
Findings and Recommendations

General Findings and Recommendations

Finding #1

U.S. forces, in many instances, used interrogation techniques on detainees that constitute torture. American personnel conducted an even larger number of interrogations that involved “cruel, inhuman, or degrading” treatment. Both categories of actions violate U.S. laws and international treaties. Such conduct was directly counter to values of the Constitution and our nation.

The Task Force believes there was no justification for the responsible government and military leaders to have allowed those lines to be crossed. Doing so damaged the standing of our nation, reduced our capacity to convey moral censure when necessary and potentially increased the danger to U.S. military personnel taken captive.

Democracy and torture cannot peacefully coexist in the same body politic. The Task Force also believes and hopes that publicly acknowledging this grave error, however belatedly, may mitigate some of those consequences and help undo some of the damage to our reputation at home and abroad.

[This report includes a detailed memorandum outlining the factual basis of this finding. The memorandum cites instances in which the United States has asserted that torture was used in other cases, judicial findings in both domestic and international cases and citations to international law. See Appendix 1]

Finding #2

The nation’s most senior officials, through some of their actions and failures to act in the months and years immediately following the September 11 attacks, bear ultimate responsibility for allowing and contributing to the spread of illegal and improper interrogation techniques used by some U.S. personnel on detainees in several theaters. Responsibility also falls on other government officials and certain military leaders.

[This report includes a detailed memorandum outlining the factual basis of this finding. See Appendix 2]

Recommendations

- (1) Regardless of political party, the leaders of this country should acknowledge that the authorization and practice of torture and cruelty after September 11 was a grave error, and take the steps necessary to ensure that it cannot be repeated. Torture and “cruel, inhuman, or degrading treatment” are incompatible not only with U.S. law, but with the country’s founding values. No government can be trusted with the power to inflict torment on captives.
- (2) U.S. intelligence professionals and service members in harm’s way need clear orders on the treatment of detainees, requiring, at a minimum, compliance with Common Article 3 of the Geneva Conventions. Civilian leaders and military commanders have an affirmative responsibility to ensure that their subordinates comply with the laws of war.
- (3) Congress and the president should strengthen the criminal prohibitions against torture and cruel, inhuman, or degrading treatment by:
 - a. amending the Torture Statute and War Crimes Act’s definition of “torture” to mean “an intentional act committed by a person acting under the color of law that inflicts severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”
 - b. amending the War Crimes Act’s definition of “cruel, inhuman and degrading treatment” to make clear that cruel and inhuman treatment of detainees is a federal crime even if it falls short of torture and regardless of the location or circumstances in which detainees are held or the state’s interest in obtaining information from detainees.”
 - c. amending the Uniform Code of Military Justice to define specific offenses of torture, cruel and inhuman treatment, and war crimes, whose definitions and sentences track those in the U.S. Code.

Finding #3

There is no firm or persuasive evidence that the widespread use of harsh interrogation techniques by U.S. forces produced significant information of value. There is substantial evidence that much of the information adduced from the use of such techniques was not useful or reliable.

There are, nonetheless, strong assertions by some former senior government officials that the use of those techniques did, in fact, yield valuable intelligence that resulted in operational and strategic successes. But those officials say that the evidence of such success may not be disclosed for reasons of national security.

The Task Force appreciates this concern and understands it must be taken into account in attempting to resolve this question. Nonetheless, the Task Force believes those who make this argument still bear the burden of demonstrating its factual basis. History shows that the American people have a right to be skeptical of such claims, and to decline to accept

any resolution of this issue based largely on the exhortations of former officials who say, in essence, “Trust us” or “If you knew what we know but cannot tell you.”

In addition, those who make the argument in favor of the efficacy of coercive interrogations face some inherent credibility issues. One of the most significant is that they generally include those people who authorized and implemented the very practices that they now assert to have been valuable tools in fighting terrorism. As the techniques were and remain highly controversial, it is reasonable to note that those former officials have a substantial reputational stake in their claim being accepted. Were it to be shown that the United States gained little or no benefit from practices that arguably violated domestic and international law, history would render a harsh verdict on those who set us on that course.

