



ENJOINING AN AMERICAN NIGHTMARE

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On a sweltering Washington, DC, day in late August 2009, the Central Intelligence Agency (CIA) released a special review from its inspector general entitled “Counterterrorism Detention and Interrogation Activities,” dated 7 May 2004.¹ The 162-page report, more than five years old by its release, investigated the agency’s use of “enhanced interrogation techniques” (EIT) on high-value al-Qaeda detainees caught by the United States after the terrorist attacks of 11 September 2001. The 10 specific EITs deemed legal by the Justice Department’s Office of Legal Counsel for CIA use included stress positions, sleep deprivation, and waterboarding—all commonly considered torture by international law, the human rights community, and the United States prior to 2001.² Unfortunately, those techniques would finally make their way into military interrogation rooms in Afghanistan and Iraq, most notoriously Abu Ghraib, in the United States’ Global War on Terror.

Despite assurances from the Bush administration that such EITs were legal, the CIA’s inspector general launched the investigation after receiving information that “some employees were concerned that certain covert agency activities at an overseas detention and interrogation site might involve violations of human rights.”³ The employees worried that CIA interrogators tortured detainees in contravention of United States and international law. Participants in the Counterterrorist Center (CTC) program, responsible for terrorist interrogation, damningly told investigators that they feared prosecution for torturing detainees.⁴ Worse still, the report could not determine whether the enhanced techniques worked, while acknowledging that the techniques’ practitioners knew they could harm the prisoner. According to the report, “the fact that precautions have been taken to provide on-site medical oversight in the use of all EITs is evidence that their use poses risks.”⁵

Despite this guilt and fear among interrogators, defenders of these “enhanced interrogation techniques” argue that torturing detainees in violation of US and international law was and remains necessary to safeguard the American population against a heartless enemy that could be stopped no other way. Lead among these was former vice president Dick Cheney, who played an intimate role in pushing for the EITs.⁶ In the late hours of 24 August 2009, the former vice president issued a statement defending EITs after the CIA documents’ release. “The documents released . . . clearly demonstrate that the individuals subjected to Enhanced Interrogation Techniques provided the bulk of

intelligence we gained about al-Qaeda,” he said. “This intelligence saved lives and prevented terrorist attacks.”⁷

While the statement ignored whether or not these detainees gave the “bulk of intelligence” before or after they were tortured, the underlying message was undoubtedly clear: Torture works. It saves American lives. Argument over. The problem, however, is that these arguments were deeply flawed. Torture rarely, if ever, works. And the lives it may save in the immediate present will not equal the multitude of servicemen and civilian lives lost because of torture’s power to stoke anti-American violence worldwide. But there are better, moral arguments than these practical concerns for why American officials and servicemen should never torture. Torture violates everything the United States is supposed to stand for: the sanctity of the individual, human rights, and the rule of law.

Drawing on the United States’ historic opposition to torture in its darkest days, the practice’s prohibition internationally and domestically, its grotesque and counterproductive uselessness, and the irreparable harm it does to both tortured and torturer alike, I hope to convince servicemen that torture is always wrong and harms US national security and prestige. I will stress that any official or serviceman’s actions that lead to the torture of another human being should be prosecuted to the fullest extent of the law. Only then can the US military reclaim the moral high ground it has lost in this new century of counter-terrorist conflict.

A Founding Aversion

Proponents of torturing detainees often resort to the “ticking time bomb.” In this hypothetical situation, the United States has caught a terrorist with knowledge of an imminent and catastrophic attack against an American city, and torture is the only way to find out where the bomb is located. Putting aside the slim probability that such a scenario could happen outside a television show,⁸ there was a time in American history where even the idea of the United States seemed destined for demise. During the darkest days of the American Revolutionary War, Gen George Washington prohibited his rag-tag army of colonists, seething with vengeance, from torturing British prisoners of war (POW). This order came when American POWs, described as traitors and insurgents by the British military, were routinely tortured. After the Battle of Bunker Hill, all 31 colonial captives died in British custody. The circumstances were not pretty.⁹

Despite this knowledge, Washington warned his Northern Expeditionary Force on 14 September 1775 that:

Should any American soldier be so base and infamous as to injure any [prisoner] . . . I do most earnestly enjoin you to bring him to such severe and exemplary punishment as the enormity of the crime may require. Should it extend to death itself, it will not be disproportional to its guilt at such a time and in such a cause . . . for by such conduct they bring shame, disgrace and ruin to themselves and their country.¹⁰

