

USA

TRUTH BE TOLD

*CALL FOR PROPER INVESTIGATION AND
DECLASSIFICATION OF ALLEGED ROLE
IN SECRET DETENTION PROGRAM OF
NOMINEE FOR CIA DIRECTOR*

**AMNESTY
INTERNATIONAL**



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SUMMARY

Veritatem Cognoscere – To Know the Truth

CIA Directorate of Operations, website banner¹

On 13 March 2018, President Donald Trump announced via Twitter that he was nominating Gina Haspel to become the next Director of the Central Intelligence Agency (CIA). The nomination raises serious human rights concerns because Gina Haspel is alleged to have been involved in a program of secret detention operated by the CIA between 2002 and 2008. Specifically, she is said (1) to have had a supervisory role at a CIA “black site” outside the USA where two detainees were subjected to torture and enforced disappearance in 2002; and (2) to have been involved in the destruction in 2005 of videotaped evidence of their torture.

Amnesty International has called on President Trump to withdraw his nomination of Gina Haspel pending investigation into her alleged role in crimes under international law. If allegations of her involvement in torture and enforced disappearances – and in the destruction of evidence of such crimes – are confirmed following a proper judicial process, she should not be appointed to lead the CIA. However, it is not possible to get to the truth without the necessary investigation of her role in the secret detention program and the declassification of information surrounding the crimes in question. President Trump should withdraw her nomination while this fact-finding goes ahead.

For its part, the Senate should not hold a confirmation hearing on Gina Haspel’s nomination unless the necessary investigation and declassification have taken place. It should reflect on previous confirmation hearings involving individuals alleged to have been linked to the secret detention program (outlined in this report), and recognize that as things stand, such a hearing is not the forum in which to establish the truth about the current allegations against this nominee.

If she were to be confirmed with the allegations unanswered and the truth obscured by secrecy, it would be yet another showing of US authorities ignoring the crimes committed in the CIA program. The risk for human rights posed by this situation – not least under a President who has publicly voiced his support for torture – is clear. Without transparency and full accountability for past human rights violations, their future recurrence becomes more likely.

Amnesty International takes no position on the appointment of particular individuals to government positions, unless they are reasonably suspected of crimes under international law and could use their appointment to the position in question to either prevent accountability for these crimes or to continue perpetration.

There were many people involved in developing and operating the secret detention program. While the current focus is on Gina Haspel because of her nomination (her promotion in February 2017 to Deputy CIA Director did not require Senate approval), Amnesty International has long called for the crimes under international law committed in this CIA program to be fully investigated and anyone against whom there is admissible evidence of responsibility for such crimes to be brought to justice in full and fair trials without recourse to the death penalty. It has also for years called for full declassification of all materials relating to human rights violations in this program. The organization’s response to Gina Haspel’s nomination is part of its continued efforts for truth, accountability, remedy and prevention of future human rights violations.

¹ See <https://www.cia.gov/offices-of-ciTa/clandestine-service/index.html>

JOINING THE DOTS IN THE DARK

To protect the classified fact of whether or not [Gina Haspel] had any role in the program, the Agency could not permit [her] to answer any questions pertaining to the program

CIA Director Michael Pompeo, March 2017²

The allegations against Gina Haspel relate to the CIA's first "black site" for so-called "high-value detainees". It is alleged that she was Chief of Base at that secret detention facility during the final period of its operation in 2002, when two detainees were being subjected to enforced disappearance there. Interrogation under torture of the first detainee occurred before the reported date of Gina Haspel's arrival, but she is said to have arrived at the site by November 2002 when the second of the two detainees was brought there and subjected to torture and other cruel, inhuman or degrading treatment using "enhanced interrogation techniques" including "water-boarding".

As outlined further below, if she was Chief of Base, she would have had not only a level of supervisory or oversight involvement in the interrogation of this second detainee at this facility, but also full knowledge of the onward secret transfer – "rendition" – of both detainees to further enforced disappearance and other forms of torture and other ill-treatment in the next "black site", believed to have been in Poland, to which they were taken at the end of 2002.³

Again, if Chief of Base at the relevant time, she would apparently also have been involved in the "sanitization" in late 2002 of the initial "black site" – the destruction or removal of evidence of what had gone on there – when the decision was taken to close the facility down because of concerns within CIA Headquarters that its secret location was about to become public. Gina Haspel is also alleged to have been involved in 2005 in the decision of her then immediate boss to destroy the videotapes of interrogations in 2002 of the two detainees in this first "black site", in other words, the destruction of evidence of crimes under international law.

From 11 September 2001, Gina Haspel worked at the Counterterrorist Center (CTC), the division of CIA Headquarters near Washington, DC which ran the secret detention program and was closely involved in interrogations at the "black sites". As noted below, a broader allegation that emerges from piecing together information in the public realm is that Gina Haspel may have been the CTC officer who for some period before November 2004 is said to have "run the interrogation program" in the secret detention operation.

Getting to the truth is a tall order.⁴ The CIA itself has said little about Gina Haspel's roles beyond a bare outline of her more than 30-year long career at the agency. In a statement released on 2 February 2017 announcing her appointment as Deputy Director of the CIA, the Director of the agency, Michael Pompeo said that she had held "numerous senior leadership positions at CIA, including as Deputy Director of the National Clandestine Service, Deputy Director of the National Clandestine Service for Foreign Intelligence and Covert Action, Chief

² *Mitchell and Jessen v. United States of America*, Declaration of formal claim of state secrets and statutory privileges by Michael Pompeo, Director of the Central Intelligence Agency. In the US District Court for the Eastern District of Washington, 2 March 2017.

³ See *Unlock the Truth: Poland's involvement in CIA secret detention*, 12 June 2013, <https://www.amnesty.org/en/documents/eur37/002/2013/en/>. And, Landmark rulings expose Poland's role in CIA secret detention and torture, 24 July 2014, <https://www.amnesty.org/en/latest/news/2014/07/landmark-rulings-expose-poland-s-role-cia-secret-detention-and-torture/> (including links to rulings).

⁴ It is also worth bearing in mind former US Deputy Secretary of Defense John Hamre's description of the CIA as "an organization that thrives through deception". John Hamre, President of the Center for Strategic and International Studies in Washington, DC, was Deputy Secretary of Defense from 1997 to 2000. Quoted in *Legacy of Ashes: The History of the CIA*, by Tim Weiner. First Anchor Books Edition, May 2008, p. 578. From an interview by the author.

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of Staff for the Director of the National Clandestine Service, and in the Counterterrorist Center". Her "extensive overseas experience" during her three decades with the agency included a number of assignments serving as CIA "Chief of Station".⁵ On 23 March 2018, the CIA revealed that she began working at the Counterterrorist Center (CTC) on 11 September 2001.⁶ It was the CTC which developed and operated the CIA's secret detention program.

A key figure in the CTC from the month that Gina Haspel joined it was José Rodríguez. From September 2001 to May 2002 he was the CTC's Chief Operating Officer/Deputy Director, and from May 2002 to November 2004, he was its Director. In late September 2004, Porter Goss was confirmed as Director of the CIA following the resignation of George Tenet. "Several weeks later", recalls former CIA chief legal officer John Rizzo, Porter Goss "promoted José Rodríguez to the position of deputy CIA Director for operations".⁷ "What's more", Rizzo continues, "José installed as his chief of staff an officer from the Counterterrorist Center who had previously run the interrogation program".⁸ In March 2018, the CIA stated that among Gina Haspel's previous "senior jobs" at the CIA had been "Chief of Staff to the Deputy Director for Operations".⁹

From November 2004 to October 2005, José Rodríguez was Deputy Director of Operations for the CIA and from October 2005 to August 2007, he was Director of the newly established National Clandestine Service at the CIA.¹⁰ He then retired. Amnesty International has previously stated that the evidence against José Rodríguez, including from his own admissions in interviews and his memoirs, of his leading role in a program in which detainees were subjected to enforced disappearance and interrogation techniques and conditions of detention that violated the prohibition of torture and other ill-treatment, warrant the opening of a criminal investigation into his involvement.

On the other hand, the continued use of classification by the CIA about any role Gina Haspel may have had in the secret detention program leaves the public in the dark about the human rights record of the person who has been nominated to head the Central Intelligence Agency.

As this report describes further below, when Gina Haspel's alleged supervisory role in the secret detention program threatened to end up on the record in federal court, it resulted in the Trump administration's invocation of the state secrets privilege in 2017. The report then outlines the role of the Chief of Base at CIA "black sites", with particular reference to that first site in which Gina Haspel is alleged to have held that position, and the core allegations about the detention of Abu Zubaydah and 'Abd al-Rahim al-Nashiri at that base and their onward transfer from it in December 2002. It then addresses the issue of the videotape destruction.

ANSWERS SOUGHT, STATE SECRETS INVOKED, DECLASSIFICATION NEEDED

Exactly a month after Director Pompeo announced Gina Haspel's promotion to Deputy Director

⁵ Gina Haspel Selected to be Deputy Director of CIA, CIA news item, 2 February 2017, <https://www.cia.gov/news-information/press-releases-statements/2017-press-releases-statements/gina-haspel-selected-to-be-deputy-director-of-cia.html>

⁶ Get to know your Deputy Director, Central Intelligence Agency Featured Story Archive, 23 March 2018, <https://www.cia.gov/news-information/featured-story-archive/2018-featured-story-archive/get-to-know-our-deputy-director.html>

⁷ John Rizzo. *Company Man: Thirty years of controversy and crisis in the CIA*, Scribner Books (2014), page 14. John Rizzo has described himself as "one of the key legal architects of the CIA's EIT [enhanced interrogation technique] Program, which I monitored and oversaw from its beginning to end". *Salim v. Mitchell*, Declaration of John Rizzo, US District Court for the Eastern District of Washington, 23 January 2017, ¶ 68. Rodríguez has said that his promotion was handled by the then Executive Director of the CIA, Kyle "Dusty" Foggo. José Rodríguez, Jr., *Hard measures: How aggressive CIA actions after 9/11 saved American lives*. Threshold Editions (2012), pages 137-141.

⁸ *Ibid.*

⁹ Get to know your Deputy Director, Central Intelligence Agency Featured Story Archive, 23 March 2018, <https://www.cia.gov/news-information/featured-story-archive/2018-featured-story-archive/get-to-know-our-deputy-director.html>

¹⁰ *Salim et al v Mitchell and Jessen*, Declaration of Jose Rodriguez. US District Court for the Eastern District of Washington, 24 January 2017.

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of the CIA, the Director signed a declaration in support of the Trump administration's invocation of the state secrets privilege in the context of a civil trial then pending in federal court in Washington State. The defendants were Dr James Mitchell and Dr John "Bruce" Jessen, the two psychologists contracted by the CIA from 2002 to assist in interrogations in the secret detention program, and who became central to the development and use of "enhanced interrogation techniques".

Although Mitchell and Jessen worked as independent contractors with the CIA, their contracts contained "indemnity provisions" and the US Government was paying all of their legal fees for their defence against the lawsuit brought by two former detainees alleging the defendants were "psychologists who designed, implemented, and personally administered an experimental torture program for the US Central Intelligence Agency."¹¹ The CIA Director was now asserting the state secrets privilege, not to stop the lawsuit from proceeding, but to prevent the defendants from deposing Gina Haspel.¹² They had wanted her as a witness in their "everything we did was approved" defence and to seek to obtain her testimony that she had had a supervisory role in reviewing and authorizing their interrogation activities in the CIA program.¹³

In his declaration filed in court on 8 March 2017, Director Pompeo said that while he was aware of the public "speculation" about Gina Haspel's role in the secret detention program, "the CIA has never officially acknowledged whether [she] was involved in the program... Public speculation about the identities of persons who worked in the program – whether through media reporting, books written by former CIA officers, reports from non-governmental organizations, or unauthorized disclosures by government employees – does not equate to declassification and official acknowledgement by the CIA".¹⁴ He said that "When unofficial disclosures occur [about the identities of those involved]..., the absence of official confirmation leaves an important element of doubt about the veracity of the information... To protect the classified fact of whether or not [Gina Haspel] had any role in the program, the Agency could not permit [her] to answer any questions pertaining to the program."¹⁵

Furthermore, Director Pompeo said, even if the CIA has acknowledged that a person has worked for the CIA in "the counterterrorism arena", that does not mean that it has acknowledged their work in a particular program. The detention program, he added, was "but one highly-compartmented aspect of the Agency's world-wide counterterrorism operations". He reiterated the now well-worn position of the CIA that secrecy about the detention program continued to be necessary to protect the identities of the countries and their intelligence services that had cooperated in any aspect of the detention program. He asserted, among other things, that the invocation of the state secrets privilege also covered the location of any CIA detention facilities (information that was classified Top Secret), and of CIA stations and bases (classified Secret).¹⁶

¹¹ *Suleiman Abdullah Salim, Mohamed Ahmed Ben Soud, Obaid Ullah (as personal representative of Gul Rahman) v. James Elmer Mitchell and John 'Bruce' Jessen*, Complaint and Demand for Jury Trial, In the US District Court for the Eastern District of Washington, 13 October 2015. See also, *Mitchell and Jessen v. USA*. Order Re: Third and Fourth motion to compel and assertion of state secrets privilege, US District Court for the Eastern District of Washington, 31 May 2017.

¹² And James Cotsana, a former CIA official they alleged was their direct supervisor. The Government did not file a declaration from the Attorney General invoking the privilege, but said it had followed guidance issued in 2009 under the Obama administration that assertion of the privilege had to be approved by the Attorney General. The judge ruled that it would have been preferable to have had a Declaration from the Attorney General as well, but took the government at its word that the 2009 policy had been followed.

¹³ The defendants, sought "critical testimony from the individuals who directly supervised their work with the CIA – Haspel and Cotsana... Defendants seek to depose Haspel and Cotsana... who were Defendants' direct supervisors and who have otherwise unavailable personal knowledge about the CIA's oversight of Defendants." *Mitchell and Jessen v. USA*, Defendants' response in further support of third and fourth motions to compel, US District Court for Eastern District of Washington, 22 March 2017.

