On the Duty of the Prosecutors in the United States under the Convention against Torture

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

Addressees. The prosecuting authorities of the United States and of the several States — federal United States Attorneys and the Civil Rights Division of the United States Department of Justice; State Attorneys General; District Attorneys, County Attorneys, and the analogous offices of each State; public-integrity units; civil-rights units; inspectors general; and judicial-conduct authorities holding charging or referral power over the conduct UNCAT governs.

Subject. The duty, under existing federal and state law, to receive, preserve, protect, investigate or refer, charge where reachable, and document by record where not reachable, every credible allegation of torture or cruel, inhuman, or degrading treatment committed under color of public authority within the United States.

Source and status. This is a civil-society notice and operational memorandum issued by the IAJ in its role as an assessor of compliance with the Convention against Torture. It is not a subpoena, a court order, an accusation against any named prosecutor, or a demand to act inconsistently with domestic law. It states what existing domestic law, read against the United States' supreme-law treaty commitment, requires, and it constitutes formal notice for purposes of the international review of the United States.

Companion publications. This Notice and Memorandum is one of three companion IAJ publications. (i) IAJ-NOT-20260607-001-PUB, On the Duty of the Legislatures of the United States to Complete the Nation's Compliance with the Convention against Torture, addresses the statutory gap only Congress and the legislatures of the several States can supply. (ii) IAJ-GDE-20260510-001-PUB, A Guide to Domestic Criminal Enforcement of Torture and Cruel, Inhuman, or Degrading Treatment in the United States, sets out the doctrinal elements, charging architecture, and gap-documentation requirements at the level of the elements. (iii) This memorandum, IAJ-NOT-20260607-002-PUB, addresses the prosecutorial duty at the level above the elements.

Record function. This Notice is intended to become, and is preserved by the IAJ as, part of the record before the United Nations Committee against Torture under Article 19 of the Convention; before the Universal Periodic Review of the United States; and before such special-procedure mandate-holders, treaty bodies, and bar bodies as the IAJ considers competent to receive and act on the conduct it concerns. From the date of its issuance, the prosecuting authorities addressed are on notice that inaction is not the silence of ignorance.

PART I — AUTHORITY AND SOURCE STATUS

§ 1. Purpose, Addressees, and Status of This Notice

This Notice is issued as a memorandum and a record. It 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 duty that rests upon the prosecuting authorities of the Nation in the matter of torture and cruel, inhuman, or degrading treatment under color of law, and it constitutes formal notice that the duty, in important respects, remains imperfectly discharged — a notice intended to form part of the record before the Committee against Torture, the Universal Periodic Review, and such other review mechanisms as are competent in the matter.

Second, it addresses the prosecuting authorities themselves: not to instruct those entrusted with the law's enforcement, but to set a known obligation plainly before them, and to observe, in candor, what its non-exercise costs the office that declines it. The IAJ writes in the same spirit in which it has addressed the legislatures. It does not accuse, and it does not flatter. It proceeds from the premise that the prosecuting authorities of the United States are fully capable of discharging the duties described here, and that the office of a prosecutor is owed the respect of a plain account rather than either intimidation or solicitude.

The prosecuting office is held in trust for the people, in whose name every charging instrument is signed and to whom the office answers. It is to the people, then, that the duties described in this Notice are owed. The IAJ raises the matter in their name. The phrase "on behalf of the people" is used in this Notice in the public-interest and treaty-monitoring sense: the IAJ does not claim governmental office, electoral mandate, prosecutorial authority, or attorney-client representation of the People of the United States.

§ 2. The Binding Baseline: UNCAT, the Constitution, and Existing Domestic Law

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. Four obligations among those it imposes bear directly on the conduct of prosecutions, in operational terms.

Article 4 requires that all acts of torture be offences under the criminal law, punishable in proportion to their gravity. Article 12 requires that, wherever there is reasonable ground to believe an act of torture has been committed within the State Party's jurisdiction, the competent authorities proceed to a prompt and impartial investigation. Article 13 requires that any individual alleging such treatment have the right to complain to, and have the case promptly and impartially examined by, the competent authorities, with steps taken to ensure that the complainant and witnesses are protected against ill-treatment or intimidation as a consequence of the complaint or any evidence given. Article 16 extends Articles 10 through 13 to cruel, inhuman, or degrading treatment that does not amount to torture.

The prohibition itself is absolute. No circumstance — war, emergency, claim of necessity, the asserted dangerousness of the person mistreated, the operational pressures of an institution — may be invoked to justify torture, and superior orders furnish no defense. The prohibition is, moreover, a peremptory norm of

general international law from which no State may derogate; the Vienna Convention on the Law of Treaties confirms that a State may not invoke its internal law, including the arrangement of its own federal structure or the discretion of its prosecuting agencies, to excuse non-performance. The IAJ invokes VCLT Articles 26 and 27 as codifications of general treaty-law principles and, to the extent applicable, customary international law, and not as a separate ratified treaty obligation of the United States; the United States has not ratified the VCLT, and the IAJ treats its principles as binding on the United States only to the extent they reflect rules of customary international law.

