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May 18, 2009

New York and Bronx Counties:
Departmental Disciplinary Committee for the First Department
61 Broadway, 2nd Floor
New York, NY 10006

Re: Complaint Against Michael B. Mukasey

Dear Sir or Madam:

NOTICE OF COMPLAINT

Velvet Revolution (“VR”), a Washington, D.C. based non-profit with a network of more than 150 organizations representing over a million members nationwide, including in the State of New York, herein lodges a complaint against Michael B. Mukasey (No. 108039), former Attorney General and currently with Debevoise & Plimpton, 919 3rd Avenue, New York, NY, 10022; 212-909-6000. VR requests the *Appellate Division of State Supreme Court* take immediate disciplinary action against Mr. Mukasey for violations of the *NY Rules of Professional Conduct*.

SUMMARY OF COMPLAINT

Michael B. Mukasey breached his legal duty and violated the *NY Rules of Professional Conduct* by his lack of moral clarity and ethically compromising political expediency on questions regarding “enhanced” interrogation techniques (amounting to torture), a program carried out by U.S. authorities after September 11th 2001 that resulted in clear violations of U.S. and international law.

Specifically, during his Senate confirmation hearing on October 18, 2007, Mr. Mukasey ignored well-known historical and legal precedents by refusing to deem “waterboarding” as illegal. This went well outside of accepted and legal norms and fell short of the “good faith” imperative required for attorneys. By doing so as the nominee to the highest law enforcement office in the country, he perpetuated the false cover of claimed legality for those who had engaged in acts and policies that, in fact, violated the following laws, both in letter and spirit:

- 1) The United Nations Convention Against Torture (UNCAT), Articles 1, 2, 3 and 16 (ratified in October 1994) implemented by Sections 2340-2340A of title 18 of the United States Code.
- 2) The Geneva Conventions, Article 3, (ratified in August 1955)

- 3) The Eighth Amendment against “cruel and unusual punishment”
- 4) The “Separation of Powers” constructs and imperatives of the U.S. Constitution
- 5) The United States Criminal Code, Title 18, Prohibitions Against Torture (18 USC 2340A) and War Crimes (18 USC 2441)

As the “law of the land,” these legal protections and dictates are clear. Rather than offering a “good faith” analysis of the applicable law during his nomination hearing and afterwards, Mr. Mukasey failed to challenge the contrary memoranda ^[1] (since repudiated ^[2]) from the Office of Legal Counsel. Mr. Mukasey provided effective legal cover for a small cadre of Administration lawyers ^[3] who had advanced legal arguments that led directly to detainee abuses, and, evidence suggests, deaths at overseas U.S. military facilities ^[4]. In so doing, Mr. Mukasey impeded the administration of justice in contradiction to the U.S. Constitution, the Geneva Convention, the Convention against Torture, the U.S. Criminal Code, and several *NY Rules of Professional Conduct*. Mr. Mukasey did not act in “good faith” but rather in a manner that was extremely prejudicial, grossly incompetent and clearly immoral.

Therefore, VR calls upon the Departmental Disciplinary Committee for the First Department to act immediately to disbar Mr. Mukasey for conduct that is a travesty of justice and an affront to the rule of law and the standards of professional legal and ethical conduct.

Further, because the evidence points to numerous violations of the law, VR believes that disbarment proceedings will complement steps toward open hearings in Congress and a criminal investigation by an independent counsel appointed by the Department of Justice.

APPLICABLE LAW PROHIBITING TORTURE

The U.S. Constitution -- The Supreme Law of the Land

As the initial U.S. report to the *UN Convention against Torture* wrote:

“...the protections of the right to life and liberty, personal freedom and physical integrity found in the Fourth, Fifth and Eighth Amendments to the United States Constitution provide a nationwide standard of treatment beneath which no governmental entity may fall.” [49., p. 13, Initial Report submitted by the United States to the *Convention against Torture* in 1999 (CAT/C/28/Add.5)]

U.S. Citizens are guaranteed these protections. Jose Padilla is one example of a U.S. citizen who was held without charge for several years, and subject to the extreme interrogation techniques advocated by Mr. Mukasey. Citizens of other countries are similarly protected when in United States custody. The Eighth Amendment specifically prohibits cruel and unusual punishment.

