

The CIA and the Torture Controversy: Interrogation Authorities and Practices in the War on Terror

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The purpose of this piece is to shed some light on the way the intelligence community operates, to describe how legal rules shape some of its most sensitive work, and to offer a perspective on the way the Central Intelligence Agency (CIA or Agency) fits into the debate about interrogation and torture.

The debate is not about, and indeed cannot be about, whether our government should conduct torture. The answer to that question is and must be, by law and standards of human decency, no. As recently as March 2005, CIA Director Porter Goss reiterated the Agency's position that it is bound by the laws banning torture and that the Agency adheres to those laws.¹

But at a level deeper than the denials and the blanket statements, there is a difficulty that cannot be avoided. That difficulty lies not in the abstract form of the question, but in the real, on-the-ground scenarios that develop where interrogations are taking place. What can an interrogator do? When can she use deception, discomfort, fear, fatigue, punishment, physical contact, and similar tactics?

Many in the academic community prefer to discuss this issue in hypothetical terms – often referring to a ticking nuclear bomb in Manhattan. The trouble is that appropriate analysis of the issue requires far more engagement in the operational details. That may be unsettling, but the academic community needs to go beyond mere hypothetical concerns. It

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I came to work at the CIA not as a career intelligence officer, but as a lawyer. George Tenet and I worked together on Capitol Hill in the late 1980s for Senator David Boren (D-Oklahoma), and when Tenet became Director of Central Intelligence under President Clinton in 1998 he asked me to join his staff. It was a wonderful experience for many reasons, chief among them the quality and professionalism of my colleagues. In particular, I was deeply impressed by the CIA lawyers and the influential role they play at the Agency – from the day-to-day matters to the most sensitive operations in government. That impression forms, in part, my perspective on this very important debate.

1. Porter J. Goss, *Testimony of the Director of Central Intelligence Before the Senate Armed Services Committee*, Mar. 17, 2005 (as prepared for delivery) (“the [United States government] does not engage in or condone torture”), available at http://www.cia.gov/cia/public_affairs/speeches/2005/Goss_testimony_03172005.html.

matters little if one debunks the ticking time bomb scenario or embraces it. The non-hypothetical reality is that interrogations of al Qaeda leaders must take place, and that some interrogations will be conducted under circumstances in which lives are reasonably understood to be at stake.

What rules govern? Where is the line to be drawn? Which suspects can be treated in what way?

It is important to distinguish at the outset between coercive measures used for interrogation and abusive practices in a detention facility that have no bearing on intelligence gathering efforts. One should, for example, consider at least some of the abuses at Abu Ghraib prison in Baghdad (where one guard remarked that prisoners were mistreated “just for fun”²) differently from the abuses of detainees approved in the now infamous 2002 memorandum to White House Counsel Alberto R. Gonzales, in which a Justice Department lawyer severely minimized the legal constraints on torture and even argued that torture could be approved by the President as Commander in Chief during wartime.³ Interrogation tactics and gratuitous abuse of detainees raise different issues.

Some may argue that the 2002 memorandum (dubbed the Bybee Memo, for its author) and its attendant attitude of receptiveness to coercive interrogation facilitated the Abu Ghraib scandal. That position is conjectural, however, and not easily proven one way or the other. Moreover, the wild abandon of Abu Ghraib has no resemblance to a scenario in which legal guidance is requested and received. One might abhor the Bybee Memo or the notion that the CIA uses aggressive interrogation techniques on terrorist leaders. That abhorrence is premised on discomfort with the notion that law could sanction “torture-like” activities. But the CIA’s interrogation techniques are distinct from the orgiastic lawlessness that took place at Abu Ghraib.

The much more difficult question is the one that gave rise to the August 2002 Bybee Memo in the first place and that remains unresolved. That question is whether an officer of the CIA or of any other United States agency – or whether any entity acting under the direction of or in concert with the United States of America – can apply coercive interrogation techniques to

2. See James Polk, *Testimony: Abu Ghraib Photos “Just for Fun,”* CNN.COM, Aug. 3, 2004 (reporting a military investigator’s testimony that Pvt. Lynndie England described the taking of photographs as “just for fun”), available at <http://www.cnn.com/2004/LAW/08/03/england.hearing/index.html>.

3. Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Asst. Attorney General, *Standards of Conduct for Interrogation under U.S.C. §§2340-2340A*, Aug. 1, 2002 [hereinafter Bybee Memo], available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf>, reprinted in MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* 115 (2004).

a suspected terrorist who has potential knowledge of an imminent terrorist attack. If so, which techniques are permitted, and what factual predicates are required before they are used?

DEFINING TORTURE – THE CONTEXT OF INTERROGATIONS
AND A NEW ROLE FOR CIA

Armed only with unclassified and media information, it is impossible to speak authoritatively about specific interrogation techniques employed by U.S. officials. But the range of techniques is fairly well known and even declassified in many instances. According to Department of Defense documents released by the White House, the tactics in question range from sleep deprivation to hooding or blindfolding to mild physical contact, such as lightly touching or poking a detainee in a non-injurious manner.⁴ Other tactics, such as “water boarding,” in which a feeling of imminent drowning is induced, have been discussed in certain reports, but declassified documents do not address that tactic.⁵ Presumably, the United States government is not seeking approval for the use of the infamous practices of some other countries, such as physical beatings, electric shocks, burning of flesh, and hanging by the prisoners’ limbs.⁶ There are, however, persistent reports that the Defense Department and the Agency have used some of these techniques.⁷

Is there a line marking the boundary between the practices described in official memoranda and released to the public and the infamous practices understood to be customary in countries like Egypt, Saudi Arabia, Indonesia, and Iran? If there is such a line, it would be hard to describe or define. One set of practices seems to be less shocking to the conscience than the other, but the road from “sleep deprivation” to “water boarding” and beyond is a precipitous one to many.

4. Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, Apr. 4, 2003 [hereinafter Working Group Report], at 62-65, available at <http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf>, reprinted in DANNER, *supra* note 3, at 187, 190-192.

5. See, e.g., James Risen, David Johnston & Neil A. Lewis, *Harsh C.I.A. Methods Cited in Top Qaeda Interrogations*, N.Y. TIMES, May 13, 2004, at A1; Editorial, *The CIA’s Prisoners*, WASH. POST, July 15, 2002, at A20.

6. On the other hand, the United States does reportedly engage in the “extraordinary rendition” of some detainees, sending them to other countries where such practices are used. See, e.g., Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A01; see also *infra* text accompanying notes 42-55.

7. See, e.g., Carol D. Leonnig, *Further Detainee Abuse Alleged: Guantánamo Prison Cited in FBI Memos*, WASH. POST, Dec. 26, 2004, at A01; Risen, Johnston & Lewis, *supra* note 5, at A1.

As hard as this line may be to articulate, the August 2002 Bybee Memo made a poor attempt to draw it – or at least to preserve as much space as possible on the side of “not torture”:

[W]e conclude that torture as defined in and proscribed by Sections 2340-2340A, covers only extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like posttraumatic stress disorder. Additionally, such severe mental pain can arise only from the predicate acts listed in Section 2340. *Because the acts inflicting torture are extreme, there is [a] significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture.*⁸

In short, the definition proffered by the Bybee Memo circulated at the White House is that an interrogation tactic must be “extreme” in order to be illegal.⁹ It is not enough for the tactic to be “cruel, inhuman or degrading” for it to constitute torture.¹⁰ A number of commentators have effectively and rightly criticized the legal arguments of the Bybee Memo.¹¹ Even the White House ultimately disavowed much of it,¹² and the Department of Justice eventually issued a new opinion in late 2004 superseding it.¹³

Just as important as the definitional issues surrounding torture is the question – sharpened by considering its real-time context – of how the definition of torture and the scope of legitimate interrogation became policy issues, and how they ripened enough to require specific Justice Department guidance. The 2002 Bybee Memo hints at the answer in its second sentence: “As we understand it, this question arises in the context of the conduct of interrogations outside the United States.”¹⁴ Media reports indicate that the

8. Bybee Memo, *supra* note 3, at 46 (DANNER at 155) (emphasis added).

9. *Id.* at 1 (DANNER at 115).

10. *Id.*

11. Each of the other articles in this Symposium does so.

12. See Mike Allen & Susan Schmidt, *Memo on Interrogation Tactics Is Disavowed; Justice Document Had Said Torture May Be Defensible*, WASH. POST, June 23, 2004, at A01.