The IAJ acknowledges, candidly, the two-plane character of the United States' implementation of the Convention. On the plane of international obligation, the commitments above bind the Nation as a whole. On the plane of domestic enforceability, the Nation's instrument of ratification declared the Convention non-self-executing, and the Supreme Court has held in Medellín v. Texas, 552 U.S. 491 (2008), that obligations of this character require implementing legislation for direct judicial enforceability in domestic courts. Article VI makes the treaty part of the supreme-law architecture of the United States; the non-self-execution declaration and Medellín limit direct judicial enforceability of the treaty itself, absent implementing legislation. Those limits do not erase the international obligation, and they do not erase the prosecutor's duty to use existing domestic law where it already reaches the conduct UNCAT governs. The full domestic enforcement architecture is therefore the province of the Nation's legislatures, and is the subject of the IAJ's companion Notice to those bodies. What remains, on the prosecutorial plane, is the duty to enforce so much of the Convention as existing domestic law already supplies — and to document, where it does not, the gap. That is the duty this Notice addresses.

§ 3. The Documented National Deficiency, and the Notice Already Constructively Given

In 2014 the Committee against Torture reviewed the United States and recorded specific respects in which the conduct of investigations and prosecutions had failed to meet the commitment (CAT/C/USA/CO/3-5). The findings are a matter of record. Serious abuses were neither fully investigated nor punished. Victims went without remedy. There is no general federal offence of torture, conforming to Article 1, reaching conduct within the United States; the federal torture statute reaches only conduct abroad. A reservation and an interpretive understanding remain that the Committee found capable of narrowing the protection in Article 16.

In a leading instance, the survivors of the Chicago police-torture cases — the conduct committed under Commander Jon Burge and others between 1972 and 1991 — could not be vindicated through the criminal law because the State of Illinois furnished no offence equal to the conduct and the federal civil-rights statutes, by the time the conduct came clearly to light, were barred by limitation. The Committee observed that the United States had not ensured prosecution of those responsible, including those exercising superior responsibility, and had not provided victims with effective redress.

These findings were transmitted to and received by the Government of the United States in 2014. The deficiency in the prosecution of torture and ill-treatment has therefore been known to the Nation, at the level of its responsible institutions, for more than a decade. This Notice places the same matter expressly

before the individual prosecuting authorities, so that what has been constructively known to the Government is now expressly known to those alone able, within the limits of current law, to bring particular cases. From this point, inaction is not the silence of ignorance.

A prosecutor need not charge what the law does not permit; but a prosecutor may not allow credible torture or cruel, inhuman, or degrading treatment to disappear by intake refusal, non-investigation, unexplained declination, misclassification, or undocumented gap.

PART II — PROSECUTORIAL DUTIES UNDER PRESENT LAW

§ 4. The Duty to Receive Complaints

In operation of Article 13 of the Convention against Torture, applied through the intake and complaint-receipt functions of every prosecuting office holding jurisdiction over the conduct.

Article 13 requires that any individual alleging conduct UNCAT governs have the right to complain to, and have the case promptly and impartially examined by, the competent authorities. The duty falls, in the United States, on the intake function of every prosecuting office holding jurisdiction over the conduct alleged.

The intake duty is not satisfied by the formal availability of complaint channels. It is satisfied only by the actual capacity of those channels to receive and to act upon complaints from the persons in whose hands torture and ill-treatment most often occur: incarcerated persons, persons with psychiatric histories, persons in immigration detention, persons without housing, persons whose only prior contact with the prosecutor's office was as a defendant, and persons whose disability or language status the office's ordinary intake processes do not accommodate. A complaint mechanism that operates, in practice, only for the credentialed or the well-resourced is not the complaint mechanism Article 13 contemplates.

Two practical implications follow. First, a prosecuting office's intake function ought to be designed so that a credible allegation of torture or ill-treatment, from any source, reaches an officer competent to act on it, without procedural intermediation by the agency whose officers are alleged to have committed the conduct. Second, where complaints are referred to the alleged-perpetrator agency for initial fact-gathering, the prosecuting office retains the Article 13 duty notwithstanding the referral; the duty cannot be discharged downstream, and the referral does not extinguish the prosecuting office's obligation to receive the complaint and to examine it independently.

Appendix A sets out, in summary form, the elements of an intake practice consistent with the duty Article 13 describes.

§ 5. The Duty to Preserve Records and Evidence

In operation of Articles 12 and 13 of the Convention against Torture, applied to the documentary footprint of every credible allegation from the moment of its receipt.

A credible allegation of torture or ill-treatment generates evidence of three kinds, each subject to a distinct erosion if it is not preserved promptly. There is physical and forensic evidence on the body and at the place of the conduct, which deteriorates within hours or days. There is contemporaneous documentary evidence held by the agency under whose authority the conduct occurred — incident reports, body-worn camera footage, intake medical records, custodial logs, surveillance recordings, and the like — which the agency holds, retains under its own retention policy, and, in the absence of a preservation request, may overwrite, lose, or destroy on the ordinary disposal schedule. And there is witness recollection, which decays even when the witness is not subject to pressure.

The prosecutor's office that receives the complaint is, in the ordinary case, the only institution positioned to take the steps necessary to preserve each. A litigation-hold or preservation directive, issued promptly to the relevant agencies; an independent medical examination of the complainant before custodial conditions can be altered; an early statement taken from the complainant and from any witnesses, recorded; and the formal sequestration of any physical evidence still recoverable — these are the preservation steps that, taken or not taken, distinguish a case in which the underlying evidence remains assessable from a case in which it has effectively been lost. The duty to take them does not depend on the prosecutor's preliminary view of the merits. It depends on the credibility of the allegation; that is the trigger Article 12 specifies, and it is the same trigger that operates here.

Where the preservation duty is performed and the case is later declined on the merits, the office's record will reflect the steps taken and the conclusions drawn. Where the duty is not performed, the office's record will reflect the absence — and the absence will, by itself, become part of the compliance picture.

