

# State-Sanctioned Torture in the Age of Trump

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*During the presidential campaign, Donald Trump declared he would “immediately” resume waterboarding and would “bring back a hell of a lot worse than waterboarding” because the United States is facing a “barbaric” enemy. He labeled waterboarding a “minor form” of interrogation.*

Waterboarding, which involves pouring water into the nose and mouth to make victims feel like they’re drowning, has long been considered torture, which is a war crime under US and international law. Indeed, the United States hung Japanese military leaders for waterboarding as a war crime after World War II.

In late November 2016, Vice President Mike Pence refused to rule out torture in the Trump administration.

## **Torture Is Always Illegal**

What does torture have in common with genocide, slavery and wars of aggression? They are all “jus cogens.” That’s Latin for “higher law” or “compelling law.” This means that under international law, no country can ever pass a law that allows torture. There can be no immunity from criminal liability for violation of a “jus cogens” prohibition.

The United States has always prohibited torture — in our Constitution, laws, executive orders, judicial decisions and treaties. When we ratify a treaty, it becomes part of US law under the Supremacy Clause of the Constitution.

“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 for torture,” the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which the US ratified, states unequivocally.

Torture is considered a grave breach of the Geneva Conventions, also ratified by the United States. Geneva classifies grave breaches as war crimes.

The US War Crimes Act and 18 USC, sections 818 and 3231, punish torture, willfully causing great suffering or serious injury to body or health, and inhuman, humiliating or degrading treatment.

And the Torture Statute criminalizes the commission, attempt, or conspiracy to commit torture outside the United States.

## **Torture Doesn’t Work to Get Reliable Information**

Trump said he would approve the use of waterboarding “in a heartbeat” because “only a stupid person would say it doesn’t work.” But even “if it doesn’t work,” he added, “they deserve it anyway, for what they’re doing.” Trump, who relies on “alternative facts,” probably doesn’t care if torture works to get the real facts.

Experts agree that torture does not work to get reliable information. A 2006 study by the National Defense Intelligence College found that traditional, rapport-building interrogation techniques are extremely effective even with the most hardened detainees, but coercive tactics create resistance and resentment.

Interrogators concur that torture is not efficacious to glean intelligence. Glenn L. Carle, who supervised the 2002 interrogation of a high-level detainee for the CIA, told *The New York Times* that coercive techniques “didn’t provide useful, meaningful, trustworthy information.”

In her chapter in [\*The United States and Torture: Interrogation, Incarceration, and Abuse\*](#), journalist Jane Mayer discusses Ibn Sheikh al Libi, who was tortured in CIA custody. Al Libi provided a link between Saddam Hussein and al Qaeda, which Colin Powell cited in his speech before the Security Council as he tried to secure a resolution authorizing the invasion of Iraq. The CIA knew Al Libi’s information was false; indeed, he later recanted, and died under mysterious circumstances.

Likewise, Ali Soufan, a former FBI Supervisory Special Agent who conducted several high-profile terrorism interrogations, testified before Congress that harsh interrogation techniques “are ineffective, slow, and unreliable, and as a result harmful to our efforts to defeat al Qaeda.”

Matthew Alexander, a former senior military interrogator who supervised or conducted 1,300 interrogations in Iraq, which led to the capture of several al-Qaeda leaders, echoed Soufan’s sentiments. Alexander said, “I think that without a doubt, torture and interrogation techniques slowed down the hunt for Bin Laden.”

Both Senators John McCain (R-Arizona) and Dianne Feinstein (D-California) said that torture did not lead us to Bin Laden. The United States located Bin Laden with traditional interrogation methods over several years.

When I testified in 2008 before the House Judiciary Committee’s Subcommittee on the Constitution, Civil Rights, and Civil Liberties about Bush administration interrogation policy, one of the Republican congressmen asked me how I would fashion an interrogation statute. I replied that it would require humane, kind, respectful treatment to develop trust. As the questioner sniggered, international law expert Professor Philippe Sands, who also testified on the same panel, said I was correct, that the British got much better intelligence from the Irish Republican Army when they used humane techniques.