After the Continental Army's victory at the Battle of Trenton, Washington guaranteed the humane treatment of all POWs in colonial custody. "Treat them with humanity, and let them have no reason to complain of our copying the brutal example of the British Army in their treatment of our unfortunate brethren who have fallen into their hands," he wrote. Even when the country could have been nothing more than an aborted dream, Washington chose to outlaw torture rather than desecrate the Enlightenment principles that the Continental Army fought for. Scott Horton, an international lawyer and harsh critic of the Bush administration's enhanced interrogation techniques, writes:

[Washington] made it a point of fundamental honor (and that was his word) that the Americans would not only hold dearly to the laws of war, they would define a new law of war that reflected the humanitarian principles for which the new Republic had risen. These principles required respect for the dignity and worth of every human being engaged in the conduct of the war, whether in the American cause or that of the nation's oppressor.¹¹

The decision not to torture derived not only from General Washington's fealty to liberal¹² principles, but from a strategist's cunning. Continental POWs were treated so well that many British soldiers and their Hessian mercenaries defected to the Continental Army, many of whom became citizens when the colonies achieved independence.¹³

Even Pres. Abraham Lincoln, faced with the country's disintegration and ruin, banned torture during the Civil War. Endorsing the Lieber Code for Union soldiers, Lincoln outlawed the use of "torture to extort confessions."¹⁴ The code, named after Francis Lieber, a professor of Columbia College in New York, would become the foundation for international laws of armed conflict. "The governments of Prussia, France, and Great Britain copied it. The Hague and Geneva Conventions were indebted to it," writes historian Richard Shelley Hartigan. "Though buried in voluminous United States government publications, 'the General Orders, no. 100,' remains a benchmark for the conduct of an army toward an enemy army and population."¹⁵

Despite Washington's historic precedent, reaffirmed by Lincoln, the US military finds itself stained with torture's disgrace for adopting the Bush administration's enhanced interrogation techniques.

A Universal Abomination

Beyond its own military prohibitions not to torture in the Revolutionary War and the Civil War, the United States has agreed multiple times not to torture anyone that falls into its custody since the end of World War II. Underneath the Third Geneva Convention of 1949, the United States pledged not to do "violence to life and person, in particular murder of all kinds, cruel treatment and torture" as well as "outrages upon personal dignity, in particular, humiliating and degrading treatment."¹⁶

While the previous presidential administration argued in internal memos that the Geneva Conventions did not apply to al-Qaeda detainees because the

terrorist organization was not a “High Contracting Party to Geneva,” it still reaffirmed its belief that detainees should be treated humanely.¹⁷ Despite the administration’s unilateral decision that Geneva did not apply, the United States was also a signatory to another international treaty that banned all forms of torture absolutely. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment bans torture based on the “inherent dignity of the human person.” According to the treaty, torture is defined as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹⁸

The Convention finds torture so abominable that “no exceptionable circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency” could justify the practice.

Pres. Ronald Reagan signed the Convention in 1988,¹⁹ and in 1994, the US Congress ratified it, making it the supreme law of the land.²⁰ In 1996, Congress also passed the War Crimes Act strengthening the rule of law against torture. Much like George Washington more than two centuries before, the United States declared that any citizen, “whether inside or outside the United States,” involved in torture would face serious punishment. According to the law, a US citizen convicted of torture “shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.”²¹

Taken together, all three laws not only ban torture under all circumstances, but exclude nobody, no matter their position or rank, from prosecution, even execution. Is it any wonder that both CIA and military interrogators administering EITs feared not only for their reputations, but their very freedom if their actions were exposed? In one memorable passage from the CIA inspector general report, a CIA officer feared he and his colleagues would find themselves on a wanted list before the World Court for war crimes.²²

To understand why CIA and military interrogators, as well as other officials and lawyers inside the US government, feared that EITs constituted torture, it is necessary to describe the most notorious practice: waterboarding. In the CIA’s own words:

The application of the waterboard technique involves binding the detainee to a bench with his feet elevated above his head. The detainee’s head is immobilized and an interrogator places a cloth over the detainee’s mouth and nose while pouring water onto the cloth in a controlled manner. Airflow is restricted for 20 to 40 seconds and the technique produces the sensation of drowning and suffocation.²³

Known as the “water treatment” during World War II, the Japanese commonly waterboarded their POWs throughout the Pacific theater.²⁴ After hostilities ceased, Gen George McArthur convened the International Military

Tribunal for the Far East (IMTFE), composed of judges from the nations previously at war with Japan, to prosecute Japanese officers for their torture and other inhumane treatment of Allied POWs. Among the techniques listed as torture was waterboarding.²⁵

The IMTFE's description of the practice is eerily similar to the CIA's:

The so-called "water treatment" was commonly applied. The victim was bound or otherwise secured in a prone position; and water was forced through his mouth and nostrils into his lungs and stomach until he lost consciousness. Pressure was then applied, sometimes by jumping upon his abdomen to force the water out. The usual practice was to revive the victim and successively repeat the process.²⁶

Some of the Japanese defendants who were found responsible for "ordering, authorizing, and permitting commission of war crimes including, *inter alia*, torture," were sentenced by the IMTFE to death by hanging.²⁷

Perhaps more inconvenient to defenders of EITs, especially those inside the Department of Justice (DOJ) that approved the techniques during the Bush administration, is that US courts had ruled on waterboarding before. In 1983, the DOJ successfully prosecuted a Texas sheriff and three of his deputies for waterboarding suspects in violation of their civil rights in 1983. Count one of the indictment alleged the defendants conspired to:

subject prisoners to a suffocating "water torture" ordeal in order to coerce confessions. This generally included the placement of a towel over the nose and mouth of the prisoner and the pouring of water in the towel until the prisoner began to move, jerk, or otherwise indicate that he was suffocating and/or drowning.²⁸

All four were convicted. Sheriff James Parker received 10 years in prison and a \$12,000 fine. During sentencing, District Judge James DeAnda called Parker and his deputies "a bunch of thugs," adding, "the operation down there would embarrass the dictator of a country."²⁹

And yet practices once reserved for the twentieth century's worst dictators and secret police forces were embraced by the same administration that vowed to destroy tyranny wherever it reared its terrible head. The Bush administration approved the CTC program's using the EITs on detainees, including waterboarding, without setting limits.³⁰ And waterboard they did. The CIA inspector general's report states al-Qaeda operative Abu Zubaydah was waterboarded 83 times³¹ and stuffed inside a cage he referred to as a "a tiny coffin."³² Zubaydah was subjected to these extreme techniques after interrogators determined he was holding out on them. He wasn't.³³ Khalid Sheik Mohammad, the mastermind of 9/11, was waterboarded 183 times³⁴ and told his children would be murdered if he did not talk.³⁵ The effects of such techniques shattered Zubaydah's psyche. He masturbated "like a monkey," a former CIA officer told journalist Jane Mayer, adding, "[Zubaydah] didn't care that they were watching him. I guess he was bored, and mad."³⁶

Many of the same EITs that were used against Zubaydah and Mohammad migrated to the detention facilities at Guantanamo Bay, Cuba, (GTMO) when Secretary of Defense Donald Rumsfeld approved 15 special "counter-resistance

techniques³⁷ for use against Mohammed Mani' Ahmad Sha' Lan al-Qahtani, otherwise known as "detainee number 063," by American officials, on 2 December 2002.³⁸ Qahtani endured a 54-day span of harsh interrogation techniques: 20-hour interrogations; standing sessions that swelled his feet and hands; sexual humiliation, including a forced enema; and denial of bathroom breaks.³⁹ Qahtani's health began to fade; his heart rate plunged. A psychiatrist who viewed Qahtani's medical history over the interrogation span questioned whether it put him "in danger of dying."⁴⁰ Qahtani begged his interrogators to let him commit suicide.

And just as the CTC program's harsh interrogation practices spread to GTMO, Rumsfeld's "counter-resistance techniques" also spread to detention facilities in Afghanistan and Iraq, most notoriously Abu Ghraib prison—the same facility in which deposed dictator Saddam Hussein tortured his political prisoners. There detainees were subjected to horrifying abuses, according to an internal military report authored by Maj Gen Antonio M. Taguba:

Breaking chemical lights and pouring the phosphoric liquid on detainees; pouring cold water on naked detainees; beating detainees with a broom handle and a chair; threatening male detainees with rape; allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell; sodomizing a detainee with a chemical light and perhaps a broom stick, and using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee.⁴¹

At least 100 detainees died during American interrogation sessions.⁴² In one autopsy report obtained by the American Civil Liberties Union (ACLU), a military medical examiner deemed the death of a 52-year-old man at a detention facility in Nasiriyah, Iraq, a homicide. The cause of death: strangulation.⁴³ The ACLU has compiled many more such autopsy reports.⁴⁴

Even for the most ardent serviceman who believes in the necessity of breaking a few eggs sometimes, there's the military's own binding legal regime, the Uniform Code of Military Justice (UCMJ). According to internal memos from military lawyers entered into the Congressional record in July 2005, many of the EITs were deemed illegal underneath the UCMJ. "Several of the more extreme interrogation techniques, on their face, amount to violations of domestic criminal law and the UCMJ (e.g., assault)," wrote then-Maj Gen Jack L. Rives, deputy judge advocate general for the US Air Force. "Applying the more extreme techniques during the interrogation of detainees places the interrogators and the chain of command at risk of criminal accusations domestically."⁴⁵

To stand before such legal and historical precedence and defy it because someday, somewhere in the future, a terrorist could attack the United States isn't patriotism: it is reckless vigilantism. "Cruelty disfigures our national character," former general counsel of the Navy, Alberto J. Mora, a heroic critic of EITs, told Mayer. "It is incompatible with our constitutional order, with our laws, and with our most prized values. . . . Where cruelty exists, law does not."⁴⁶

Torture is a self-defeating proposition for any military, especially one committed to protecting the US Constitution against all enemies, foreign and domestic.