On the question as to whether coercive interrogation techniques were valuable in locating Osama bin Laden, the Task Force is inclined to accept the assertions of leading members of the Senate Intelligence Committee that their examination of the largest body of classified documents relating to this shows that there was no noteworthy connection between information gained from such interrogations and the finding of Osama bin Laden.

The Task Force does not take any unequivocal position on the efficacy of torture because of the limits of its knowledge about classified information. But the Task Force believes it is important to recognize that to say torture is ineffective does not require a belief that it never works; a person subjected to torture might well divulge useful information.

The argument that torture is ineffective as an interrogation technique also rests on other factors. One is the idea that it also produces false information and it is difficult and time-consuming for interrogators and analysts to distinguish what may be true and usable from that which is false and misleading.

The other element in the argument as to torture’s ineffectiveness is that there may be superior methods of extracting reliable information from subjects, specifically the rapport-building techniques that were favored by some. It cannot be said that torture always produces truthful information, just as it cannot be said that it will never produce untruthful information. The centuries-old history of torture provides example of each, as well as many instances where torture victims submit to death rather than confess to anything, and there are such instances in the American experience since 2001.

The Task Force has found no clear evidence in the public record that torture produced more useful intelligence than conventional methods of interrogation, or that it saved lives.

Conventional, lawful interrogation methods have been used successfully by the United States throughout its history and the Task Force has seen no evidence that continued reliance on them would have jeopardized national security thereafter.

Recommendations

- (1) Given that much of the information is going on 10 years old, the Task Force believes the

president should direct the CIA to declassify the evidence necessary for the American public to better evaluate these claims. To the extent that the efficacy of these methods is a relevant question, it should be examined as fully as possible in a time of relative calm so as to have a considered view before another event that could raise the issue again.

- (2) If any such information exists to demonstrate significant success in using harsh interrogation techniques that may not be disclosed without risk to national security, the Task Force believes that information should be presented in some official forum or body that would both be neutral and credible in its assessment of that claim and be able to maintain confidentiality to protect any sources or methods. If needed for these reasons, the Task Force favors the creation of some official study group or commission with appropriate high-level security clearances and stature to lend weight to any judgment on this question.
- (3) If the members of the Senate Intelligence Committee deem that the information in their possession on this subject does not endanger national security, committee members should move to disclose that information.

Finding #4

The continued indefinite detention of many prisoners at Guantánamo should be addressed.

Recommendations

The Task Force was unable to agree on a unanimous recommendation on the issues of ending indefinite detention of prisoners at Guantánamo Bay and closing the detention facility there.

As President Obama has said that all U.S. troops will be withdrawn and the war in Afghanistan will be over by the end of next year, a majority of the Task Force members favored moving swiftly to deal with all of the prisoners currently held in Guantánamo and closing the detention facility in accordance with a cessation of hostilities by the end of 2014, as the law of war will no longer be applicable. The details of that proposal, shown below, would have some prisoners tried in U.S. courts or in military commissions that followed the same procedures as Article III civilian courts. Other prisoners would be transferred to countries where the U.S. could be certain that they would not be subject to torture. Those prisoners who are deemed to still be a threat to the safety of the U.S. and its citizens and who would be difficult (a) to prosecute because they were subjected to torture or the relevant criminal laws did not apply overseas at the time of their conduct; or (b) to transfer due to lack of suitable receiving country, would be brought to the mainland United States and held in custody until a suitable place to transfer them was found. Their cases would be subject to periodic review.

A minority¹ of the Task Force does not agree with those prescriptions. Those members believe that as troubling as indefinite detention might be, there are currently no good or feasible alternatives. Those prisoners who are deemed to be a continuing threat to the United States and for whom a trial is not currently feasible, and where there is no other suitable country that will accept them, should remain in detention for the foreseeable future. They should not be brought to the U.S., and Guantánamo remains the best location to hold them.

