On the Duty of the Legislatures of the United States to Complete the Nation's Compliance with the Convention against Torture

A Memorandum, and a Record of Notice, Issued by the IAJ on Behalf of the People of the United States

Addressed to the members of the Congress of the United States and of the legislatures of the several States

I. Purpose and Standing of This Memorandum

This memorandum serves two purposes at once, and is written so that each is fully discharged. First, it states, with supporting authority and on behalf of the people of the United States, the constitutional and international duties that rest upon the Nation's legislatures in the matter of torture, and it constitutes formal notice that those duties remain unfulfilled — a notice intended to form part of the record before the Committee against Torture and the Universal Periodic Review. Second, it addresses the lawmakers themselves: not to instruct those well able to govern, but to set a neglected obligation plainly before them, and to observe, in candor, what the continued non-exercise of a legislative power costs the institution that declines it.

The IAJ writes in a deliberate spirit. It does not accuse, and it does not flatter. It proceeds from the premise that the members of the legislatures of the United States are fully capable of discharging the duty described here, and that the office of a lawmaker is owed the respect of a plain account rather than either intimidation or solicitude. What follows is offered in that manner.

II. The People as Sovereign, and Authority as a Trust

In the constitutional order of the United States, public authority is not owned by those who exercise it. It is held in trust for the people, in whose name it is constituted and to whom it answers. The IAJ therefore addresses the legislatures not as a supplicant and not as an adversary, but on behalf of the principal whose interest the lawmaker is bound to serve.

The prohibition of torture illustrates the point exactly. It is not a courtesy the government extends to itself; it is a guarantee secured for every person within the Nation's jurisdiction. When the United States bound itself to that guarantee, it acted as the people's agent, and the benefit of the undertaking belongs to the people as principal. It follows that a legislative power left unexercised, where its exercise is necessary to render the guarantee effective in domestic law, is not merely an institutional omission. It is the withholding from the sovereign people of a protection promised in their name — and it is on their behalf that the omission is here identified.

III. The Binding Commitment

The United States ratified the Convention against Torture in 1994, and by Article VI, clause 2 of the Constitution the treaty thereby entered the supreme law of the land. The obligations it imposes

are, in their essentials, neither contestable nor conditional: to take effective measures to prevent torture (Article 2(1)); to ensure that all acts of torture are offences under the criminal law, punishable in proportion to their gravity (Article 4); and to guarantee victims redress and an enforceable right to fair and adequate compensation (Article 14). The prohibition itself is absolute. No circumstance — war, emergency, or claim of necessity — may be invoked to justify torture, and superior orders furnish no defense (Article 2(2)–(3)).

The prohibition is, moreover, a peremptory norm of general international law, from which no State may derogate. Two settled rules of the law of treaties give the commitment its force in practice: a treaty in force binds the parties and must be performed in good faith, and no State may invoke its internal law — including the arrangement of its own federal structure — to excuse non-performance. These are not the IAJ's propositions; they are the common ground of the international legal order to which the United States has subscribed.

IV. The Documented Deficiency, and the Notice Already Constructively Given

In 2014 the Committee against Torture, the body the States Parties established to assess compliance, reviewed the United States and recorded specific respects in which domestic law had not been brought into conformity with the commitment (CAT/C/USA/CO/3-5). The findings are a matter of record:

- no general federal offence of torture, defined in conformity with Article 1, exists for conduct within the United States, the federal statute reaching only conduct abroad (paragraph 9);
- a reservation and an interpretive understanding remain that the Committee found capable of narrowing the protection and creating avenues to impunity (paragraphs 9–10);
- serious abuses were neither fully investigated nor punished, and victims — among them the survivors of the Chicago police-torture cases, where the absence of a conforming offence allowed limitation periods to bar prosecution — went without remedy (paragraphs 11–12, 26); and
- the enforceable right of victims to redress was not secured in law (paragraph 29).

These findings were transmitted to and received by the Government of the United States in 2014. The deficiency has therefore been known to the Nation, at the level of its responsible institutions, for more than a decade. This memorandum places the same matter before the individual members of the legislatures, so that what has been constructively known to the Government is now expressly known to those alone able to supply the cure. From this point, inaction is not the silence of ignorance.