¹⁴ *Mitchell and Jessen v. United States of America*, Declaration of formal claim of state secrets and statutory privileges by Michael Pompeo, Director of the Central Intelligence Agency. In the US District Court for the Eastern District of Washington, 2 March 2017.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

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On 31 May 2017, the federal judge ruled that the state secrets privilege precluded Mitchell and Jessen's request for the depositions of Gina Haspel (and former CIA official James Cotsana alleged to have been the defendants' direct supervisor in the program), despite it having been "widely reported she had a role in the Detention and Interrogation Program, including overseeing a 'black site' in a foreign country, where Abu Zubaydah was detained and interrogated, and she is also alleged to have played a role in destroying videotapes of interrogations... However, the CIA has not officially confirmed her role". The judge concluded:

"The state secrets privilege belongs to the Government and can only be waived by it, not by a private party. Therefore, an article in a newspaper does not override the Government's assertion of privilege. The Government has refused to confirm or deny Ms Haspel's and Mr Cotsana's involvement with the Program.... The Court is not aware of there being any mention of Cotsana or Haspel in the over 500-page Executive Summary of the Senate Select Committee on Intelligence released to the public.¹⁷ Although the Government has, over the years, made public certain details about the Program, others remain classified. It is generally not for this court to second-guess such determinations."¹⁸

It is true that there is no occurrence of Gina Haspel's name in the summary report issued by the Senate Select Committee on Intelligence (SSCI). Identifying details about individuals, dates, cooperating countries, and locations of "black sites" have been redacted or given code names or pseudonyms in the declassified version of the summary published in 2014. For example, the identity of the person who sent the following October 2002 email from the "black site" [Detention Site GREEN] where Abu Zubaydah was being held and where 'Abd al-Rahim al-Nashiri would be arriving about five weeks later, is kept from the public eye:

email from: [REDACTED] (chief of Base at DETENTION SITE GREEN);
to: CIA Headquarters;
subject: "Assessment to Date" of Abu Zubaydah;
date: October 6, 2002, at 05:36:46 AM.¹⁹

The full SSCI report which runs to more than 6,000 pages remains classified in its entirety, so whether Gina Haspel is named in it is not publicly known. Among those who have seen material that remains classified are members of the SSCI.²⁰

On 2 February 2017, after Gina Haspel's appointment by President Trump to be Deputy Director of the CIA, Senators Ron Wyden and Martin Heinrich, both of whom are members of the SSCI, and were at the time of the SSCI summary report publication, wrote to the President:

"We write to express our concern at the announcement today that Ms Gina Haspel has been named as the Deputy Director of the CIA. Her background makes her unsuitable for the position. We are sending separately a classified letter explaining our position and urge

¹⁷ Dr Mitchell and Jessen appear in the SSCI summary report under the pseudonyms Dr Grayson Swigert and Dr Hammond Dunbar. See USA: Crimes and Impunity: Full Senate Committee report on CIA secret detentions must be released, and accountability for crimes under international law ensured, April 2015, <https://www.amnesty.org/en/documents/amr51/1432/2015/en/>. In 2016 Dr Mitchell published his memoirs about his leading involvement in the CIA program.

¹⁸ *Mitchell and Jessen v. USA*. Order Re: Third and Fourth motion to compel and assertion of state secrets privilege, US District Court for Eastern District of Washington, 31 May 2017. The judge ruled that the state secrets privilege on the limited grounds of preventing the Haspel and Cotsana depositions did not prevent the case from proceeding. On 17 August 2017, with the case due to go to trial the following month, the case was settled out of court, pursuant to a Confidential Settlement Agreement. *Salim v. Mitchell*, Order directing entry of judgment and closing file. US District Court for Eastern District of Washington, 17 August 2017.

¹⁹ Report of the Senate Select Committee on Intelligence Study of the Central Intelligence Agency's Detention and Interrogation Program. Summary [hereinafter SSCI summary], 29 December 2014, footnote 225.

²⁰ "In short, the committee had access to almost everything – millions and millions of documents. But in return [CIA Director Leon] Panetta requested that the committee review the documents – analytic pieces, intelligence reports, operational cables, e-mails, and more – in CIA spaces". Michael Morrell, *The great war of our time: The CIAs fight against terrorism – from al-Qa'ida to ISIS*. Twelve Books, New York/Boston (2015), page 256.

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that the information in that letter be immediately declassified.”²¹

The information in question has not been declassified in the year since, nor has the SSCI report. Both should be.²²

On 13 March 2018, Senator Wyden announced that he was opposing the nomination of Gina Haspel as CIA Director:

“Ms Haspel’s background makes her unsuitable to serve as CIA director. Her nomination must include total transparency about this background... If Ms Haspel seeks to serve at the highest levels of US intelligence, the government can no longer cover up disturbing facts from her past”.²³

On the same day, Senator Heinrich issued a statement in which he said:

“President Trump’s nomination of Gina Haspel to lead the CIA is deeply troubling. Her record makes her unsuitable for a leadership role at the agency, let alone to serve as the director. We should not be asked to confirm a nominee whose background cannot be publicly discussed and who cannot then be held accountable for her actions. The American public deserves to know who its leaders are.”²⁴

ALLEGATIONS OF INVOLVEMENT AT ‘BLACK SITE’

Over a decade after joining the CIA “in the waning days of the Cold War”, Gina Haspel “requested a transfer to CIA’s Counterterrorist Center (CTC). Her first day on the job was September 11, 2001.”²⁵ The CTC was the division of the Central Intelligence Agency delegated by its Director George Tenet after the attacks of 11 September (9/11) to establish a detention program for detainees the agency deemed to have the highest intelligence value in the so-called “war on terror”.

In the immediate wake of the 9/11 attacks, Director Tenet had sought and obtained special authorities for the CIA from President George W. Bush. This included authority for detentions. The secret detention programme was established under a still classified Memorandum of Notification (MON) signed by President Bush on 17 September 2001. The MON gave “unprecedented authorities, granting the CIA significant discretion in determining whom to detain, the factual basis for their detention, and the length of the detention.”²⁶

John Rizzo, variously chief legal officer or Senior Deputy General Counsel at the CIA between November 2001 and October 2009, stated in 2017 that “in response to the MON, attorneys for the CIA’s Counterterrorist Center (CTC) drafted memoranda on the parameters of legally permissible interrogation techniques. Also pursuant to the MON, the CIA began building secret detention facilities referred to as ‘black-sites’. Certain of these black-sites existed by early 2002”.²⁷

²¹ Wyden, Heinrich Express Concern on Selection of Gina Haspel to be Deputy Director of the CIA, 2 February 2017, <https://www.wyden.senate.gov/news/press-releases/wyden-heinrich-express-concern-on-selection-of-gina-haspel-to-be-deputy-director-of-the-cia>

²² USA: Crimes and Impunity: Full Senate Committee report on CIA secret detentions must be released, and accountability for crimes under international law ensured, April 2015, <https://www.amnesty.org/en/documents/amr51/1432/2015/en/>.

²³ See <https://www.wyden.senate.gov/news/press-releases/wyden-opposes-nominations-of-pompeo-and-haspel>

²⁴ See <https://www.heinrich.senate.gov/press-releases/heinrich-statement-on-gina-haspel-being-named-to-lead-cia>

²⁵ Get to know your Deputy Director, Central Intelligence Agency Featured Story Archive, 23 March 2018, <https://www.cia.gov/news-information/featured-story-archive/2018-featured-story-archive/get-to-know-our-deputy-director.html>

²⁶ SSCI summary, 29 December 2014, *op. cit.*, page 11.

²⁷ *Salim v. Mitchell*, Declaration of John Rizzo, US District Court for the Eastern District of Washington, 23 January 2017, ¶¶ 5-6 and 68.

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According to former CIA Deputy Director Michael Morrell, there were two separate programs: “One is the detainee program – CIA’s establishment of secret prisons around the world where we held high value detainees. And the second is the use of enhanced interrogation techniques – harsh measures – to extract information that detainees were otherwise unwilling to provide. This is an important distinction because you can have the detention program without the EIT program”.²⁸ The CIA detention program, he writes, “occurred somewhat earlier” than the “enhanced interrogation” program. The “black sites” were “set up with the knowledge and cooperation of the host governments, who wanted our thanks, some financial support, and our silence. While we delivered on the first two promises, we, as a country, were not able to deliver on the third.”²⁹

From an international human rights law perspective, the first program was a program of enforced disappearance. The refusal or failure of the US authorities to acknowledge in whose custody the detainees were or to clarify their whereabouts, leaving them outside the protection of the law for a prolonged period, placed them squarely within the scope of the UN Declaration on the Protection of All Persons from Enforced Disappearance.³⁰ Whether or not a detainee was subject to interrogation in the program, in most cases he was being subjected to this crime under international law. Enforced disappearances have been recognized as crimes under international law since the judgment of the Nuremberg Tribunal in 1946.³¹ International

²⁸ Michael Morrell, *The great war of our time: The CIA’s fight against terrorism – from al-Qa’ida to ISIS*. Twelve Books, New York/Boston (2015), page 265.

²⁹ Morrell, *The great war of our time*, *op. cit.*, pages 268-269. The two “black sites” which are the subject of this report were reportedly in Thailand (Detention Site GREEN, April to December 2002) and Poland (Detention Site BLUE, December 2002 to fall 2003). At a White House press conference on 14 December 2001 with President George W. Bush and the visiting Prime Minister of Thailand, Thaksin Chinnawat, President Bush said that “The Prime Minister has assured me – and this visit is further confirmation – that our longtime friend will be a steady ally in the fight against terror. Mr. Prime Minister, I thank you for that.” Prime Minister Thaksin said: “This is very right for me to visit and giving full support to US, which is our very long ally. And it’s very right for me to discuss war against terrorism”. In a joint statement agreed between the USA and Thailand during the visit, President Bush “expressed appreciation for the Thai Government’s support for the campaign against terrorism” and “the two leaders... expressed determination to expand counterterrorism cooperation further through new programs”. Joint Statement between the United States of America and the Kingdom of Thailand, 14 December 2001. At a press conference on 14 January 2003 during a visit with the President of Poland, Aleksander Kwasniewski, President Bush said: “we’re here to have a substantive talk on a lot of issues, issues ranging from the war on terror to the recent decision by the Polish Government on the purchase of U.S.-made aircraft... I’ve got no better friend in Europe today than Poland. One of the reasons why is because this man has made a commitment to work together, as equal partners, in the war on terror”. See more generally, *Breaking the conspiracy of silence: USA’s European ‘partners in crime’ must act after Senate torture report*, 20 January 2015, <https://www.amnesty.org/en/documents/eur01/002/2015/en/>. Also *EI-Masri v ‘The Former Yugoslav Republic of Macedonia’*, Written submissions on behalf of Amnesty International (AI) and the International Commission of Jurists (ICJ), 29 March 2012, <http://www.amnesty.org/en/library/info/EUR65/001/2012/en>. *AI Nashiri v Poland*: Written submissions on behalf of AI and the ICJ, 5 November 2012, <http://www.amnesty.org/en/library/info/EUR37/002/2012/en>; and *AI Nashiri v Poland*: Written supplementary submissions on behalf of AI and the ICJ, 15 February 2013, <http://www.amnesty.org/en/library/info/EUR37/003/2013/en>. *AI Nashiri v Romania*: Written submissions on behalf of AI and ICJ, 13 March 2013, <http://www.amnesty.org/en/library/info/EUR39/005/2013/en>. *Abu Zubaydah v. Lithuania*: Written submissions on behalf of AI and ICJ, 22 April 2013, <http://www.amnesty.org/en/library/info/EUR53/002/2013/en>.

³⁰ See pages 107-116, *USA: Human dignity denied. Torture and accountability in the ‘war on terror’*, October 2004, <https://www.amnesty.org/en/documents/amr51/145/2004/en/>. See also José Rodríguez, Jr., *Hard measures: How aggressive CIA actions after 9/11 saved American lives*. Threshold Editions (2012), pages 54 and 115-117 (After Abu Zubaydah was taken into custody, “we immediately went to work to identify and establish a black site. We believed it critical to be able to conduct the interrogations in isolation, with neither the detainee nor the rest of the world knowing where he was”... “Our sites were designed to create a complete loss of orientation on the part of the detainees... They had no idea where they were... After a while, the media started an all-out effort to uncover and expose where the detainees were being held. It was not an easy thing for them to find out. We deliberately kept the circle of people who knew where the black sites were to a very small number... Several times during my tenure we felt obliged to close one well-functioning facility and move to another because we were unable to maintain the secrecy of the site”).

³¹ Field Marshal Wilhelm Keitel was convicted by the Nuremberg Tribunal for his role in implementing Adolf Hitler’s *Nacht und Nebel* Erlass (Night and Fog Decree) issued on 7 December 1941 requiring that persons “‘endangering German security’ who were not to be immediately executed” were to be made to “vanish without a trace into the unknown in Germany”. Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the dissenting opinion of the Soviet Member) – Nuremberg 30th September and 1st October 1946 (Nuremberg Judgment), Cmd. 6964, Misc. No. 12 (London: H.M.S.O. 1946), p. 88.

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instruments adopted since that date have reiterated that enforced disappearances are crimes under international law.³² The UN Human Rights Committee has recognized enforced disappearance as a multiple violation of rights enshrined in the International Covenant on Civil and Political Rights (which the USA ratified in 1992).³³

The “second” program was one which employed interrogation techniques that violated the prohibition of torture and other cruel, inhuman or degrading treatment. Separately, the conditions of detention in the “black sites” violated that prohibition too, regardless of whether the detainee was actually subjected to interrogation or not. For example, the detainees were held in solitary confinement, incommunicado, some for years on end, in the program. They were also subjected to white noise, 24-hour lighting and cruel use of shackling, amongst other conditions.³⁴

The first detainee taken into custody by the CIA whom it deemed to have “high value” was Zayn al Abidin Muhammad Husayn, also known as Abu Zubaydah. On the morning of 29 March 2002, shortly after Abu Zubaydah had been taken into custody in Pakistan, President George W. Bush “approved moving forward with the plan” to transfer him to another country and “shortly thereafter” the detainee was “rendered from Pakistan” to that country “where he was held at the first CIA detention site”.³⁵ Abu Zubaydah had been shot upon arrest, and was hospitalized, and was only returned to the “black site” on 15 April 2002 (where he was kept naked, sleep deprived, and in a cell with bright lights with white noise or loud music playing).³⁶ During the months of April and May 2002 there were periods when he was on life support and unable to speak.³⁷

The location of this “black site”, as with all such sites, apart from one operated at Guantánamo Bay in Cuba in 2003 and 2004, remains classified to this day. The 2014 summary of the SSCI’s review of the secret detention program, refers to it only as Detention Site GREEN. The two detainees brought here “were held with the foreign host government’s knowledge and approval”, according to the CIA Inspector General in his 2004 report, until the facility was “closed for operational security reasons in December 2002”, at which point the two detainees

³² Declaration of All Persons from Enforced Disappearance, Adopted by General Assembly resolution 47/133 of 18 December 1992, Article 1.2 (“Any act of enforced disappearance... constitutes a violation of the rules of international law”); and preamble (“the systematic practice of such acts is of the nature of a crime against humanity”), and article 4; Inter-American Convention on the Forced Disappearance of Persons, Preamble, adopted on 9 June 1994 in Belém do Pará, Brazil, at the 24th regular session of the OAS General Assembly; International Law Commission, 1996 Draft Code of Crimes against the Peace and Security of Mankind, Article 18 (i); Rome Statute of the International Criminal Court, Article 7 (1)(i) and (2) (i); Elements of Crimes, Article 7 (1) (i). See also International Law Commission Draft Articles on crimes against humanity, Article 3(1)(i), UN Doc. A/72/10 (Chapter IV). When the Elements of Crimes were adopted by the Preparatory Commission for the International Criminal Court, the US delegate, Lieutenant Colonel William Lietzau, stated that the United States was “happy to join consensus in agreeing that this elements of crimes document correctly reflects international law”. Christopher Keith Hall, The first five sessions of the UN Preparatory Commission for the International Criminal Court, 94 Am. J. Int’l L. 773, 788 (2000). International Convention for the Protection of All Persons from Enforced Disappearance, preamble (“Aware of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity, Determined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance”), see also articles 4, 5, 6, 9, 10, 11.