§ 6. The Duty to Protect Complainants, Witnesses, and Experts

In operation of Article 13 of the Convention against Torture, which requires steps to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

Article 13 contains, in its second sentence, an obligation often overlooked: the State Party must take steps to ensure that the complainant and witnesses are protected against ill-treatment or intimidation as a consequence of the complaint or evidence given. The duty falls, in operational terms, on the prosecuting authority that receives or accepts for review the complaint, and on the institutions of the State and locality whose officers the prosecuting authority can reach.

The protection duty has three principal aspects in present-day United States practice. First, the institutional aspect: a complainant who remains in the custody, employment, or service of the agency whose officers are alleged to have committed the conduct is in a position of structural vulnerability that the prosecuting authority is required to take steps to address. Steps may include arrangements for housing in a different facility, the placement of a no-contact directive, the documentation of the complainant's status with the

relevant oversight body, or the immediate referral to a parallel authority equipped to provide protective custody.

Second, the prosecutorial aspect: the prosecuting authority must not, by act or omission, use the criminal process to intimidate the complainant or the witnesses. The charging of a complainant for conduct alleged to have occurred during the same encounter; the threatened or actual prosecution of a witness for collateral conduct disclosed only because of the witness's cooperation; and the disclosure of identifying information about a complainant or witness to the alleged-perpetrator agency in advance of an interview — each requires careful and reasoned judgment, recorded in the office's files, and each is the subject of independent professional-responsibility examination if it forms part of a pattern.

Third, the duty extends to experts: the medical, forensic, and other professional witnesses without whom the conduct UNCAT governs cannot be substantiated. An expert's capacity to render an honest opinion is itself a subject of protection; an expert who, by retaliation, loss of credentials, professional discipline, or the calculated pressure of repeated litigation, is deterred from rendering opinions in torture and CIDT cases is, for compliance purposes, a witness lost. The prosecuting authority is positioned to take steps to support the integrity of expert testimony in the cases before it, within its lawful authority and through available referral, protective-order, anti-retaliation, witness-protection, and professional-conduct channels; the failure to take those steps, where available, is itself a failure of the protection duty.

§ 7. The Duty to Investigate or Refer

> *In operation of Article 12 of the Convention against Torture, applied through the existing federal and state criminal jurisdictions and through the duty to refer where the receiving office is not the proper investigating authority.*

Article 12 obliges the competent authorities to proceed to a prompt and impartial investigation wherever there is reasonable ground to believe that an act of torture or cruel, inhuman, or degrading treatment has been committed within the State Party's jurisdiction. In the United States, the competent authorities for conduct under color of official authority are, in the ordinary case, the prosecuting authorities of the State or locality in which the conduct occurred, and — for conduct of federal officials, conduct otherwise within federal civil-rights jurisdiction, or systemic conduct cognizable under federal pattern-or-practice authority — the United States Department of Justice and its component offices.

Three elements of the investigative duty bear naming. Promptness is the first. An investigation initiated only after a civil suit is filed, or after the press has reported the conduct, or after the survivor has obtained counsel willing to press the matter publicly, is not the prompt investigation Article 12 contemplates. Impartiality is the second. An investigation conducted by, or referred entirely to, the agency that committed the conduct, or that staffs and trains the personnel whose conduct is under review, is not impartial in the sense Article 12 contemplates. The third element is reach: a credible allegation that the conduct was systemic, or part of a pattern across multiple incidents, is not adequately investigated by examination of a single case in isolation.

Where the receiving prosecuting office is not the proper investigating authority — because the conduct lies outside its jurisdiction, because the receiving office has a conflict, or because effective investigation requires institutional capacities the receiving office does not possess — the duty Article 12 imposes is discharged by referral to an authority that can investigate, with the referral itself recorded in the office's files and tracked to disposition. Referral does not extinguish the receiving office's record-keeping duty. Where the referred-to authority does not act within a reasonable time, the referring office retains the duty to escalate, to refer to another competent authority, or to document the failure.

The duty Article 12 imposes does not require certainty. It requires reasonable ground to believe, and an investigation that flows from that ground. The decision whether to proceed beyond investigation — to charge — is treated separately in § 8 below. The investigation duty stands on its own, and is not discharged by a decision not to charge. It is the predicate of the charging decision, not its consequence.

§ 8. The Duty to Charge Where the Law Reaches

> *In operation of Article 4 of the Convention against Torture, applied through such offences as the federal and state criminal codes already supply.*

The IAJ acknowledges, candidly, what the companion Notice on legislative duty establishes. There is at present no general federal offence of torture, defined in conformity with Article 1 of the Convention, reaching conduct within the United States; the federal torture statute reaches only conduct abroad. Many States have no offence equal to the gravity of torture by their own officers. The full remedial architecture the Convention contemplates is, in important respects, not yet in place. The legislative cure for this is the subject of the companion Notice, and the responsibility for that cure does not lie with the prosecuting authorities. The IAJ adds, for clarity, that Article 16 cruel, inhuman, or degrading treatment may not be treated as a non-criminal category by default: where culpable official CIDT is reachable through an existing criminal vehicle, and the office has jurisdiction, admissible evidence sufficient to satisfy ordinary charging standards, and ethical authority to proceed, the conduct must be charged through the most adequate available vehicle and must not be declined merely because it is labeled CIDT rather than torture; where no vehicle fully reaches it, or where ordinary charging standards cannot be satisfied, the absence of criminal accountability must be documented in the office's record as an Article 16 implementation gap under § 9 below.

It does not follow that the prosecutor's role is small. What follows is that the prosecutor's duty must be discharged with the instruments already in hand — and those instruments are not negligible.