¹Task Force members Asa Hutchinson and Richard Epstein.

The majority of the Task Force believes that the situation of indefinite detention is abhorrent and intolerable. The majority recommends:

- (1) The administration, using authority it currently has, should move swiftly to release or transfer those detainees at the Guantánamo Bay detention facility who have been cleared for release or transfer.
- (2) To facilitate dealing with the remaining detainees at Guantánamo Bay, Congress should lift its prohibition on any of them being brought to the mainland United States. The Task Force believes that no one should doubt that U.S. authorities are capable of holding them securely.
- (3) Following the release or transfer of cleared detainees, the remaining detainees held at Guantánamo Bay should be:
 - a. Tried wherever possible by a U.S. Article III court as a matter of preference. If Congress does not lift its ban on bringing Guantánamo detainees to the mainland United States, a U.S. district court should be designated to sit or set up at Guantánamo to clear as many remaining cases as practicable;
 - b. Should the above process fail to be capable of or sufficient to handle all remaining detainees, a military commission based on standards fully parallel if not identical to those applied by Article III courts should be used to clear any remaining cases;
 - c. Any remaining detainees who are deemed a threat to U.S. security, but cannot be tried as above, either because of a lack of evidence or tainted evidence — or where there is no adequate legal basis under which they may be tried in the U.S. — should be treated as follows, in the order noted below:
 1. U.S. authorities should seek a foreign country willing to try the detainees with the best commitments and processes the United States can obtain (in keeping with the appropriate recommendations of this Task Force) against any use of torture or cruel, inhuman or degrading treatment;
 2. In the absence of finding such a state, the detainees should be released to a state willing to receive them and with the best commitments and processes the United States can obtain (in keeping with the appropriate recommendations of this Task Force) against any use of torture or detention without trial and which is prepared to provide them an opportunity to live free of the threat of detention without trial for any known or presumed past actions for which sufficient untainted evidence cannot be produced;
 3. Failing the above, the detainees should be returned to a state of citizenship or nationality or former citizenship or nationality with the best commitments and processes the United States can obtain (in keeping with the appropriate recommendations of this Task Force) against any use of torture or detention without trial;
 4. Failing that, the detainees may be brought to the United States and kept in

the custody of the Department of Homeland Security under appropriate immigration statutes and regulations until such time as a suitable place to deport them is found. They would be subject to semiannual reviews under conditions and standards to be determined by the executive branch.

- (4) There should be a U.S. declaration of cessation of hostilities with respect to Afghanistan by the end of 2014. If there is no such formal declaration, legal authorities should recognize the situation to be the same as existed in Iraq with the withdrawal of U.S. forces by the end of 2011, thereby providing for recognition of a de facto cessation of hostilities.
- (5) Following a cessation of hostilities and clearing of all detainee cases at Guantánamo Bay in accordance with the above process, the detention facility there should be closed, and under no circumstances later than the end of 2014.

Finding #5

The United States has not sufficiently followed the recommendation of the 9/11 Commission to “engage its friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists.”

In the 8 ½ years since the release of the 9/11 Commission Report, the United States has failed to take meaningful, permanent steps to develop a common coalition approach toward the humane treatment and detention of suspected terrorists. As the 9/11 Commission found, so too does the Task Force find that such steps should “draw upon Article 3 of the Geneva Conventions on the law of armed conflict. That article was specifically designed for those cases in which the usual laws of war did not apply. Its minimum standards are generally accepted throughout the world as customary international law.” With the passage of time, the United States’ failure to take meaningful, permanent action in this regard has put our nation’s security at greater risk.

Recommendation

- (1) The Task Force fully endorses the implementation of the 9/11 Commission’s recommendation on the necessity of a common coalition approach toward the detention and humane treatment of suspected terrorists consistent with the rule of law and our values.