³³ See, The UN Human Rights Committee’s proposed General Comment on the Right to Life, Amnesty International’s preliminary observations, 15 June 2015, pages 31-34, <https://www.amnesty.org/en/documents/ior40/1644/2015/en/>. Also, The Human Rights Committee’s New General Comment on the Right to Liberty and Security of Person, Amnesty International’s Preliminary Observations, September 2012, pages 9 to 14, <https://www.amnesty.org/en/documents/IOR40/021/2012/en/>

³⁴ Re: Application of the Detainee Treatment Act to conditions of confinement at Central Intelligence Agency detention facilities. Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 31 August 2006.

³⁵ SSCI summary, 29 December 2014, *op. cit.*, page 23. Amnesty International has called for former President Bush to be subjected to criminal investigation. See USA: Bringing George W. Bush to justice. International obligations of states to which former US President George W. Bush may travel, November 2011, <https://www.amnesty.org/en/documents/amr51/097/2011/en/>

³⁶ SSCI summary, 29 December 2014, *op. cit.*, page 341.

³⁷ SSCI summary, 29 December 2014, *op. cit.*, footnote 1207.

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were moved to a facility “located in another foreign country”.³⁸

The taking into US custody of Abu Zubaydah had “accelerated CIA’s development of an interrogation program and establishment of an interrogation site”.³⁹ This apparently led to a certain amount of improvisation and staffing challenges. The site had “no permanent positions” and was staffed “with temporary duty (TDY) officers”. At first, his CIA interrogators included an officer who also served as Chief of Base (COB). Because this site was set up and run prior to the CIA Director issuing conditions of confinement guidelines for “black sites” in January 2003, “officers assigned to manage detention facilities developed and implemented confinement condition procedures”. These were “site-specific and not uniform”.⁴⁰

In his memoirs, former CTC Director José Rodriguez referenced someone he called “Jane”:

“Another superstar whom I recruited was ‘Jane’, who had served extensive time overseas and was working in an Agency organization that provided surveillance support. I stole her away and had her head one of our earliest ‘black sites’, where terrorists were interrogated. Later she became my right arm as chief of staff when I led the clandestine service.”⁴¹

This would seem to reference Gina Haspel given that she became José Rodriguez’s chief of staff at the National Clandestine Service. If indeed it does refer to her, it could also suggest that she might have been “Chief of Base” (COB) of the “black site” known as GREEN by the SSCI (the next “earliest” site was “BLUE”, believed to have been in Poland).⁴² Citing a “former senior CIA official”, the *New York Times* has alleged that she arrived to run the “black site” in Thailand in late October 2002, after the torture of Abu Zubaydah but before that of the next detainee, ‘Abd al-Rahim al-Nashiri, who was transferred to the base on 15 November 2002.⁴³ He was subjected to waterboarding and other “enhanced interrogation techniques” there.

“Abu Zubaydah was the only detainee at [redacted] until ‘Abd Al-Rahim Al-Nashiri arrived on 15 November 2002. The interrogation of Al-Nashiri proceeded after [redacted] received the necessary Headquarters authorization. The two psychologist/interrogators began Al-Nashiri’s interrogation using EITs immediately upon his arrival... On the twelfth day of interrogation, the two psychologist/interrogators administered two applications of the waterboard to Al-Nashiri during two separate interrogation sessions. Enhanced interrogation of Al-Nashiri continued through 4 December 2002.”⁴⁴

The two psychologist/interrogators were Dr James Mitchell and Dr Bruce Jessen. In his account,

³⁸ Special Review. Counterterrorism Detention and Interrogation Activities (September 2001- October 2003), Central Intelligence Agency (hereinafter CIA OIG Special Review), 7 May 2004, ¶ 70. The SSCI summary revealed that “In November 2002, after the CIA learned that a major US newspaper knew that Abu Zubaydah was in Country [redacted], senior CIA officials, as well as Vice President Cheney, urged the newspaper not to publish the information. While the US newspaper did not reveal Country [redacted] as the location of Abu Zubaydah, the fact that it had the information, combined with previous media interest, resulted in the decision to close DETENTION SITE GREEN” (page 38).

³⁹ CIA OIG Special Review, 7 May 2004, *op. cit.*, ¶ 30.

⁴⁰ CIA OIG Special Review, 7 May 2004, *op. cit.*, ¶¶ 57 and 71.

⁴¹ José Rodriguez, Jr., *Hard measures: How aggressive CIA actions after 9/11 saved American lives*. Threshold Editions (2012), p. 37. In his acknowledgments, Rodriguez reserved “a very special thanks to my chief of staff and loyal friend ‘Jane’. She endured intense scrutiny by federal agents and the special prosecutor because of her close working relationship with me. I will forever be grateful to her for her wise counsel and dedicated service”. *Ibid.*, page 264.

⁴² Detention Site COBALT (believed to be in Afghanistan) was supposedly for medium and low value detainees, although used as a staging post for high value detainees being moved to “black sites” in the high value detainee program.

⁴³ Gina Haspel, Trump’s choice for CIA, played role in torture program. *The New York Times*, 13 March 2018, <https://nyti.ms/2tLgLHj>

⁴⁴ CIA OIG Special Review, 7 May 2004, *op. cit.*, ¶ 76. On 14 March 2007, six months after being transferred to Guantánamo from secret CIA custody, ‘Abd al-Rahim al-Nashiri had a Combatant Status Review Tribunal hearing at which, through an interpreter, he said that “From the time I was arrested five years ago, they have been torturing me”. He referred to hanging, drowning, being hit against walls, nudity, and being put for a week in a box half a metre by half a metre, by two metres in height. See, https://www.thetorturedatabase.org/files/foia_subsite/pdfs/csrt_transcript_al_nashiri_released_6.13.16_highlighted.pdf

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James Mitchell (“I visited all the black sites holding high-value detainees”)⁴⁵ recalls the interrogation of ‘Abd al-Rahim al-Nashiri thus:

“When it became clear that he had no intention of cooperating, we began to use the EITs. At some point, following the headquarters-approved plan, al-Nashiri was waterboarded. But not without difficulty. He was a really small guy. Security personnel had trouble securely strapping him to the large hospital gurney that the medical personnel wanted us to use as a waterboard at the time... The interrogation team discontinued waterboarding al-Nashiri after three sessions.”⁴⁶

In his memoirs, Mitchell refers to a male CIA officer who was Chief of Base when the only detainee there was Abu Zubaydah.⁴⁷ Based on declassified emails and Mitchell’s account, it seems that at some point during the life time of this “black site”, the COB was changed. This would be consistent with the lack of permanent staffing positions there, and the rotation of TDY staff, a situation which persisted even into the next site, believed to be in Poland.⁴⁸ It would also be consistent with a note in the SSCI summary which indicates that there were at least two Chiefs of Base at this initial “black site”:

“The chief of Station in the country that hosted the CIA’s first detention site told the OIG [Office of Inspector General] that ‘[t]he Reports Officers did not know what was required of them, analysts were not knowledgeable of the target, translators were not native Arab[ic] speakers, and at least one of the [chiefs of Base] had limited field experience.’”⁴⁹ See Interview report of [REDACTED], Office of the Inspector General, May 20, 2003. According to [redacted] of CTC Legal, there was no screening procedure in place for officers assigned to DETENTION SITE GREEN. See interview of [redacted], by [REDACTED] and [REDACTED], Office of the Inspector General, February 14, 2003. See also interview of [redacted], Office of the Inspector General, March 24, 2003.”⁵⁰

On 6 October 2002, a little over a month before the second detainee – ‘Abd al-Rahim al-Nashiri – arrived there, an email was sent from the “black site” by its “outgoing Chief of Base”.

email from: [REDACTED] (outgoing Chief of Base at DETENTION SITE GREEN):
to: [REDACTED]
subject: “Assessment to Date” of AZ;
date: 10/06/2002, at 05:36:46 AM.⁵¹

José Rodriguez has said that it was he who ordered the closure of this first “black site”, and references the chief of base at that time as having been female:

“When we grew concerned that the identity of the first location where Abu Zubaydah was interrogated was about to leak, I issued an order that the facility be closed in ninety-six hours and the detainees be moved to a new site. The Agency officers on scene quickly

⁴⁵ Enhanced Interrogation, James E. Mitchell, Crown Forum, New York, 2016, page 202.

⁴⁶ Enhanced Interrogation, James E. Mitchell, *op. cit.*, page 97.

⁴⁷ Enhanced Interrogation, James E. Mitchell, *op. cit.*, page 24.

⁴⁸ This site also “had no permanent positions and was staffed with TDY officers.. [CIA Department of Operations] told OIG that in selecting a COB at [redacted] they considered a combination of factors, to include grade and managerial experience. A senior DO officer said that, by March 2003, because of lack of available, experienced DO officers who could travel to [redacted] the selection criteria were limited to selecting CTC candidates based on their grade. Like most TDY personnel who travelled to [redacted] the COB was generally expected to remain for a 30-day TDY”. CIA OIG Special Review, 7 May 2004, *op. cit.*, ¶¶ 84-85.

⁴⁹ In his account of the early time at this “black site” former FBI officer, Ali Soufan, recalls that “As soon as Abu Zubaydah arrived [at the site]... I went to the CIA chief of base and asked when they were planning to start interviewing him. **He** was surprised at my question. ‘Who? Us?’ he asked. ‘I don’t know anything about this guy and neither do my guys’.” [Emphasis added]. Ali Soufan, *The Black Banners: The inside story of 9/11 and the war against al-Qaeda*. WW Norton and Company (2011), page 376.

⁵⁰ SSCI summary, 29 December 2014, *op. cit.*, footnote 721.

⁵¹ SSCI summary, 29 December 2014, *op. cit.*, footnote 2559.

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began packing up the material they needed to take with them to the next location and destroying anything else so as to leave no reminders of what had taken place there... In the case, the base chief sought guidance on a number of things, including a pile of ninety-two videotapes that were stacked in a jumble on a bookcase in **her** office. The tapes had been made during the early days of AZ's interrogation..."⁵² [emphasis added]

When describing the closure of the first "black site" in December 2002, Mitchell wrote that "We scrambled to get the detainees ready to relocate. The COB, in concert with headquarters, decided that I should be on the rendition flight that moved them... Before I departed, the COB handed me a pouch containing a computer with our black site's intelligence reports and cables on it. **She** told me what it was and asked me to hand carry it to the new black site" [Emphasis added].⁵³

"On 4 December 2002 a CIA contracted aircraft, a Gulfstream jet (capacity for 12 passengers) registered as N63MU with the US Federal Aviation Authority and operated by First Flight Management/Airborne Inc., flew [Abd al-Rahim al-Nashiri] and Mr Abu Zubaydah from Thailand to the Szymany military airbase in Poland. The flight flew from Bangkok *via* Dubai and landed in Szymany, Poland, on 5 December 2002 at 14:56."⁵⁴

It is worth also recalling the CIA transfer procedure, as described to John Rizzo in a report sent to him by the International Committee of the Red Cross in 2007:

"The transfer procedure was fairly standardised in most cases. The detainee would be photographed, both clothed and naked prior to and again after transfer. A body cavity check (rectal examination) would be carried out and some detainees alleged that a suppository (the type and the effect of such suppositories was unknown by the detainees), was also administered at that moment.

The detainee would be made to wear a diaper and dressed in a tracksuit. Earphones would be placed over his ears, through which music would sometimes be played. He would be blindfolded with at least a cloth tied around the head and black goggles. In addition, some detainees alleged that cotton wool was also taped over their eyes prior to the blindfold and goggles being applied. Mr Abu Zubaydah alleged that during one transfer operation the blindfold was tied very tightly resulting in wounds to his nose and ears. He does not know how long the transfer took but, prior to the transfer, he reported being told by his detaining authorities that he would be going on a journey that would last twenty-four to thirty hours.

The detainee would be shackled by hands and feet and transported to the airport by road and loaded onto a plane. He would usually be transported in a reclined sitting position with his hands shackled in front. The journey times obviously varied considerably and ranged from one hour to over twenty-four to thirty hours. The detainee was not allowed to go to the toilet and if necessary was obliged to urinate or defecate into the diaper.

On some occasions the detainees were transported lying flat on the floor of the plane and/or with their hands cuffed behind their backs. When transported in this position the detainees complained of severe pain and discomfort. In addition to causing severe physical pain, these transfers to unknown locations and unpredictable conditions of detention and treatment placed mental strain on the fourteen, increasing their sense of disorientation and isolation. The ability of the detaining authority to transfer persons over apparently significant distances to secret locations in foreign countries acutely increased the detainees' feeling of futility and helplessness..."⁵⁵

According to Mitchell's account, this female Chief of Base may not only have had a direct

⁵² José Rodríguez, Jr., *Hard measures*, *op. cit.*, pages 118-119. For more on tapes, see below.

⁵³ *Ibid.*, page 103.

⁵⁴ *Case of Al Nashiri v. Poland*, Application No.: 28761/11. Judgment, European Court of Human Rights, 24 July 2014 (Final, 16 February 2015), ¶ 91. <http://hudoc.echr.coe.int/eng?i=001-146044>; See also *Case of Husayn (Abu Zubaydah) v. Poland*, Application No: 7511/13, Judgment at <http://hudoc.echr.coe.int/eng?i=001-146047>

⁵⁵ ICRC Report on the treatment of fourteen 'high value detainees' in CIA custody, February 2017.

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oversight role in relation to the enforced disappearance of Abu Zubaydah and ‘Abd al-Rahim al-Nashiri and the interrogation of the latter detainee under “enhanced” techniques, including water-boarding, but also appears to have been directly involved in shutting down a secret facility, not in order to end such crimes under international law, but to allow the CIA to continue them elsewhere. The secret transfer of the detainees – in conditions that are known to have violated not just the prohibition of arbitrary detention but also of torture and other cruel, inhuman or degrading treatment – was also entirely unlawful.

Both detainees transferred from this “black site” were subject to another nearly three years of enforced disappearance, and to further “enhanced” interrogation techniques and detention conditions that violated the prohibition of torture and other cruel, inhuman or degrading treatment at the next “black site”.