The Geneva Convention (1949)

Common Article 3 of the *Geneva Conventions* broadly prohibits "violence to life and person," and specifically prohibits "mutilation, cruel treatment and torture" including "outrages upon personal dignity, in particular humiliating and degrading treatment". These terms include "other forms of cruel, inhuman and degrading treatment or punishment."

The drafters of common Article 3 avoided a detailed list of prohibited acts in order to ensure that it had the broadest possible reach, leaving no loophole.

[<http://www.amnestyusa.org/war-on-terror/reports-statements-and-issue-briefs/torture-and-the-law/page.do?id=1107981>]

The **Army Field Manual** on detainee treatment and interrogation is predicated on the Geneva Convention and specifically requires humane treatment of prisoners and detainees. Exhibit B

UN Convention Against Torture (1994)

Adopted by the United Nations in 1984, the Convention requires states to take effective measures to prevent torture within their borders. The United States ratified the Convention against Torture in October 1994 and it entered into force for the United States on November 20, 1994. To date, there are over 146 nations that are party to the convention.

Article 2(2) of the Convention states that:

"No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

***Hamdan v. Rumsfeld* (2002) -- Due Process and Legal Protections**

The Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) held that the Geneva Conventions are applicable to accused members of al-Qaeda. Thus, due process protections apply to all detainees in U.S. custody including those in military prisons (Guantanamo, Abu Grahیب, Bagram) as well as so-called "black sites" in Poland, Diego Garcia and elsewhere.

US Criminal Code

TITLE 18 § 2340A. Torture

(a) Offense.— Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction.— There is jurisdiction over the activity prohibited in subsection (a) if—

- (1) the alleged offender is a national of the United States; or
 - (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.
- (c) Conspiracy.— A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

TITLE 18 § 2441. **War crimes**

- (a) Offense.— Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
- (b) Circumstances.— The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).
- (c) Definition.— As used in this section the term “war crime” means any conduct—
- (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
 - (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

CASE FOR DISBARMENT -- NY Rules of Professional Conduct

The case for Mr. Mukasey’s disbarment is simple and clear. Above all, a lawyer must demonstrate respect for the legal system while adhering to a high moral standard. However, as a nominee for, and as the confirmed Attorney General, Mr. Mukasey did not.

Rule 1.3 (b) (Diligence) states, “a lawyer shall not neglect a legal matter entrusted to the lawyer.” On Oct. 18, at his Judiciary Committee confirmation hearing to replace Alberto Gonzales as Attorney General, Mr. Mukasey was asked if waterboarding was illegal. Ignoring established historical and legal precedent and established U.S. law, Mr. Mukasey refused to confirm the illegality of waterboarding. Despite the fact he was about to assume the position of the top Justice official in the U.S. with the responsibility of enforcing the law, Mr. Mukasey showed neither moral clarity nor legal knowledge of the law as it pertained to torture.

Senator McCain commented on the issue in an interview with George Stephanopoulos:

"Anyone who says they don't know if waterboarding is torture or not has no experience in the conduct of warfare and national security. This is a fundamental about America. It isn't about an interrogation technique. It isn't about whether

someone is really harmed or not. It's about what kind of a nation we are. We are a nation that takes the moral high ground. If we engage in a practice that was invented in the Spanish inquisition, which was used by Pol Pot in Cambodia in that great genocide, is now being used on Buddhist monks in Burma, and we're going to be the same as that? How do we keep the moral high ground in the world? I would never use that, and find some other practices."

After becoming Attorney General, Mr. Mukasey protected those who engaged in torture by failing to properly investigate and prosecute violations of US law against torture. Thus, Mr. Mukasey was grossly negligent on the grave questions surrounding torture programs and the denial of due process to detainees, including U.S. citizens, and thus violated Rule 1.3 (b) of the New York Rules of Professional Conduct.