On the federal side, the civil-rights criminal cluster reaches a substantial portion of the conduct UNCAT governs when the conduct is committed by federal, state, or local officials acting under color of law. 18 U.S.C. § 241 (conspiracy against rights) and § 242 (deprivation of rights under color of law) supply the principal vehicles; § 249 supplements them for hate-crime conduct, including conduct directed at persons because of disability; the obstruction and record-falsification provisions in §§ 1512, 1513, and 1519 reach the conduct that suppresses investigation. The Department's professional-conduct and judicial-misconduct referral channels supply further routes.

On the state and local side, the ordinary criminal law of the State — laws of homicide, assault, kidnapping, official misconduct, and abuse of office — reaches much of the residue. Where the available offence understates the gravity of the conduct, the State's prosecuting authority retains the duty under Article 4 to charge the most adequate available offence, and to document the gap between that offence and the conduct it imperfectly reaches. The documentation of the gap is the subject of § 9 below.

Civil remedies and institutional enforcement tools are not the prosecutor's criminal charging vehicles, and the IAJ does not present them as such. 42 U.S.C. § 1985(2) and § 1985(3) are civil conspiracy statutes; 34 U.S.C. § 12601 confers pattern-or-practice authority on the United States Department of Justice against governmental authorities. These tools do not substitute for criminal charges. They are nevertheless relevant to the prosecutor's overall response to torture and CIDT cases: they help identify patterns, preserve and produce records the criminal case may not on its own require, support referrals to authorities holding the civil power, and expose institutional failures when the criminal law is incomplete. The Guide companion to this Notice sets out their separate operation in detail.

Where a credible allegation falls within the prosecutor's jurisdiction and the conduct is reachable by an offence the law already supplies, the prosecutor's office holds in its own hands both the duty and the means to act. The absence of a perfect statute does not relieve the office of the duty to use the statute it has. The detailed architecture of these charging vehicles — elements, mens rea, fair-warning standards under Screws v. United States, 325 U.S. 91 (1945), and United States v. Lanier, 520 U.S. 259, 267 (1997); the conscious-avoidance jurisprudence of Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 769 (2011); the agreement-element analysis under Iannelli v. United States, 420 U.S. 770 (1975), and Direct Sales Co. v. United States, 319 U.S. 703 (1943); and the access-to-courts injury element under Bounds v. Smith, 430 U.S. 817 (1977), and Christopher v. Harbury, 536 U.S. 403 (2002) — is set out in the IAJ's companion Guide. This Notice addresses the prosecutorial duty at the level above the elements; the Guide addresses the elements. Appendix C summarizes the principal criminal charging vehicles, related civil and institutional tools, and referral pathways.

§ 9. The Duty to Decline by Record Where the Law Does Not Reach

> *In operation of Articles 12 and 13 of the Convention against Torture, applied to the documentary closure of every credible allegation a prosecuting office receives.*

Even in cases where charges cannot lawfully be brought — because the available offence imperfectly tracks the conduct, because the limitation period has run, because the proof falls short of the standard the criminal law properly demands — the prosecutor's office is the institution uniquely positioned to create the documentary record on which the Nation's compliance, in the eyes of the Committee against Torture and of the international community, depends. Charging instruments, declination memoranda, grand-jury referrals and their dispositions, deferred-prosecution agreements, professional-conduct referrals, and the formal records of pattern-or-practice investigations are, between them, the principal sources from which the Nation's investigative-and-prosecutorial response to torture allegations is reconstructed by outside reviewers.

The duty to maintain that record is therefore, in its own right, a duty of compliance. A reasoned declination, recorded in the office's files and made available, where appropriate, to oversight, is an act of Article 12 compliance — the investigative duty does not require successful prosecution; it requires prompt, impartial, and recorded examination. A silent declination is not.

Appendix B sets out, in template form, the elements such a record ought to contain: the conduct alleged; the legal vehicles considered and the reasons each was thought applicable or inapplicable; the factual gaps, if any, that prevented charging; the referrals made and their disposition; the protection steps taken and their outcome; the unmet treaty outcomes, identified by Article; and the date and signature of the responsible deciding officer. None of this is exotic prosecutorial practice; it is, in substantial part, the practice already followed in many offices for serious matters. The point is that, in the matter of torture and ill-treatment, this practice is not a discretionary improvement. It is the form in which the Nation's compliance is shown.

PART III — FEDERALISM, STATE PROSECUTORS, AND THE PUBLIC-INTEGRITY BACKSTOP

§ 10. State Prosecutors as Necessary Competent Authorities in the United States Federal System

The duty Article 12 imposes runs to the State Party as a whole, but it operates through the State Party's competent authorities — the institutional units that the State Party's own constitutional and legal arrangements designate to investigate and prosecute the conduct in question. In a unitary State, the question of who those authorities are is straightforward. In the United States, the answer is supplied by the federal structure of the Nation, by the allocation of the criminal-law jurisdiction within that structure, and by the Nation's own instrument of ratification of the Convention.

The Government's understanding deposited with the instrument of ratification of UNCAT contemplated that the Convention would be implemented by the Federal Government to the extent of federal jurisdiction, and otherwise by the state and local governments. That understanding constitutes, on its face, an assignment of the implementing role: matters within state jurisdiction were, by the United States' own ratification instrument, committed to the States to perform. For the prosecutorial duties this Notice addresses, the consequence is direct. The custody of persons in the United States is overwhelmingly a state and local function. The prisons, jails, juvenile facilities, police stations, hospitals operating under state license, and schools whose use of restraint reaches a child's bodily integrity are, in their vast majority, operated under State and local authority and governed by State law. The criminal laws of homicide, assault, kidnapping, official misconduct, and abuse of office are the States'.