A United Nations expert study on secret detention issued in 2010 noted that: “In its submission for this study the Government of Thailand denies the existence of a secret detention facility in Thailand in 2002-2003, stating that international and local media have visited the suspected places and found no evidence that such a facility existed on Thai soil. In light of the detailed nature of the allegations, however, the Experts take it as credible that a CIA black site existed in Thailand, and calls for the domestic authorities to launch an independent investigation into the matter”.⁵⁶ By all accounts, a federal judge noted in 2011, this first “black site” was in Thailand.⁵⁷ In 2014, the European Court of Human Rights pointed to the information put before it that the facility was “code-named Cat’s Eye” and was located in Bangkok.⁵⁸

In summary, this “black site” thus had a relatively short operational existence from April to December 2002. During this period, two detainees were held there – Abu Zubaydah for that whole time, and ‘Abd al-Rahim al-Nashiri during November and December 2002. Both men were subjected to torture, including by “water-boarding”, and to enforced disappearance there before being transferred to the next facility “in another foreign country”, believed to be Poland. There eight detainees would be held in a facility with five cells “constructed to accommodate five detainees”, including Abu Zubaydah and ‘Abd al-Rahim al-Nashiri.⁵⁹

ROLE OF CHIEF OF BASE AT A ‘BLACK SITE’

It is alleged that Gina Haspel was Chief of Base of the first “black site” during the last two months of its operations in late 2002. Most of the declassified material relating to that site is connected to the period of Abu Zubaydah’s initial detention and subsequent interrogation between April and August 2002. While the Chief of Base during that time period is said to have been an unidentified male CIA officer, and not Gina Haspel, the information on the post is relevant to the extent that its functions would have continued during the remainder of the short period that this “black site” remained operational. Meanwhile, it is unknown what role Gina Haspel had in the CTC in CIA headquarters. CTC remained closely involved in a supervisory capacity in the case of all interrogations involving “enhanced” techniques, as outlined below.

The US Department of Justice Office of Professional Responsibility (OPR) report issued in 2009 noted that in the “black site” in which Abu Zubaydah and ‘Abd al Nashiri were held,

⁵⁶ UN Doc. A/HRC/13/42, 26 January 2010. Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances, ¶ 111.

⁵⁷ *ACLU et al v. Department of Defense, et al.* Opinion and order denying motion to hold defendant Central Intelligence Agency in civil contempt. US District Court for the Southern District of New York, 5 October 2011.

⁵⁸ Case of *Al Nashiri v. Poland*. Judgment, European Court of Human Rights, 24 July 2014, ¶ 34.

⁵⁹ CIA OIG Special Review, 7 May 2004, *op. cit.*, ¶¶ 70 and 82. This “black site” was “used to detain and interrogate eight individuals”, ¶ 80.

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while “the [redacted] psychologist/interrogators administered all of the interrogation sessions involving EITs”, these sessions were “closely followed by headquarters personnel”. The OPR report noted also that “overall supervision of the facility was the responsibility of a CIA case officer assigned as Chief of Base (COB), who reported to CTC headquarters”.⁶⁰

José Rodriguez has pointed to a formal memorandum, produced while Abu Zubaydah was being interrogated in the first “black site”. This has the Chief of Base as filling the role of “Team Leader” of the “Core Team” involved in the interrogations.⁶¹

The Office of Inspector General of the CIA similarly stated:

“The responsibility of the COB [redacted] was to ensure the facility and staff functioned within the authorities that govern the mission. In conjunction with those duties, the COB was responsible for the overall management and security of the site and the personnel assigned to support activities there. The COB oversaw interrogations and released operational and intelligence cables and situation reports. The COB coordinated activities with the Station and Headquarters and reported to the CTC Chief of Renditions Group.”

“The two psychologist/interrogators at [redacted] led each interrogation of Abu Zubaydah and Al-Nashiri where EITs were used. The psychologist/interrogators conferred with the COB and other team members before each interrogation session...”⁶²

In litigation in 2017, Drs Mitchell and Jessen described the chain of command at the “black site” where Abu Zubaydah was held:

“From the outset, the CIA established that the CIA’s Station Representative was responsible for all activities at GREEN. At GREEN, the Chief of Base reported to the Station Representative, who reported to the Chief of Station, who reported back to personnel at CIA Headquarters... Dr Mitchell’s role was to observe the interrogation conducted by the CIA and make recommendations to CTC as to how Zubaydah’s resistance to interrogation could be overcome. While in this role, Dr Mitchell reported directly to HQS and Jose Rodriguez, who was aware of Mitchell’s activities.”⁶³

For his part, José Rodriguez has said that “the black-site COB, in turn, reported directly to me. As such, I was keenly aware of and approved of all of Drs Mitchell and Jessen’s activities”. The “GREEN COB was responsible for ensuring that all on-site staff and support, including Drs. Mitchell and Jessen, complied with all applicable regulations, guidelines, standard operating procedures, and the applicable interrogation plan (for Zubaydah initially and other HVDs thereafter). The COB provided me and HQS with detailed correspondence regarding interrogations on both a daily and an as needed basis”.⁶⁴

Implementing the “initial phase” of Abu Zubaydah’s interrogation in April 2002, “CTC’s primary interrogator was in charge of and responsible for all aspects of Zubaydah’s interrogation. He or she was the leader of the interrogation team and ‘in some respects the de facto chief of the CIA base [‘COB’] where Zubaydah was being held, GREEN”.⁶⁵ As the interrogation became more aggressive over time, by the “next phase” in June, “The COB where

⁶⁰ Investigation into the Office of Legal Counsel’s Memoranda concerning issues relating to the Central Intelligence Agency’s use of ‘enhanced interrogation techniques’ on suspected terrorists. Report of Office of Professional Responsibility, US Department of Justice [hereinafter, OPR Report], 29 July 2009, page 83.

⁶¹ *Salim et al v. Mitchell and Jessen*, Declaration of Jose Rodriguez. US District Court for the Eastern District of Washington, 24 January 2017, ¶ 77. The memo is available at https://www.aclu.org/sites/default/files/field_document/175-16-Exhibit-P.pdf

⁶² CIA OIG Special Review, 7 May 2004, *op. cit.*, ¶¶ 73-74.

⁶³ *Salim v. Mitchell*, Defendants’ statement of undisputed facts, US District Court for the Eastern District of Washington, 22 May 2017, ¶¶ 40-41 and 43.

⁶⁴ *Salim v. Mitchell*, Declaration of Jose Rodriguez. US District Court for the Eastern District of Washington, 24 January 2017.

⁶⁵ *Ibid.*, ¶ 71.

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Zubaydah was being detained was responsible for all aspects of the interrogation, including making immediate decisions in response to the fluid nature of the interrogation”.⁶⁶

With the “aggressive phase” of Abu Zubaydah’s interrogation looming, a 23 July 2002 cable was sent from the “black site” to CIA HQ – “Station, [GREEN] COB and [GREEN] Personnel will make every effort to insure [sic] that subject is not permanently physically or mentally harmed but we should not say at the outset of this process that there is no risk”.⁶⁷

The “aggressive phase” of Abu Zubaydah’s interrogation – pursuant to the 1 August 2002 memorandum signed by Jay Bybee and converted into a cable to the “black site” at the request of John Rizzo – included multiple water-boarding sessions and being held in “cramped confinement” in coffin-like boxes. According to Mitchell and Jessen,

“The CIA determined what was done to Zubaydah, how it would be done, and when it would be done. The CIA, through HQS, the CTC and the COB of GREEN, maintained complete operational control over Drs Mitchell and Jessen while they interrogated Zubaydah, whether using EITs or otherwise. Drs Mitchell and Jessen reported directly to GREEN’s COB. GREEN’s COB, in turn, reported to Rodriguez, who was keenly aware of, and approved of, all of Drs Mitchell and Jessen’s activities. GREEN’s COB was responsible for ensuring that all on-site staff and support, including Drs Mitchell and Jessen, complied with all applicable regulations, guidelines, standard operating procedures and the applicable, approved interrogation plan. The Zubaydah interrogation team did not apply any EITs to Zubaydah until it received express HQS approval.”⁶⁸

According to John Rizzo, the CIA’s Chief Legal Officer, the cable he had sent on 3 August 2002 to the “black site” based on the 1 August Bybee memo on Abu Zubaydah’s interrogation, “confirms that the final decision to halt or recommence EIT use would lie exclusively with the CIA’s Chief of Base and Senior CTC Officer”.⁶⁹

The “aggressive phase” of Abu Zubaydah’s interrogation began on 4 August and was “conducted entirely at the behest of, and within the control of, HQS and CTC... GREEN’s COB provided HQS, and specifically Rodriguez, with detailed correspondence regarding interrogations on both a daily and as needed basis”⁷⁰ On 4 August, Abu Zubaydah was brought out of 47 days of isolation to face the “aggressive” phase of his interrogation framed in the 1 August memo. By the eighth day of this phase, he had already been repeatedly slammed into walls, forced into stress positions, placed in a coffin-shaped box for hours, and water-boarded.⁷¹

The close involvement of headquarters in what was going on in the ‘black site’ was illustrated when a videoconference between the interrogation room at the “black site” and CIA Headquarters in Langley was held on 13 August 2002, during which “enhanced interrogation techniques” were used on Abu Zubaydah while the remote audience watched. After this session, CIA headquarters instructed the interrogation team to “continue with the aggressive interrogation strategy for the next 2-3 weeks”, including waterboarding.⁷²

On 16 August 2002, a team from CIA Headquarters arrived at the “black site” to “discuss the

⁶⁶ *Ibid.*, ¶ 95.

⁶⁷ *Ibid.*, ¶ 153.

⁶⁸ *Ibid.*, ¶¶ 177-181.

⁶⁹ *Salim v. Mitchell*, Declaration of John Rizzo, US District Court for the Eastern District of Washington, 23 January 2017. The cable is available at https://www.thetorturedatabase.org/files/foia_subsite/62.pdf

⁷⁰ *Salim v. Mitchell*, Defendants’ Statement of Undisputed Facts, *op. cit.*, ¶¶ 186 and 189. See also SSCI summary, 29 December 2014, *op. cit.*, page 58.

⁷¹ SSCI summary, 29 December 2014, *op. cit.*, pages 41-43.

⁷² *Salim v. Mitchell*, Defendants’ Statement of Undisputed Facts, *op. cit.*, ¶¶ 199 and 201.

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general strategy for the current phase of Zubaydah's interrogation".⁷³ The "HQS team" subsequently became "actively involved in Zubaydah's interrogation".⁷⁴ On 19 August 2002, "the water board was applied to Zubaydah while CTC/LGL and GREEN's COB observed."⁷⁵ The "aggressive phase" of the interrogation ended on 23 August 2002, after 19 days of interrogation using "enhanced interrogation techniques".⁷⁶

CIA headquarters instructed that the "aggressive phase" of Abu Zubaydah's interrogation should be used as a "template" for future interrogations of "high value captives".⁷⁷ To wit:

"All cables from a black-site were reviewed by Chief of Base prior to being sent to HQS. Rodriguez explained that cables requesting approval for the application of EITs would go to multiple people in the chain of command at CIA HQS, including Rodriguez, who had to approve any such requests. For certain techniques, specifically water boarding, the Director of the CIA would also have to approve, in advance, usage of the technique."⁷⁸

"The COB at each black-site was responsible for the overall management and supervisory duties of an interrogation team, including Drs Mitchell and Jessen, and for the specific interrogation plan. Drs Mitchell and Jessen reported to the COB. All communications between the field and HQS flowed through the COB up the chain to the Chief of Station, then to CTC, and then to the Director of the CIA.... Interrogation plans, or changes to an interrogation plan, were approved by the COB and then approved by all of his or her superiors."⁷⁹

Both Abu Zubaydah and 'Abd al-Rahim al-Nashiri were transferred out of it in December 2002 and taken to another "black site", believed to be in Poland. A decade and a half later, both men are still in US custody, at the US naval base at Guantánamo (itself used as a CIA "black site" in 2003 and 2004), where they have been since early September 2006.⁸⁰ Abu Zubaydah has never been charged. 'Abd al-Rahim al-Nashiri is facing a capital trial by military commission.⁸¹

DESTRUCTION OF INTERROGATION TAPES

In January 2008, the Washington Post reported that in 2005 the outgoing CIA station chief in Bangkok had sent a classified cable to his superiors in CIA Headquarters in Langley to ask if he could destroy the tapes of interrogations conducted in a secret CIA facility in Thailand in 2002. The tapes were allegedly being held in a safe in the CIA station, based in the compound at the US Embassy in Bangkok, and the station chief apparently wanted the tapes destroyed before he left office.⁸²

Three weeks before this report was published, then CIA Director Michael Hayden (who today is supporting Gina Haspel's nomination) issued a statement to CIA employees after being told that the New York Times had learned that the agency had destroyed interrogation videotapes

⁷³ *Ibid.*, ¶ 204.

⁷⁴ *Ibid.*, ¶ 205.

⁷⁵ *Ibid.*, ¶ 206.

⁷⁶ *Ibid.*, ¶ 207.

⁷⁷ *Ibid.*, ¶ 208.

⁷⁸ *Ibid.*, ¶¶ 221-223.

⁷⁹ *Ibid.*, ¶¶ 233-234 and 238.

⁸⁰ USA: Broken promises: Failure to close Guantánamo is part of a deeper human rights deficit, January 2017, <https://www.amnesty.org/en/documents/amr51/5433/2017/en/>

⁸¹ USA: Capital injustices – more damage to rule of law principles, more shambles at Guantánamo, more executions, In February 2018, the military judge indefinitely suspended proceedings in the case because of the defence counsel's withdrawal.

⁸² Station chief made appeal to destroy CIA tapes. Washington Post, 16 January 2008.

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recorded at a “black site” during 2002. Director Hayden wanted to get the CIA’s version of events to its employees before the issue became public. He confirmed that the CIA had destroyed the tapes in 2005, without giving any detail of the interrogations depicted on them, or where the “black site” was, emphasising instead that the interrogation techniques had been a “lawful, safe, and effective” means “to obtain the information” from detainees in “our terrorist detention program”:

“If past public commentary on the Agency’s detention program is any guide, we may see misinterpretations of the facts in the days ahead. With that in mind, I want you to have some background now... What matters here is that it was done in line with the law. Over the course of its life, the Agency’s interrogation program has been of great value to our country. It has helped disrupt terrorist operations and save lives. It was built on a solid foundation of legal review. It has been conducted with careful supervision. If the story of these tapes is told fairly, it will underscore those facts.”⁸³

To reiterate: the detention program violated international law from day one, and crimes under international law were committed in it throughout its operations. Destruction of the tapes destroyed evidence of torture and enforced disappearance, crimes under international law. Wilfully concealing or destroying evidence of a crime can constitute complicity in the crime. Articles 4, 6 and 7 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) requires that not only the direct perpetrators of torture, but also those complicit in it, be brought to justice.

In addition, the tapes were destroyed in violation of a federal court order. They were destroyed on 9 November 2005, more than a year *after* a federal judge ordered the government to produce or identify materials responsive to a request filed in 2003 by the American Civil Liberties Union (ACLU) and other US non-governmental organizations under the Freedom of Information Act (FOIA) seeking information on the treatment of detainees in US custody in the counter-terrorism context. In December 2007, after the CIA Director confirmed that the interrogation tapes had been destroyed, the ACLU filed a motion to have the CIA found in contempt of court.