Legal Findings and Recommendations

Finding #6

Lawyers in the Justice Department’s Office of Legal Counsel (OLC) repeatedly gave erroneous legal sanction to certain activities that amounted to torture and cruel, inhuman or degrading treatment in violation of U.S. and international law, and in doing so, did not properly serve their clients: the president and the American people.

Finding #7

Since September 11, the Justice Department’s Office of Legal Counsel (OLC) failed, at times, to give sufficient weight to the input of many at the Department of Defense, the FBI, and the State Department with extensive and relevant expertise on legal matters pertaining to detainee treatment.

Recommendation

- (1) The OLC should always consult with, and be counseled by, agencies affected by its legal advice and those agencies’ subject-matter experts. When providing legal advice contrary to the views of agency subject-matter experts, the OLC should include and clearly outline opposing legal views to its own, the legal support (if any) and reasoning for those opposing views, and the basis for why the OLC chose not to adopt those views.

Finding #8

Since the Carter administration, the Office of Legal Counsel (OLC) has published some opinions, a practice that continues to this day. Transparency is vital to the effective functioning of a democracy. It is also vital that the president, during his or her presidency, be able to rely on confidential legal advice.

Recommendations

- (1) To balance the need for transparency and the need of the president to receive confidential legal advice, the American people should be notified when a classified opinion is issued. The OLC should periodically review earlier confidential opinions to determine if they may be declassified and released. If any and all opinions from the OLC might someday, at the appropriate time, be disclosed, OLC attorneys would be more mindful of their responsibility to act in an impartial manner on behalf of the nation and less likely to engage in advocacy that could later prove to have been misguided.
- (2) Congress should amend the attorney general’s current notification requirement to Congress found at 28 U.S.C. § 530D and extend it beyond those cases in which the executive branch acknowledges it is refusing to comply with a statute. The Justice Department (DOJ) should have to explain not only when it determines a statute is unconstitutional, and need not be enforced, but also whenever it concludes that a certain construction of a statute is required to avoid constitutional concerns under Article II of the Constitution or separation-of-powers principles. We support efforts that have been proposed in the past but failed to come to fruition, such as the OLC Reform Act of 2008, sponsored by Sens. Dianne Feinstein and Russ Feingold, to ensure Congress is notified when the DOJ determines that the executive branch is not bound by a statute.

Extraordinary Rendition Findings and Recommendations

Finding #9

It is the view of the Task Force that the United States has violated its international legal obligations in its practice of the enforced disappearances and arbitrary detention of terror suspects in secret prisons abroad.

After September 11, 2001, the extraordinary rendition program consisted of individuals being captured in one part of the world and transferred extrajudicially to another location for the purpose of interrogation rather than legal process. The U.S. officials involved did not notify the detainees' families of their whereabouts, or provide the detainees with legal representation in any locations operated by the CIA as "black sites" or for proxy detention. The International Covenant on Civil and Political Rights, to which the United States is a party, states at Article 9(1): "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." Additionally, the practice of enforced disappearance violates international humanitarian law in both international and non-international armed conflicts, according to the first and fourth Geneva Conventions. The International Convention for the Protection of All Persons Against Enforced Disappearances, to which the United States is not a party but which codifies binding customary international law, states that "[t]he widespread or systematic practice of enforced disappearance constitutes a crime against humanity."

Recommendations

- (1) The Task Force urges the Department of State (DOS), Department of Defense (DOD), and the CIA to expeditiously declassify and release information pertaining to any secret proxy detention (upon U.S. authority or pursuant to U.S. official requests) occurring abroad. The Task Force also recommends that DOS, DOD and the CIA ensure that any detainees still held in such circumstances are allowed access to the International Committee of the Red Cross as required by international law.
- (2) In order to ensure uniform treatment and the guarantee of rights for individuals under the control of the United States, the U.S. government must clarify that the U.S. interpretation of Article 3 of the Convention Against Torture (CAT) and Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) includes both individuals within U.S. territory and individuals under U.S. jurisdiction extraterritorially, in accordance with the treaty bodies' interpretations of the CAT and the ICCPR. Such clarification would prohibit arbitrary detention by U.S. forces outside of U.S. territory.