V. The Allocation of the Duty Among the Organs of Government, and Its Return to the Legislatures

A supreme-law obligation binds the whole of government, and the IAJ does not single out the legislatures as if the duty were theirs alone. The judiciary is bound to construe and apply domestic law in conformity with the treaty so far as its text permits, to give faithful effect to existing implementing law, and to adjudicate the constitutional claims through which the prohibition is vindicated; the courts of the several States are bound directly, by the Supremacy Clause, to treat the treaty as supreme over contrary state law. The executive is bound to enforce the law and to refrain from authorizing what the treaty forbids. And each State is independently bound to bring its own law into conformity within its sphere — a duty distinct enough, and weighty enough, to be treated separately in Section VI below.

Within that shared structure, one measure is reserved to the federal legislature in particular. The Supreme Court has held that an obligation of this character becomes domestic law only through legislation enacted by Congress; neither the executive nor the judiciary may supply it.

While, according to IAJ analysis, this does not relieve any court, including the Supreme Court of the United States, of responsibility for ensuring the equivalence promised by the reservations and understandings of ratification, that responsibility is of a particular and bounded kind. The United States did not qualify its consent on the ground that the Convention would go unimplemented, but on the ground that implementation was unnecessary because existing domestic law already afforded equivalent protection — the reservation to Article 16 accepting the obligation only insofar as the prohibited treatment is that already forbidden by the Fifth, Eighth, and Fourteenth Amendments. Equivalence was thus promised in the coin of domestic constitutional law, whose construction is the judiciary's own province. The courts are accordingly the custodians of that equivalence: bound to construe the Acts of Congress so as not to conflict with the Convention, to give faithful effect to such implementing law as exists, and to administer the constitutional guarantees the reservations invoked to a measure consonant with the absolute, non-derogable prohibition to which those guarantees were equated. That this is no abstraction is shown by the same reservation's having been pressed, in the legal memoranda of 2001 to 2009, to advise that conduct amounting to torture might be authorized — the equivalence device turned against its own promise.

The judiciary may not, however, enact the offence that would conform domestic law to Article 1, supply the limitation rules that would keep torture from escaping punishment, or create the enforceable right to redress that Article 14 requires. Those are legislative acts, and responsibility for them remains with the legislature, undiminished and — because the obligation is the Nation's as a whole, binding every State and reaching federal conduct that no State can govern — non-delegable to the States.

Herein lies the decisive point. In resting the Nation's compliance upon existing and largely judge-administered law, the reservations amounted, in practical effect, to a consignment of the Convention's domestic efficacy to the judiciary — the political branches passing to the courts a duty those branches alone could discharge. Yet the judiciary regards itself, correctly under the rule just stated, as without authority to supply what only legislation can supply. The consignment therefore fails on its own terms, and the responsibility it sought to transfer does not vanish. **It returns to the legislatures, and returns with redoubled force**: for the legislature now confronts not only the original allocation that made the cure its own, but the demonstrated foreclosure of the very alternative on which it relied. The political branches passed the question to the courts; the courts, finding the door closed to them, return it. What this closed circuit establishes is precisely the Committee's conclusion of 2014 — that the deficiency is curable by domestic legislation, and by domestic legislation alone. Every avenue but the legislative one has been shown, by the Nation's own arrangements, to be foreclosed; and the duty to take that one open avenue rests, doubly and inescapably, upon the Congress and the legislatures of the States.

VI. The Distinct and Independent Duty of the Legislatures of the Several States

That the complete federal cure is reserved to Congress does not place the States at the margin of this obligation. Their duty is distinct, independent, and direct. Article VI, clause 2 makes the Convention supreme over any contrary provision of state law and, by its own terms, binds the judges of every State; Article VI, clause 3 binds every state legislator, by oath, to support the Constitution of the United States, of which that supremacy is part; and the constitutions of the several States themselves acknowledge the supremacy of the Constitution and treaties of the United States. The state legislator is thus bound to the Convention not derivatively, through the federal government, but immediately, by the same supreme law the federal legislator serves.