The ensuing litigation revealed that between April and December 2002, the CIA had recorded at least 92 videotapes of interrogations of Abu Zubaydah (90) and ‘Abd al-Rahim al-Nashiri (2)’⁸⁴ at the CIA’s first “black site” which the judge noted was reportedly in Thailand. Twelve of the tapes depicted use of “enhanced interrogation techniques”, including “water-boarding”.⁸⁵

US District Court Judge Alvin Hellerstein noted that “there had been some talk within the CIA” of destroying the videotapes later that same year: “In an email chain dated November 15, 2002 [the date of ‘Abd al-Rahim al-Nashiri’s arrival at the site], between an officer in the field and officers and attorneys at CIA headquarters, the officer in the field expressed ‘personnel concerns with the disposition of the video tapes’. In the same email chain, a CIA attorney discussed a request ‘to have a random independent review of the video tape, before they are destroyed’.”⁸⁶ The three-page email chain remains classified Top Secret, and exempted from

⁸³ Director’s Statement on the Taping of Early Detainee Interrogations, 6 December 2007, <https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2007/taping-of-early-detainee-interrogations.html>

⁸⁴ According to Mitchell, “With the capture of al-Nashiri, headquarters decided that we should tape a day’s worth of interrogations, use them to supplement our notes for report writing that night, and then tape over them the next day. That way, if something went wrong during an interrogation, it would be on tape. We could review it and set it aside and sent it to headquarters if necessary. But we wouldn’t be adding to the large pile of tapes we had from taping Abu Zubaydah”. Enhanced Interrogation, *op. cit.*, page 264.

⁸⁵ *ACLU et al v. Department of Defense, et al.* Opinion and order denying motion to hold defendant Central Intelligence Agency in civil contempt. US District Court for the Southern District of New York, 5 October 2011.

⁸⁶ *ACLU et al v. Department of Defense, et al.* Opinion and order denying motion to hold defendant Central Intelligence Agency in civil contempt. US District Court for the Southern District of New York, 5 October 2011. Appended to the order is a “summary of CIA policies regarding document preservation”.

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FOIA release, including on the grounds that it contained information “relating to the identities of personnel engaged in counterterrorism operations, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”.

Former CIA chief legal officer John Rizzo has written that the “sudden desire” in late 2002 of the then CTC chief operating officer José Rodriguez to destroy the tapes “was not spurred by an urgent need to eliminate unnecessary clutter. It was based on what the tapes showed”. The waterboarding scenes were “tough to watch” and “more to the point, clearly showed the faces of CIA employees and contractors on the scene”.⁸⁷

The tapes were not destroyed at that time, however. A subsequent review of the tapes by the CIA Office of Inspector General during 2003 disclosed, for example, that Abu Zubaydah had been subjected to 83 “applications of the waterboard” (this information was not made public until 2009). Judge Hellerstein noted that despite the FOIA requests in 2003 and 2004, and “despite my repeated orders”, the CIA “failed to identify or produce the videotapes”. It should have done so, the judge wrote.⁸⁸

Throughout 2004 and 2005, Judge Hellerstein continued, “the CIA’s terrorist and interrogation practices came under increasing public scrutiny”. On 8 November 2005, a cable sent “from the field to CIA headquarters sought approval to destroy the videotapes”. “Jose Rodriguez, then the CIA’s Deputy Director of Operations, responded that ‘DDO approves Ref A request to destroy [redacted] video tapes as proposed... Request that [redacted] advise when destruction has been completed’”. A cable sent from the field to CIA headquarters on 9 November 2005 confirmed that the 92 videotapes had been destroyed.

In a subsequent email chain, Judge Hellerstein noted, “Rodriguez allegedly said that the ‘heat from destroying is nothing compared to what it would be if the tapes ever got into public domain – he said that out of context, they would make us look terrible; it would be devastating to us’, sentiment with which all in the room agreed”. However, an email sent on 10 November 2005 from an unidentified individual to Kyle Foggo, then Executive Director of the CIA, revealed concern about the decision to destroy the tapes:

“While I understand Jose’s ‘decision’ (and I believe the tapes were bad news), I was just told by Rizzo that [redacted] DID NOT concur on the cable – it was never discussed with him (this is perhaps worse news, in that we may have ‘improperly’ destroyed something. In fact, it is unclear now whether the IG [Inspector General] did as well. Cable was apparently drafted by [redacted] and released by Jose; they are only two names on it, so I am told by Rizzo. Either [redacted] lied to Jose about ‘clearing’ with [redacted] and IG (my bet) or Jose misstated the facts. (It is not without relevance that [redacted] featured prominently in the tapes, as [redacted] was in charge of [redacted] at the time and clearly would want the tapes destroyed.) Rizzo is clearly upset, because he was on the hook to notify Harriet Miers [White House Counsel] of the status of the tapes because it was she who had asked to be advised before any action was taken. Apparently, Rizzo called Harriet this afternoon and she was livid, which he said was actually unusual for her. Rizzo does not think this is likely to just go away.”⁸⁹

This email could be read to indicate that a person who “featured prominently in the tapes” was the “chief of base” of the “black site” where the interrogations occurred and that this person also drafted the cable which José Rodriguez approved. However, classification redacts his or

⁸⁷ John Rizzo, *Company Man*, *op. cit.*, page 5.

⁸⁸ *ACLU et al v. Department of Defense, et al*. Opinion and order denying motion to hold defendant Central Intelligence Agency in civil contempt. US District Court for the Southern District of New York, 5 October 2011.

⁸⁹ Email to: Dusty Foggo. Subject: Short backgrounder – part 2. Date: 10 November 2005, 7.25pm. Filed in *ACLU et al v. DOD et al*, Declaration of Alicia L. Bannon in Support re Motion for Contempt and Sanctions. Exhibit 46, US District Court for the Southern District of New York, 15 February 2011.

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her name from the public record. It could also be the chief of station, for example. In James Mitchell's account, he says that the "chief of station of the country was on those tapes", who he depicts as male (see below). As noted above, the Washington Post reported in January 2008 that it was the outgoing CIA chief of station in Bangkok who in 2005 had requested that the tapes be destroyed before he left office.

According to Mitchell, the chief of base was in charge of "sanitizing" the "black site" – getting rid of materials before shutting it down. When the decision was taken to close the initial "black site" down in December 2002, Mitchell says that he had viewed it as "another chance, I thought, to destroy the tapes". He asserts that "One of the last things I said to the [female] base chief and anyone else who would listen as I left the site for the rendition aircraft with Abu Zubaydah and al-Nashiri in tow was 'Don't forget to get rid of the tapes'."⁹⁰ He continues:

"Years later I talked to one of the security officers who had been at the black site at the end, shutting it down. He said he had been told by the COB to burn everything he could in preparation for sanitizing the black site. He had the tapes piled in a pit and was about to pour gasoline on them and light a match. Then he thought, I'd better check with the COB one more time. When he did, he was told to hold off until **she** could check with headquarters to see if the instruction to sanitize the site included getting rid of the tapes. Sadly, headquarters punted and told **her** to retain them. No one at the black site was happy. The chief of station was on those tapes. He said he wanted to keep them in his office, where he could be certain access was tightly controlled, ensuring that they couldn't be easily taken or duplicated and guaranteeing that only those with a legitimate need would view them" [emphasis added].⁹¹

In his memoirs published in 2014, former CIA chief legal counsel John Rizzo wrote about the tape destruction episode in some detail. As noted above, Rizzo recalled that in late 2004 the newly confirmed Director of the CIA, Porter Goss, promoted José Rodriguez to the position of CIA Deputy Director for Operations, and Rodriguez in turn "installed as his chief of staff an officer from the Counterterrorist Center who had previously run the interrogation program". One of Gina Haspel's positions was as chief of staff to the Deputy Director for Operations. Rizzo continues about Rodriguez and this chief of staff:

"Between them, they were the staunchest advocates inside the building [CIA Headquarters] for destroying the tapes. They were now in a position to lobby the director directly. Yet I never had any indication that they did so. Instead, they continued to come to me, persistently pressing their case. In June 2004, José had been upset to learn of the White House objections, and I could tell he was becoming more frustrated as the months went by.

As 2004 turned to 2005, it was increasingly apparent that the 'right' time to destroy the tapes was nowhere in sight.... Nonetheless José and his chief of staff kept coming to me. On the edges of meetings on other subjects, in the hallways, they would raise the subject almost every week..."⁹²

John Rizzo said that the issue seemed to go away for several months after he told Rodriguez and his chief of staff that neither the White House nor other senior officials were supportive of

⁹⁰ Enhanced Interrogation, *op. cit.*, pages 264-265.

⁹¹ Enhanced interrogation, *op. cit.*, page 265. According to the Rodriguez account, "...the base chief sought guidance on a number of things, including a pile of ninety-two videotapes that were stacked in a jumble on a bookcase in her office... Some midlevel person in CTC, whose name I do not know, correctly believing that we weren't getting any useful intelligence from the tapes, recommended that they be thrown onto a bonfire that was being lit nearby. The tapes were scooped up and about to be turned into useless slag when a follow-up cable from headquarters came in saying: 'Hold up on the tapes. We think they should be retained for a little while longer.'" José Rodriguez, *Hard Measures*, *op. cit.*, page 119.

⁹² John Rizzo, *Company Man*, *op. cit.*, pages 14-15.

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destroying the tapes. Then, in early November 2005, according to Rizzo, "José and his senior staff" had approached CTC lawyers and sought to "revisit the issue", possibly as a result of the fact that "the chief of our overseas office, who had been safeguarding the tapes for years, was preparing to retire shortly and was pressing headquarters for final resolution before he left".⁹³

Rizzo said that "my two lawyers began with José and his staff to draft language that would be included in a classified cable that would come from the chief of our overseas office, formally requesting permission to destroy the tapes". According to José Rodríguez, in his own memoirs:

"My chief of staff held a meeting with CTC lawyers and other parties and asked two questions: (1) Is the destruction of the tapes legal? And (2) Did I, as director of the National Clandestine Service, have the authority to make that decision on my own? The answer she got to both questions was: Yes".⁹⁴

He continued;

"on November 4, 2005, lawyers in CTC drafted a cable that could be sent to the field with instructions that they cut and paste the appropriate language from the cable and put it into their own cable back to us. The instructions basically were: 'ask us this way and we will say yes'... The next day, a Saturday, the field dutifully sent a cable to headquarters asking for permission to destroy the tapes. The language was just right, of course, since our lawyers had drafted it. I asked my chief of staff to prepare a cable granting permission... My chief of staff drafted a cable approving the action... The cable left nothing to chance. It even told them *how* to get rid of the tapes. They were to use an industrial-strength shredder to do the deed... I took a deep breath of weary satisfaction and hit send. The next day, November 9, the field sent a cable reporting that the shredder had done its work."⁹⁵

In his memoirs, Rizzo characterized Rodríguez's decision as "an act of gross insubordination".⁹⁶ After Gina Haspel's nomination to be Director of the CIA, John Rizzo was interviewed on National Public Radio. The following exchange took place:

INTERVIEWER: I want to ask you about something else, another area where Gina Haspel - as some of her critics have been speaking up. And it was her order to destroy the videotapes of some of these brutal sessions where suspects were waterboarded. Isn't that an area of judgment where lawmakers - would you welcome them to really dig in? Because, you know, even the White House and many others said that videotapes, important evidence of how the US government acts, should not be destroyed.

RIZZO: *Well, I certainly - it's a legitimate area of inquiry for the committee. I mean, Gina was not - to be fair, Gina was not the official who actually did the order. The official who did the order was José Rodríguez, her boss at the time, chief of operations at CIA. And I might add, the...*

INTERVIEWER: But she sent the cable to this prison to destroy these tapes.

RIZZO: *That's correct. And, you know, I should add that I myself was not informed about this decision before it happened. So I felt blindsided at the time and, frankly, upset. But it certainly - yeah, it certainly is a legitimate area for inquiry. There was, mind you, a three-year criminal investigation by the Justice Department into the videotapes' destruction, and no charges were ever brought.*

INTERVIEWER: Do you question her judgment, though, after that episode?

⁹³ John Rizzo, *Company Man*, *op. cit.*, page 17.

⁹⁴ José Rodríguez, *Hard Measures*, *op. cit.*, page 192.

⁹⁵ José Rodríguez, *Hard Measures*, *op. cit.*, page 192-193

⁹⁶ John Rizzo, *Company Pan*, *op. cit.*, page 20.

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RIZZO: No... I understand why she and Mr. Rodriguez decided that the tapes needed to be destroyed. It wasn't, in my view, an attempt to obstruct justice. They were genuinely worried that the tapes someday would be leaked to the public. And on the tapes, there were visual images of the CIA people who were doing the interrogations, and they thought those people would be put under terrorist risk. That was their rationale. And, as I say, I did not agree with the decision. They should not have done it. But I understand their rationale for doing it.⁹⁷

In a sworn declaration in 2017 filed in federal court, John Rizzo described himself as “one of the key legal architects of the CIA’s EIT [enhanced interrogation technique] Program, which I monitored and oversaw from its beginning to end”.⁹⁸

During a hearing in January 2011, Judge Hellerstein had said that the destruction of the tapes had “flouted” his order of September 2004, and that the individuals who destroyed the tapes “did something that was really wrong”.⁹⁹ However, in a ruling from the bench in August, he made clear that he would not “hold an entire agency in contempt for the mistakes of some of its officials”. However, he also declined to hold José Rodriguez in civil contempt for authorizing the tapes’ destruction. Judge Hellerstein indicated that he considered that such a finding would be more akin to criminal contempt, and “that’s not my job”.¹⁰⁰ In an opinion issued in October 2011, he denied the ACLU’s motion.

By the time Judge Hellerstein issued his written ruling, the prosecutor who had been assigned by the Attorney General to look into the matter had already declined to initiate any criminal proceedings against anyone in relation to the destruction of the interrogation tapes. On 9 November 2010, the US Department of Justice had announced, without further explanation, that no one would face criminal charges in relation to this issue.¹⁰¹

In his memoirs, José Rodriguez confirmed that it was he who approved the destruction in November 2005 of videotapes of CIA interrogations of Abu Zubaydah and ‘Abd al-Rahim al-Nashiri at the “black site”, including recordings of “water-boarding”.¹⁰² In a deposition given in the Mitchell and Jessen civil pre-trial proceedings in 2017, José Rodriguez was asked the question, “What was the reason why you felt that it was important to have the tapes destroyed?” He responded:

“I felt it was important to have the tapes destroyed, because I needed to protect the people who were there on the black sites, and they were not just my people, but they were also people from other directorates that were involved with our team conducting the enhanced interrogation program. It would make the CIA look bad, and it would actually, in my view, you know, almost destroy the clandestine service because of it.”¹⁰³

Michael Morell was “read into” the secret detention program on 7 July 2006 two days after he became Deputy Director of the CIA. After signing a document “essentially saying that I understood that I could go to jail if I ever disclosed the information in an unauthorized way”,

⁹⁷ Former CIA Lawyer Defends Gina Haspel's Role At Agency, NPR 14 March 2018, <https://www.npr.org/2018/03/14/593398937/former-cia-lawyer-defends-gina-haspels-role-at-agency>

⁹⁸ *Salim v. Mitchell*, Declaration of John Rizzo, US District Court for the Eastern District of Washington, 23 January 2017, ¶ 68.

