

WASHINGTON  
LEGISLATIVE OFFICE



## **TEN REASONS WHY:**

**CONGRESS SHOULD DEMAND THE APPOINTMENT  
OF AN INDEPENDENT PROSECUTOR FOR TORTURE  
CRIMES AND ANY CRIMINAL COVER-UP.**

AMERICAN CIVIL  
LIBERTIES UNION  
WASHINGTON  
LEGISLATIVE OFFICE  
915 15<sup>th</sup> STREET, NW, 6<sup>th</sup> FL  
WASHINGTON, DC 20005-2313  
T/202.544.1681  
F/202.546.0738  
[WWW.ACLU.ORG](http://WWW.ACLU.ORG)

Caroline Fredrickson  
DIRECTOR

authorization and use of torture and abuse over the past six years was deliberate and pervasive, and its investigation and prosecution requires the extension of broad authority to an independent prosecutor.

Congress should demand that the Attorney General appoint an independent prosecutor. In the absence of the Independent Counsel Act, which lapsed in 1999, Justice Department regulations require the Attorney General or his designee to appoint an independent prosecutor, designated as “an outside Special Counsel” in the regulation, to avoid a conflict of interest for the Justice Department. 28 C.F.R. 600.1-600.6. Although the Attorney General or his designee has sole power under the regulation to appoint an independent prosecutor, Congress should demand that the Attorney General exercise his power of appointment.

Based on prior government investigations, documents obtained by the ACLU through our Freedom of Information Act litigation, and numerous media reports, there is credible evidence that acts authorized, ordered, and committed by government officials constitute violations of federal criminal statutes.



members of Congress that videotapes depicting waterboarding were destroyed than that government personnel committed waterboarding with impunity.

Torture and abuse also took many other forms,

The last item on the January 25, 2002 memo

leadership of the House and Senate Intelligence Committees. In addition, in a document obtained through the ACLU FOIA litigation, former Major General Michael Dunlavey, who asked the Pentagon to approve more aggressive interrogation methods for use at Guantánamo, claimed to have received "marching orders" from President Bush. On May 12, 2004, the *Baltimore Sun* quoted then-Secretary of State Colin Powell, who reportedly had fought internally for the government to comply with the Geneva Conventions, describing his informing President Bush directly on reports of abuse, long before at least some of those reports became public.

who authorized or ordered torture. The question is not hypothetical because an array of reports, including media interviews this week by a former member of a CIA interrogation team, state that waterboarding was used on detainees. Moreover, he has had more than a month to be briefed on CIA practices and Justice Department policies. Mukasey's refusal to characterize the legality or illegality of the underlying conduct requires that he turn the matter over to an independent prosecutor.

#### **REASON 4: The Current Head of the Criminal Division Was in Meetings on Interrogations**

The Justice Department's litigating division for criminal prosecutions is headed by a person who has at least the appearance of a conflict of interest. In the absence of an appointed independent prosecutor, all prosecutorial authority for violations of federal criminal law is concentrated in the Criminal Division of the Justice Department and the individual U.S. Attorney offices. The current head of the Criminal Division is Assistant Attorney General Alice Fisher.

While serving as a deputy in the Criminal Division from 2001 through 2005 overseeing terrorist suspect prosecutions, Fisher participated in at least some meetings on interrogations. In May 10, 2004 emails, an FBI agent identified Fisher as attending meetings on interrogation techniques. In response to written questions from senators during her confirmation to head the Criminal Division, Fisher stated that she recalled regular meetings between the Criminal Division leadership and FBI agents, but could not "recall . . . that interrogation techniques were discussed at these meetings." However, in those same written response, she could recall discussions with the then-head of the Criminal Division Michael Chertoff comparing the "effectiveness" of FBI tactics with Defense Department tactics. The FBI agent who authored the May 10, 2004 emails subsequently told Senator Levin in an interview that he had detailed discussions of interrogation tactics, including tactics which he considered "completely inappropriate" with two of Fisher's fellow deputies, but not with Fisher, in the political leadership of the Criminal Division.

There are some unanswered questions in determining Fisher's precise relationship to the interrogations, but she had at least some role in receiving information and at least some contemporaneous knowledge of at least some of the approved interrogation tactics. She also was part of a small working group within the leadership of the Criminal Division, which included other members identified as having detailed knowledge of the interrogation tactics employed. At minimum, Fisher is someone who should be questioned on her knowledge of interrogation tactics and who ordered any criminal acts, rather than being entrusted with prosecuting federal torture and abuse crimes, or any criminal cover-up.

#### **REASON 5**

Chertoff testified that, while Assistant Attorney General for the Criminal Division, he counseled “intelligence officials” on applying the Anti-Torture Act and the August 1, 2002 Office of Legal



for the Eastern District of Virginia. The Justice Department subsequently wrote to Senator Dick Durbin that it received twenty referrals from the Defense Department and the CIA Inspector General. The *New York Times* reported on October 23, 2005 that at least two of these referrals involved deaths related to the interrogations. Nearly three and one-half years after those twenty referrals were made, Passaro remains the only civilian indicted for any torture or abuse crime. Only an independent prosecutor can determine whether the Justice Department made the correct decision in all of those cases, and only an independent prosecutor can be trusted to fully and fairly investigate, and if appropriate, prosecute any other civilians.