Torture's Blowback

There seems no reason to doubt that the United States' use of torture occurred out of a commendable duty to protect American soil from another terrorist attack by squeezing actionable intelligence out of detainees with ties to al-Qaeda. Yet the best of intentions cannot turn bad policies with even worse consequences into legal policies with salutary consequences.

Putting aside the paramount moral and legal concerns that torture raises, it is important to focus on the various reasons why the US military's decision to torture is already considered a strategic failure in its fight against jihadism.⁴⁷ Torture creates more enemies, produces bad intelligence, and leaves US servicemen vulnerable to the same treatment when the enemy captures them, whether that be another state or a substate actor, like al-Qaeda. In the strongest sense, it is contrary to the national security of the United States.

Maj Matthew Alexander, a pseudonym, is a military interrogator who followed the rules in Iraq while conducting 300 interrogations and supervising over a 1,000. According to him, torture has the second-order effect of increasing the level of insurgents and terrorists in the fight against US forces overseas.⁴⁸ "I listened time and time again to foreign fighters, and Sunni Iraqis, state the number one reason they had decided to pick up arms and join al-Qaeda was the abuses at Abu Ghraib and the authorized torture and abuse at Guantanamo Bay," said Alexander.⁴⁹ The Navy's former top lawyer agreed. During his testimony before the Senate Armed Services Committee in June 2008, Mora, general counsel of the Navy under then-secretary of defense Donald Rumsfeld, said, "US flag-rank officers maintain that the first and second identifiable causes of US combat deaths in Iraq—as judged by their effectiveness in recruiting insurgent fighters into combat—are, respectively the symbols of Abu Ghraib and Guantanamo."⁵⁰

Torture's ability to radicalize its victims and those who identify with the victims shouldn't be surprising. In fact, two of the military's biggest targets in its war against al-Qaeda were produced by torture: Dr. Ayman al-Zawahiri and Abu Musab al-Zarqawi. Al-Qaeda's second-in-command and its chief intellectual, al-Zawahiri was active in underground Islamist activity dedicated to bringing down the Egyptian government of Anwar Sadat. After Sadat's assassination in 1981, Egypt's current president, Hosni Mubarak, swept up thousands of Islamists and threw them into prison, including al-Zawahiri. During torture sessions, al-Zawahiri broke down and gave up his comrades. According to the *New Yorker's* Lawrence Wright, al-Zawahiri "was humiliated by this betrayal. Prison hardened him; torture sharpened his appetite for revenge."⁵¹ Al-Zarqawi, on the other hand, was a Jordanian street thug and sex offender imprisoned in the country's notoriously harsh prison system. The leader of the most bloodthirsty segment of the Iraqi insurgency, al-Qaeda in Iraq, he was killed in Iraq by an American airstrike in June 2006. Like al-Zawahiri, he is believed to have been systematically tortured while he embraced Islam during his prison term, learning to memorize the Koran.⁵² Both regimes received substantial security

assistance from the United States, which wasn't lost on either of these men. According to Chris Zambelis of the Jamestown Foundation's *Terrorism Monitor*:

For radical Islamists and their sympathizers, US economic, military, and diplomatic support for regimes that engage in this kind of activity against their own citizens vindicates al-Qaeda's claims of the existence of a US-led plot to attack Muslims and undermine Islam. In al-Qaeda's view, these circumstances require that Muslims organize and take up arms in self-defense against the United States and its allies in the region.⁵³

Torture, as Zambelis notes, is a frequent topic of discussion for al-Zawahiri. In a May 2007 statement, he savaged US relations with Egypt. "American hypocrisy, which calls for democracy even as it considers Hosni Mubarak to be one of its closest friends, and which sends detainees to be tortured in Egypt, exports tools of torture to Egypt and spends millions to support the security organs and their executioners," he said, "even as the American State Department, in its annual report on human rights, criticizes the Egyptian government because it tortures detainees!"⁵⁴ So if indirect support of regimes that torture can produce such enemies, imagine the unknown number of enemies the United States will face in the future because US servicemen and intelligence agents personally battered and psychologically harmed detainees.

