

# Torture Report Confirms Team Bush War Crimes

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*Reading the 499-page torture report just released by the Senate Select Committee on Intelligence was a disgusting experience. Even after many years of writing books and articles about the Bush torture policy, I was unprepared for the atrocious pattern of crimes our government committed against other human beings in our name.*

One of the most hideous techniques the CIA plied on detainees was called “rectal rehydration” or “rectal feeding” without medical necessity – a sanitized description of rape by a foreign object. A concoction of pureed “hummus, pasta with sauce, nuts and raisins” was forced into the rectum of one detainee. Another was subjected to “rectal rehydration” to establish the interrogator’s “total control over the detainee.” This constitutes illegal, cruel, inhuman and degrading treatment and a humiliating outrage upon personal dignity.

Several detainees were waterboarded, a technique whereby water is poured into the nose and mouth to cause the victim to think he’s drowning. One detainee in CIA custody was tortured on the waterboard 183 times; another was waterboarded 83 times. Waterboarding has long been considered torture, which is a war crime. Indeed, the United States hung Japanese military leaders for the war crime of torture after World War II.

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Other “enhanced interrogation techniques” (EIT) 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 executive summary of the torture report was made public, but the 6,700-page report remains classified. The summary depicts the CIA at best, as keystone cops, at worst, as pathological, lying, sadistic war criminals. The CIA lied repeatedly about the effectiveness of the torture and cruel treatment. Interrogations of detainees were much more brutal than the CIA represented to government officials and the American public.

Bush’s CIA directors George Tenet, Porter Goss and Michael Hayden should be charged with crimes, along with their minions who carried out the torture.

Obama Violates Constitutional Duty

In light of the gruesome revelations in the torture report, it is high time President Barack

Obama fulfilled his constitutional duty to enforce the law. The US Constitution states the president “shall take care that the laws are faithfully executed.” Yet Obama refuses to sanction prosecutions of those responsible for the torture.

When the United States ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Geneva Conventions, we promised to prosecute or extradite those who commit or are complicit in the commission of torture.

The report documents torture and cruel, inhuman, and degrading treatment, all of which violate US and international law. The War Crimes Act punishes torture as a war crime. The Torture Statute (Statute) provides that whoever “outside the United States” commits or attempts to commit torture shall be imprisoned for not more than 20 years “and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.”

The statute defines torture as an “act intended to inflict severe physical or mental pain or suffering upon another person within his custody or physical control.”

When the United States ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Geneva Conventions, we promised to prosecute or extradite those who commit or are complicit in the commission of torture. A ratified treaty is part of US law under the Constitution’s Supremacy Clause. Yet the Obama administration persists in its refusal to bring the culprits to justice.

On January 11, 2009, nine days before Obama was sworn into office, George Stephanopoulos of ABC News confronted the newly elected president with the “most popular question on your own website, change.gov”- whether Obama would investigate torture by members of the Bush administration. Obama responded:

“I don’t believe that anybody is above the law. On the other hand, I also have a belief that we need to look forward, as opposed to looking backward . . . At the CIA, you’ve got extraordinarily talented people who are working very hard to keep Americans safe. I don’t want them to suddenly feel like they’ve got to spend all their time looking over their shoulders, lawyering up . . . ”

Now we know that many of those people at the CIA were using their extraordinary talents to devise new and more horrific ways to torture, humiliate, degrade and mistreat the people under their control.

To his credit, shortly after he was inaugurated, Obama signed an executive order banning torture. But hunger strikers at Guantánamo are still force-fed, a practice that violates the Torture Convention, according to the UN Committee Against Torture (CAT).

In 2009, US Attorney General Eric Holder ordered an investigation headed by veteran prosecutor Assistant US Attorney John Durham. But, two years later, Holder announced that his office would investigate only the deaths of Gul Rahman and Manadel al-Jamadi, who died while in CIA custody. Holder said that the US Department of Justice had “determined that an expanded criminal investigation of the remaining matters is not warranted.” With that decision, Holder made clear that no one would be held accountable for the torture and

abuse except possibly for the deaths of Rahman and al-Jamadi.