The reach of that duty is, moreover, far from incidental, for the conduct the Convention governs falls in great part within the States' own domain. The custody of persons in the United States is overwhelmingly a state and local function: the prisons, jails, juvenile facilities, and police stations in which the prohibition of torture and ill-treatment is tested day by day are, in their vast majority, operated under state and local authority and governed by state law. The plenary police power to define crimes, to regulate the conduct of officers, and to provide remedies for their abuse is the States'. The front line of prevention contemplated by Article 2(1) — and much of the redress contemplated by Article 14 — therefore lies precisely where the state legislatures legislate. A duty that governs the daily treatment of the confined is no peripheral one.

The United States' own terms of ratification confirm the point. In consenting to the Convention, the United States understood that it would be implemented by the federal government to the extent of federal jurisdiction, and otherwise by the state and local governments. Whatever the defects of that understanding as a matter of international law, no state legislature may read it as an exemption; it is, on its face, an assignment. The matters within state jurisdiction were, by the Nation's own

instrument of ratification, committed to the States to implement. And so, just as Congress may not pass its federal duty down to the States, **a state legislature may not pass its own duty up to Congress**: the federal cure, however complete, will not reach the state prison, the county jail, or the municipal interrogation room, and no Act of Congress can conform the criminal law of a State that the State alone may write.

The cost of neglecting this duty is neither hypothetical nor distant, and the Committee's own record supplies the illustration. The torture committed under Commander Jon Burge and others in Chicago between 1972 and 1991 went unpunished as torture not because the conduct was lawful, but because the law of the State furnished no offence adequate to it and the ordinary limitation periods had run before the truth was established. That impunity was a state-legislative gap, and it was a state legislature, not Congress, that was positioned to close it. The lesson generalizes: wherever a State's criminal law lacks an offence equal to the gravity of torture, or attaches to it a limitation that lets it escape, or leaves its victims without an effective remedy, the State holds within its own hands both the failure and its cure.

For the legislatures of the States, then, the course of compliance is as concrete as it is for Congress. It requires that each State ensure that torture and cruel, inhuman, or degrading treatment by any person acting under its authority are fully prohibited and punishable under state law, by an offence equal to their gravity and not defeated by limitation; that its correctional, custodial, and policing practices conform to the Convention's standard; that victims of such conduct within the State have an effective remedy and redress; and that its agencies be directed to treat the Convention as the supreme law it is. These are ordinary exercises of the police power the States have always claimed as their own.

Nor is the States' role merely to follow. A State that conforms its law need not wait upon the Nation; it may furnish the example the Nation has yet to complete, and demonstrate within its own borders the equivalence the United States has promised to the world. The IAJ addresses the state legislatures, accordingly, not as subordinate recipients of a federal obligation, but as independent custodians of a supreme-law duty that, in the domain of daily custody and treatment, is more nearly theirs than anyone's.

VII. The Erosion of Authority Through Its Non-Exercise

It is worth stating plainly, and in the legislatures' own interest, what the prolonged non-exercise of an exclusive power entails. Authority in a constitutional republic is sustained by its exercise. A power that the Constitution commits to the legislature, and that the legislature declines to use in the face of a known and binding obligation, does not simply lie dormant awaiting a more convenient session. Its function migrates: to an executive that comes to conduct the Nation's compliance by representation and assurance rather than by law; to courts pressed to supply through interpretation what the legislature has not enacted; and to international bodies that, in the absence

of domestic action, become the only fora in which the obligation is examined at all. The constitutional design of checks and balances, which presumes that each branch will occupy its own office, is to that extent defeated.

Each such migration diminishes the legislature's standing as the branch that speaks for the sovereign people. The institution that will not perform the duties uniquely its own gradually forfeits the authority that attached to them, and weakens its claim to be the people's first voice in the government. What is said here of Congress holds equally of a state legislature that declines, within its own sphere, the duty Section VI describes. The accountability that follows is not criminal, and it is not the decree of any single tribunal; it is institutional, political, and historical — the judgment of constituents, the assessment of the international community, and the record by which the conduct of a legislature is finally measured. A legislature mindful of its own authority guards that authority by exercising it. The IAJ raises the point not as a threat — it has none to make — but as an observation a responsible institution would wish to have before it. And it is the people who bear the cost — deprived of a protection that is theirs by right, that they are entitled to enjoy, and that their government has assured the world is secure within its borders.