⁹⁹ *ACLU, et al v. Department of Defense, et al.* Transcript of hearing before District Judge Alvin Hellerstein, US District Court for the Southern District of New York, 14 January 2011.

¹⁰⁰ *ACLU et al v. Department of Defense et al.* Transcript of hearing before District Judge Alvin Hellerstein, US District Court for the Southern District of New York, 1 August 2011.

¹⁰¹ Department of Justice Statement on the Investigation into the Destruction of Videotapes by CIA Personnel, 9 November 2010, <http://www.justice.gov/opa/pr/2010/November/10-ag-1267.html>

¹⁰² José Rodriguez, *Hard measures, op. cit.*, especially pages 183-196.

¹⁰³ *Salim v. Mitchell*, Transcript of Videotaped Deposition of Jose Rodriguez, Washington, D.C., 7 March 2017, US District Court for the Eastern District of Washington, filed 22 May 2017.

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he was told the locations of the “black sites” and briefed in detail on each of the “enhanced interrogation techniques”.¹⁰⁴ In 2011, he conducted an internal “accountability” review of the tape destruction issue. In December 2011, he told José Rodriguez (who had retired some four years earlier) that “his action [to destroy the tapes] had been inappropriate”, and that because he had knowingly violated the chain of command, Morrell was issuing a letter of “reprimand” against him.¹⁰⁵

In 2013, without naming her, the New York Times reported on the “female officer” who “had helped develop the CIA’s detention program... and was briefly in charge of the agency’s secret prison in Thailand.” In late 2005, the report continued, “the female officer was Mr Rodriguez’s chief of staff at the time, and according to several former CIA officials was a strong advocate for destroying the [interrogation] tapes, which were in a safe at the agency’s station in Bangkok.”¹⁰⁶ In a more recent article, the New York Times named the officer as Gina Haspel.¹⁰⁷

In February 2017, responding to President Trump’s decision to appoint Gina Haspel to the position of Deputy Director, former Deputy Director Morell wrote:

“Haspel does not shy away from the toughest jobs; in fact, she gravitates toward them. Some of the assignments that she took on have later come under political fire, but in each case she was following the lawful orders of the president. And, in each case, she carried out her responsibilities within the bounds of the law and with excellent judgment. Any criticism of her in this regard is unfair.

The media is also likely to refer to a moment in her career when she drafted a cable instructing a field station to destroy videotapes of CIA interrogations of senior al Qaeda operatives. She did so at the request of her direct supervisor and believing that it was lawful to do so. I personally led an accountability exercise that cleared Haspel of any wrongdoing in the case.”¹⁰⁸

Senators Wyden and Heinrich wrote to CIA Director Pompeo on 23 February 2017 noting that since their earlier letter to President Trump expressing their concern about the appointment of Gina Haspel to the position of Deputy CIA Director, at least two former senior CIA officials -- former Acting CIA Director Michael Morell and John Bennett, former Director of the National Clandestine Service -- had spoken publicly about Haspel’s background in recent weeks, including that she “drafted a cable directing that CIA interrogation videos be destroyed”. They called on the CIA Director to declassify information on Gina Haspel’s background, concluding that “it is a basic hallmark of our democracy that the public know who its leaders are”.¹⁰⁹

¹⁰⁴ Michael Morrell, *The Great war of our time*, *op. cit.*, page 246.

¹⁰⁵ *Ibid*, page 260. José Rodriguez has said that “the practical implication of the letter is nil”. *Hard Measures*, *op. cit.*, page 261.

¹⁰⁶ New Head of CIA’s Clandestine Service Is Picked, as Acting Chief Is Passed Over, *New York Times*, 7 May 2013, <http://www.nytimes.com/2013/05/08/us/cia-officer-tied-to-detention-program-is-replaced.html>

¹⁰⁷ Gina Haspel, Trump’s Choice for CIA, Played Role in Torture Program, 13 March 2018, <https://www.nytimes.com/2018/03/13/us/politics/gina-haspel-cia-director-nominee-trump-torture-waterboarding.html>

¹⁰⁸ Haspel hailed by CIA vets. By Michael Morell, 2 February 2017, https://www.thecipherbrief.com/column_article/why-haspel-makes-sense-as-the-deputy-cia-director

¹⁰⁹ Heinrich, Wyden Urge CIA to Declassify Information About Deputy Director Haspel’s Background, 23 February 2017, <https://www.heinrich.senate.gov/press-releases/heinrich-wyden-urge-cia-to-declassify-information-about-deputy-director-haspels-background>

SENATE MUST HOLD FIRM FOR TRUTH

Gina Haspel is precisely the kind of truth teller you want in the room when important decisions are being made

Former CIA Director Michael Hayden¹¹⁰

On the morning of 13 March 2018, President Donald Trump tweeted that “Gina Haspel will become the new Director of the CIA.” Gina Haspel is currently Deputy Director of the CIA, a position to which she was appointed by the President in early 2017. The post of CIA Deputy Director did not require Senate approval. The Director position does.

While her nomination has drawn support from former and current leaders of the US intelligence community, and some Senators, serious human rights concerns are swirling around this nomination. As they consider the President’s decision to nominate Gina Haspel, Senators should reflect upon some relatively recent history and recognize that, as things stand, they should not hold a hearing.

Exactly 15 years before President Trump’s tweet, on 13 March 2003, Senator Patrick Leahy spoke on the Senate floor, troubled by discussions in the US media about whether the USA should resort to torture against terrorism suspects. He said:

“It is well-established that torture is a violation of international law, by which our country is bound. It is also a violation of our own laws. Yet commentators have been quoted by the press saying that in certain limited circumstances, when the threat is a possible terrorist attack, the use of torture is justified...

Torture is among the most heinous crimes, and there is no justification for its use. One need only review history to understand why there can be no exception to torture... [H]istory has shown that once an exception is made for torture, it is impossible to draw the line.”

Aside from Senator Leahy – whose intervention noted the recent deaths in US military custody of two Afghan nationals at Bagram airbase – no one that day in Congress spoke of torture by US personnel.¹¹¹ Yet by then the USA had been operating a program of secret detention for a year, a program in which detainees had already been subjected to torture and enforced disappearance. It would operate for another five years after that, and perpetrators of crimes under international law committed in it would continue to enjoy impunity to the present day.

The Senate has faced prior nominations of individuals alleged to have been involved in the secret detention program, and because of the level of classification around the program, can now be said to have held confirmation hearings without the information necessary to make an informed decision. Amnesty International urges Senators to reflect on this history and to prioritize the USA’s human rights obligations relating to investigation and transparency, truth, remedy and prevention. On the secrecy issue, the Senate must insist on declassification of all information relating to any involvement Gina Haspel may have had in human rights violations including enforced disappearances and detention conditions or interrogation techniques that violated the international ban on torture and other cruel, inhuman or degrading treatment.

¹¹⁰ Bipartisan Support for Gina Haspel’s Nomination to be CIA Director From Distinguished National Security Leaders, CIA News Release, 19 March 2018, <https://www.cia.gov/news-information/press-releases-statements/2018-press-releases-statements/bipartisan-support-for-gina-haspels-nomination-to-be-cia-director.html>

¹¹¹ Coincidentally, torture was mentioned in three contexts in the House of Representatives that same day, in reference to Saddam Hussein in Iraq, to a man facing execution in India for a bomb attack he was said to have confessed to under torture, and to the human rights situation in Tibet. At that time, a review of the CIA secret detention program by the CIA Inspector General had already begun. The subsequent classified report issued in May 2004 noted that the program had been developed against a backdrop of “repeated US policy statements condemning torture and advocating the humane treatment of political prisoners and detainees in the international community”. CIA OIG Special Review, 7 May 2004, *op. cit.*, ¶ 5.

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A 74-19 VOTE

Earlier on 13 March 2003, the Senate had approved by a vote of 74-19 President George W. Bush's nomination of Jay Bybee to the US Court of Appeals for the Ninth Circuit. At the time, Assistant Attorney General Jay Bybee was head of the Office of Legal Counsel (OLC) at the US Department of Justice. Senator Leahy noted that during Jay Bybee's confirmation to that position in 2001, Jay Bybee had promised to "not trample civil rights" in the post-11 September context; Senator Leahy added that "given the veil of secrecy imposed by the Administration, I have serious concerns about how the Department of Justice has been operating". Senator Russ Feingold had similar concerns, noting that "Only three OLC opinions had been made publicly available since Mr Bybee's confirmation to head that office... This is a dramatic change in the Department's practice... While there may be some justification for releasing fewer opinions since 9/11, the wholesale refusal to share with the public and Congress important OLC decisions affecting a wide range of legal matters is, to say the least, troublesome." Senator Leahy was years later quoted as saying that "If the Bush administration and Mr Bybee had told the truth, he never would have been confirmed."¹¹²

On 13 March 2002, exactly one year before his confirmation as a federal judge, Jay Bybee had signed an OLC memorandum advising the US Department of Defense that the President had "full discretion to transfer al Qaeda and Taliban prisoners captured overseas and detained outside the territorial jurisdiction of the United States to third countries". Neither the Geneva Conventions nor UN Convention Against Torture (which the USA ratified in 1994), the memo asserted, posed any obstacle to such transfers. It advised how US personnel could avoid criminal liability under US law if the receiving country tortured the detainee in question.¹¹³

A year later, Deputy Assistant Attorney General John Yoo persuaded Jay Bybee, given that he was about to become a federal judge, not to put his name to another OLC memorandum that was ready for signature.¹¹⁴ Instead John Yoo signed it the following day, 14 March 2003. The memorandum advised the Pentagon on the legal limits of interrogations of foreign nationals held outside the USA in the so-called "war on terror".¹¹⁵ It incorporated most of the analysis from another memo that had been signed by Bybee on 1 August 2002 and provided to the CIA. It gave the legal green light to torture and other cruel, inhuman or degrading treatment and advised as to how interrogators could avoid criminal liability.¹¹⁶ Bybee signed a second memorandum that same day, this one listing the "enhanced interrogation techniques", including "water-boarding" and "cramped confinement" in coffin-like boxes that could be used against a specific detainee who was by then in his fifth month at a secret facility operated by

¹¹² Friends say Judge Bybee regrets interrogation memo he signed. Washington Post, 25 April 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/24/AR2009042403888.html> In its 2009 report, the Office of Professional Responsibility at the US Department of Justice concluded that Jay Bybee's signature on the memos "had the effect of authorizing a program of CIA interrogation that many would argue violated [domestic and international law], and he endorsed legal analyses that justified acts of outright torture..." The OPR report stated that "Bybee's signature, which added greater authority to the memoranda, carried with it a significant degree of personal responsibility", and concluded that "he acted in reckless disregard of his obligation to provide thorough, objective and candid legal advice". OPR Report, 29 July 2009, *op. cit.*, pages 256-257.

¹¹³ The President's power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations. Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 13 March 2002.

¹¹⁴ OPR Report, 29 July 2009, *op. cit.*, page 80.

¹¹⁵ Military interrogation of alien unlawful combatants held outside the United States. Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 14 March 2003.

¹¹⁶ Standards of conduct for interrogation under 18 U.S.C. §§2340-2340A. Memorandum for Alberto R. Gonzales, Counsel to the President, signed by Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002. In the OLC's Abu Zubaydah memorandum of the same date, this memorandum was cited as "Memorandum for John Rizzo, Acting General Counsel for the Central Intelligence Agency".

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the CIA.¹¹⁷ On 3 August 2002, the Chief Legal Officer at the CIA, John Rizzo had the memo “converted into a cable” that was sent to the facility.¹¹⁸ This facility was the CIA’s first “black site” for “high-value detainees” and the detainee was the first whom the CIA had in its custody and whom it deemed to have “high value” in terms of intelligence. What happened at this “black site” is today at the centre of concern about the nomination of Gina Haspel to the post of CIA Director. But although 15 years have passed since Jay Bybee was confirmed by the Senate, similar secrecy around whether Gina Haspel was involved in the same secret detention program continues to confound public access to the truth.

A 60-36 VOTE

The main 1 August memo was leaked into the public domain in June 2004, a year after the confirmation of Jay Bybee to his life tenure as a federal judge. It was ostensibly replaced by the OLC with a public memorandum issued on 30 December 2004, a month after President Bush’s nomination to the position of Attorney General of Alberto Gonzales, then White House Counsel and the named recipient of the 2002 memorandum. One week after this new memo was issued, stating the USA’s opposition to torture – Alberto Gonzales had a successful confirmation hearing in the Senate Judiciary Committee.¹¹⁹ At this hearing, asked whether he agreed with the 1 August 2002 Bybee memo’s extremely narrow reading of what constitutes torture, Alberto Gonzales replied: “I don’t recall today whether or not I was in agreement with all of the analysis, but I don’t have a disagreement with the conclusions then reached by the Department.” He was nevertheless confirmed by the full Senate – by 60 votes to 36 – the following month, on 3 February 2005. Two days later, Steven Bradbury became acting head of the OLC. Within three months, the OLC had issued two more classified memorandums, signed by Bradbury, giving the CIA the legal thumbs up to continued application of “enhanced interrogation techniques” against detainees held incommunicado in solitary confinement in secret custody.¹²⁰ The new Attorney General was involved in the production of these memorandums, as he had been in earlier ones when White House Counsel.¹²¹

¹¹⁷ Interrogation of al Qaeda operative. Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency. From Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002. The techniques included “water-boarding”, confinement in a box, sleep deprivation, physical assaults, and stress positions. The two 1 August 2002 memos were signed by Bybee, but John Yoo was “directly responsible” for their contents. OPR Report, 29 July 2009, *op. cit.*, page 251. See also USA: ‘Congress has made no such decision’: Three branches of government, zero remedy for counter-terrorism abuses, February 2012, <https://www.amnesty.org/en/documents/amr51/008/2012/en/>

¹¹⁸ *Salim v. Mitchell*, Declaration of John Rizzo, US District Court for the Eastern District of Washington, 23 January 2017, ¶ 44.

