

# Torture Impunity and Police Shootings

A danger from the “war on terror” was always that it would encourage the spread of an authoritarian U.S. state, ignoring international law abroad and constitutional rights at home, a process that is now growing more apparent with impunity for both torturers and police who kill minorities, writes Nat Parry.

By Nat Parry

The international fallout from last week’s long-delayed release of the Senate Intelligence Committee’s 500-page executive summary of its still-classified 6,000 report on CIA torture could hardly be more intense, with calls coming from the United Nations, foreign governments and the human rights community for prosecutions of those who carried out or authorized the torture techniques described in the report, including senior officials from the Bush administration.

But judging from the self-assured comments of CIA and former administration officials, there is no real concern over the possibility of any criminal liability, a lack of accountability which has led to a palpable arrogance among those who would be behind bars if laws were actually enforced on an equal basis in the United States.

The above-the-law sense of entitlement was perhaps most clearly on display in former Vice President Dick Cheney’s appearance this Sunday on “Meet the Press,” stating that when it comes to using torture, “I’d do it again in a minute.”

When presented with gruesome details from the Senate report on torture for example the newly revealed “enhanced interrogation technique” of “rectal feeding,” i.e., anal rape and asked for his definition of what might constitute “torture” in a legal sense, Cheney retorted that torture is “an American citizen on his cellphone making a last call to his four young daughters shortly before he burns to death in the upper levels of the Trade Center in New York on 9/11.”

Short of this rather high bar, nothing, by definition, that the United States does to its detainees could conceivably be considered torture.

Similarly, when asked about the large number of innocent people (26 out of 119 CIA detainees, according to the report) who had tragically been detained and tortured in error, for example Gul Rahman a victim of mistaken identity who was chained to the wall of his cell, doused with water and froze to death in CIA custody Cheney stated indifferently that these individuals essentially don’t matter in the grand scheme of things. The only problem that Cheney had was “with the folks that we did release that end up back on the battlefield.”

"I'm more concerned with bad guys who got out and released than I am with a few that, in fact, were innocent," he said. Taken to its logical conclusion, Cheney's reasoning would seem to hold that it is preferable to indefinitely detain and torture a million innocent people than to allow one "bad guy" to slip through the cracks. The implications of this logic are, needless to say, chilling (not to mention completely at odds with the legal principle of presumed innocence).

### **A Courtroom Defense**

At times, watching Cheney make these cold rationalizations on "Meet the Press," it may have occurred to viewers that the more appropriate venue for this interview would have been on the witness stand of a courtroom. After all, what Cheney was defending was not just controversial policy choices, but clearly defined crimes of torture and murder.

Although he was sure to emphasize that "All of the techniques that were authorized by the President were, in effect, blessed by the Justice Department," the fact remains that providing the cover of law to a crime makes it no less of a crime.

This is a point that UN Special Rapporteur on Human Rights and Counterterrorism Ben Emmerson specifically made last week following the release of the report. In [a statement](#), Emmerson said, "The fact that the policies revealed in this report were authorized at a high level within the U.S. government provides no excuse whatsoever. Indeed, it reinforces the need for criminal accountability."

Emphasizing that all individuals responsible for "the criminal conspiracy" described in the Senate report "must be brought to justice, and must face criminal penalties commensurate with the gravity of their crimes," Emmerson noted that "international law prohibits the granting of immunities to public officials who have engaged in acts of torture."

Judging from Cheney's arrogant display on "Meet the Press," however, there appears to be very little appreciation for the niceties of international law such as its expressed prohibition on official immunity when it comes to the crime of torture. He seems to be quite confident, indeed, that official immunity is unnecessary when there is an implied unofficial immunity that is granted to public officials in the United States, this being the case whether it pertains to CIA torture or police brutality.

### **Police Shootings**

The same arrogance that Cheney is so casually displaying can also be seen in the closely paralleled story of the recent spate of police shootings and killings of

innocent or unarmed African-Americans, and the remarkable wave of demonstrations that has taken hold across the United States in response.

With large-scale protests happening in most major American cities over the past month particularly since grand juries decided not to indict the police officers who killed Michael Brown in Ferguson, Missouri, and Eric Garner in New York City one might think that cops would be extra careful these days not to come across overly arrogant or obdurate. This, however, would not be the case.

In response to the NFL's Cleveland Browns' wide receiver Andrew Hawkins taking the field on Sunday wearing a T-shirt protesting recent police shootings in Ohio reading "Justice for Tamir Rice and John Crawford" on the front and "The Real Battle for Ohio" on the back Jeff Follmer, president of the Cleveland police union, claimed the shirt was disrespectful and he disparaged the very idea of athletes holding opinions about anything other than sports.

"It's pretty pathetic when athletes think they know the law," Follmer said in a statement. "They should stick to what they know best on the field." In other words, keep your opinions to yourself, boy, and just play football. Follmer also demanded an apology from the Cleveland Browns organization, which to their credit, the Browns did not extend.

Instead, the Browns fired back with a statement saying the organization endorses the rights of players "to project their support and bring awareness to issues that are important to them if done so in a responsible manner."

Hawkins also weighed in with comments to the media that revealed, in fact, a deep knowledge and understanding of what law and justice mean (or should mean), contrary to Follmer's condescending remarks. "Justice," he said, "is a right that every American should have. Justice means that the innocent should be found innocent. It means that those who do wrong should get their due punishment."

His six-minute locker-room monologue to reporters ended with him choking up while drawing a parallel between his own young son and the tragic death of Tamir Rice, the 12-year-old boy shot by police in Cleveland on Nov. 22 while holding a toy gun.