Finding #10

The Task Force finds that "diplomatic assurances" that suspects would not be tortured by the receiving countries proved unreliable in several notable rendition cases, although the full extent of diplomatic assurances obtained is still

unknown. The Task Force believes that ample evidence existed regarding the practices of the receiving countries that rendered individuals were “more likely than not” to be tortured.

In conducting detainee transfers subsequent to receiving inadequate and unenforceable diplomatic assurances, the United States violated its legal obligations under the Convention Against Torture, which was drafted in part by the United States and which states at Article 3(1): “No State Party shall expel, return (“refouler”), or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” This obligation attaches when an individual “is more likely than not” to be tortured. Under the administrations of President Bill Clinton and President George W. Bush, the extraordinary rendition program often involved transfers of terror suspects to countries where there existed a documented high likelihood of torture or cruel, inhuman, or degrading treatment. U.S. officials were sometimes involved in the interrogations of transferred detainees or received notice of detainees’ allegations regarding torture in proxy detention, and were therefore aware of conditions and treatment in the receiving countries.

Recommendation

- (1) The Task Force recommends that diplomatic assurances must not be the sole or dispositive factor for U.S. satisfaction of its obligation under CAT Article 3(1) that “[n]o State Party shall expel, return (“refouler”), or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Legislation should be enacted that establishes diplomatic assurances as only one of several factors informing the likelihood of torture in a receiving state, with State Department’s Human Rights Reports serving as key indicators of future conduct by host nations. Additionally, diplomatic assurances should be accompanied by guarantees of a right to monitor, a right to interview and, potentially, a right to retake custody of the individual if the United States determines that transferred individuals are tortured or subjected to cruel, inhuman or degrading treatment. When a transfer involves an individual with ties of nationality or residence to a third state, the U.S. should, wherever feasible, consult with the third state regarding our common interest in the above guarantees from the receiving state.

Finding #11

The Task Force finds that U.S. officials involved with detention in the black sites committed acts of torture and cruel, inhuman or degrading treatment.

Ample evidence of this treatment is found in the December 2004 CIA Inspector General’s Report on Counterterrorism, Detention, and Interrogation Activities, as well as the testimony of former detainees. The use of torture and cruel, inhuman, or degrading treatment has long been considered war crimes and violations of customary international law, as well as being prohibited by the Convention Against Torture and denounced by the United States when practiced by other states.

Recommendation

- (1) Due to the growing legal and political consequences of the CIA's rendition program and network of secret prisons, and the fact that officials credibly assert that both programs have been discontinued, the Task Force recommends that the United States fully comply with its legal obligations under the Convention Against Torture in cooperating with pending investigations and lawsuits in the United States and abroad.

Medical Findings and Recommendations

Finding #12

After September 11, 2001, psychologists affiliated with U.S. intelligence agencies helped create interrogation techniques for use in questioning detainees. The methods were judged to be legal by the Department of Justice's Office of Legal Counsel (OLC), but the Task Force has found that many of them constituted torture or cruel, inhuman or degrading treatment.

Finding #13

Medical professionals, including physicians and psychologists, in accordance with Department of Defense and intelligence agency operating policies, participated variously in interrogations by monitoring certain interrogations, providing or allowing to be provided medical information on detainees to interrogators, and not reporting abuses.

Finding #14

Prior to September 11, 2001, ethical principles and standards of conduct for U.S. physicians regarding military detainees included prohibition against involvement in torture, monitoring or being present during torture, or providing medical care to facilitate torture. From 2006 to 2008, after information was available on the treatment of detainees, additional medical professional ethical principles and guidance were established by medical associations, including the duty to report abuses and prohibitions against conducting or participating in or being present during interrogations, and providing detainees' medical information to interrogators.

Finding #15:

After September 11, 2001, military psychologists and physicians were instructed that they were relieved of the obligation to comply with nonmilitary ethical principles, and in some cases their military roles were redefined as non-health-professional combatants.

