Preventing the New American "Professionalism": Accountability for Lawyers and Health Care Professionals Shaping Torture

BY GITANJALI GUTIERREZ

In the wake of September 11, 2001, the United States parted from its traditional adherence to fundamental legal principles, including domestic and international prohibitions against torture, kidnapping, disappearances, and arbitrary detention without trial. Legal memorandum from the White House's Office of Legal Counsel (OLC) and other government documents disclosed through the Freedom of Information Act, congressional and agency reports, court documents, and unauthorized leaks reveal that lawyers and health care professionals were key players in the authorization, creation, and implementation of torture and related legal violations. Now that we have learned what U.S. personnel did, our nation must fulfill its obligations to hold them accountable.

Editorial pages, human rights organizations, and politicians are debating the political and historical wisdom of prosecuting those who participated in U.S. torture practices

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and other illegal activity versus the benefits of an independent truth commission similar to the 9/11 Commission. Ultimately, the decision to prosecute rests with the Attorney General of the United States. The Center for Constitutional Rights (CCR), along with a handful others, has urged that the current circumstances require prosecutions to avoid similar abuses during any future national security threats. Although truth commissions have served valuable functions of reconciliation and unification in transitional governments, a truth commission in the United States post-9/11 context is inadequate to deter future abuses.

LAWBREAKING PROFESSIONALS

Tremendous public attention is focused upon the former Administration's lawlessness, which ranged from illegal warrantless wiretapping to enforced disappearances. What has garnered perhaps the most criticism, however, is the United States' torture program, particularly the acts of lawyers who crafted the faulty legal authorizations for torture and secret detention, as well as the health professionals who designed interrogation protocols and monitored interrogations to calibrate the physical and psychological strain imposed by the techniques. Both groups of professionals disregarded their respective obligations to safeguard adherence to the law and physical or psychological safety. Moreover, they played crucial roles in the creation and implementation of the U.S. torture program.

Rather than viewing the law as a restraint upon the Executive, lawyers within the Department of Justice (DOJ) and OLC unlawfully authorized the use of "enhanced" interrogation methods—including waterboarding, prolonged sleep deprivation, and other techniques that U.S., foreign, and international tribunals had firmly designated as "torture" at the time the legal opinions were written. This "authorization" sanctioned the development and implementation of the torture program by giving it legal cover.

Physicians, psychiatrists, and psychologists were also intimately involved. Health care professionals designed torturous interrogation protocols and falsely legitimized their use.[1] As the *When Healers Harm* project explains:

> On the discredited theory that "breaking" prisoners would yield valuable intelligence, psychologists designed torture methods that mirrored the torture

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used by the Chinese and North Koreans to elicit false confessions from American prisoners of war. Psychologists took techniques like suffocation by water, confinement in a coffin-like box, severe isolation, and prolonged sleep deprivation, used by the U.S. military on its own soldiers as preparation for torture by enemy forces, and reverse-engineered them into offensive interrogation techniques to be used against our own prisoners.[2]

As members of the "Behavioral Science Consultation Teams," psychiatrists and psychologists advised interrogators on the techniques that would lead to maximum exploitation of an individual's psychological vulnerabilities. At Guantánamo and in CIA secret detention, medical personnel also approved continuing torture sessions by conducting physical examinations to confirm that individuals could withstand further strain.[3]

Significantly, the OLC legal memos indicate the dangerous and symbiotic relationship between the corruption of these professions. Both lawyers and health care professionals are mandated to serve higher aspirations than blind adherence to political or military commands. Yet lawyers argued that the "enhanced" interrogation techniques were not "torture" because medical personnel were present to safeguard individuals' well-being; medical professionals reasoned that they were not participating in torture because lawyers had affirmed that the techniques did not meet the legal definition of torture. A civilized society is dangerously threatened when those tasked with safeguarding individuals from the abuse of law or violation of their bodily integrity abandon their oaths and join in the perpetration of torture. In tandem, they failed to uphold their professional obligations and, in doing so, violated the anti-torture law.