Therefore, VR calls upon the *Board on Professional Responsibility*, to take disciplinary action against Mr. Mukasey.

KEY DOCUMENTS IN EVIDENCE

In order to build the case for disciplinary action against Michael Mukasey, Jay Bybee, John Yoo, and other lawyers advocating for, and defining so-called "enhanced interrogation," and to examine the origins of the legal advocacy, it is necessary to review an extensive body of evidence and investigative reporting and analysis, including the following documents/articles:

- 1) Memoranda prepared by lawyers in the Bush Justice Department's Office of Legal Counsel (OLC). [http://www.aclu.org/safefree/general/olc_memos.html] Exhibits C, D, E, F, G, N and O See also Haynes Memo, Exhibit I.
- 2) The Senate Armed Services Committee Investigation (SASCI) *See*, Attachment B, Senate Armed Services Inquiry Into the Treatment of Detainees in U.S. Custody, released December 2008 (SASCI), pg. xxviii. Exhibit K
<http://levin.senate.gov/newsroom/release.cfm?id=305735>
<http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf>
- 3) Memo released by the Senate Intelligence Committee:
<http://intelligence.senate.gov/pdfs/olcopinion.pdf>
- 4) The Red Cross Report on Detainee Treatment, Exhibit J.
- 5) Investigative Reporting:
 - a. *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*
 - b. "Report: Abusive tactics used to seek Iraq-al Qaida link"; Jonathan S. Landay, *McClatchy Newspapers* -- Tue, Apr. 21, 2009

1) The **OLC memoranda** offered the patina of legal sanction to the use of techniques such as waterboarding, hypothermia, stress positions, extensive sleep deprivation and confinement with stinging insects to exploit prisoner phobias.

The memos, by carefully defining parameters, clearly demonstrate that the authors of the memos were deeply engaged in the application of torture techniques, not merely giving abstract legal counsel.

2) The **Senate Armed Services Committee report** provided a detailed chronology of the process of formulation of policy respecting the treatment of prisoners, with a special focus on the introduction of torture techniques. Exhibit K

Senior officials in the U.S. government decided to use some of these harsh techniques against detainees based on deeply flawed interpretations of U.S. and international law.

[Levin, McCain Release Executive Summary and Conclusions of Report on Treatment of Detainees in U.S. Custody, December 11, 2008]

3) The **Senate Intelligence Committee memo** details the steps leading to issuance of the OLC memos and identified the Justice Department lawyers and others involved in the process. The memo details a systematic authorized program for the mistreatment and torture of persons denied rights of due process. [Letter from Attorney General Eric Holder, Jr. to Senator John. D. Rockefeller IV of the SSCI forwarding declassified narrative, (April 17, 2009).]

4) The **Red Cross Report On Detainee Treatment** was prepared from interviews with a number of detainees and others. In short, it confirms that the types of torture techniques advocated by the attorney we have complained about here were in fact used against many detainees. These techniques included suffocation by water, prolonged stress standing, beatings by use of a collar, beating and kicking, confinement in a box, prolonged nudity, sleep deprivation, continuous loud noises, exposure to cold temperature and cold water, threats, forced shaving, and deprivation of food. Exhibit J

5) In **testimony at a Senate hearing** on May 13, 2009, Former State Department counselor Philip Zelikow told a committee panel that Bush administration officials engaged in a 'collective failure' with regard to the detention and interrogation of suspected terrorists. He asserted that the torture memos were unsound because "the lawyers involved ... did not welcome peer review and indeed would shut down challenges even inside the government." Georgetown University law professor David Luban testified that the Justice Department torture memos constituted "an ethical train wreck" because they violated constitutional, statutory and international law.

<http://www.washingtonpost.com/wp-dyn/content/article/2009/05/13/AR2009051301281.html>

6) **Investigation Reporting/Biographies:** Select reporting from credible sources further suggests that following the attacks of 9/11/01, a host of controversial and illegal policies were advanced persistently and systematically by a small group of lawyers to serve narrow policy goals and political ambitions, with a primary aim of vastly amplifying the power of the Presidency, in direct threat to the system of checks and balances elucidated in the U.S. Constitution.