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Ultimately, the Obama administration gave a free pass to those responsible for the two deaths. 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. Military police officer Tony Diaz, who was present during 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 determined that al-Jamadi's death was a homicide.

Nevertheless, Holder said that "based on the fully developed factual record concerning the two deaths, the department has declined prosecution because the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt."

Torture is Who They Are

After the report was made public, the White House issued a statement calling the CIA interrogation program "harsh" and the treatment "troubling" - a study in understatement. Obama said that torture "is contrary to who we are."

But torture is who President George W. Bush, Vice President Dick Cheney, Defense Secretary Donald Rumsfeld and Secretary of State Condoleezza Rice are. Under the well-established doctrine of command responsibility, commanders are liable for war crimes if they knew, or should have known, their subordinates would commit them and they did nothing to stop or prevent it.

In 2008, ABC News reported that the National Security Council Principals Committee consisting of Cheney, Rice, Rumsfeld, Tenet and Ashcroft met in the White House and micromanaged the torture of terrorism suspects by approving specific torture techniques such as waterboarding. Bush admitted in his 2010 memoir that he authorized waterboarding. Cheney, Rice and Yoo have made similar admissions.

Indeed, Cheney recently admitted on Fox News that Bush "was in fact an integral part of the interrogation program, and he had to approve it." Cheney added, "We did discuss the techniques. There was no effort on our part to keep him from that." Karl Rove told Fox News that Bush was "intimately involved in the decision" to use the EIT. Rove said Bush "was presented, I believe, 12 techniques, he authorized the use of 10 of them, including waterboarding."

Bush, Cheney, Rumsfeld and Rice should be should be prosecuted for their crimes.

The Senate report contains example after example of why "the use of the CIA's enhanced 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 continually lied that the EIT "saved lives."

## The Legal Mercenaries Should Be Prosecuted

The report says the Department of Justice's (DOJ) Office of Legal Counsel (OLC) relied on the CIA's numerous misrepresentations when crafting OLC memos authorizing the techniques.

Yoo, Bybee and company knew very well that the techniques the CIA sought to employ were illegal.

But the report gives OLC lawyers, including Deputy Assistant US Attorney General John Yoo (now a law professor at Berkeley) and Assistant Attorney General Jay Bybee (now a federal appellate court judge), free passes by failing to connect the dots leading to their criminal responsibility as war criminals.

The OLC's infamous "torture memos" contain twisted legal reasoning that purported to define torture more narrowly than US law allows. The memos advised high Bush officials how to avoid criminal liability under the War Crimes Act.

Yoo, Bybee and company knew very well that the techniques the CIA sought to employ were illegal. Their August 1, 2002, memo advised that attention grasp, walling, facial hold, facial slap (insult slap), cramped confinement box and the waterboard passed legal muster under the act. They knew these techniques constitute torture or cruel, inhuman or degrading treatment, in violation of the Torture Statute, and the Torture Convention.

The report also fails to connect the dots to the Pentagon.

The Torture Convention is unequivocal: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." In light of that clear prohibition, the OLC lawyers knew that "necessity" and "self-defense" are not defenses to torture. Whether the CIA was being forthright about the necessity for, or effectiveness of, the techniques was irrelevant to the faulty legal analysis in the torture memos.

Moreover, after the report was released, Cheney told The New York Times: "The program was authorized. The agency did not want to proceed without authorization, and it was also reviewed legally by the Justice Department before they undertook the program."

Bush's attorneys general, Alberto Gonzales, John Ashcroft and Michael Mukasey, who oversaw the DOJ, should be criminally charged, together with the OLC's legal mercenaries.

"The individuals responsible for the criminal conspiracy revealed in [the Senate] report must be brought to justice, and must face criminal penalties commensurate with the gravity of their crimes."

The report also fails to connect the dots to the Pentagon. In December 2002, Rumsfeld approved interrogation techniques that included the use of dogs, hooding, stress positions, isolation for up to 30 days, 20-hour interrogations, deprivation of light and sound, using scenarios to convince the detainee that death or severely painful consequences are imminent for him and/or his family, and using a wet towel and dripping water to induce the misperception of suffocation.