"My number one reason for wearing the T-shirt was the thought of what happened to Tamir Rice happening to my little Austin. And that scares the living hell out of me," he said.

## **Protests and Fears**

This genuine, personal fear of police violence is one that has been widely

expressed over the last several weeks of protests taking hold across the country. As Democracy Now's Aaron MatÃ© reported from New York's "Millions March" on Saturday, one of the dominant themes being expressed on the streets was "a sense of not feeling safe, not feeling safe themselves and not feeling safe for their loved ones, people of color in heavily policed communities."

Interviewing protester Darrell Greene, MatÃ© asked him to explain his sign, which read "Me, my father, my son. Who's next?"

Greene responded, "At this point, I know I'm a productive citizen, and I don't feel safe in my own community. I've never been in trouble with law enforcement. And from what I'm seeing on the news and what's been going on, I really wonder: Am I next? I'm wondering if the people in my community are next. We're all productive citizens, and we're in fear for our life. We feel like it's open season on all minorities, and we want to know if we're really safe."

Protester Nilan Johnson echoed these sentiments. "I'm here because Americans, period, are being preyed on, right now," he said. "African-Americans are once again fighting for the right to be human, and I think that's horrible."

Asked whether he feels, as a person of color, whether he is unsafe in his community, Johnson replied, "That's I feel that daily, so I feel that's a preconditioned nature now. I feel threatened and marked and cornered. And everybody here feels the same way. And we're trying to keep our humanity."

If not a direct byproduct of the war on terror's excesses and the impunity that law-breakers at the highest levels of government enjoy, this feeling of powerlessness, insecurity and injustice is certainly closely related. Indeed, as far back as 2007, civil rights leaders were drawing these connections, in particular in a report prepared for the United Nations entitled "In The Shadows Of The War On Terror: Persistent Police Brutality and Abuse of People of Color in the United States."

Since 9/11, the report explained, "there have been dramatic increases in law enforcement powers in the name of waging the 'war on terror,'" while simultaneously, counter-terrorism policies have "created a generalized climate of impunity for law enforcement officers, and contributed to the erosion of what few accountability mechanisms exist for civilian control over law enforcement agencies."

This has led to an erosion of public discussion and accountability with respect to the use of excessive force against people of color, while at the same time, "systemic abuse of people of color by law enforcement officers has not only continued since 2001 but has worsened in both practice and severity," according

to the report. As a representative of the NAACP put it, “the degree to which police brutality occurs is the worst I’ve seen in 50 years.”

### **Troubling Trend**

Even establishment publications such as the Wall Street Journal have noticed the troubling trend of rising police violence and its connections with the war on terror. As a feature article in WSJ [put it](#) in August 2013, “the war on drugs and, more recently, post-9/11 antiterrorism efforts have created a new figure on the U.S. scene: the warrior cop armed to the teeth, ready to deal harshly with targeted wrongdoers, and a growing threat to familiar American liberties.”

This threat to liberties is compounded when the justice system fails to hold accountable those who break the law and violate people’s rights. Whether it is Eric Garner in New York or Gul Rahman in Afghanistan, the victims of injustice must have redress, and “those who do wrong should get their due punishment,” in the words of Cleveland Browns wide receiver Andrew Hawkins.

As human rights advocates and civil libertarians have warned since the early days of the “war on terror,” human rights violations of terror suspects will eventually set the United States on a slippery slope in which authorities deem it optional whether to respect the human rights of anyone, including U.S. citizens. At that point, anyone is fair game, and all of us, including law-abiding Americans, may find ourselves at the mercy of an unsympathetic authoritarian state.

**Nat Parry is the co-author of [Neck Deep: The Disastrous Presidency of George W. Bush](#). [This story previously appeared at [EssentialOpinion](#).]**

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## **Giving the Torturers a Pass**

During Watergate, senior U.S. officials went to jail for lying and obstructing justice. Many politicians have gone to prison for taking bribes and for corruption. But it’s somehow unthinkable to prosecute Bush administration officials implicated in torture and murder, an attitude that Marjorie Cohn rejects.

By Marjorie Cohn

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 hanged Japanese military leaders for the war crime of torture after World War II.

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 U.S. 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.

The report documents torture and cruel, inhuman, and degrading treatment, all of which violate U.S. 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 U.S. law under the Constitution’s Supremacy Clause. Yet the Obama administration persists in its refusal to bring the culprits to justice.

On Jan. 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](http://www.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 Guantãinamo are still force-fed, a practice that violates the Torture Convention, according to the UN Committee Against Torture (CAT).

In 2009, U.S. Attorney General Eric Holder ordered an investigation headed by veteran prosecutor Assistant U.S. 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 Justice Department 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.

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 Justice Department legal adviser John 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 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."

### **Legal Mercenaries Should Be Prosecuted**

The report says the Justice Department's Office of Legal Counsel (OLC) relied on the CIA's numerous misrepresentations when crafting OLC memos authorizing the techniques. But the report gives OLC lawyers, including Deputy Assistant U.S. 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 U.S. 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 Aug. 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 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 Justice Department, should be criminally charged, together with

the OLC's legal mercenaries.

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.

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 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 U.S. 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 U.S. 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 Guantanamo 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**

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As always, thanks so much.

Robert Parry

**Robert Parry is a longtime investigative reporter who broke many of the Iran-Contra stories for the Associated Press and Newsweek in the 1980s. He founded Consortiumnews.com in 1995 to create an outlet for well-reported journalism that was being squeezed out of an increasingly trivialized U.S. news media.**

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