ENDNOTES

[1] See *ProPublica's* comprehensive list of legal memoranda on controversial Bush policies regarding detentions, interrogations and warrantless wiretapping.
<http://www.propublica.org/special/missing-memos>.

A detailed listing of torture related legal memoranda is available here:
<http://www.aclu.org/safefree/torture/torturefoia.html> Exhibit A

The most recently declassified memos from Yoo's *Office of Legal Counsel* can be found here: http://www.aclu.org/safefree/general/olc_memos.html

[2] See April 15, 2009, *Memorandum to the Attorney General Re. The Withdrawal of Office of Legal Counsel Opinions* mentioning the legal opinions expressed in dated memoranda written by Jay S. Bybee, Assistant Attorney General and Steven G. Bradbury, Principal Deputy Assistant Attorney General.
[http://media.mcclatchydc.com/smedia/2009/04/16/16/Taylor-OLCops_withdrawal.source.prod_affiliate.91.pdf]

The TIMES Online reported:

"Jack Goldsmith, who succeeded Jay Bybee - the author of many of these memos - at the Office of Legal Counsel, has since declared that they had 'no foundation' in any source of law and rested on 'one-sided legal arguments'. **Their purpose, he said, was to provide the CIA with a 'golden shield' against criminal prosecution of agents.** After all, the US prosecuted waterboarding as torture when the Japanese used it against American troops during Second World War."
[http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6116281.ece]

[3] Mayer, Jane; *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*, Doubleday, 2008.

Yoo, John C.; *War by Other Means: An Insider's Account of the War on Terror*, Atlantic Monthly Press, 2006.

Mayer sources "hard-line law-and-order stalwarts in the criminal justice system" to describe how beginning on 9/11/01 a group who called themselves the "War Council"

worked to upend the American system of law and checks and balances in order to exercise a new legal paradigm for Executive Power. They worked methodically to vastly expand presidential authority (“not limited by any laws”) in which the president “had the power to override existing laws that Congress had specifically designed to curb him.” The ‘War Council’ was led by David Addington, Chief of Staff of Vice President Cheney, and included John Yoo of the OLC, William James Haynes from the Department of Defense and Timothy E. Ashcroft and Alberto Gonzales, from the White House. Mayer’s account was in part based on John Yoo’s 2006 book, *War by Other Means*, which revealed a larger circle of lawyers who met regularly in order to advance an entirely unprecedented new legal regime.

[4] Unredacted Church Report Documents (Previously Classified) (2/11/2009)

<http://www.aclu.org/safefree/torture/38710lgl20090211.html>

<http://www.aclu.org/torturefoia/released/021109.html>

These reports from the Criminal Investigation Division of the Dept. of Justice detail the deaths of a number of detainees at Bagram Air Force Base in Afghanistan and at prisons in Iraq. Thus far, 21 homicides have been confirmed, eight of which resulted from abusive interrogation techniques.

[5] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the United Nations General Assembly in 1984 and entered into force on June 26, 1987.

It defines torture as any act by which: “severe pain or suffering, whether physical or mental; is intentionally inflicted on a person; for such purposes as”:

- a) obtaining from him/her or a third person information or a confession
- b) punishing him/her for an act s/he or a third person has committed or is suspected of having committed
- c) intimidating or coercing him/her or a third person,
- d) or for any reason based on discrimination of any kind;

When such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*

<http://www.amnestyusa.org/war-on-terror/reports-statements-and-issue-briefs/torture-and-the-law/page.do?id=1107981>

[6] “The Torture Memo By Judge Jay S. Bybee That Haunted Alberto Gonzales's Confirmation Hearings,” by John W. Dean, Friday, Jan. 14, 2005;

<http://writ.news.findlaw.com/dean/20050114.html>

Sincerely,

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