Moreover, torture doesn't only produce more enemies to detain or kill; it produces extremely unreliable intelligence. According to Army Field Manual (FM) 34-52, *Human Intelligence Collector Operations*, which outlines the military's acceptable interrogation standards:

Experience indicates that the use of force is not necessary to gain the cooperation of sources for interrogation. Therefore, the use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear.⁵⁵

The United States has known this at least from the beginning of the Cold War when the government produced the survival, evasion, resistance, and escape program after 36 US Airmen were tortured into giving "stunningly false confessions during the Korean War." The program taught US servicemen captured by the enemy how to resist torture techniques by subjecting them to those same techniques, including waterboarding, under highly controlled circumstances. After 9/11, the program was tragically "reverse-engineered" into an instrument of torture by the US government.⁵⁶

Not surprisingly, "stunningly false confessions" followed from detainees during harsh interrogations. One of the most unjust cases was that of Maher Arar, an innocent Canadian telecommunications engineer. American officials snatched Arar during his trip home to Canada from Tunisia while he was trying to board his connecting flight at John F. Kennedy Airport in New York City. Implicated by confessions extracted by torture in Syria, Arar was extraordinarily rendered to the same country where he was also tortured. During these torture sessions, Arar confessed to training with al-Qaeda in Afghanistan. He had never been to the country. "I was ready to do anything to get out of that place, at any cost," he told reporter Mayer.⁵⁷

Another case was low-level al-Qaeda member Zubaydah, who “reportedly confessed to dozens of half-hatched or entirely imaginary plots to blow up American banks, supermarkets, malls, the Statue of Liberty, the Golden Gate Bridge, the Brooklyn Bridge, and nuclear power plants.”⁵⁸ The government dispatched federal law enforcement to follow up on these leads, wasting time and resources.⁵⁹ The CIA inspector general’s report seems to confirm the fantastical nature of Zubaydah and other detainees’ confessed plots, stating “this Review did not uncover any evidence that these plots were imminent.”⁶⁰

In 2006, the Intelligence Science Board investigated what was scientifically known about interrogation and intelligence gathering for the US intelligence community in the wake of the torture scandals. Its answer: not much. In a chapter reviewing the *KUBARK Counterintelligence Interrogation Manual*, the CIA manual notorious for discussing coercive methods, Col Steven Kleinman, an Air Force reservist and experienced intelligence officer, wrote that there is absolutely no empirical evidence that torture works:

The scientific community has never established that coercive interrogation methods are an effective means of obtaining reliable intelligence information.

In essence, there seems to be an unsubstantiated assumption that “compliance” carries the same connotation as “meaningful cooperation” (i.e., a source induced to provide accurate, relevant information of potential intelligence value).⁶¹

But there is scientific evidence mounting that torture biologically impairs a victim’s ability to recall information from long-term memory and thus is an ineffective interrogation technique. Writing in the journal *Trends in Cognitive Science*, Prof. Shane O’Mara of the Trinity College Institute of Neuroscience argues that the EITs approved by the Justice Department legal memos would not elicit truthful information.⁶² Rather, O’Mara contends that extreme stress on captives would degrade their memory and could even produce false memories, or confabulations. In these situations, interrogators would be hard-pressed to distinguish accurately between what was truth and what was stress-induced fiction.⁶³ The KUBARK manual, Kleinman writes, essentially agrees with O’Mara’s findings. Even if captives had intelligence information, its authors state, torture is so psychologically damaging that it could degrade their ability to communicate it accurately.⁶⁴

O’Mara dismisses the belief that torture works as a “folk psychology that is demonstrably incorrect.”⁶⁵ Everything neurobiologists know about the brain, he says, proves EITs will not likely help detainees remember critical intelligence information. “On the contrary, these techniques cause severe, repeated and prolonged stress, which compromises brain tissue supporting memory and executive function,” O’Mara writes. “The fact that the detrimental effects of these techniques on the brain are not visible to the naked eye makes them no less real.”⁶⁶

The kicker in the fight over whether torture works or not is that there is another way to get good, solid, actionable intelligence from terrorist detainees: be nice to them. This is a style of interrogation known as rapport-building,

outlined by Army FM 34-52 and used by the FBI and police departments. It was used to kill Iraq's most vicious terrorist, who, ironically, torture helped produce. Major Alexander recounts how in only six hours time, his rapport-building technique convinced a man to give up the location of al-Zarqawi. "The old methods of interrogation had failed for 20 days to convince this man to cooperate," Alexander said in an interview. "The American public has a right to know that they do not have to choose between torture and terror."⁶⁷ Ironically, Kleinman writes in his review of the KUBARK manual that its authors spent considerable time discussing how important rapport-building skills are to any interrogator.⁶⁸