And the report gives short shrift to the extraordinary rendition program, where detainees were illegally sent to other countries to be tortured. The report refers to “renditions,” which are conducted with judicial process. But detainees were rendered to black sites in Syria, Libya and Egypt in order to avoid legal accountability.

## No Impunity

“The individuals responsible for the criminal conspiracy revealed in [the Senate] report must be brought to justice and must face criminal penalties commensurate with the gravity of their crimes,” according to Ben Emmerson, the UN Special Rapporteur on Counter Terrorism and Human Rights. And the UN’s CAT said the Obama administration has failed to investigate the commission of torture and punish those responsible, including “persons in positions of command and those who provided legal cover to torture.”

A special prosecutor should be appointed to investigate those from the CIA, the DOJ, and the high officials of the Bush administration who violated, or aided and abetted the violation of, our laws banning torture and cruel, inhuman and degrading treatment. The full 6,700-page Senate report should be declassified.

“Torture is a crime of universal jurisdiction. The perpetrators may be prosecuted by any other country they may travel to.”

But Obama said, “Rather than another reason to refight old arguments, I hope that today’s report can help us leave these techniques where they belong – in the past.” Yes, these crimes were committed in the past. Crimes are always prosecuted after they are committed. Obama should be reminded of his constitutional duty to enforce the law.

If we don’t bring the offenders to justice, they could eventually get their due when other countries prosecute them under “universal jurisdiction.” Some crimes are so atrocious that countries can punish foreign nationals, the way Israel tried, convicted and executed Adolph Eichmann for his crimes during the Holocaust, even though they had no direct connection to Israel. Emmerson also said, “Torture is a crime of universal jurisdiction. The perpetrators may be prosecuted by any other country they may travel to.”

The only way to prevent others from using torture and cruel treatment in the future is to bring those responsible to justice.

The following grave breaches of the Geneva Conventions constitute war crimes punishable under the Rome Statute of the International Criminal Court (ICC), when committed as part of a plan or policy: torture, willful killing, inhuman treatment, and willfully causing great suffering or serious injury to body or health. The Senate report documented instances of willful killing (death); great suffering (hysterical, asking to die, attempts at self harm); and serious injuries (placed on life support, hallucinations) caused by the EIT. Yoo admitted in his 2006 book that the denial of Geneva protections and coercive interrogation “policies were part of a common, unifying approach to the war on terrorism.”

Although the United States is not a party to the ICC, other countries could prosecute US nationals under universal jurisdiction for the core crimes in the Rome Statute.

Obama declared, “Hopefully, we don’t do it again.” But Obama’s hopeful sentiments won’t

do the trick. The only way to prevent others from using torture and cruel treatment in the future is to bring those responsible to justice. We must send a message to would-be torturers that they will not enjoy impunity for their crimes. Torture has no statute of limitations.

In light of the torture report, the responsibility for the US targeted killing program – by drones and manned bombers – should be removed from the CIA, which cannot be trusted with such awesome responsibility.

Indeed, the entire targeted killing program should be the subject of the next congressional report. Anticipating the imminent release of the torture report, Obama stated, “We did a whole lot of things that were right,” after September 11, “but we tortured some folks.”

The Bush administration did torture some folks. But we are still doing other things that are not right. The Obama administration has avoided adding detainees to the Guantánamo roster by illegally assassinating them without judicial process. For this, members of Team Obama should also find themselves as criminal defendants someday.

*Marjorie Cohn is a professor at Thomas Jefferson School of Law, a former president of the National Lawyers Guild, and deputy secretary general for scientific work of the International Association of Democratic Lawyers. Her books include The United States and Torture: Interrogation, Incarceration, and Abuse; Cowboy Republic: Six Ways the Bush Gang Has Defied the Law; and Drones and Targeted Killing: Legal, Moral, and Geopolitical Issues. She testified twice before Congress about the Bush administration torture policy.*

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