It is the IAJ's considered position that, within this allocation, the State prosecuting authorities are among the competent authorities through whom the United States performs Articles 12 and 13 in respect of the conduct UNCAT governs that occurs within State or local jurisdiction. The position is not derived from any holding of the Supreme Court; it is the IAJ's treaty-compliance conclusion, drawn from the structure of the Convention, the Nation's own ratification understanding, and the allocation of the criminal-law jurisdiction

in the United States. Section 11 below describes the federalism cases that support the conclusion at the institutional level.

§ 11. The Federal-Narrowing Cases and the State-Backstop Principle

Over the last fourteen years, the Supreme Court has narrowed several federal public-corruption and public-integrity statutes in ways that leave substantial enforcement responsibility to state law and state prosecutors. Five cases mark the trajectory. In Skilling v. United States, 561 U.S. 358 (2010), the Court narrowed honest-services fraud under 18 U.S.C. § 1346 to schemes involving bribes or kickbacks. In McDonnell v. United States, 579 U.S. 550 (2016), a unanimous Court further narrowed federal bribery liability by holding that an "official act" under 18 U.S.C. § 201 requires "a formal exercise of governmental power" on a specific matter, and does not encompass arranging meetings, hosting events, or making inquiries on behalf of constituents. In Kelly v. United States, 590 U.S. ___, 140 S. Ct. 1565 (2020), a unanimous Court reversed federal wire-fraud and federal-program-fraud convictions arising from the Bridgegate scheme, holding that federal fraud law requires the object of the deception to be money or property — and not, even where deception, corruption, and abuse of power are admitted, a regulatory choice by a public official. In Trump v. Vance, 591 U.S. 786 (2020), the Court held that Article II and the Supremacy Clause do not categorically preclude — or require a heightened standard for — the issuance of a state criminal subpoena to a sitting President. And in Snyder v. United States, 603 U.S. 1 (2024), a 6–3 Court read 18 U.S.C. § 666 to proscribe bribes to state and local officials, but not to make it a federal crime for those officials to accept gratuities for their past acts.

These cases proceed by different doctrinal mechanisms. Taken together, these cases illustrate a recurring federalism and clear-statement pattern in the public-integrity field: where Congress has not clearly made state or local official misconduct a federal crime, the Court has often refused to convert federal fraud, bribery, or program-fraud statutes into general good-government codes. That pattern leaves substantial public-integrity enforcement to state law and state prosecutors. It does not displace federal civil-rights statutes — 18 U.S.C. §§ 241, 242, 249, and the related obstruction provisions — where Congress has expressly supplied the federal interest, and the IAJ does not assert otherwise. The Court has stated the federalism point in its own words. In Kelly, Justice Kagan explained:

> The upshot is that federal fraud law leaves much public corruption to the States (or their electorates) to rectify.
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> *Kelly v. United States, 590 U.S. ___, slip op. at 7 (2020) (Kagan, J., for a unanimous Court).*

Snyder, in its majority opinion by Justice Kavanaugh, confirms the same allocation in different doctrinal language: the Court read § 666 to leave it to state and local governments to regulate gratuities to state and local officials. See Snyder v. United States, 603 U.S. 1, 5 (2024) ("§ 666 leaves it to state and local governments to regulate gratuities to state and local officials"); id. at 20 ("section 666 proscribes bribes to state and local officials, while allowing state and local governments to regulate gratuities to state and local officials"). The IAJ acknowledges that the dissent in Snyder, by Justice Jackson and joined by Justices Sotomayor and Kagan, would have read the statute differently and characterized the majority's reading as creating a significant loophole; the trajectory is one of the Court, not necessarily of all its Justices. The

dissent's observation that the broader reading would give federal prosecutors "unwarranted power to allege crimes that should be handled at the State level" is itself a quotation from the record below — see Snyder, slip op. at 2 (Jackson, J., dissenting) (quoting App. 14–15) — deployed in the dissent in the service of a different point. The IAJ does not attribute that phrase to the majority.

The underlying principle of statutory construction has a doctrinal name. It is the federalism canon: where a federal statute could be read to reach traditionally state-regulated conduct, courts will not assume Congress did so without a clear statement. The canon does not depend on any particular ideological commitment; it has been invoked by Justices across the spectrum, and the cases listed above include unanimous opinions written by the Court's most prominent voices. Its reach, however, is bounded. The canon does not displace the federal civil-rights criminal statutes — 18 U.S.C. §§ 241, 242, 249, and the related obstruction provisions — because Congress has, in those statutes, clearly supplied the federal interest in the conduct of state and local officials acting under color of law. Federal civil-rights enforcement therefore remains central in many official-abuse cases, and the IAJ's position is consistent with that allocation.

The bearing of this principle on the prosecutorial duties this Notice addresses is best stated with care. The federal-narrowing cases do not interpret UNCAT, and they do not themselves identify the "competent authorities" of the Convention. They establish a federalism allocation in domestic United States law that, taken together with the Nation's own ratification understanding (described in § 10), supports the IAJ's treaty-compliance conclusion: the State prosecuting authorities are functionally among the competent authorities through whom the United States must perform Articles 12 and 13 in respect of conduct UNCAT governs that occurs under color of State or local authority. The conclusion is the IAJ's; the cases support it; they do not decide it.