Torture is also counter-productive. Former Navy General Counsel Alberto Mora testified before Congress that the two most effective recruiting tools for those who would do harm to US soldiers in Iraq were Abu Ghraib and Guantánamo. When people see the US government torturing detainees from their countries, they resent us even more.

Indeed, an interrogator who served in Afghanistan, told *Forbes*, “I cannot even count the amount of times that I personally have come face to face with detainees, who told me they were primarily motivated to do what they did, because of hearing that we committed

torture.... Torture committed by Americans in the past continues to kill Americans today.”

### **Trump Cabinet Nominees Claim to Oppose Torture**

Several of Trump’s cabinet nominees were asked about waterboarding and torture during their confirmation hearings. Although some were on record favoring torture in the past, all declared their opposition to it, saying it was illegal.

Rep. Mike Pompeo (R-Kansas), Trump’s pick for CIA Director, has defended the use of waterboarding, saying that while torture was illegal, waterboarding was not torture. He criticized the 2014 Senate report, saying, “These men and women are not torturers, they are patriots.” Pompeo opposed closing the CIA’s “black sites” where the Bush administration plied torture.

But when asked at his hearing whether he would allow “enhanced interrogation techniques” (a euphemism for torture) to be used if so ordered by Trump, Pompeo categorically replied, “Absolutely not.” He added, however, “I can’t imagine I would be asked to do that by the president-elect.”

In his written answers to Senate Intelligence Committee queries, Pompeo was not so absolute, leaving open the possibility that the Trump administration would use torture. Pompeo wrote that he would ask CIA agents whether the limitations in the Army Field Manual constitute “an impediment to gathering vital intelligence to protect the country.”

Attorney General nominee Jeff Sessions has supported waterboarding, saying “it worked” in extracting information. But he admitted in his testimony that “waterboarding or any other form of torture is absolutely improper and illegal” as Congress has outlawed it, although he voted against that legislation.

The Office of Legal Counsel (OLC) is a division of the Department of Justice, which provides legal advice to the president and all the executive branch agencies. As head of the Justice Department, Sessions would oversee and have the power to replace the head of the OLC. It was OLC lawyers, including notably John Yoo and Jay Bybee, who wrote memos advising the Bush administration how to illegally torture people and get away with it.

Secretary of State nominee Rex Tillerson testified that he opposes torture.

Although the International Committee of the Red Cross described interrogation techniques used at Guantánamo as “tantamount to torture,” Department of Homeland Security Secretary Gen. John Kelly said that criticism of detainee treatment was “foolishness.” Kelly, a former Marine, oversaw interrogations at Guantánamo.

Kelly defended the force-feeding of hunger strikers at Guantánamo, a practice the UN Human Rights Commission called torture. “After a mass of hunger strikes that were threatening to destabilize the prison, [Kelly] engaged in a retributive campaign, including aggressive force-feeding and solitary confinement to punish strikers,” UN Special Rapporteur on Torture Juan Mendez said.

At his hearing, however, Kelly stated he “absolutely” would abide by US laws prohibiting waterboarding and torture.

Gen. James Mattis, Trump’s new Secretary of Defense, opposes torture because it doesn’t

work.

Trump told The New York Times that when he asked Mattis what the general thought of waterboarding, Mattis replied, "I've never found it to be useful. I've always found, give me a pack of cigarettes and a couple of beers and I do better with that than I do with torture." Trump was "very impressed by that answer. I was surprised, because [Mattis is] known as being like the toughest guy."

Eliot Cohen, a former senior official in the George W. Bush administration, told the Senate Armed Services Committee that "[Mattis] would refuse to comply" with a presidential order to torture.

But Trump said if Americans feel strongly the US government should bring back waterboarding and other torture techniques, "I would be guided by that."

### **Torture by the Bush Administration**

In late 2014, the Senate Select Committee on Intelligence released a 499-page executive summary of its 6,700 page classified torture report, which says several detainees were waterboarded. One detainee in CIA custody was tortured on the waterboard 183 times; another was waterboarded 83 times.

The summary states that the CIA used "rectal feeding" without medical necessity on prisoners. A mixture of pureed hummus, pasta and sauce, nuts and raisins was forced into the rectum of one detainee. "Rectal rehydration" was also utilized to establish the interrogator's "total control over the detainee."