PROSECUTIONS OF PROFESSIONALS INVOLVED IN U.S. TORTURE PRACTICES

Attorney General Eric Holder has taken the extraordinary—and entirely warranted—first step towards criminal liability by appointing an independent investigator to conduct "a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations."[4] Although charges may not flow from the "preliminary review," he stated that his "duty is to examine the facts and to follow the law."[5] After reviewing classified information, including reports from the DOJ

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Office of Professional Responsibility's inquiry into the drafting of the OLC memos authorizing "enhanced" interrogation techniques and the CIA's Inspector General's investigation into detainee treatment, the Attorney General stated that "it is clear to me that this review is the only responsible course of action for me to take."[6]

Deterrence is the most compelling rationale for prosecutions. Nonprosecution sends a clear message of impunity to current and future political officials, lawyers, and health care professionals. Our nation is dangerously close to accepting torture as a justified State act, which has been near-universally rejected for over fifty years. Debates about the efficacy of torture that were once viewed as immoral and unconscionable are now part of mainstream public discourse in the United States. Professional associations have also balked at formally sanctioning individual members, at times citing the lack of criminal liability as justification for this failure. Professional and political leaders breathe a sigh of relief at their ability to act with impunity and avoid economic or legal consequences.

This lack of consequences, combined with the secrecy and marginalization of the victims of the U.S. torture program, has also led to the failure of other accountability mechanisms in the United States to foster deterrence. The nature of the victims has prevented any significant political remedy because, regardless of political party or administration, elected officials are concerned about being perceived as "soft" on terrorism. The inability of investigative journalists to access the detention centers for many years and the mainstream media's unquestioning early acceptance of the representations of the Bush administration also prevented the "fourth branch" from engaging public criticism or shaming to prevent abuses. Political and social institutions have not functioned as mechanisms for accountability, making the criminal judicial process essential for deterrence.

This need for deterrence is further enhanced by the damaging ripple effect of U.S. actions upon other countries' adherence to international human rights law. The United States must reestablish the principle that torturers will be held accountable.

The failure of the United States to prosecute perpetrators of torture and other abuses also makes international accountability more likely under universal jurisdiction.

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Universal jurisdiction permits a State to prosecute war crimes and crimes against humanity regardless of the nationality of the victim or perpetrator or the location of the office. It is based on the notion that these crimes harm all humanity and each State has an obligation to prosecute them. Spanish judges, for example, are currently investigating White House lawyers' authorization of torture, forced disappearances, and rendition.[7] If a U.S. proceeding is available or ongoing, foreign courts will likely decline to prosecute under the principle of exhaustion, which requires that domestic remedies be pursued prior to the exercise of universal jurisdiction. If the United States refuses to prosecute, this deference to domestic proceedings is unnecessary.

Prosecutions could also have an educational function, perhaps more so than a truth commission. With respect to U.S. torture and other unlawful activities, less information may remain classified in a criminal proceeding. The government's assertion of classification authority in a criminal proceeding to withhold information would face judicial oversight and, while the Classified Information Protection Act (CIPA) establishes procedures for preserving secrecy during criminal proceedings, CIPA and nature of criminal trials require as much transparency as possible.

Little question exists that the U.S. anti-torture statute, and perhaps additional laws, were violated. Under these circumstances, the United States has an unambiguous obligation to investigate and prosecute those who engaged in torture and other abuses.

TRUTH COMMISSIONS ARE INADEQUATE

The traditional goals of truth commissions are inapplicable in the United States post-9/11 context. Most significantly, the United States is not grappling with uniting diverse internal communities following the end of an internal conflict.

Doubts also exists whether a truth commission can affect public truth-telling in a context saturated with challenges concerning secrecy and the marginalization of victims. Further details about what lawyers, psychiatrists, and psychologists did remains heavily classified and are inaccessible to a public commission. Even though this information may be improperly classified, the lack of independent judicial oversight

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impedes challenges to it. The new administration's decision to disclose previously classified records about interrogations further suggests that the government's classification authority was misused earlier to conceal questionable government practices from the public. For example, President Barack Obama made clear in a January 21, 2009 Memorandum to Heads of Executive Departments and Agencies that "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears." A few months later, the President announced in a April 16, 2009 statement that the government would disclose a series of OLC legal memos regarding the CIA's use of "enhanced interrogation techniques and secret detention.