13. Memorandum from Daniel Levin, Acting Asst. Attorney General, to James B. Comey, Deputy Attorney General, *Legal Standards Applicable under 18 U.S.C. §§2340-2340A*, Dec. 30, 2004, available at <http://www.usdoj.gov/olc/dagmemo.pdf>.

14. Bybee Memo, *supra* note 3, at 1 (DANNER at 115).

issues emerged while intelligence officials were holding a major terrorist figure, Abu Zubaydah, in a remote detention facility.¹⁵ These officials, who were obviously using the most aggressive interrogation techniques available to them, wanted to know the limits of their authorities.¹⁶ They hoped that Zubaydah and other reputed 9/11 masterminds, like Khalid Sheik Mohammad and Ramzi bin al Shibi, might reveal the intentions and plans of other al Qaeda leaders, allowing the United States to preempt other attacks potentially as catastrophic as those of 9/11, or even more devastating should they involve weapons of mass destruction.¹⁷ The Bybee Memo relates to the conflict with al Qaeda, not the war in Iraq.¹⁸

Despite official silence on the role of the CIA in al Qaeda interrogations and the Agency's insistence that torture is not condoned, it is clear that the CIA has played a principal role in questioning "high-value" terrorist detainees. This role apparently grew out of the Agency's prominence in the war on terrorism, and it was specifically carved out for the CIA after a bureaucratic battle with the FBI over which agency would play the lead role in such interrogations.¹⁹ This is a departure from past practice, in which a law enforcement or transaction-based model of counter-terrorism placed the FBI in a lead investigative role.²⁰ For example, the FBI led the investigations and interrogations following the 1998 embassy bombings in Africa and the Khobar Tower bombing in 1996. Since September 11, 2001, however, the war footing of the United States has placed this traditional, law enforcement approach in doubt. Media reports indicate that a decision was made at the highest levels of government, in the form of a covert action finding signed by the President, to allow the CIA to establish "secret interrogation facilities" for high-level

15. See, e.g., David Johnston & James Risen, *The Reach of War: The Interrogations; Aides Say Memo Backed Coercion Already in Use*, N.Y. TIMES, June 27, 2004, at 1 (reporting that the memo was prepared in response to "an internal debate within the government about the methods used to extract information from Abu Zubaydah, one of Osama bin Laden's top aides, after his capture in April 2002").

16. *Id.*

17. *Id.*; see also *Iraqi Prisoner Abuse: Hearing Before the Senate Armed Services Comm.*, 108th Cong. (2004) (statement of Stephen Cambone, Under Sec. of Defense for Intelligence), available at 2004 WL 1053885.

18. Bybee Memo, *supra* note 3, at 2 (DANNER at 116). The U.S. government has taken the position that the Geneva Conventions govern the conduct of the CIA and other U.S. officials in Iraq, thereby requiring an analysis far different from the one developed in the Bybee Memo for suspected terrorist detainees. See Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004, at A01 (quoting White House spokesman Sean McCormick).

19. See Michael Hirsh, John Barry & Daniel Klaidman, *A Tortured Debate*, NEWSWEEK, June 21, 2004, at 51.

20. *Id.*

terrorist operatives, and to authorize the CIA to use “new, harsher methods” of interrogation.²¹

GUIDELINES FOR AGGRESSIVE INTERROGATIONS

Which “harsher methods” have been approved? No documents have yet been declassified that show what techniques are used specifically by the CIA, but one can reasonably assume that the Agency has at least the same range of freedom as that given to the Department of Defense in interrogating unlawful combatants outside the United States.

In a Department of Defense memorandum entitled *Working Group Report on Detainee Interrogations in the Global War on Terrorism*,²² military officials divided non-routine interrogation techniques into two broad categories. The first category contained 26 techniques, all recommended for approval.²³ These included techniques with names like “Fear Up Harsh,” “Rapid Fire,” “Dietary Manipulation,” “Environmental Manipulation,” and “Isolation.”²⁴

A second set of eight techniques was recommended for approval only “where there is a good basis to believe that the detainee possesses critical intelligence” and where the detainee has been determined to be medically suitable to withstand the technique.²⁵ The report also calls for an “appropriate specified senior level approval [to be] given for use with any specific detainee.”²⁶

These eight “exceptional” techniques, advanced in the report as legal, are:

Isolation: Isolating the detainee from other detainees while still complying with basic standards of treatment.