The final practical reason why the United States, especially its military, should never torture is simple self-interest. There is no way to tell what repercussions will follow from the United States' embrace of EITs. The Judge Advocate General School's (TJAGS) dissenting memos understood this. As MGEN Thomas J. Romig, judge advocate general for the Army, observed in his memo weighing the legality of EITs, "the implementation of questionable techniques will very likely establish a new baseline for acceptable practice in this area, putting our service personnel at far greater risk and vitiating many of the POW/detainee safeguards the US has worked hard to establish over the past five decades."⁶⁹ Or as Lt Gen Jack Rives, the Air Force's judge advocate general, put it, "Treating [Operation Enduring Freedom] detainees inconsistently with the Conventions arguably 'lowers the bar' for treatment of US POWs in future conflicts."⁷⁰ In other words, the US flight from the international legal paradigm it helped create would open captured servicemen to torture.

There was something else the US government opened its service personnel to by condoning torture: prosecution. The TJAGS understood this as well. Romig argued that the administration's legal argument that the commander-in-chief could do anything to protect national security in wartime would not likely prevail in either US courts or internationally. "If such a defense is not available," he wrote, "soldiers ordered to use otherwise illegal techniques run a substantial risk of criminal prosecution or personal liability arising from a civil lawsuit."⁷¹ Rives' analysis also agreed, and much like the guilt-riddled CIA interrogators that first used EITs on high-value detainees, he believed implementing the proposed interrogation techniques "places interrogators and the chain of command at risk of criminal accusations abroad, either in foreign domestic courts or in international fora, to include the [International Criminal Court]."⁷² Sure that one technique amounted to torture, Rear Adm Michael F. Lohr, judge advocate general for the US Navy, argued that servicemen could not serve as interrogators when the technique was administered because "they are subject to UCMJ jurisdiction at all times."⁷³

In addition to US history, the law, and the national security of the nation as well as its servicemen, there's one more intimate reason why torture is wrong: it destroys the humanity of all who come into contact with it.

Crossing Over

Torture is a wrenching experience for torturer and tortured alike. The descriptive notion of “breaking someone” should be explanation enough. To break something means to damage it irreparably. Once broken, something can never again be the same. Yet torture is nevertheless described this way, with little regard that the object is a human being.⁷⁴ Even less regard is given to the person commanded to strip another human being of his or her integrity—a ghastly responsibility that ultimately cracks the torturer as well as the tortured. According to Mayer:

Experts on torture . . . often write of the corrosive and corrupting effect that such animalistic behavior has on discipline, professionalism, and morale. [One] former officer said that during “enhanced” interrogations, officers worked in teams, watching each other behind two-way mirrors. Even with this group support, he said, a friend of his who had helped to waterboard Khalid Sheikh Mohammed “has horrible nightmares.” He went on, “When you cross over that line of darkness, it’s hard to come back. You lose your soul. You can do your best to justify it, but it’s well outside the norm. You can’t go to that dark place without it changing you.” He said of his friend, “He’s a good guy. It really haunts him. You are inflicting something really evil and horrible on somebody.”⁷⁵

Indeed, Professor O’Mara notes that there is overwhelmingly evidence in “the historical literature” that former torturers fall into alcohol and drug abuse.⁷⁶

No service member should be asked while defending his country to sacrifice his humanity, whether willingly or unwillingly. But this is exactly what happened as the US military, at the direction of civilian leadership, condoned torture in an ill-advised gamble to protect the country from further terrorist attacks. Torture, as the military’s recent history shows, cannot be contained. Rather, as author and journalist Andrew Sullivan argues, it is a virus infecting its practitioners. Once it is unleashed, it has a way of spreading uncontrollably. “Remember that torture was originally sanctioned in administration memos only for use against illegal combatants in rare cases,” Sullivan writes. “Within months of that decision, abuse and torture had become endemic throughout Iraq, a theater of war in which, even Bush officials agree, the Geneva Conventions apply.”⁷⁷

The US military’s widespread use of torture once again shows good people are capable of very bad things when the right pressures are selected. This was dramatically illustrated during a classic social psychology experiment in the early 1970s by Philip Zimbardo at Stanford University. Using college students, Zimbardo randomly divided his test subjects into two groups of volunteers: guards and prisoners. The guards were given the authority to do whatever was needed within limits to maintain law and order inside the prison. When a rebellion broke out, the guards reacted fiercely, doling out arbitrary punishments and humiliating prisoners by stripping them and calling them names. According to Zimbardo, “In only a few days, our guards became sadistic and our prisoners became depressed and showed signs of extreme stress.” The experiment was supposed to last for two weeks; it made it only six days. The college students, suddenly thrust into an unfamiliar environment,

enacted their roles in a profound and unexpected fashion. The experiment was so intoxicating, *Zimbardo* wrote that:

Even the “good” guards felt helpless to intervene, and none of the guards quit while the study was in progress. Indeed, it should be noted that no guard ever came late for his shift, called in sick, left early, or demanded extra pay for overtime work.⁷⁸

Sparked by a paper trail of memos from the Bush administration, the United States has replicated a Stanford prison experiment of global proportions. In the process, it has jeopardized the humanity of every service member associated with the harsh interrogation regime it created. Along the way, the US military has seemingly forgotten its grandest historical mission: to protect the Enlightenment values enshrined in the Constitution every service member pledges to protect.

What Is to Be Done?

Fortunately for the military, its ability to close the door on the torture chamber is simple—it must cease torturing any human being that ever winds up in its custody. That’s the easy part, and, unfortunately, the military will not get any credit for undoing abominable practices that should have never been done in the first place. Indeed, it will take a long slough for the US military to regain its prestige and honor domestically and internationally.

Regaining the high ground will mean difficult and unpopular decisions to investigate, try, and prosecute American servicemen who tortured detainees in their custody along with their superior officers. The military, as an honorable institution, must ignore the fact that the orders came from the secretary of defense and civilian lawyers. Military prosecutors must ignore any Nuremberg-style defense that relies on following orders, owing to the Torture Convention’s blanket prohibition on such treatment regardless of the circumstances. The fact that a subordinate carried out a superior officer’s orders should, however, be taken into account during sentencing. And like the International Military Tribunal (IMT) that prosecuted Axis officers, superior US officers who conspired in torture or knew of the abuse and did nothing to stop it must also be prosecuted under the doctrine of command responsibility. As just war theorist Michael Walzer argues, command responsibility means “military commanders, in organizing their forces, must take positive steps to enforce the war convention and hold the men under their command to its standards.”⁷⁹ During the IMT, as previously noted, the Allied powers executed Axis officers under command responsibility, even those that arguably had no control over their subordinates.⁸⁰ The US military, by adhering to the same standards it applied to Axis officers, would show that the rule of law does indeed guide the US military, however long overdue its application is. Otherwise, the United States will retain its tarnished image as “a law unto itself,” as General Romig observed in his 2003

memo criticizing EITs. Accountability is the only way to conquer impunity, the hallmark of tyranny.

Second, the US military must continue to adhere to the interrogation guidelines established by Army FM 34-52, which stresses the rapport-building approach and forbids the use of force and any inhumane treatment of prisoners. In this effort, the military recently received a push. On 24 August 2009, the same day the CIA released its report on EITs used against high-level detainees, the Special Task Force on Interrogations and Transfer Policies concluded that Army FM 34-52 should not only govern military interrogations, but any interrogation undertaken by any federal agency.⁸¹ The task force, created by Pres. Barack Obama, also recommended forming specialized interrogation teams that recruit the government's best interrogators to question high-level terrorism suspects. According to a Justice Department press release, the High-Value Detainee Interrogation Group "would bring together officials from law enforcement, the US Intelligence Community and the Department of Defense to conduct interrogations in a manner that will strengthen national security consistent with the rule of law."⁸² That last part, of course, is the most critical. MAJ Matthew Alexander, the rapport-building interrogator who got the intelligence that led to al-Zarqawi's demise, observes that the:

success of an elite interrogation team will be dependent upon the leadership of the team . . . and leadership of the interrogation team will be as important as the actual interrogations. It involves prioritizing detainees and information requirements, matching interrogators to detainees, and advising on interrogation strategies. The bureaucratic hurdles that are sure to arise given the inevitable power struggles will make the leadership challenge difficult.⁸³

According to Major Alexander, the US government should focus on training elite interrogation leaders to ensure the United States never tortures anyone in its custody again. The US military should find interrogators like Alexander and recommend them for such distinction. Men of Alexander's caliber should also be tapped to teach servicemen the various historical, legal, practical, and personal reasons why torture conflicts with the best of the nation's ideals.

Despite the US military's entanglement with the dark side, it is important to remember that dissent coursed throughout the entire hierarchy. None, however, were more eloquent than CAPT Ian Fishback, who fought unsuccessfully to get his commanders to end the systematic abuse he witnessed, erect clear interrogation guidelines, and abide by command responsibility. After 17 months of consulting the military's chain of command for clear guidance, Captain Fishback finally broke down and wrote Senator John McCain, a former Vietnam POW tortured by the North Vietnamese, begging him for clear guidelines on "the lawful and humane treatment of detainees."⁸⁴ Fishback understood the enormous millstone torture strapped around all servicemen's necks and didn't want to see the American military and its honorable traditions end up in the abyss. He wrote:

I am certain that this confusion contributed to a wide range of abuses including death threats, beatings, broken bones, murder, exposure to elements, extreme

forced physical exertion, hostage-taking, stripping, sleep deprivation, and degrading treatment. I and troops under my command witnessed some of these abuses in both Afghanistan and Iraq.