Unlike truth commissions in other countries, testimony from victims of U.S. abuses would not be easily available. The United States, for example, continues to detain and heavily censor the communications from any individuals subjected to "enhanced" interrogation techniques in CIA secret detention. The United States also still maintains —based upon secret, untested, and, often unfounded, information—that most other individuals formerly detained in its custody are or were associated with politically-violent organizations. These men are often transferred home or released with the cloud of these accusations hovering over them. This precarious position can result in unwillingness to risk testifying against U.S. personnel. Further, individuals who want to testify are unlikely to receive visas to enter this country and only video testimony may be available. The failure to include live testimony from victims' because of their ongoing demonization defeats the very purpose of a truth and reconciliation process.

Moreover, a truth commission could actually undermine accountability efforts. Its process is likely to exceed several years, during which the statute of limitations will run for certain offenses that would otherwise be eligible for prosecution. Importantly, truth commissions also traditionally exchange some form of immunity to perpetrators for their testimony. Here, immunity would permit U.S. government lawyers and health care professionals to act with impunity.

Finally, the members of a truth commission would be selected by Congress, an institution that bears some responsibility for the U.S. torture program. Congressional

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leadership's prior oversight of CIA and DOD interrogation and detention activities failed to stop any of the unlawful practices. This raises additional significant concerns about the institution's ability to appoint and empower a truly independent commission untainted by political self-interest.

The essential facts surrounding the question of accountability are known. Attorney General Holder found sufficient basis to review whether federal crimes were committed. Public divulging of further details of torture only through a truth commission —divorced from the experience of survivors and providing immunity to perpetrators— risks becoming voyeuristic torture pornography or entertainment in the United States rather than a meaningful process.

CONCLUSION

One of the most significant aspects of the United States' actions is its profound impact upon communities throughout the world. In addition to undermining adherence to human rights standards, the United States' torture of Arab and Muslim individuals has fueled extremism and strained diplomatic relationships. In the context of Guantánamo alone, the United States has held nearly 800 men and boys from forty different countries, over 200 of whom are now in their eighth year of detention. As my colleagues and I travel to other countries, we are struck by Guantánamo's symbolism and the deep distrust it has fostered within Muslim and Arab communities–from high-ranking diplomats to taxi drivers. To allow those who perpetrated these grim acts to escape with impunity when we have sought prosecutions of enemies for this harm to U.S. soldiers in the past conveys an explicit message to the Arab and Muslim world that we view their lives and pain as less than our own.

If the United States pursues only a truth commission, we can predict its likely conclusion and potential impact upon the broader accountability effort. It is difficult to see how a commission could avoid concluding that, yes, U.S. personnel engaged in torture that should not have been authorized or implemented. But rather than view this as requiring prosecutions, a commission will likely resort to the notion of post-9/11 exceptionalism to excuse the criminality. We can imagine the final report's explanation of the dangerous and unique threat the United States faced after 9/11. This historical

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narrative continues to enjoy almost universal acceptance despite its deeply questionable analysis. In light of the perceived significance of the historical moment, any commission will have reluctance to recommend prosecutions because the individuals who were involved in torture were, so the narrative goes, patriots acting in our Nation's best interests.

Prosecution of those who authorized and implemented torture by U.S. personnel is necessary to prevent this calculation by U.S. leaders in the future.

Gitanjali S. Gutierrez is an attorney with the Center for Constitutional Rights.

ENDNOTES

1. *See* When Healers Harm: Holding Health Professionals Accountable for Abuse, *Involvement of Health Professionals in Torture and Abuse*, *available at* http://whenhealersharm.org/how-have-hps-been-involved-in-torture/. [ ]
2. *Id.* [ ]
3. *See*, *e.g.*, Center for Constitutional Rights, *Report: Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantanamo Bay* (July 2006), at 23, *available at* http://www.ccrjustice.org/files/Report_ReportOnTorture.pdf. [ ]
4. Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees, Aug. 24, 2009, *available at* http://www.usdoj.gov/ag/speeches/2009/ag-speech-0908241.html. DOJ, however, "will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by [OLC] regarding the interrogation of detainees." It is unclear whether DOJ will seek accountability for lawyers whose legal advice was so incorrect that it constituted conspiracy to violate the federal anti-torture statute. [ ]
5. *Id.* [ ]
6. *Id.* [ ]
7. Universal jurisdiction prosecutions, however, may not be as an effective deterrent mechanism as domestic prosecutions. For example, if a U.S. defendant was convicted in Spain, it may not be possible to enforce any sanction unless he or she enters Spain or another country with which Spain has an extradition agreement. [ ]

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