Use of Prolonged Interrogations: The continued use of a series of approaches that extend over a long period of time (e.g. 20 hours per day per interrogation).

Forced Grooming: Forcing a detainee to shave hair or beard. (Force applied with intention to avoid injury. Would not use force that would cause serious injury).

Prolonged Standing: Lengthy standing in a “normal” position (non-stress). This has been successful, but should never make the detainee exhausted to the point of weakness or collapse. Not

21. *Id.*

22. Working Group Report, *supra* note 4.

23. *Id.* at 62-64 (DANNER at 190-191).

24. *Id.*

25. *Id.* at 70 (DANNER at 197).

26. *Id.*

enforced by physical restraints. Not to exceed four hours in a 24-hour period.

Sleep Deprivation: Keeping the detainee awake for an extended period of time. (Allowing individual to rest briefly and then awakening him, repeatedly.) Not to exceed 4 days in succession.

Physical Training: Requiring detainees to exercise Assists in generating compliance and fatiguing the detainees. No enforced compliance.

Face slap/Stomach slap: A quick glancing slap to the fleshy part of the cheek or stomach. These techniques are used strictly as shock measures and do not cause pain or injury. They are only effective if used once or twice together. After the second time on a detainee, it will lose the shock effect. Limited to two slaps per application; no more than two applications per interrogation.

Removal of Clothing: Potential removal of all clothing; removal to be done by military police if not agreed to by the subject. Creating a feeling of helplessness and dependence. This technique must be monitored to ensure the environmental conditions are such that this technique does not injure the detainee.

Increasing Anxiety by Use of Aversions: Introducing factors that of themselves create anxiety but do not create terror or mental trauma (e.g., simple presence of dog without directly threatening action). This technique requires the commander to develop specific and detailed safeguards to insure detainee's safety.²⁷

In response to the *Working Group Report*, Defense Secretary Rumsfeld sent a directive to the Commander of the U.S. Southern Command specifically accepting a number of the techniques endorsed in the report, but not the eight exceptional tactics.²⁸ Rather, the Secretary directed that, in the event that the eight exceptional tactics are warranted, the Commander "should provide [the Secretary], via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed techniques, recommended safeguards, and the rationale for applying it with an identified detainee."²⁹

27. *Id.* at 64-65 (DANNER at 191-192).

28. Memorandum from Donald Rumsfeld, for the Commander, US Southern Command, *Counter-Resistance Techniques in the War on Terrorism*, Apr. 16, 2003, at 1, available at <http://www.defenselink.mil/news/Jun2004/d20040622doc9.pdf>, reprinted in DANNER, *supra* note 3, at 199.

29. *Id.*

The guidelines just described concern interrogation methods used by the Department of Defense, not necessarily the CIA. One can expect a similar degree of latitude, however, for detainees under the control of the CIA, especially since it appears that the CIA is expected to manage interrogations of senior terrorist leaders.³⁰ In any event, the *Working Group Report* and Secretary Rumsfeld's responding directive open a window into the legal judgments of national security lawyers who are experts on interrogation. While not all the methods described in the report were authorized in advance by the Secretary of Defense, they all seem to be considered legal by the Administration.

CIA AUTHORITIES AND LIMITS

The CIA has historically received the blame, rightly or wrongly, for a multitude of White House policies. It is practically certain, therefore, that CIA conduct would have closely tracked White House guidance on such a sensitive subject as interrogation of terrorist leaders. In other words, CIA activities in the war on terrorism involving interrogation of terrorist detainees would have been and will continue to be driven by White House tasking and, more specifically, by presidential directive.

The Agency also takes very seriously legislative requirements concerning covert actions. As a result of congressional and other oversight investigations in the 1980s, most prominently the Iran-Contra episode, Congress revised the National Security Act in 1991.³¹ As a result, the Agency operates under an even better-defined regulatory rubric than earlier. Any covert action involves significant red tape, and it demands countless hours of legal work by the specialized lawyers at the CIA and the National Security Council. Covert action proposals are heavily lawyered at the CIA and subjected to a robust inter-agency process. That process is ordinarily coordinated by the Legal Advisor at the National Security Council,³² and it culminates in a covert action finding signed by the President.³³

Interrogations that amount to "covert actions," as defined by the 1991 amendments,³⁴ also require a notification to the congressional overseers of the

30. See *supra* notes 19-21 and accompanying text.

31. Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, §§601-604, 105 Stat. 429, 441-445 (codified as amended in scattered sections of 10 U.S.C., 22 U.S.C., and 50 U.S.C.).