Two corollaries follow. First, a federal declination of a particular case does not foreclose, and does not displace, the State prosecuting authority's own jurisdiction. Second, where state law and state jurisdiction otherwise reach the conduct, a State prosecuting authority should not decline solely on the ground that the matter is "federal"; such a refusal misreads both UNCAT and the federalism allocation described here, and leaves the Article 12 and 13 compliance question unanswered. The National Association of Attorneys General has described, in the parallel context of public-corruption enforcement, the need for state prosecutors to fill the enforcement role left to them by narrowed federal public-corruption doctrine, in its Attorney General Journal series on The Anticorruption Manual, beginning with Amie Ely, The Anticorruption Manual: Helping State Corruption Prosecutors Fill the Role the U.S. Supreme Court Expects Them to Play (2021), which discusses the underlying NAAG Anticorruption Manual: A Guide for State Prosecutors (Ely & Walker eds., 2021). The institutional posture there described is, in this respect, the same posture the present Notice identifies for the torture and CIDT context.

Trump v. Vance confirms that state criminal process is not categorically displaced merely because a matter implicates a federal official, even the President. That holding does not eliminate fact-specific federal defenses or Supremacy Clause immunity arguments where they are properly available to a federal officer acting within lawful federal authority. It does, however, defeat the extreme claim that state prosecutors lack authority, as a class, to use ordinary criminal process when potential crimes within their jurisdiction involve public officials. For state and local officers — who, in the ordinary case, do not possess federal supremacy defenses — the argument for state prosecutorial competence is stronger still.

PART IV — FAILURE MODES AND NOTICE

§ 12. Failure Mode One: Intake Avoidance and Silent Declination

The first failure mode this Notice identifies is the disappearance of a credible torture or CIDT allegation either before merits review or after merits review without documentary closure. The IAJ identifies it not to accuse any individual office or officer, but because a notice of this character would be incomplete without naming it.

Intake avoidance is the pre-merits form of the failure. It includes the office practice that returns a complainant's communication to the agency under whose authority the conduct occurred; the routing of a credible allegation through a complaint channel designed for collateral grievances rather than for criminal allegations; the rejection of a complaint on grounds of formality (signature, format, channel) without inquiry into the substance; and the silent expiration of an intake matter that was received but to which no responsible deciding officer was ever assigned. In each of these forms the office may, in the formal sense, never have made a charging decision. The substantive result is, in the eyes of Article 13, the same as a refusal to receive.

Silent declination is the post-merits form of the failure. A prosecutor's office may, in any individual case, lawfully decline to charge — for reasons the criminal law itself supplies. None of those reasons is the difficulty. The difficulty is the closure that leaves no record of the conduct alleged, no record of what the office found, and no record of the reason the office declined to proceed. A silent declination treats the Article 12 obligation as discharged by the prosecutor's internal disposition. It is not. Where the record is silent, the Convention's investigative requirement is, as a matter of demonstrable fact, unmet.

§ 13. Failure Mode Two: Active Discretionary Shielding of Official Abuse

The second failure mode this Notice identifies is the use of the prosecutor's office, by act or by omission, to insulate official conduct that the law in fact reaches. It takes recognizable forms: the conversion of a credible torture complaint into a personnel matter referred to the same agency that committed the conduct; the routing of a credible custodial-death investigation to a police-shooting review process designed to dispose of use-of-force questions rather than torture or homicide questions; the offer of an immunity or non-prosecution agreement to an official witness in unrelated proceedings, on terms that incidentally foreclose prosecution of that official for conduct UNCAT governs; the charging of a victim of torture for conduct alleged to have occurred during the same encounter, in a manner that places the victim's prosecution in a position to obstruct the prosecution of the official; and, where physical or psychological injury to the victim is the predicate, the strategic narrowing of the charge to an offence whose elements understate the conduct.

The IAJ does not assert that every instance of these practices is unlawful. Each can have lawful applications in cases not concerning torture or ill-treatment, and lawful applications in some cases that do. The point is that when these practices are used in a credible torture or CIDT case without independent review, without preservation of the evidence the case would require, and without reasoned explanation in the office's files,

they become evidence of an institutional failure to perform Articles 12 and 13. That is the form in which the IAJ identifies them — not as accusations against named offices, but as patterns whose presence in the record of a torture or CIDT case places that office's compliance with the Convention in serious doubt.

§ 14. Consequence of Non-Exercise; Notice; and the Course of Compliance

It is worth stating plainly, and in the prosecuting authorities' own interest, what the prolonged persistence of the two failure modes entails. The charging power is sustained by its exercise. A power that the Constitution and the laws commit to the prosecuting office, and that the office declines to use in cases reaching the conduct UNCAT governs, does not simply lie dormant awaiting a more convenient case. Its function migrates: to civil-rights organizations and academic clinics, who acquire and exercise, through the apparatus of civil litigation, the documentation function the criminal office has set aside; to international treaty bodies and special-procedure mandate-holders, who in the absence of domestic investigation become the principal fora in which the conduct is examined at all; and to the historical record itself, in which a prosecutorial office's failure to act on a serious allegation is, in time, the conduct by which the office is remembered. The accountability that follows is institutional, professional, and historical — the judgment of constituents, the assessment of the bar and of the international community, and the record by which the conduct of a prosecuting office is finally measured. 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.

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 Notice have been set expressly before the prosecuting authorities of the United States and of the several States; that the deficiency they address has been a matter of record since 2014; that the instruments necessary to discharge a substantial portion of the duty already exist in current law; and that the discharge of the duty lies within the ordinary professional competence of the offices addressed. 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 prosecutorial means — as fidelity to the office held in trust for the people, and will regard the continued denial or evasion of the duty, after notice, as its dereliction. This Notice is the notice.

