claim that it is trying to protect intelligence or avoid harm to national security. Victims of the Bush administration's 'enhanced interrogation techniques,' including Mr. Mohamed, have already spoken in harrowing detail about their mistreatment. The objective is to avoid official confirmation of wrongdoing that might be used in lawsuits against government officials and contractors, and might help create a public clamor for prosecution those responsible. President Obama calls that a distracting exercise in 'looking back.' What it really is, is justice.", Or, to quote from a *Times* editorial on June 4, 2010, "The rule of law rests on scrutinizing evidence of past behavior to establish accountability, confer justice, and deter bad behavior in the future."

It is in the name of justice and accountability that we, the members of the Justice Robert Jacking Steering Committee, call for the complete removal of all redactions in the OPR reports and related memoranda released in February, 2010.

Respectfully submitted this 22nd day of October in Cambridge, Vermont,

Charlotte Dennett, Esq.

On behalf of the Justice Robert Jackson Steering Committee