32. See National Security Decision Directive (NSDD) 286 (n.d.) (unclassified extract), at ¶II.B.1., available at <http://www.fas.org/irp/offdocs/nsdd286.htm>.

33. *Id.*; 50 U.S.C. §413b(a) (2000).

34. *Id.* §413b(e)(1).

intelligence function.³⁵ In ordinary circumstances, covert action notification is made by senior CIA officials to the full Intelligence Committees.³⁶ In more sensitive situations, however – and presumably the interrogation of high-value terrorist suspects would be one such instance – the President may direct that the notification be made only to a select group in Congress known as the Gang of Eight, that is, the Chairs and Vice-Chairs of the House and Senate Intelligence Committees, as well as the two party leaders in the House and Senate, respectively.³⁷

Unless the Agency is in violation of these basic legal commitments (and it would be a matter of serious offense if it were), CIA interrogation of terrorist detainees like 9/11 planners Abu Zubaydah and Khalid Sheik Mohammed is a highly regulated activity, involving teams of lawyers and the direction of top-level White House officials, with congressional notification. Thus, it would be only natural and proper to involve White House lawyers in spelling out the limits on interrogation tactics, and to procure a memo such as the one drafted by Justice Department lawyer Bybee and addressed to White House Counsel Gonzales in August 2002.³⁸ Indeed, it would be reckless for CIA leadership not to seek legal advice from the Department of Justice in determining how to carry out its responsibilities for interrogation under a covert action finding without breaking the law.

As the interrogation controversy has taken shape, it is becoming increasingly clear that the Agency did in fact take significant steps to ensure that it had met its legal responsibilities. In March 2005 testimony prepared for delivery to the Senate Armed Services Committee, CIA Director Goss defended current interrogation practices.³⁹ When a *New York Times* article appeared the next day suggesting that Goss believed previous interrogation policies might have been extra-legal,⁴⁰ the CIA took the unusual step of issuing a public statement on this highly sensitive matter. The statement read, in its entirety:

Today's front-page story in The New York Times on testimony by Director of Central Intelligence Porter J. Goss creates the false

35. 50 U.S.C.A. §413b(b)-(d) (West 2003 & Supp. 2005).

36. *Id.* §413b(c)(1).

37. *Id.* §413b(c)(2).

38. Bybee Memo, *supra* note 3.

39. Goss, *supra* note 1 (“Professional interrogation has become a very useful and necessary way to obtain information to save innocent lives, to disrupt terrorist schemes, and to protect our combat forces.”)

40. Douglas Jehl, *Questions Left by C.I.A. Chief on Torture Use*, N.Y. TIMES, Mar. 18, 2005, at A1.

impression that US Intelligence may have had a policy in the past of using torture against terrorists captured in the war on terror. That is not true.

All approved interrogation techniques, both past and present, are lawful and do not constitute torture.

The truth is exactly what Director Goss said it was: “We don’t do torture.” CIA policies on interrogation have always followed legal guidance from the Department of Justice. If an individual violates the policy, then he or she will be held accountable.

Lawful interrogation of captured terrorists is a vital tool in saving American lives. It works – and it is done with Congressional oversight, in keeping with American law.⁴¹

It is noteworthy that the CIA response specifically mentioned congressional oversight, clearly implying that the Intelligence Committees had been properly apprised of any significant issues relating to interrogation of captured terrorists in the aftermath of 9/11.

THE IMPLICATIONS OF INTELLIGENCE COMMUNITY RESPONSIBILITY FOR AL QAEDA INTERROGATIONS

Assigning the CIA lead responsibility for al Qaeda interrogation was a departure from the Agency’s previous counterterrorism role. In fact, it is a departure not just in degree but in kind. The job of interrogating terrorist operatives is distinct from the typical elicitation and information gathering traditionally associated with intelligence service responsibilities. Interrogating detainees is quite different from questioning an intelligence asset or even a defector, more typical roles for an Agency officer.