The course of compliance is summarized, for ease of reference, in the appendices that follow: the elements of an intake practice consistent with the duty to receive (Appendix A); the elements of a declination or gap memorandum consistent with the duty of record (Appendix B); a concise table of the principal criminal charging vehicles, civil tools, and referral pathways (Appendix C); the authorities on which this Notice rests (Appendix D); and the referral and reporting routes through which a prosecuting office may, in cases it cannot itself charge, discharge the duty by referral (Appendix E).

APPENDICES

Appendix A — Prosecutor Intake Checklist

The following is a summary outline, not a substitute for the Guide's fuller treatment. An intake practice consistent with the duty Article 13 imposes, in respect of credible allegations of torture or cruel, inhuman, or degrading treatment, will ordinarily include the following elements.

- Receipt logged: the complaint is logged in the office's intake records, with the date of receipt, the channel through which it was received, and the identity (or anonymous indicator) of the person making the complaint.
- Source-agnostic acceptance: the office's intake processes do not exclude communications from incarcerated persons, persons in immigration detention, persons without housing, persons with psychiatric histories, persons whose only prior contact with the office was as a defendant, or persons whose disability or language status the office's ordinary processes do not accommodate.
- Independent routing: the complaint is not referred for initial fact-gathering to the agency whose officers are alleged to have committed the conduct, except where (a) the receiving office's independent review remains operative and (b) the referral itself is recorded.
- Responsible-officer assignment: a deciding officer of the office is assigned to the matter on receipt, by name, and remains the deciding officer of record.
- Preservation directive issued: a preservation directive is issued, promptly, to the agency or agencies holding records relevant to the conduct (see Appendix B for the elements of preservation).
- Protection assessment performed: the office assesses the complainant's exposure to retaliation, custody, or institutional pressure, and takes such steps as are available to address that exposure (see § 6).
- Acknowledgment to complainant: the office acknowledges receipt to the complainant, in a form the complainant can understand and at an address through which the complainant may be reached, identifying the deciding officer assigned.

Appendix B — Declination or Gap Memorandum Template

Where the prosecuting office concludes that no criminal charge can lawfully be brought in respect of a credible torture or CIDT allegation, the IAJ identifies the following elements as the components of a declination or gap memorandum consistent with the duty of record under Articles 12 and 13. The form is plain; the function is to ensure that what the office concluded, and why, is preserved in a record competent to support later review.

- Caption and identifiers: case name or matter identifier; complainant (or anonymous indicator); date of complaint; date of memorandum; deciding officer.
- Conduct alleged: a plain account of the conduct alleged, in language adequate to identify it as torture, CIDT, or related conduct.
- Legal vehicles considered: each statute or vehicle considered for charging, with the office's reason for finding it applicable or inapplicable to the conduct.

- Factual gaps: the evidentiary gaps, if any, that prevented charging — distinguishing those attributable to the nature of the conduct, to the office's investigative limits, to limitations periods, and to the unavailability of witnesses or evidence.
- Referrals and reporting paths: the referrals made to competent criminal, civil-rights, inspector-general, judicial-conduct, professional-discipline, or other lawful oversight channels; any internal escalation undertaken in support of Article 19 or treaty-compliance reporting through proper authority; and the disposition of each, tracked to conclusion where within the office's authority.
- Protection record: the protection steps taken under § 6, with their outcome.
- Unmet treaty outcomes: a brief identification, by Article (1, 4, 12, 13, 14, 16, as relevant), of the treaty outcomes that the office's declination leaves unmet — in candid terms, not as criticism of the office but as documentation of the gap.
- Signature and date: signed and dated by the deciding officer of record.

Appendix C — Criminal Charging Vehicles, Civil Tools, and Referral Pathways

The following table summarizes the principal criminal charging vehicles, related civil and institutional tools, and referral pathways available, in present law, to the prosecuting authority addressing torture or ill-treatment by an official acting under color of public authority. It is a summary for reference; the doctrinal architecture, including the elements, mens rea, and fair-warning standards, is set out in detail in the IAJ's companion Guide.

Vehicle	Reach	Held by
18 U.S.C. § 241 (conspiracy against rights)	Conspiracy to injure, oppress, threaten, or intimidate any person in the free exercise or enjoyment of a federal right	Federal prosecutors
18 U.S.C. § 242 (deprivation of rights under color of law)	Willful deprivation, under color of law, of any right secured or protected by the Constitution or laws of the United States	Federal prosecutors
18 U.S.C. § 249 (hate-crimes)	Hate-crime conduct, including conduct directed at persons because of disability	Federal prosecutors
18 U.S.C. §§ 1512, 1513, 1519 (obstruction; record-falsification)	Obstruction, retaliation against witnesses, and falsification of records relating to torture / CIDT investigations	Federal prosecutors
18 U.S.C. §§ 2340–2340A (federal torture statute)	Torture committed outside the United States (the statute does not	Federal prosecutors

	reach conduct within the United States)	
State criminal law: homicide; assault; aggravated assault; kidnapping; official misconduct; abuse of office; deprivation under color of state law	Custodial homicide; physical and psychological injury under color of state authority; conduct of officers, custodial staff, and other officials within state jurisdiction	State and local prosecutors
Professional-conduct and judicial-conduct authorities	Discipline, licensure, and removal proceedings against officials whose conduct does not satisfy the criminal-charging threshold, or cannot be charged by that office, but constitutes professional, judicial, or official misconduct	State bar bodies; judicial-conduct commissions; federal judicial-conduct authorities
Civil tools (not criminal charging vehicles): 42 U.S.C. § 1985(2)–(3); 34 U.S.C. § 12601	Civil conspiracy claims; civil pattern-or-practice investigations of law-enforcement agencies. These do not substitute for criminal charges; they support pattern identification, record preservation, referral, and exposure of institutional failures.	Civil litigants; DOJ Civil Rights Division (for § 12601)

Appendix D — Authorities

— U.S. Constitution, Article VI, clause 2 (Supremacy Clause); Article II, Section 3 (Take Care Clause).