Rules, regulations and operating procedures were altered to guide and instruct physicians in their involvement in detention and interrogation procedures including

the provision of detainees' medical information to interrogators, being present or monitoring interrogations, engaging in medically and ethically improper practices in dealing with hunger strikers, and not reporting abuses.

Recommendations

- (1) The Department of Defense (DOD) and CIA should ensure adherence to health professional principles of ethics by using standards of conduct for health professionals that are in accordance with established professional standards of conduct, including the prohibition of physicians from conducting, being present, monitoring or otherwise participating in interrogations – including developing or evaluating interrogation strategies, or providing medical information to interrogators. In addition, physicians should be required to report abuses to authorities. The DOD should discontinue classifications of health professionals as non-health-professional combatants. It should also adopt standards with respect to confidentiality of detainee medical and psychological information that prohibit the use of medical information, whether obtained in clinical treatment or through an assessment for any other purpose, from being shared with interrogators.
- (2) Standard periodic military reviews of the conduct and performance of health professionals should be based on their compliance with military detention standards, regulations and operating procedures that are in accord with professional ethical principles and standards established by U.S. medical associations. Violations should be dealt with under the Code of Military Justice and the findings shared with existing civilian agencies for action, including the National Practitioner Data Bank, state licensing boards, medical associations, and specialty certifying boards.
- (3) The Department of Justice should formally prohibit the Office of Legal Counsel from approving interrogation techniques based on representations that health providers will monitor the techniques and regulate the degree of physical and mental harm that interrogators may inflict. Health professionals cannot ethically condone any deliberate infliction of pain and suffering on detainees, even if it falls short of torture or cruel treatment.

Finding #16

For detainee hunger strikers, DOD operating procedures called for practices and actions by medical professionals that were contrary to established medical and professional ethical standards, including improper coercive involuntary feedings early in the course of hunger strikes that, when resisted, were accomplished by physically forced nasogastric tube feedings of detainees who were completely restrained.

Recommendations

- (1) Forced feeding of detainees is a form of abuse and must end.
- (2) The United States should adopt standards of care, policies and procedures regarding detainees engaged in hunger strikes that are in keeping with established medical professional ethical and care standards set forth as guidelines for the management of hunger strikers in the 1991 World Medical Association Declaration of Malta on Hunger Strikes (revised 1992 and 2006), including affirmation that force-feeding is prohibited

and that physicians should be responsible for evaluating, providing care for and advising detainees engaged in hunger strikes. Physicians should follow professional ethical standards including: the use of their independent medical judgment in assessing detainee competence to make decisions; the maintenance of confidentiality between detainee and physician; the provision of advice to detainees that is consistent with professional ethics and standards; and, the use of advance directives.

- (3) The Task Force recognizes that as a matter of public policy the United States has a legitimate interest regarding detainees whom it is holding to prevent them from starving to death. In doing so, it should respect the findings and processes reflected in the above-noted standards and recommendations.

Consequences Findings and Recommendations

Finding #17

It is the view of the Task Force that it is harmful for the United States to release detainees without clear policies or practices in place for the re-introduction of those individuals into the societies of the countries of release.

Detainees held at Guantánamo Bay and abroad are released to home countries or third countries, in many cases, without contacts or the means to support themselves, and suffering from mental and physical problems resulting from their time in U.S. detention. Such prolonged physical and mental effects have the potential to manifest in acts of recidivism for those detainees who previously fought against U.S. forces, or in increasing anti-U.S. sentiment in a vulnerable population.

Recommendation

- (1) The United States should establish agreements with all countries receiving detainees upon release to establish standard procedures by which those without family or other means may be properly monitored on their ability to secure housing, medical and other necessities in order to fully integrate them into society.

Recidivism Findings and Recommendations

Finding #18

The Task Force finds a large discrepancy between the recidivism figures published by government agencies such as the Defense Intelligence Agency and the Subcommittee on Oversight and Investigations of the House Committee on Armed Services, and nongovernmental organizations (NGOs) such as the New America Foundation. The Task Force believes that it is not possible to determine an accurate rate of re-engagement (or engagement for the first time) in terrorist activity without systematic and detailed data indicating whether each particular individual is “confirmed” or “suspected” of such activity.