Coercive interrogation of those who are in custody involves a set of skills, experiences, and safeguards that are ordinarily the province of neither intelligence analysts nor traditional case officers, who are trained to recruit spies in foreign countries. Pulling useful information from an incarcerated terrorist is a very different business from eliciting information from a recruited foreign national working for the United States. The CIA polygraphers and security professionals who normally police Agency personnel and manage the clearance process have more relevant training. If the Agency is to play such an expanded role, it must make significant changes in training and mind set.

41. *Statement by CIA Director of Public Affairs Jennifer Millerwise*, Mar. 18, 2005, available at http://www.cia.gov/cia/public_affairs/press_release/2005/pr03182005.html.

When the CIA is asked to play a lead role in this delicate effort, the request must be viewed in the larger context of Agency politics, Agency status, and Agency culture. CIA officials feel keenly the weight of decades of criticism and career-ending allegations of lawlessness and rogue activity. The CIA is picked apart on a regular basis for allegedly acting outside the bounds of its legal authority, a pattern of criticism established during the Church Committee hearings in the 1970s and continuing all the way through the Iran-Contra era of the 1980s to the present. At the same time, the Agency has been criticized for being too risk averse, toothless, and inept, because it failed to prevent the September 11 attacks and did not sufficiently penetrate hostile groups or governments. It is told that it is overly timid, hide-bound, and bureaucratic. The tension between these irreconcilable criticisms – cowboys to some but toothless to others – is very much a part of Agency culture, and it is a source of frustration at the working and leadership levels. When the Agency needs to extract terrorist plans from terrorist leaders, the desire to use all effective means is intense. Yet the Agency needs legal guidance, and it takes that guidance quite seriously, perhaps to an extent at odds with the aggressiveness demanded by much of the public and by overseers on Capitol Hill.

Although CIA activity is regulated far more rigorously than the public understands, the Agency operates under a rather unusual umbrella. Perhaps more than any other agency led by a Senate-confirmed director or secretary, the CIA exists to serve the President of the United States. The Directorate of Intelligence, one of the two core components of the Agency, has as its main focus the publication of the President's Daily Brief, a highly classified set of memoranda designed to serve a small number of elite customers, chief among them the President of the United States. The clandestine service, the Directorate of Operations, is charged with stealing information from foreign sources, both governmental and non-governmental, and with supplying that information to Agency leadership, so that CIA reports to the President can be as reliable as possible. While Congress is also a consumer of at least some of that information, the CIA role in supporting Congress is less urgent than the day-to-day support given to the President and top members of his leadership team.

Given the centrality of the Chief Executive in Agency culture, the focus on supplying timely and accurate terrorist threat information to the President is intense. Will this intensity affect the willingness of the Agency to employ extreme methods of interrogation, even torture, in order to elicit such information? The answer is two-fold. On the one hand, the need to serve the President creates a deterrent to reckless or over-zealous action. Senior leaders know from experience that it serves the President poorly if CIA officials take actions that create political or legal risk to the President (let alone to their own

careers). On the other hand, the ethic of service to the President and to the American people acts as a powerful impetus for the CIA to use all means possible to exact information about a legitimate threat from a knowledgeable terrorist figure under CIA control. After all, a President's success in the war on terror – and the CIA's achievements as well – will be measured in large part by the Agency's ability to prevent future attacks, particularly on the scale of 9/11. Where useful information can be gleaned, the strength of the impulse to obtain that information will be immense.

One other matter of concern is that the use of the Agency to conduct interrogations effectively means that the courts will have no role to play in monitoring the interrogations. While presidential and congressional oversight operate continuously to confine the CIA, the Agency is rarely the subject of significant judicial review. In contrast, the FBI culture and experience is one in which judges play a central role, with that result that the Bureau is much more likely to operate with possible judicial constraints in mind. At the end of the day, the Agency's culture of legality, as reflected in the work of its offices of General Counsel and Inspector General, may provide the strongest force for restraint against executive branch abuse. If the President ordered actions that would violate the law, lawyers throughout the Agency, as well as those at the National Security Council, would be aware of it, and they would have the chance to voice strong concerns or to object outright.⁴²

In particular, the CIA's Office of General Counsel would be heavily involved in any covert action tasking. The CIA's general counsel is appointed by the President subject to the advice and consent of the United States Senate, strengthening her accountability to legislative oversight. Her professionalism also operates as a part of the legal culture at the CIA, and it serves to sharpen the Agency's deference to congressional intent and its adherence to the rule of law. But one may rightly ask whether that is enough.

