

December 12, 2014

## **PUBLIC MEMORANDUM**

Re: Senate Torture Report

There are at least two separate bases for potential prosecutions of former government officials responsible for the acts described in the Senate Torture Report released on December 9, 2014. Further research is needed to confirm liability under these statutes and that an indictment or other criminal complaint may properly lie in the Eastern District of Virginia, or other appropriate venue.

### **The War Crimes Act**

The War Crimes Act, 18 U.S.C. § 2441, makes it a crime for any person, “whether inside or outside the United States” to commit a “war crime.” War crimes are defined as any grave breach of the Geneva Conventions, and in particular, any conduct that violates common Article 3. In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court explicitly ruled that common Article 3 applies to alleged Al Qaeda members and the so-called war on terror. *Id.* at 629-633.

The crimes of torture, cruel or inhuman treatment and murder -- all acts documented by the Senate Torture Report -- are specifically prohibited by common Article 3 and the War Crimes Act.

In 2006, the government enacted the Military Commissions Act of 2006, which severely curtailed the reach of the War Crimes Act, limiting its application well short of the protections of common Article 3. It also passed a provision that provided for retroactive immunity for certain government personnel who were following orders in implementing what they thought were lawful directives from the President. *See* 42 U.S.C. § 2000dd-1. The Washington Post [noted at the time](#)<sup>1</sup> that the intent of these changes was to reduce the threat of future prosecutions when the day came when such abuses would be revealed to a shocked public. These provisions remain untested.

A potential cause of action under the War Crimes Act may be appropriate against any person involved in the chain of command that authorized the crimes detailed in the Senate Torture Report. This includes but may not be limited to George W. Bush, Richard Cheney, Donald Rumsfeld, and the CIA officials, psychologists and attorneys (including Alberto Gonzales, Jay Bybee and John Yoo) who permitted, ratified or engaged in such practices.

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<sup>1</sup> R. Jeffrey Smith, “War Crimes Act changes would reduce threat of prosecution,” The Washington Post, August 9, 2006, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/08/AR2006080801276.html>

## **The Convention Against Torture**

The United States is a signatory to the Convention Against Torture, and its implementing legislation is at 18 U.S.C. § 2340A. This statute was the famous subject of the “Torture Memos,” a series of legal opinions written by John Yoo and Jay Bybee during their tenure in government.

[Bybee famously concluded](#)<sup>2</sup> that “torture” under the law only referred to “the most egregious conduct,” “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” “Purely mental pain or suffering” had to result in “significant psychological harm of significant duration, lasting for months or even years.” Bybee even thought that the Convention Against Torture might be unconstitutional because it would infringe the “President’s authority to conduct war.”

President Obama repudiated the Torture Memos in 2009. As with the War Crimes Act, the Convention Against Torture may provide a second basis for criminal prosecutions against people who authorized, engaged in, or ratified torture.

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<sup>2</sup> <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>