Other "enhanced interrogation techniques" documented in the summary included being slammed into walls, hung from the ceiling, kept in total darkness, deprived of sleep — sometimes with forced standing — for up to seven and one-half days, forced to stand on broken limbs for hours on end, threatened with mock execution, confined in a coffin-like box for 11 days, bathed in ice water, dressed in diapers. One detainee "literally looked like a dog that had been kenneled."

The summary contains example after example of why "the use of the CIA's interrogation techniques was not an effective means of obtaining accurate information or gaining detainee cooperation." It says: "Multiple CIA detainees fabricated information, resulting in faulty intelligence... on critical intelligence issues including the terrorist threats which the CIA identified as its highest priorities." Yet the CIA had continually lied that the techniques "saved lives."

Shortly before the report summary was made public, Obama stated, "We did a whole lot of things that were right" after 9/11, "but we tortured some folks."

The interrogation policy that permitted torture and abuse came from the top. Bush, Dick Cheney, Condoleezza Rice and John Yoo admitted they participated in decisions to subject prisoners to waterboarding.

In a practice called extraordinary rendition, the CIA sent men to other countries where they were viciously tortured, in violation of the Torture Convention.

Yet the Bush administration's legal mercenaries, including Yoo and Bybee, wrote memos

with twisted reasoning that purported to justify torture, and advised high government officials how to avoid criminal liability under the US War Crimes Act.

Those who engaged in hunger strikes were brutally force-fed, a practice that the United Nations Human Rights Commission called torture. Force-feeding continued under Barack Obama.

### **Obama Refused to Fulfill His Constitutional Duty to Prosecute Torturers**

In 2005, Congress passed the Detainee Treatment Act, which prohibits cruel, inhuman or degrading treatment or punishment of anyone in the custody of the US government, including prisoners at Guantánamo. The act also restricts interrogation techniques to those allowed by the Army Field Manual.

One of Obama's first acts as president was to order that no government agency would be allowed to use interrogation methods, including waterboarding, not listed in the Army Field Manual.

He stated, "I will continue to use my authority as president to make sure we never resort to those [torture] methods again."

Yet Obama has consistently refused to hold the officials who authorized torture during the Bush administration legally accountable, despite his constitutional duty to "take care that the laws be faithfully executed."

Gen. Barry McCaffrey noted, "We tortured people unmercifully. We probably murdered dozens of them during the course of that, both the armed forces and the CIA." Maj. Gen. Antonio Taguba, who directed the Abu Ghraib investigation, [wrote](#), "there is no longer any doubt as to whether the [Bush] administration has committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held to account."

The answer to Taguba's question is a resounding "no."

Obama said, "My view is also that nobody's above the law and, if there are clear instances of wrongdoing, that people should be prosecuted just like any ordinary citizen. But," he added, "generally speaking, I'm more interested in looking forward than I am in looking backwards."

Eric Holder, Obama's attorney general, investigated only two of the most egregious instances of torture, the deaths of Gul Rahman and Manadel al-Jamadi, stating that his Department of Justice "determined that an expanded criminal investigation of the remaining matters is not warranted."

Rahman froze to death in 2002 after being stripped and shackled to a cold cement floor in the secret Afghan prison known as the Salt Pit. Al-Jamadi died after he was suspended from the ceiling by his wrists, which were bound behind his back. MP Tony Diaz, who witnessed al-Jamadi's torture, [said](#) that blood gushed from his mouth like "a faucet had turned on" when he was lowered to the ground. A military autopsy concluded that al-Jamadi's death was a homicide.

Nevertheless, Holder ultimately refused to prosecute the Bush officials responsible for the

torture and deaths of those two men.

Last fall, an International Criminal Court prosecutor said there was a “reasonable basis” to open investigations into the war crime of torture in detention facilities run by the CIA and the US military in Afghanistan.

The Obama administration’s refusal to bring the torturers to justice sends a clear message to future administrations — including the incoming one — that they can use torture with impunity.

Moreover, if the United States does return to the bad old days of torture, “what kind of message would that be to the world?” asked Nils Melzer, UN special rapporteur on torture. “If the United States does it, those other countries will know they can get away with it. The last thing the world needs is a US president legitimizing this.”

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