42. This internal restraint could be important under certain scenarios. We can imagine a hypothetical case in which the President directed the CIA to engage in extreme methods of interrogation rising to the level of torture. If Congress were notified and kept currently informed in a manner consistent with the statutes governing covert action, one might expect to hear an argument that compliance with a presidential covert action finding and strict adherence to congressional notification procedures would make the interrogation legal and that there would therefore be a complete defense to prosecution under the domestic statute criminalizing torture. 18 U.S.C. §§2340-2340B. The CIA's culture of fidelity to the law would at least guarantee that such problematic claims would be thoroughly vetted.

USING INFORMATION OBTAINED FROM THIRD COUNTRIES

Related to questions about U.S. interrogation techniques in the war on terrorism are concerns about other countries' practices that might amount to torture. These practices may be pursued with the knowledge, or even the assistance, of the United States. In particular, media reports have focused attention on U.S. policy regarding renditions.⁴³ "Rendition" in this context involves the transfer of a suspected terrorist in U.S. custody to his home country or to a third country for interrogation.

What responsibility does the U.S. government have to avoid the receipt of intelligence obtained by torture in third countries? No express treaty obligation or domestic law imposes such a responsibility. The government's duty concerning rendition of detainees is spelled out generally in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁴⁴ ratified by the United States in 1990. Article 3(1) of the Convention provides that "[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."⁴⁵ As a condition of its consent to the Convention, the U.S. Senate attached an "understanding" that "the phrase 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in Article 3 of the Convention, [means] 'if it is more likely than not that he would be tortured.'"⁴⁶ U.S. government officials are further constrained by a statute that makes torture a federal crime⁴⁷ and by another that prohibits war crimes.⁴⁸

It is widely understood that a number of the countries allied with the United States in the effort to eliminate al Qaeda are highly experienced in and

43. See, e.g., Priest & Gellman, *supra* note 6; Priest, *supra* note 18; Jane Mayer, *Outsourcing Torture; The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, at 106.

44. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85. The text of the convention, with links to the reservations, declarations, and understandings upon ratification by the United States and other states, can be found at Office of the High Commissioner for Human Rights, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (n.d.), at http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

45. Convention Against Torture, *supra* note 44, art. 3(1).

46. Resolution of Advice and Consent to the Ratification of the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, §II(1)(e), 136 CONG. REC. S17491 (Oct. 27, 1990).

47. 18 U.S.C.A. §2340-2340B (West 2000 & Supp. 2005).

48. War Crimes Act, 18 U.S.C. §2441 (2000 & Supp. II 2002).

quite comfortable with conditions of imprisonment and techniques of interrogation that are abhorrent. These countries often have close liaison relationships with the United States on security matters.⁴⁹ They regularly provide information to U.S. intelligence agencies, much of it highly specific and very useful in learning about terrorist plans, intentions, and identities.⁵⁰ The intelligence community in turn analyzes the information and passes it on to policy makers.⁵¹ This general arrangement is logical, particularly in light of the fact that many current and future terrorist operatives hail from, have lived in, or have been active in countries not known for their strict adherence to international human rights norms. Since terrorist cells are so hard to crack with case officers from the United States, liaison relations with sister intelligence services provide crucial assistance in the conflict against al Qaeda.

The international alliance in the struggle against al Qaeda is based in a deep sense of mutual self-interest. The governments of Saudi Arabia, Pakistan, Indonesia, Jordan, and Morocco, for example, are key U.S. allies not only because they wish to assist the United States in the wake of 9/11, but also because they perceive that their own societies and political orders are in a struggle with religious extremists. As a result of these shared interests, the United States leads a broad, multilateral intelligence-gathering effort. To the extent that the various intelligence services are involved in more than pure information sharing, the U.S. role would be governed by the legal regime in place for authorizing and regulating covert action.⁵² However, information sharing alone is not considered covert action.