Recommendation

- (1) The Task Force recommends that the Defense Intelligence Agency disclose all criteria used to make determinations on whether individuals fall into the “confirmed” or “suspected” categories, including clear guidelines on acts that constitute each category. The Task Force notes that Pentagon spokesman Todd Breasseale said in March 2012 that individuals on the “suspected” list may pose no threat to national security. The Task Force therefore recommends that the DIA issue separate numbers for the categories of “confirmed” and “suspected” recidivists, establishing the rate of recidivism based solely on the “confirmed” numbers for greater accuracy. Finally, the Task Force recommends that the DIA publish a list of “confirmed” recidivists with details of their terror-related activities.

Obama Administration Findings and Recommendations

Finding #19

The high level of secrecy surrounding the rendition and torture of detainees since September 11 cannot continue to be justified on the basis of national security.

The black sites have apparently been shut down, and the “enhanced interrogation techniques” have been ended. The authorized “enhanced” techniques have been publicly disclosed, and the CIA has approved its former employees’ publication of detailed accounts of individual interrogations. Unauthorized, additional mistreatment of detainees has been widely reported in the press and by human rights groups.

Ongoing classification of these practices serves only to conceal evidence of wrongdoing and make its repetition more likely. As concerns the military commissions at Guantánamo, it also jeopardizes the public’s First Amendment right of access to those proceedings, the detainees’ right to counsel, and counsel’s First Amendment rights.

Recommendations

- (1) Apart from redactions needed to protect specific individuals and to honor specific diplomatic agreements, the executive branch should declassify evidence regarding the CIA’s and military’s abuse and torture of captives, including, but not limited to:
 - The Senate Intelligence Committee’s report on the CIA’s treatment of detainees.
 - The Report of the Special Task Force on Interrogation and Transfer Policies.
 - The CIA Office of the Inspector General (OIG) reports on the deaths of Gul Rahman, Manadel al-Jamadi, and Abed Hamed Mowhoush; the rendition of Khaled El-Masri; the non-registration of “ghost” detainees; the use of unauthorized techniques at CIA facilities; and all OIG reports on the CIA’s interrogation, detention and transfer of detainees.
 - Investigations by the Armed Forces’ criminal investigative divisions, the chain of command, and the Department of Defense into abuses of detainees by Joint Special Operations Command Special Mission Unit Task Forces in Iraq and Afghanistan.

- (2) Apart from any steps needed to prevent security threats against individual intelligence agents, the executive branch should cease its attempts to prevent detainees from providing evidence about their treatment in CIA custody. Guantánamo detainees obviously hold no security clearances and have never signed nondisclosure agreements with the United States government, and were exposed to “intelligence sources and methods” only involuntarily.
- (3) Congress should pass legislation that makes clear that acts of torture, war crimes, and crimes against humanity are not legitimate “intelligence sources and methods” under the National Security Act, and evidence of these acts cannot be properly classified, unless their disclosure would endanger specific individuals or violate specific, valid, agreements with foreign countries.

Finding #20

The Convention Against Torture, in addition to prohibiting all acts of torture, requires that states ensure in their “legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.” The United States has not complied with this requirement, in large part because of the government’s repeated, successful invocation of the state-secrets privilege in lawsuits brought by torture victims.

Recommendation

- (1) The state-secrets privilege should not be invoked to dismiss lawsuits at the pleadings stage. Invocations of the privilege should be subjected to independent judicial review, which do not automatically defer to the executive’s conclusions on the need for secrecy. Instead, courts should be able to evaluate the evidence (*in camera* where appropriate) and restrict invocation of the privilege to cases where it is necessary to guard against specific, non-speculative harms to national security.