VIII. The Capacity of the Nation, and the Expectation of the World

This is a matter for Americans to resolve, and it is well within their competence to resolve it. The obligation is the United States' own, assumed through its own constitutional process; its completion requires nothing more than the ordinary exercise of the legislative power, at both the national and the state level. The international community does not expect the United States to be lectured into compliance. It expects the United States to do what a self-governing people has always claimed the capacity to do: to identify a shortcoming in its own law and to correct it through its own institutions, without external compulsion.

A Republic that has so often urged the observance of human rights upon other nations is fully capable of securing that observance at home, and is expected — by friends and adversaries alike — to furnish the example rather than to require one. Nothing in this memorandum supposes otherwise. It is written in the confidence that the Nation's lawmakers, in the Congress and in the States alike, once the matter is set plainly before them, will prefer to complete the Nation's commitment by their own hand, as befits a people that governs itself.

IX. The Course of Compliance

What the duty requires is neither uncertain nor onerous. For the federal legislature, compliance is achieved by enacting a general federal offence of torture conforming to Article 1, measures addressing cruel, inhuman, or degrading treatment consistent with Article 16, and reaching conduct within as well as outside the United States and the conduct of federal actors; by securing in law the enforceable right of victims to redress and compensation; by withdrawing the reservation and

understanding the Committee identified as sources of impunity; and by establishing a settled practice of timely reporting and of recorded legislative response to the findings of the treaty body, so that no obligation of this kind again goes unattended. The corresponding course for the legislatures of the States is set out in Section VI above. Both are necessary, and neither is answered by the other.

These measures are set out not as conditions imposed by the IAJ, but as the plain content of an obligation the United States has already accepted. To enact them is to complete what the Nation began in 1994; to decline them, after notice, and after every other avenue has been shown to be foreclosed, is to choose that the Nation's law shall remain unequal to its word.

X. Notice and Record

The IAJ records, for the purposes of the international review of the United States and as a statement made on behalf of the people, that the duties described in this memorandum have been set expressly before the members of the Congress and of the legislatures of the several States; that the deficiency they address has been a matter of record since 2014; that every avenue of cure but the legislative one has been shown, by the Nation's own arrangements, to be foreclosed; and that the means of cure lie within the ordinary competence of the bodies addressed, federal and state alike. The IAJ, in its role as an assessor of compliance, will regard the good-faith taking-up of this duty — its acknowledgment, examination, and pursuit by some effective legislative means — as fidelity to the oath of office, and will regard the continued denial or evasion of the duty, after notice, as its dereliction. This memorandum is the notice.

Appendix — Authorities

- U.S. Constitution, Article VI, clauses 2 and 3; Article I, Sections 5 and 6.
- Oath of office, 5 U.S.C. § 3331, and the corresponding oaths of state legislators; state constitutional provisions acknowledging the supremacy of the Constitution and treaties of the United States.
- Convention against Torture, Articles 1, 2, 4, 14, 16, 19; General Comments No. 2 (2007) and No. 3 (2012).
- United States reservations and understandings to UNCAT (1990/1994), including the reservation to Article 16, the federal-implementation understanding, and the non-self-execution declaration.
- Committee against Torture, Concluding Observations on the United States, CAT/C/USA/CO/3-5 (2014), paras. 9, 10, 11–12, 26, 29.
- Vienna Convention on the Law of Treaties, Articles 26 and 27.

— Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); Medellín v. Texas, 552 U.S. 491 (2008).

— International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001), Articles 2 and 4.

— 18 U.S.C. §§ 2340–2340A.

Issued by the IAJ as a memorandum of legislative duty and a record of notice. It states the law and the obligation; it asserts no claim for relief in any tribunal and alleges no crime by any individual.

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