It must be acknowledged that some of the information shared among intelligence services will likely be the fruits of torture. This has both intelligence and legal implications. Morally, the use of such information is repugnant, but it may be impossible to bar that information from the process of intelligence exchange. To do so would require a level of legal scrutiny that would be nearly impossible to meet in practice. Nevertheless, a good intelligence officer should assess the possibility that torture was or may have been used, because the use of such techniques would bear heavily on the

49. See George Tenet, *Testimony Before the National Comm'n on Terrorist Attacks Upon the United States*, Mar. 24, 2004, available at http://www.odci.gov/cia/public_affairs/speeches/2004/tenet_testimony_03242004.html.

50. See *id.*

51. See *id.*

52. See, e.g., 50 U.S.C. §413b(a)(4) (requiring that a presidential finding specify “whether it is contemplated that any third party which is not an element of, or a contractor or contract agent of, the United States Government, or is not otherwise subject to United States Government policies and regulations, will be used to fund or otherwise participate in any significant way in the covert action concerned, or be used to undertake the covert action concerned on behalf of the United States.”).

credibility of information.

Even if a policy were in place to permit U.S. intelligence services to accept and use information only when they were confident that it was not elicited through torture, evasion of the policy would be easy. Governments conducting the interrogations would prevent U.S. officials from viewing the process and would simply deny any use of torture. After all, countries that use torture are well-practiced in denying that they do so.

Some in the human rights field have criticized the United States for “outsourcing” torture by sending detainees to other countries for interrogation. The organization Human Rights Watch reports:

In locations far from the public eye, most often in total secrecy, dozens and perhaps hundreds of suspects have been transferred from one country to another, often from Western countries to those in the Mid-East or Asia, but in other cases between countries within a single region. Evidence is emerging that, in many such cases, the suspects are being tortured.

The global ban on torture includes a ban on sending people – no matter their alleged crime or status – to any country where they would be at risk of torture or ill-treatment.

Even if a person is suspected of having committed a terrorist act, it is illegal to send him or her to a place where there is a risk of torture.⁵³

Before 9/11, renditions to third countries were a cornerstone of U.S. counterterrorism policy and were cited by the Director of Central Intelligence in his speeches and testimony to the Congress on several occasions.⁵⁴ Recent media reports detail an elaborate, extensive, and continuing policy of detainee transfers.⁵⁵ To the extent that renditions are intended or likely to facilitate torture, they are illegal. If the predictable result is cruel or degrading treatment of suspected terrorists, the renditions should similarly be seen as illegal. Otherwise, where mistreatment is not likely and there is a well

53. Human Rights Watch, *Renditions and Diplomatic Assurances: “Outsourcing” Torture* (n.d.), available at <http://www.hrw.org/campaigns/torture/renditions.htm>.

54. See, e.g., Tenet, *supra* note 49.

55. See Douglas Jehl, *The Reach of War: Guantanamo; Pentagon Seeks to Shift Inmates from Cuba Base*, N.Y. TIMES, Mar. 11, 2005, at A1; Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad*, N.Y. TIMES, Mar. 6, 2005, §1, at 1. Transfer of detainees to secret U.S. facilities in third countries should be considered a relatively salutary development, reducing reliance on other countries that might use torture, and instead maintaining the legality and oversight that comes with U.S. government control.

articulated legal basis for a rendition of a particular detainee to a particular destination country, a rendition should be considered legal.

CONCLUSION

This is not a discussion about mere hypotheticals. Professional intelligence officers may today be questioning prisoners reasonably believed to know operational details of plans to kill hundreds, even thousands, of innocent people. It is also important not to conflate what happened at Abu Ghraib with approved interrogations of suspected al Qaeda members, in part because one is almost entirely a military issue, while the other is an intelligence matter. Intelligence operations are subjected to rigorous legal review and congressional oversight, while routine military matters are not. Some have suggested that the military should consider expanding into the field of covert intelligence operations, but for the time being, at least, the CIA is far more closely regulated under the National Security Act of 1947 than is the Department of Defense.

Finally, there is enormous pressure to do whatever is necessary to keep this nation safe. The rubber meets the road where intelligence officers are pressed to get as much information as they can from an al Qaeda operative, from an individual who has slit the throat of reporter Daniel Pearl, or from one who may have information that could save many lives. The academic community must be a constructive part of the discussion of these officers' work, influencing the training of interrogators and government lawyers, advancing guidelines to be used in interrogations, and ensuring effective oversight. We must be able to say truthfully that the work of interrogating suspected terrorists is done effectively, done legally, and done morally.