Finding #21

The Convention Against Torture requires each state party to “[c]riminalize all acts of torture, attempts to commit torture, or complicity or participation in torture,” and “proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.” The United States cannot be said to have complied with this requirement.

No CIA personnel have been convicted or even charged for numerous instances of torture in CIA custody — including cases where interrogators exceeded what was authorized by the Office of Legal Counsel, and cases where detainees were tortured to death. Many acts of unauthorized torture by military forces have also been inadequately investigated or prosecuted.

Recommendation

- (1) Congress should amend the War Crimes Act and the Torture Statute to make clear that in the future, in situations where a person of ordinary sense and understanding would know that their treatment of a detainee inflicts or is likely to result in severe or serious physical or mental pain or suffering, reliance on advice of counsel that their actions do not constitute torture or war crimes shall not be a complete defense.

Finding #22

The Obama administration’s standards for interrogation are set forth in the Army Field Manual on Interrogation. In 2006, a small handful of changes were introduced to the Manual that weakened some of its key legal protections.

For over 50 years, the Army Field Manual has been an invaluable document guiding American soldiers away from abusing prisoners, with its clear prohibitions on cruel, inhuman or degrading treatment and torture. However, the 2006 version deleted language that explicitly prohibited the use of sleep deprivation and stress positions, and its Appendix M authorizes an interrogation technique called “separation,” which could inflict significant physical and mental anguish on a detainee.

Under Appendix M, a combatant commander could arguably authorize a detainee to be interrogated for 40 consecutive hours with four-hour rest periods at either end. Appendix M also takes off the table a valuable interrogation approach, noncoercive separation, and puts it out of reach in situations where it could be employed humanely and effectively.

Recommendation

- (1) The Army Field Manual on Interrogation should be amended so as to eliminate Appendix M, which permits the use of abusive tactics and to allow for the legitimate use of noncoercive separation. Language prohibiting the use of stress positions and abnormal sleep manipulation that was removed in 2006 should be restored.

Finding #23

Detainees’ transfer from United States custody to the custody of the National Directorate of Security (NDS) in Afghanistan has resulted in their torture. The United States has a legal obligation under Article 3 of the Convention Against Torture not to transfer detainees to NDS custody unless it can verify that they are not likely to be tortured as a result.

Recommendations

- (1) The executive branch and Congress should clarify that Article 3 of the Convention Against Torture is legally binding on the U.S. government even for transfers occurring outside of U.S. territory.

- (2) The United States should ensure that transfers of detainees to Afghan custody by U.S. special operations forces and intelligence agencies are subjected to the same limitations as transfers by the military, including ongoing monitoring by both U.S. personnel and the Afghanistan Independent Human Rights Commission.
- (3) Intelligence appropriations should be subject to the limitations of the “Leahy Law,” which restricts U.S. funds to

any unit of the security forces of a foreign country if the Secretary of State has credible evidence that such unit has committed gross violations of human rights, unless the Secretary determines and reports to the Committees on Appropriations that the government of such country is taking effective measures to bring the responsible members of the security forces unit to justice.

The Director of National Intelligence should have the authority to waive this restriction if “extraordinary circumstances” require it, just as the Secretary of Defense does under existing law. The Director of National Intelligence should be required to report to the congressional intelligence committees on the extraordinary circumstances and the human rights violations that necessitate such a waiver.

Finding #24

The available evidence suggests that the Obama administration has dramatically improved the process of notifying the International Committee of the Red Cross (ICRC) of detainees’ status, and providing access to detainees.

Ensuring that detainees cannot be “disappeared” is a crucial part of preventing them from being subjected to torture and cruel treatment. However, because these changes have only been announced in anonymous leaks to the press, it is unclear whether they will bind future administrations.

Recommendations

- (1) The administration should publicly confirm its requirements for ICRC notification and access.
- (2) If it has not already done so, the United States should formally adopt regulations regarding ICRC notification and access for individuals detained pursuant to armed conflict.
- (3) The United States should sign and ratify the International Convention for the Protection of All People from Enforced Disappearance.