Center for Constitutional Rights

Torture, Former Combatants, Political Prisoners, Terror Suspects, & Terrorists

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Public Facing Advocacy Writing

Today saw the long awaited release of a report by the CIA's Office of Inspector General (the agency's internal watchdog) investigating the use of "enhanced interrogation techniques" (waterboarding and so forth) against detainees. The report's release had been delayed three times already, reportedly in response to CIA objections to the new disclosures (an earlier version had been released that seemed to be over 90 percent redacted; this one's closer to half blacked out). The release seemingly was timed to Attorney General Holder's decision to reopen a dozen or so prisoner abuse cases, made simultaneously, but not accompanied by a document many expected to be released -- a report by the Office of Inspector General of the Justice Department on whether John Yoo and other Office of Legal Counsel lawyers violated their professional ethical duties when they wrote memos claiming the administration's proposed torture techniques were legal.

Many of us in the human rights community were hopeful that the two releases would be tied together because that might be a signal that (1) the torture memos themselves would not be considered a plausible defense for individuals who implemented these techniques in the field, and (2) DOJ might eventually be willing to look at whether those lawyers were effectively active participants in formulating the torture policies, and therefore potentially criminally culpable themselves. To the extent this signals a lack of willingness to (eventually) go after the highest level defendants, it's troubling. It's normal for criminal investigations to start with the small fish, but prosecutions of higher level officials who planned, authorized and encouraged the use of torture techniques are essential if we are to ensure that this episode of rampant lawbreaking is not repeated during the next episode of terrorist attack-inspired hysteria.

The CIA OIG report released today documents an internal investigation that was focused on only those incidents that exceeded the rules set out in the Office of Legal Counsel torture memos. So waterboardings that exceeded even the limits set out in the torture memos -- e.g. waterboarding KSM 183 times (page 104) -- are noted with concern, as are times when interrogators engaged in "improvisation" -- threatening to use a power drill on Abd al-Rahim Al Nashiri, pointing an unloaded gun at his head, faking an execution of a detainee in the next cell. "Improvisation" (pages 6, 69) and abuses by "contractors" (see pages 29, 43, 69, 103) without "hands on training" (page 32) in the torture techniques are thus spotlighted. Again, this takes at face value the idea that the legal advice in the memos could be relied on in good faith by anyone with a nickel's worth of common sense.

The very idea of technical legal definitions of what constitutes torture is anathema to the legal regime that governs torture. Torture is such a grave violation that the law intentionally avoids doing what Yoo and the authors of the torture memos did - defining specific techniques that stand just to either side of the line. Instead prohibited treatment is defined broadly, in part so as to create a cordon sanitaire around the worst abuses, to make sure we never get close to the line. Although the OIG report takes the idea of the fine line separating torture from legal "enhanced interrogation techniques" at face value, Attorney General Holder should not. Indeed, it's not hard to see how the line-drawing of the memos may have encouraged the attitude that "improvised" techniques might also be found legal.

It bears repeating here that those officials high and low who participated in torture of detainees have damaged our national security. They did so even in terms of the information they extracted - the 9/11 Report itself makes reference to the fact that kernels of truth were surrounded by an "ocean of lies" produced by torture, and we now know that false information extracted under torture may well have helped lead us into Iraq (indeed, the great unwritten story of the torture program is whether it was in fact conceived to produce false information for that purpose). Moreover, it makes allied governments less willing to work with us and hands our enemies a recruiting tool. The communities from which we urgently seek cooperation from in hunting down Bin Laden are less likely to provide law enforcement with street-level intelligence if they feel that the new administration hasn't departed from torture policies targeted at Muslim detainees and their perceived sensibilities. Similarly, a whitewash of the Bush torture team will tell Muslim communities here and abroad that they don't deserve the protection of the criminal justice system.

There's a great illustration of this in the report. At page 79 it tells the story of a July 2003 visit by a CIA officer to a religious school, seeking any information the people there could provide about a local IED attack days before. In what could be a scene out of Platoon, the agent becomes offended by a teacher's smiling and laughter -- perhaps nervous, as in the film -- and beats him with his rifle butt in front of 200 students. Today's stories about the use of the power drill and mock executions (a favorite technique of Arab despotic regimes) with Al Nashiri will be seen and noticed by millions.