¹¹⁹ In January 2002, then White House Counsel Alberto Gonzales had drafted a memorandum advising President Bush that a “positive” consequence of determining that Geneva Convention protections would not apply to detainees held in the “war against terrorism”, a “new kind of war” which “places a high premium” on “the ability to quickly obtain information from captured terrorists and their sponsors”, would be the substantial reduction in the threat that US agents would be liable for criminal prosecution under the War Crimes Act. The latter criminalized as war crimes under US law conduct prohibited under Article 3 common to the four Geneva Conventions of 1949, including torture, cruel treatment, and “outrages upon personal dignity, in particular, humiliating and degrading treatment”. Decision re application of the Geneva Convention on prisoners of war to the conflict with al Qaeda and the Taliban. Memorandum for the President, From Alberto R. Gonzales, 25 January 2002, Draft, 3.30 pm

¹²⁰ Re: Application of 18 U.S.C. §§ 2340-2340A to certain techniques that may be used in the interrogation of a high value al Qaeda detainee. Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, 10 May 2005. Re: Application of United States obligations under Article 16 of the Convention against Torture to certain techniques that may be used in the interrogation of high value al Qaeda detainees. Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, OLC, Department of Justice, 30 May 2005.

¹²¹ In April 2005, responding to concerns within certain quarters, Attorney General Gonzales explained that he was “under great pressure” from Vice President Cheney to complete the memorandums, and that President Bush “had even raised it last week, apparently at the VP’s request”. Attorney General Gonzales had promised that the memorandums “would be ready early this week.” Subject: Interrogation. Email from James Comey (ODAG) to Chuck Rosenberg, Wednesday, April 27, 2005, 5:49pm. See OPR Report, 29 July 2009, *op. cit.*, page 142.

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A 50-47 VOTE

To return to 13 March, this time in 2008. On that day, a detainee was transferred from CIA to military custody and flown to the US naval base at Guantánamo, where he remains without charge or trial a decade later. This is the last detainee known to have been taken into the secret program and the last transfer to Guantánamo to date.¹²² Prior to this transfer, he had been subjected to some eight months of enforced disappearance and to various other forms of torture or other ill-treatment in CIA custody. It had again been the OLC which had provided the CIA with the legal approval for “enhanced” interrogation techniques, including prolonged sleep deprivation, via a memorandum and letters signed by Principal Deputy Assistant Attorney General Steven Bradbury.¹²³ In November 2017, the Senate voted 50 to 47 to confirm Steven Bradbury to the post to which President Trump had nominated him: General Counsel of the Department of Transportation.¹²⁴ Much of the opposition to his confirmation stemmed from his leading involvement in the provision of legal advice to the CIA for its detention program.

In 2009, the Office of Professional Responsibility at the US Department of Justice found “several indicia that the Bradbury Memos were written with the goal of allowing the CIA program to continue”, and reflected an “uncritical acceptance” of CIA assurances about the implementation of “enhanced interrogation techniques”. It added that Steven Bradbury should have “cast a more critical eye” on what the CIA said it was doing. A critical human rights eye should now be cast on the President’s decision to nominate Gina Haspel to CIA Director.

FOR THE HISTORY BOOKS?

Why raise all this? Is it not for the history books? The answer is no. This is a live, current and pressing issue. The impunity in the USA, Europe and beyond that surrounds the human rights violations committed against detainees in US custody outside the USA over the past 17 years – some of whom remain in US custody without trial or access to remedy – remains a festering affront to human rights law and principles and makes recurrence all the more likely.¹²⁵

A reminder of such risks came with an interview President Trump gave on 25 January 2017, a week before he nominated Gina Haspel to the position of Deputy Director of the CIA. In it, the President voiced his support for torture, while stating that he would “rely” upon Secretary of Defense James Mattis, CIA Director Mike Pompeo, and others in deciding whether the USA should use torture. He said he was “a little surprised” when General Mattis told him “he’s not a believer in torture”, but added that he had “spoken to others in intelligence. And they are

¹²² But see, USA: President Trump signs order on Guantánamo and sets state for first new detainee arrivals since 2008, 2 February 2018, <https://www.amnesty.org/en/documents/amr51/7822/2018/en/>

¹²³ Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques That May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees, 20 July 2007. Letter for Associate General Counsel, Central Intelligence Agency, from Steven Bradbury, Principal Deputy Assistant Attorney General, 6 November 2007, <http://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-bradbury2007-2.pdf>; 7 November 2007, <http://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-bradbury2007-3.pdf>

¹²⁴ The detainee remains in indefinite detention without charge or trial at Guantánamo a decade later. For details on the case of Muhammad Rahim, see USA: Crimes and Impunity, April 2015, <https://www.amnesty.org/en/documents/amr51/1432/2015/en/>

¹²⁵ See, e.g., UN Human Rights Committee, General Comment No. 31 (2004), UN Doc.: CCPR/C/21/Rev.1/Add.13, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 18. (“As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (see Rome Statute of the International Criminal Court, article 7).” The USA ratified the International Covenant on Civil and Political Rights in 1992.

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big believers in, as an example, waterboarding".¹²⁶

As the UN Special Rapporteur on torture stated in December 2017, the USA's "policy of impunity" not only leaves it in "clear violation of the UN Convention against Torture", it is "sending a dangerous message of complacency and impunity to officials in the US and around the world."¹²⁷ The nomination of Gina Haspel, without the necessary transparency and fact finding injected into it, threatens to reinforce this dangerous message.

The response from apologists for the secret detention program has become familiar, and will likely be heard again in the context of this latest nomination. Former Deputy Director of the CIA Michael Morell has said, for example, that "context is everything" – the USA was facing a serious terrorism related threat and so "we needed to be able to hold terrorists indefinitely and question them in secret, controlled interrogations".¹²⁸ Senator John Cornyn, speaking on the Senate floor on 15 March 2018 in support of Gina Haspel's nomination, said:

"Of course, there will be groups who will waste no time trying to tarnish her reputation over efforts she made doing her part to keep our Nation safe after the terrible tragedy of 9/11... [L]et's not just buy into the phony narratives that other people will give about her public service... Ultimately, their arguments, if believed and accepted, would make the country less safe and less secure. We have to remember that right after the terrible events of 9/11, we didn't have the luxury of hindsight... [T]ough calls had to be made. That is what leadership is all about. So I look forward to continuing to make the case for why Ms Haspel is the person the country needs to lead the Central Intelligence Agency."¹²⁹

This was a necessary and carefully managed program, the mantra goes, authorized under the constitutional power of the President for legitimate national security reasons, reviewed by numerous senior officials, checked by multiple government lawyers, operated in a way that was medically safe, and so on and so forth. It is as if the Universal Declaration of Human Rights had never existed, or as if the UN Convention against Torture had never been drafted. There is clearly a profound human rights deficit at the heart of government when dozens of senior officials, including more than one Attorney General, actively support their country's systematic use of secret detention. The absolute failure to ensure truth, accountability and redress would suggest that this human rights deficit continues.

This is illustrated in the following line from former CIA Deputy Director Morrell: "what is very important to remember is that, at the time, the EITs were being used, the Department of Justice told CIA that they were legal... So, from a legal perspective, to call what the CIA officers did at the time 'torture' is wrong and does those officers a great disservice".¹³⁰

Enforced disappearance and torture are crimes under international law. No president can render them lawful; no cabinet member, national security adviser, legislator, judge, soldier, police officer, prison guard, medical professional, interrogator, lawyer or any other official can override this prohibition. Neither war, nor threat of war, nor national emergency that threatens

¹²⁶ See In First TV Interview, President Trump Says Torture 'Absolutely' Works, https://www.democracynow.org/2017/1/26/in_first_tv_interview_president_trump

¹²⁷ 'US must stop policy of impunity for the crime of torture'- UN rights expert. UN News Release, 13 December 2017, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22532&LangID=E>

¹²⁸ Michael Morrell, *The Great war of our time*, *op. cit.*, pages 265 and 268.

¹²⁹ Congressional Record - Senate, 15 March 2018, S1758.

¹³⁰ Michael Morrell, *The Great war of our time*, *op. cit.*, page 270. What Morrell fails to mention is that as early as 2003, CIA officers involved in the secret detention "expressed unsolicited concern about the possibility of recrimination or legal action resulting from their participation in the CTC Program. A number of officers expressed concern that a human rights group might pursue them for activities [redacted]... One officer expressed concern that one day, Agency officers will wind up on some 'wanted list' to appear before the World Court for war crimes stemming from activities [redacted]... [H]e believed it to be conceivable that an employee could be arrested and tried in the European Union." CIA OIG Special Review, 7 May 2004, *op. cit.*, ¶¶ 231-233.

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the life of the nation can justify such crimes. Governments are required by international law to thoroughly investigate these crimes, to make their findings public, and to bring perpetrators to justice in fair trials, no matter their level of office or former level of office. Victims of human rights violations have the right under international law to effective access to remedy and reparation. There is a collective and individual right to the truth about violations. Amnesty International urges Senators to prioritize the USA's international human rights obligations relating to investigation and transparency, truth, remedy and prevention.

The current Chairperson of the SSCI, Senator Richard Burr had been one of the Committee members to sign the minority (dissenting) SSCI report, which argued that the review amounted to an attack on “the CIA’s integrity and credibility in developing and implementing the Program”. In 2015, having just assumed the chairmanship he called on the various departmental recipients of the SSCI report to return the copies.¹³¹ Now he appears fully supportive of the nomination of Gina Haspel, saying “I look forward to supporting her nomination, ensuring its consideration without delay.”¹³²

Others take the sort of line promoted by former Deputy Director Morell, namely that “the detention and interrogation program was not some rogue CIA operation that might be depicted in a Hollywood movie. CIA proposed the program, but only undertook it with the explicit approval of the White House”.¹³³ Morell is supporting Gina Haspel’s nomination.¹³⁴ As is SSCI member, Senator Tom Cotton, who has essentially espoused the familiar line that she was just following orders: “Ms Haspel did not go rogue or make these policies on the fly. She dutifully executed the approved policy as determined by the Department of Justice. And moreover, she did so at one of the most dangerous moments in our history. If that isn’t a qualification for high public office, I’m not sure what is.”¹³⁵

This justification that the Bush administration authorized the activities which Gina Haspel and others carried out is all too familiar. Senator Lindsey Graham, for example, has also said that while he believed waterboarding was illegal when it was used by the CIA, “at the time, the Bush administration viewed [waterboarding] as an authorized interrogation technique. After the passage of the Detainee Treatment Act, it is clearly not authorized and I’m looking for [Gina Haspel] to acknowledge that this behaviour is no longer allowed and that she will adhere to the law as it exists. She again is very highly qualified..., but she will have to adhere to the law as I believe it exists today and that will be the test for me”.¹³⁶

What Senator Graham, an outspoken supporter of the “war on terror” framework,¹³⁷ fails to acknowledge is that waterboarding was just one technique used by the CIA, that its use was a crime under international law regardless of what Bush administration lawyers and executive policy approvers asserted, and that even after the Detainee Treatment Act was passed in 2005, the OLC concluded that the conditions of detention in CIA “black sites” – such as white noise, shackling, 24-hour lighting, prolonged (years of) solitary confinement and incommunicado

¹³¹ Feinstein response to call for return of Senate torture report, 20 January 2015, <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=60c0eed2-df3b-4729-9910-22b9eb9c98fa>. See also Statement of Senator Patrick Leahy, 18 March 2015, <http://www.leahy.senate.gov/press/statement-of-senator-patrick-leahy-d-vt-ranking-member-senate-judiciary-committee-on-torture>

¹³² See <https://www.burr.senate.gov/press/releases/senate-intel-chairman-burr-on-gina-haspel-to-be-director-of-cia>

¹³³ Michael Morrell, *The Great war of our time*, *op. cit.*, pages 269.

¹³⁴ See Bipartisan Support for Gina Haspel’s Nomination to be CIA Director From Distinguished National Security Leaders, CIA News Release, 19 March 2018, <https://www.cia.gov/news-information/press-releases-statements/2018-press-releases-statements/bipartisan-support-for-gina-haspels-nomination-to-be-cia-director.html>

¹³⁵ See <https://www.cotton.senate.gov/?p=blog&id=907>

¹³⁶ Senator Graham interview with CNN, 22 March 2018.

¹³⁷ See, e.g., Graham: NYC terror suspect should be held as enemy combatant, 1 November 2017, <https://www.lgraham.senate.gov/public/index.cfm/press-releases?ID=BC6CB3F8-DFC7-4735-93B1-18B0B48C6F62>.

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detention – were consistent with the DTA.¹³⁸ “Enhanced interrogation techniques” such as prolonged sleep deprivation were also viewed by the OLC as lawful under the DTA, conducted against non-US nationals held in these conditions in secret custody.¹³⁹

This very issue implicates the Senate itself and its decades-long failure to ensure withdrawal – as UN treaty bodies have called for – of the conditions which the USA filed with its ratification of international human rights treaties like the UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT) and the International Covenant on Civil and Political Rights. These conditions were exploited by the Bush administration lawyers in providing a legal green light for the “enhanced” interrogation program.¹⁴⁰

It is now a decade since the last known detainee in the CIA program was removed from it and sent to Guantánamo. The program was de-authorized in 2009. Leading players in it have published memoirs.¹⁴¹ There has long been enough information in the public domain to know that the program was not only unlawful from the outset, but systematically violated the human rights of those dozens of individuals who were taken into its regime. By design or effect, the use of classification and state secrets continues to block truth, accountability and redress and to keep the USA on the wrong side of its human rights obligations. It is against this backdrop that the nomination of Gina Haspel to CIA Director was announced.

Senator Dianne Feinstein, who was SSCI chairperson at the time of publication of the Committee’s summary report on the CIA program in 2014, wrote to CIA Director Pompeo and Deputy Director Haspel on 18 March 2018 asking for the “declassification of pertinent agency documents related to Ms Haspel’s role in the CIA’s Rendition, Detention, and Interrogation Program...While public reporting is useful, it is no substitute for the actual truth held in CIA cables, emails and internal memos”. In an accompanying statement, Senator Feinstein said: “While many nominees have classified backgrounds, Gina Haspel is unique in that she was involved not only in the classified CIA torture program, but reportedly played a key role. That’s why I asked CIA to declassify her records. Senators must be able to fully review her activities so they can make an informed decision on her nomination – a key Senate responsibility – and the public should be aware of the background of its leaders.”¹⁴²

The Senate must insist on declassification of all information relating to any involvement Gina Haspel may have had in human rights violations including in enforced disappearances and in employing or overseeing detention or transfer conditions or interrogation techniques that violated the prohibition of torture and other cruel, inhuman or degrading treatment.

¹³⁸ Re: Application of the Detainee Treatment Act to conditions of confinement at Central Intelligence Agency detention facilities. Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 31 August 2006.

¹³⁹ Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to certain techniques that may be used by the CIA in the interrogation of high-value al Qaeda detainees. Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 20 July 2007.

¹⁴⁰ See, for example, USA: Guantánamo, impunity, and global anti-torture day, 25 June 2017, <https://www.amnesty.org/en/documents/amr51/6574/2017/en/> (“In 2014, the Committee Against Torture wrote to the USA expressing its dismay that the US reservation to article 16 of UNCAT featured in the various OLC memorandums “as part of deeply flawed legal arguments used to advise that interrogation techniques, which amounted to torture, could be authorized and used lawfully.” The Committee remained concerned that the USA “has not yet withdrawn its reservation to article 16 which could permit interpretations incompatible with the absolute prohibition of torture and ill-treatment.”)