This is a tragedy. I can remember, as a cadet at West Point, resolving to ensure that my men would never commit a dishonorable act; that I would protect them from that type of burden. It absolutely breaks my heart that I have failed some of them in this regard.

That is in the past and there is nothing we can do about it now. But, we can learn from our mistakes and ensure that this does not happen again. Take a major step in that direction; eliminate the confusion. My approach for clarification provides clear evidence that confusion over standards was a major contributor to the prisoner abuse. We owe our soldiers better than this. Give them a clear standard that is in accordance with the bedrock principles of our nation.⁸⁵

But Captain Fishback wasn't done. He, like other patriots inside the US military, understood that the military must be bound by the rule of law, as an example of its oath to preserve individual freedom against those like al-Qaeda, whose indiscriminate slaughter decapitates it. In a stirring crescendo of idealism and duty, Fishback asks, "Will we confront danger and adversity in order to preserve our ideals, or will our courage and commitment to individual rights wither at the prospect of sacrifice?"⁸⁶

His answer exemplifies the citizen-soldier American service members pledge to be. "My response is simple. If we abandon our ideals in the face of adversity and aggression, then those ideals were never really in our possession. I would rather die fighting than give up even the smallest part of the idea that is 'America.'"⁸⁷ His letter is a testament that inside the US military lies redemption.

Notes

1. Central Intelligence Agency (CIA) Inspector General, *Counterterrorism Detention and Interrogation Activities (September 2001–October 2003) Special Review*, 2003-7123-IG (Washington, DC: CIA, 7 May 2004).

2. *Ibid.*, 19–21.

3. *Ibid.*, 1–2.

4. *Ibid.*, 94.

5. *Ibid.*, 89.

6. Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York, NY: Anchor Books, 2008), chap. 4.

7. Stephen Haynes, "Cheney Statement on CIA," *The Weekly Standard*, The Blog, 24 August 2009, http://www.weeklystandard.com/weblogs/TWSFP/2009/08/cheney_statement_on_cia_docume.asp.

8. Critics of the "ticking time bomb" scenario, such as the Association for the Prevention of Torture, lampoon its proponents for "fetishizing" the television show *24*, where counterterrorist agent Jack Bauer routinely tortures suspects to get information to avert a terrorist act at the last minute. One notable military critic is US Army Brig Gen Patrick Finnegan, the dean of the United States Military Academy at West Point, as reported by Jane Mayer, "Whatever It Takes," *The New Yorker*, 19 February 2009.

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21. *US Code Collection*, Title 18, Section 2441, "War Crimes," http://www.law.cornell.edu/uscode/18/uscode_sec_18_00002441---000-.html.
22. CIA Inspector General, *Counterterrorism Detention and Interrogation Activities*, 94.
23. Ibid., 15.
24. Howard S. Levie, *Terrorism in War—The Law of War Crimes* (Dobbs Ferry, NY: Oceana Publications, Inc., 1993), 357.
25. Evan Wallach, "Drop by Drop: Forgetting the History of Water Torture in U.S. Courts," *Columbia Journal of Transnational Law* 45, no. 42 (April 2007): 478.
26. International Military Tribunal for the Far East (IMTFE), *IMTFE Judgment (English Translation)*, Chapter VIII: Conventional War Crimes, <http://www.ibiblio.net/hyperwar/PTO/IMTFE/IMTFE-8.html>.
27. Wallach, "Drop by Drop," 493 n. 110.
28. Ibid., 502.
29. Ibid., 504.
30. Philippe Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (New York, NY: Palgrave Macmillan, 2008), 5.
31. CIA Inspector General, *Counterterrorism Detention*, 36.
32. Mayer, *The Dark Side*, 165.
33. Ibid., 178. According to Mayer's sources, Zubaydah was of marginal intelligence value. FBI agent Daniel Coleman, who translated the detainee's diaries, described Zubaydah as having "a schizophrenic personality."
34. CIA Inspector General, *Counterterrorism Detention*, 91.
35. Ibid., 43.
36. Mayer, *The Dark Side*, 175.
37. Philippe Sands, "The Complicit General," *New York Review of Books*, 24 September 2009, <http://www.nybooks.com/articles/23071>.
38. Mayer, *The Dark Side*, 190; Sands, "The Complicit General," 7.
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