— Oaths of office of attorneys for the United States, 28 U.S.C. § 544; the corresponding oaths of state and local prosecutors under the constitutions and statutes of the several States.

— Convention against Torture, Articles 1, 2, 4, 12, 13, 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), paragraphs 9, 10, 11–12, 26, 29.

— Vienna Convention on the Law of Treaties, Articles 26 and 27, cited as codifications of general treaty-law principles and, to the extent applicable, customary international law; the United States has not ratified the VCLT.

— Medellín v. Texas, 552 U.S. 491 (2008) (non-self-executing treaties require legislation for domestic enforceability).

— 18 U.S.C. § 241 (conspiracy against rights); § 242 (deprivation of rights under color of law); § 249 (hate-crimes prohibition); §§ 1512, 1513, 1519 (obstruction and record-falsification); §§ 2340–2340A (federal torture statute, conduct outside the United States).

— 34 U.S.C. § 12601 (civil pattern-or-practice authority over law-enforcement agencies; not a state-prosecutor criminal vehicle).

— 42 U.S.C. § 1985(2) and § 1985(3) (civil conspiracy statutes; not state-prosecutor criminal vehicles).

— Screws v. United States, 325 U.S. 91 (1945); United States v. Lanier, 520 U.S. 259, 267 (1997); United States v. Guest, 383 U.S. 745 (1966); Iannelli v. United States, 420 U.S. 770 (1975); Direct Sales Co. v. United States, 319 U.S. 703 (1943); Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 769 (2011).

— Bounds v. Smith, 430 U.S. 817 (1977); Christopher v. Harbury, 536 U.S. 403 (2002) (access-to-courts authorities).

— The federal-narrowing trajectory referenced in § 11: Skilling v. United States, 561 U.S. 358 (2010); McDonnell v. United States, 579 U.S. 550 (2016); Kelly v. United States, 590 U.S. ___, 140 S. Ct. 1565 (2020); Trump v. Vance, 591 U.S. 786 (2020); Snyder v. United States, 603 U.S. 1 (2024) (with verified pinpoints: Kelly v. United States, 590 U.S. ___, slip op. at 7 (2020) (Kagan, J., for a unanimous Court); Snyder v. United States, 603 U.S. 1, 5, 14–15, 20 (2024) (Kavanaugh, J., for the Court); and Snyder, slip op. at 2 (Jackson, J., dissenting) (quoting App. 14–15)).

— Amie Ely, The Anticorruption Manual: Helping State Corruption Prosecutors Fill the Role the U.S. Supreme Court Expects Them to Play, National Association of Attorneys General, Attorney General Journal (2021), discussing the underlying NAAG Anticorruption Manual: A Guide for State Prosecutors (Ely & Walker eds., 2021), referenced in § 11 in the parallel context of public-corruption enforcement.

— Institute for the Advancement of Justice & Human Rights, A Guide to Domestic Criminal Enforcement of Torture and Cruel, Inhuman, or Degrading Treatment in the United States, IAJ-GDE-20260510-001-PUB (companion publication to this Notice).

— Institute for the Advancement of Justice & Human Rights, 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, IAJ-NOT-20260607-001-PUB (companion publication to this Notice).

Appendix E — Referral and Reporting Routes

Where the receiving prosecuting office determines that the matter is properly addressed by, or in conjunction with, another competent authority, the duty Article 12 imposes is discharged by referral — with the referral itself recorded, tracked, and (where it does not result in action) escalated. The following is a summary of the principal routes, presented as a reference; the appropriateness of each referral in any given case is a matter of the receiving office's judgment under existing law.

- Federal civil-rights authorities: the United States Department of Justice, Civil Rights Division, and the federal United States Attorney for the district in which the conduct occurred.
- Federal civil enforcement: the Civil Rights Division for the exercise of 34 U.S.C. § 12601 pattern-or-practice authority over law-enforcement agencies.
- Judicial-conduct authorities: the judicial-conduct commission of the State, or the analogous federal authority, where the conduct involves a judicial officer or court personnel.

- Professional-discipline bodies: the state bar; the licensing authority of the relevant professional discipline (medicine, nursing, corrections, law enforcement, education) where the alleged actor holds a professional license.
- Inspectors general: federal and state inspectors general holding jurisdiction over the agency under whose authority the conduct occurred.
- Other prosecuting authorities: a State attorney general where State law provides; a district or county attorney where local jurisdiction provides; a federal United States Attorney where federal jurisdiction provides.
- Treaty-compliance reporting: the United Nations Committee against Torture under Article 19; the Universal Periodic Review; and such special-procedure mandate-holders as are competent in the matter. The IAJ stands as one civil-society institution through which credible matters not effectively addressed by domestic authorities may be brought to the attention of these review mechanisms.

Issued by the IAJ as a memorandum of prosecutorial 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.

On the Duty of the Prosecutors in the United States under the Convention against Torture: A Memorandum, and a Record of Notice, Issued by the IAJ on Behalf of the People of the United States

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