Interestingly, Al Nashiri is not mentioned in the OLC torture memo of May 30, 2005 (authored by Steven Bradbury), which says that the question of whether these techniques violate the U.S.'s obligations under the Convention against Torture depends on whether they also violate the constitution's prohibitions on torture, which in turn depends on whether they "shock the conscience." And that in turn, says Bradbury, depends on whether the abuse is justified by the perceived threat faced by the government. (Recall that John Yoo famously answered a question about whether it was legal to crush a suspect's child's testicles to get the suspect to talk by saying "it depends on why the President wants to do that"--the same logic at work.) The idea that the measures were effective was thus made central to the justifications for their legality. The presumption -- against centuries of practical experience -- that torture somehow did "work" in extracting the truth from its victims underlies the torture memos. The OIG report released today contains a section on effectiveness of the

torture program, and while the introduction of the section indicates that "some concern" about the effectiveness of the "enhanced interrogation techniques" (page 85), it seems that whatever negative conclusions the OIG came to still remain redacted, since nothing that is unredacted in the section expresses any such concerns (see pages 85-91).

What has been released in today's newly-redacted version of the report is a great deal of detail about particular abuses -- threats of rape, of killing children, of blowing cigar smoke into detainee's faces until they retch, in addition to the power drills and mock executions. We've long said that if you televise an execution that will be the end of public support for the death penalty. In a similar way, one hopes that the more the reality of torture is put before the American public, the less support there will be for it. When the issue is presented -- as in the earliest leaked torture memos -- as a legal abstraction, it's easier for the public to rationalize the idea that nothing wrong is taking place. It's interesting that this idea comes full circle in today's story -- Holder was said to have been personally repulsed by what he heard had taken place in our names, which influenced his decision to appoint a prosecutor, and the special prosecutor he has appointed has been investigating the CIA's destruction of videotapes of torture sessions for 19 months now. If those videotapes existed today, surely making them public would expose the torture program for what it really was -- not a program designed by experts in accordance with refined legal line-drawing but an outright moral abomination. (Interestingly, the report (page 37) indicates that 11 of the tapes (including two waterboarding sessions) were blank -- shortly before recounting how the waterboarding of KSM exceeded the legal memo's parameters in a way that made it more appalling to witness ("for real" and "more poignant and convincing").)

Waterboarding and the power drill will get the most attention here, but perhaps the threats to children and female family members will be perceived as the worst in the Arab world. KSM supposedly was unmoved by the threats of death against his sons, who were captured in a house raid that just missed KSM himself some months before his capture. (Their whereabouts are unknown today.) One of our client's brothers was held in detention at a facility where the Pakistani guards told him that the two boys (aged roughly 6 and 9) had been held and threatened with stinging insects placed on their legs to frighten them into telling where their father was. I suppose this is the inverse of the "ticking time bomb" scenario -- if our opponents accuse us of being nave and absolutist for insisting that torture is never expedient, one response is that on their logic anyone, including innocent children, can be -- and have been -- tortured in pursuit of whatever ends the president wishes to pursue -- as Yoo put it, whether its legal just "depends on why the president wants to do that."

Of course, that isn't the legal standard; in fact the law is crystal clear: never, under any circumstances, with no exceptions, can torture be used. Yoo often claims he was just providing legal advice and implies that he disagreed with the policy decision to walk right up to the line defining torture. He's right about the latter: Torture is bad policy as well.

Where do we go from here? The President's other announcement today -- moving control of interrogations out of the hands of the CIA and more firmly under White House control -- is a step in the right direction. Human rights groups have long called for the CIA to get out of the detention and interrogation business -- covert operations are their supposed expertise anyway, not running jails or getting inside the minds of criminal conspirators in custody.

Prosecutions are also an important first step. Unfortunately, much of the discussion about prosecution has made it out to be vindictive -- an attempt by the new administration to punish its vanquished political opponents, born out of an unwillingness to let what's past remain past. But the criminal justice system is about deterring future lawbreakers as much as it is about punishing past lawbreakers. The only way to make sure these abuses never happen again is to prosecute those who broke the law. To do otherwise would perpetuate official approval of torture policies by telling future officials that they can break the universal laws against torture without any fear of consequences for themselves -- or, alternately, that all they need to do is get some 5-cent lawyer to give them transparently false legal advice, after which they can break the law with impunity. We can write as many statutes and sign as many treaties as we want banning torture, but, as the last eight years have shown, when officials feel that there is no chance that their own freedom will ever be in jeopardy from future criminal prosecutions for violating those laws, they will show no compunction in carrying out abuses at the direction of their superiors.

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