¹⁴¹ See ‘Thanks for the memoirs, now for truth and justice’, in USA: Time for truth and justice, 23 June 2014, <http://www.amnesty.org/en/library/info/AMR51/035/2014/en>. Also, USA: ‘We tortured some folks’, 2 September 2014, <http://www.amnesty.org/en/library/info/AMR51/046/2014/en>

¹⁴² Feinstein on Haspel nomination, 23 March 2018, <https://www.feinstein.senate.gov/public/index.cfm/press-releases?id=28EE688F-1F20-4142-A3A5-B8D6A99B5C85>

CONCLUSION

The Agency faces potentially serious long-term political and legal challenges as a result of the CTC Detention and Interrogation Program

CIA Inspector General, 2004¹⁴³

Amnesty International takes no position on the appointment of particular individuals to government positions, unless they are reasonably suspected of crimes under international law and could use their appointment to the position to either prevent accountability for these crimes or to continue perpetration. At the same time, the organization calls on governments to thoroughly vet candidates in regard to any human rights concerns arising from their prior conduct. Anyone against whom there is admissible evidence of involvement in crimes under international law should be brought to trial in proceedings that fully comply with international fair trial standards, without recourse to the death penalty.

The secret detention programme was a programme of enforced disappearance operated under presidential authority granted to the CIA a week after the attacks of 11 September 2001 and developed to facilitate aggressive interrogations of detainees held entirely incommunicado. Enforced disappearance not only facilitates acts of torture and other forms of ill-treatment, but is recognized under international law as in itself violating the prohibition of torture and other cruel, inhuman or degrading treatment.¹⁴⁴ Enforced disappearance and torture are crimes under international law. Neither war, nor threat of war, nor national emergency that threatens the life of the nation can justify such crimes. Governments are required by international law to thoroughly investigate these crimes, and to bring perpetrators to justice, no matter their level of office or former level of office. Victims of human rights violations have the right under international law to effective access to remedy and reparation. In addition, there is a collective

¹⁴³ CIA OIG Special Review, 7 May 2004, *op. cit.*, ¶ 266

¹⁴⁴ See, *inter alia*, Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, ¶18; Human Rights Committee, *Chihoub v Algeria*, Communication (Comm) No. 1811/2008, ¶8.5; Human Rights Committee, *Aboufaied v Libya*, Comm. No. 1782/2008, ¶7.4; Human Rights Committee, *Berzig v Algeria*, Comm No. 1781/2008, ¶8.5; Human Rights Committee, *Zarzi v. Algeria*, Comm No. 1780/2008, ¶7.5; Human Rights Committee, *El Abani v. Libya*, Comm No. 1640/2007, ¶7.3; Human Rights Committee, *Benaziza v. Algeria*, Comm No. 1588/2007, ¶9.3; Human Rights Committee, *El Hassy v. Libya*, Comm No. 1422/2005, ¶6.8; Human Rights Committee, *Cheraitia and Kimouche v. Algeria*, Comm No. 1328/2004, ¶7.6; Human Rights Committee, *El Alwani v. Libya*, Comm No. 1295/2004, ¶ 6.5; Human Rights Committee, *Boucherf v. Algeria*, Comm No. 1196/2003, ¶9.6; Human Rights Committee, *Bousroual v. Algeria*, Comm No. 992/2001, ¶9.8; Human Rights Committee, *Sarma v. Sri Lanka*, Comm No. 950/2000, ¶9.5; Human Rights Committee, *Celis Laureano v. Peru*, Comm No. 540/1993, ¶ 8.5; Human Rights Committee, *Rafael Mojica v Dominican Republic*, Comm No. 449/1991, ¶ 5.7. See also, *inter alia*, UN Declaration on the Protection of all Persons from Enforced Disappearance, UNGA resolution 47/133, article 2; Committee against torture, *Concluding observations on the United States of America*, CAT/C/USA/CO/2, ¶18 (“The State party should adopt all necessary measures to prohibit and prevent enforced disappearance in any territory under its jurisdiction, and prosecute and punish perpetrators, as this practice constitutes, per se, a violation of the Convention.”); Committee against torture, *Concluding observations on Rwanda*, CAT/C/RWA/CO/1, ¶14; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Report to the UN General Assembly*, A/61/259, ¶¶55-56; Inter-American Court of Human Rights, *Godínez-Cruz v. Honduras*, ¶¶164, 166 and 197; Inter-American Court of Human Rights, *Velasquez Rodríguez v. Honduras*, ¶¶156 and 187; African Commission on Human and Peoples’ Rights, *Mouvement Burkinabe des Droits de l’Homme et des Peuples v Burkina Faso*, 204/97, ¶44; Human Rights Chamber for Bosnia and Herzegovina, *Palic v Republika Srpska*, Case No. CH/99/3196, ¶74. See also, *inter alia*, Human Rights Committee, *El-Megreisi v Libya*, Communication No. 440/1990, ¶5.4; Committee against Torture, *Concluding observations on the United States of America*, CAT/C/USA/CO/2, ¶17 (“The State party should ensure that no one is detained in any secret detention facility under its de facto effective control. Detaining persons in such conditions constitutes, per se, a violation of the Convention.”); Committee against Torture, *Concluding observations on Rwanda*, CAT/C/RWA/CO/1, ¶11; UN General Assembly, *Resolution on torture and other cruel, inhuman or degrading treatment or punishment*, A/RES/66/150, ¶22 (“Reminds all States that prolonged incommunicado detention or detention in secret places can facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment, and urges all States to respect the safeguards concerning the liberty, security and dignity of the person and to ensure that secret places of detention and interrogation are abolished”).

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"I have evaluated and examined nearly 1,000 survivors of torture in my medical practice... [I]t is my conclusion that Mr Al-Nashiri suffers from complex posttraumatic stress disorder as a result of extreme physical, psychological, and sexual torture inflicted upon him by the United States... Indeed, in my many years of experience treating torture victims from around the world, Mr Al-Nashiri presents as one of the most severely traumatized individuals I have ever seen... Mr Al-Nashiri displays every symptom of complex PTSD.

The torture experienced by Mr Al-Nashiri has fractured his trust in humanity, which has damaged his ability to interact with all humans, including counsel, doctors, other detainees, and even family. While much of Mr Al-Nashiri's treatment remains classified, there is no question that Mr Al-Nashiri was tortured at the hands of the CIA and that his current symptoms and poor health relate directly to that torture."

Extract from declaration of Sondra S. Crosby, M.D., 24 October 2015, filed in US District Court, Washington, DC, with supplemental petition for writ of habeas corpus, 15 March 2018

'Abd al-Nashiri was held at multiple locations in the CIA secret detention program between November 2002 and September 2006. For the past 11 and a half years, he has been in military custody at Guantánamo, the location of one of the CIA "black sites" in which he was earlier held. He is facing capital military commission proceedings. The above petition filed on 15 March 2018 asserts: "The lasting psychological effects of the RDI [Rendition, Detention and Interrogation] Program regularly impact the proceedings as well. As Dr Crosby found, the military commissions' 'ever-changing rules and procedures' exceed [al-Nashiri's] capacity to comprehend and he 'has no way of differentiating this from the government's prior deliberate attempts to destabilize his personality.' This was vividly demonstrated on one occasion when a floor safe was brought, for reasons unknown, into the courtroom in Guantánamo. One of the 'techniques' to which [the CIA] subjected [al-Nashiri] in the RDI Program was to lock him in a 'small box,' which was the approximate size of this safe. Once locked inside this 'small box,' [he] was left in total darkness as the air became stagnant and he braced himself in a squatting fetal position, which caused his extremities to swell. Seeing what appeared to be the 'small box' brought into the courtroom produced such a strong reaction in [al-Nashiri] that he was unable to proceed until his attorneys persuaded the military commission judge to remove it."

and individual right to the truth about violations.

Amnesty International considers that Gina Haspel should be subject to investigation, and the findings should be made public. If there is sufficient admissible evidence that she is criminally responsible for crimes under international law, including torture or complicity in torture, she must be brought to trial. Her nomination to head the very agency which has a festering impunity scandal at its heart – which she may have an interest in perpetuating – should be withdrawn pending this investigation.

While the secret detention program was de-authorized by President Barack Obama in 2009, ending the impunity associated with it appears to not have been seriously contemplated by that administration, while the secrecy continued to be the enemy of accountability. As things stand, a confirmation hearing cannot be the place to establish the truth.

Amnesty International calls upon members of the US Senate, if the nomination of Gina Haspel remains in place and the above investigation is not conducted, not to hold a confirmation hearing. In any event, it should not hold a confirmation hearing unless and until the necessary

declassification of materials relevant to any such hearing is completed. If the confirmation hearing were to go ahead without the necessary prerequisites for establishing facts, the Senate should vote against Gina Haspel's appointment as CIA Director.

APPENDIX

Amnesty International issued the following text on 19 March 2018 following President Trump's nomination of Gina Haspel (<https://www.amnesty.org/en/documents/amr51/8082/2018/en/>)

Amnesty International's position on the nomination of Gina Haspel to be Director of the Central Intelligence Agency

Amnesty International calls upon President Donald Trump to withdraw his nomination of Gina Haspel to the post of Director of the Central Intelligence Agency (CIA), for the reasons outlined below.

At the same time, the organization calls upon the US Department of Justice to initiate investigations into Gina Haspel's alleged activities in the context of the program of secret detention operated by the CIA, a program in which the crimes under international law of torture and enforced disappearance were committed. The investigation should include any role she may have had in the destruction of evidence of such crimes.

Finally, Amnesty International calls upon members of the US Senate, if the nomination of Gina Haspel remains in place and the above investigation is not initiated, not to hold a confirmation hearing. In any event, as explained below, it should not hold a confirmation hearing unless and until the necessary declassification of materials relevant to any such hearing is completed. If the confirmation hearing were to go ahead without the necessary prerequisites for establishing facts, the Senate should vote against Gina Haspel's appointment as CIA Director.

Amnesty International takes no position on the appointment of particular individuals to government positions, unless they are reasonably suspected of crimes under international law and could use their appointment to the position in question to either prevent accountability for these crimes or to continue perpetration. At the same time, the organization calls on governments to thoroughly vet candidates in regard to any human rights concerns arising from their prior conduct. Anyone against whom there is admissible evidence of involvement in crimes under international law should be brought to trial in proceedings that fully comply with international fair trial standards, without recourse to the death penalty.

Enforced disappearance and torture are crimes under international law. No president can render them lawful; no politician, legislator, judge, soldier, police officer, prison guard, medical professional, interrogator, lawyer or any other official can override this prohibition. Neither war, nor threat of war, nor national emergency that threatens the life of the nation can justify such crimes. Governments are required by international law to thoroughly investigate these crimes, to make their findings public, and to bring perpetrators to justice in fair trials, no matter their level of office or former level of office. Victims of human rights violations have the right under international law to effective access to remedy and reparation. In addition, there is a collective and individual right to the truth about violations.

Enforced disappearances and other forms of torture and other cruel, inhuman or degrading treatment were committed at multiple locations in a secret detention program operated by the USA's Central Intelligence Agency. The program was operated under authority granted to the CIA by President George W. Bush in September 2001 and was not "de-authorized" until January 2009 by President Barack Obama. Under US law only the President can authorize the CIA to conduct a covert action.¹⁴⁵ President Donald Trump has publicly expressed his support

¹⁴⁵ See also USA: Bringing George W. Bush to justice. International obligations of states to which former US President George W. Bush may travel, November 2011, <https://www.amnesty.org/en/documents/amr51/097/2011/en/>

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for the use of torture.

Impunity for these crimes committed in the context of the CIA program remains all but total. The use of classification and other forms of state secrecy continue to block truth, accountability and remedy.

Amnesty International has long called for declassification of any documents or other materials depicting or describing enforced disappearance, torture or other cruel, inhuman or degrading treatment or other human rights violations, including acts of abduction and rendition, by US or non-US personnel in the context of the CIA detention program. This includes the full 2014 report of the Senate Select Committee on Intelligence of its review of the detention program, and the country locations of all 'black sites' operated by the CIA between 2002 and 2009.¹⁴⁶

In December 2017, the UN Special Rapporteur on torture called on the USA to end this "pervasive policy of impunity for crimes of torture committed by US officials" under which "the perpetrators and policymakers responsible for years of gruesome abuse have not been brought to justice". The Rapporteur continued: "By failing to prosecute the crime of torture in CIA custody, the US is in clear violation of the Convention against Torture and is sending a dangerous message of complacency and impunity to officials in the US and around the world."¹⁴⁷

It is against this backdrop that President Trump has nominated Gina Haspel to become the next Director of the CIA. While, again, the use of classification renders it impossible to get at the full truth, there are serious and credible allegations that Gina Haspel was closely involved in aspects of the CIA secret detention program, including at an alleged CIA "black site" in Thailand where at least two detainees were subjected to torture and enforced disappearance in 2002. In addition she is alleged to have played a leading role in the destruction in 2005 of videotaped evidence of torture committed against these two detainees being simultaneously subjected to enforced disappearance. Concealing evidence of a crime may constitute criminal complicity. Complicity in torture is expressly recognised as a crime under international law.

Amnesty International considers that Gina Haspel should be subject to investigation, and the findings should be made public. If there is sufficient admissible evidence that she is criminally responsible for crimes under international law, including torture or complicity in torture, she must be brought to trial. Her nomination to head the very agency which has a festering impunity scandal at its heart – which she may have an interest in perpetuating – should be withdrawn pending this investigation.

If the President does not withdraw the nomination, which has to be considered likely given his endorsement of torture and other human rights violations, the Senate should not hold a confirmation hearing pending the necessary investigation into the allegations against this nominee. Failing that, at a minimum, the Senate should not hold a confirmation hearing unless and until there is full declassification of any information possibly disclosing evidence of Gina Haspel's involvement in human rights violations, including relating to any allegations about her participation in the CIA secret detention program and the destruction of related evidence.

If a confirmation hearing does go ahead without the necessary information to ensure political and public confidence in the decision-making process, Senators should vote down her nomination. If the hearing goes ahead with or without the necessary declassification, Senators must pose all necessary and searching questions about her prior role in the CIA program, to not take any form of obfuscation as an answer, and in the absence of genuinely and fully satisfactory responses showing that the allegations against her are in fact not credible, should vote down her nomination.

¹⁴⁶ See also USA: Crimes and Impunity: Full Senate Committee report on CIA secret detentions must be released, and accountability for crimes under international law ensured, April 2015, <https://www.amnesty.org/en/documents/amr51/1432/2015/en/>. For summary sheet, see, <https://www.amnesty.org/en/documents/amr51/1461/2015/en/>

¹⁴⁷ 'US must stop policy of impunity for the crime of torture'- UN rights expert. UN News Release, 13 December 2017, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22532&LangID=E>