### **REASON 8: Military Prosecutors Have Not Gone Up the Chain of Command**

Although a few low-ranking enlisted men and women have been charged and convicted under the Uniform Code of Military Justice for their roles in the use of torture or abuse against detainees, few officers have been charged and even fewer convicted. Despite substantial evidence of top military officers having knowledge of torture and abuse, or having approved illegal tactics, none of these officers have been charged. Only an independent prosecutor could assess whether the lack of prosecutions reflects the weight of available evidence.

Moreover, an independent prosecutor would be in the best position to determine whether any officer committed any crimes that should be prosecuted in civilian federal courts. For example, there is a serious question of whether then-Lieutenant General Ricardo Sanchez was truthful in his testimony under oath on what interrogation tactics he approved for use in Iraq.

During sworn testimony before the Senate Armed Services Committee on May 19, 2004, Senator Jack Reed asked General Sanchez, who commanded the Combined Joint Task Force Seven (CJTF-7) in Iraq, whether he “ordered or approved the use of sleep deprivation, intimidation by guard dogs, excessive noise and inducing fear as an interrogation method for a

handler at all times to prevent contact with detainee.” Parts of the memorandum were modified or rescinded in a subsequent memorandum later in 2003.

The September 14, 2003 memorandum signed by General Sanchez does not square with his testimony before the Senate Armed Services Committee. Although all of this information was provided to the Justice Department in 2005, only an independent prosecutor can be trusted with such high-level matters involving top military officers implementing Administration policy.

### **REASON 9: Further Delay in Criminal Investigations Could Put Some Crimes Outside the Statutes of Limitation**

Further delay in commencing a full and fair criminal investigation of torture and abuse could jeopardize prosecutions by missing applicable statutes of limitation. The federal government began the systematic use of torture and abuse roughly six years ago and, based on documents that we have obtained through the ACLU FOIA litigation, its use appeared to escalate at least through the exposure of the torture at Abu Ghraib more than three and one-half years ago. Other acts of torture and abuse have been more recent, the destruction of the videotapes reportedly was in late 2005, and statements made to courts regarding the videotapes have been even more recent.

Applicable statutes of limitation vary in length. The general statute of limitation for most federal felony crimes is five years. However, there is no limitation period for capital offenses, and certain specific offenses have different statutes of limitation. For example, at least some acts under the Anti-Torture Act have an eight year statute of limitation (but there is no limitation period if the violation of the Anti-Torture Act “resulted in, or created a foreseeable risk of, death or serious bodily injury to another person”), while one of the criminal contempt statutes has a one year statute of limitation. For at least some alleged crimes, there is a risk that the government will run out of time for filing charges.

### **REASON 10: Congress and the Agencies Have Failed in Holding Torture Perpetrators Accountable**

More than three and one-half years after the horrors of Abu Ghraib were exposed, America is hardly any closer to holding the torture perpetrators accountable than on the day that the photos were first shown. Despite several congressional oversight hearings, requests from members of Congress, numerous government inquiries, and litigation under the Freedom of Information Act, the public still does not even have the complete picture on the causes and scope of the abuse.

No one with the authority to prosecute civilians for violations of federal criminal laws prohibiting the torture or abuse of prisoners has investigated, or been ready to prosecute if warranted, the full scope of potential criminal acts by civilians. The military has begun the process of investigating, and when appropriate, prosecuting servicemembers, but the military cannot prosecute civilians. Similarly, Major General Antonio Taguba and Major General George Fay investigated and reported on widespread abuses in military-controlled prisons, and former Defense Secretary James Schlesinger led an investigation of the origins and scale of the torture

and abuse problem, but none of them had the authority to force disclosure of information from civilians and, of course, none of them had the authority to prosecute civilians if warranted.

Similarly, several congressional committees, the Inspector General of the Justice Department, and we have been told during the course of the FOIA litigation, the CIA, either have or are investigating at least some aspects of the torture issue. But the House and Senate Judiciary Committees have not used their subpoena powers, leaders of the House and Senate Intelligence Committees can do no more than secretly document their disagreement with the use of torture, the internal agency investigations do not cross into other departments or agencies, and none of the investigators have prosecutorial powers.

There is an obvious public interest in investigating and prosecuting all persons committing torture or abuse or conspiring to commit those crimes against detainees being held or questioned by the United States. Responsibility, and possibly criminal liability, for the wrongdoing extend higher up the military chain of command and to civilians. A small number of enlisted men and women and a few military officers should not be the only persons prosecuted for crimes, if civilians also engaged in criminal wrongdoing.

Given the increasing evidence of deliberate and widespread use of torture and abuse, and that such conduct was the predictable result of policy changes made at the highest levels of government, an independent prosecutor is clearly in the public interest. The country deserves to have these outstanding matters addressed, and have the assurance that torture will stop and never happen again. An independent prosecutor is the only sure way to achieve these goals.

Thank you for your attention to this matter, and please do not hesitate to call us at 202-675-2308 if you have any questions regarding this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Caroline Fredrickson", is written over a background of horizontal stripes in purple, white, and yellow.

Caroline Fredrickson  
Director

A handwritten signature in blue ink, appearing to read "Christopher Anders", is written on a white background.

Christopher Anders  
Senior Legislative Counsel