

Accountability for Torture: Why a Criminal Investigation is Necessary

The Senate Intelligence Committee's torture report confirms that the CIA tortured and brutalized prisoners in secret prisons around the world. The report, which is the culmination of a multi-year inquiry, also provides startling, new details about the level of cruelty perpetrated in our names.

The conduct that the report describes violates both international and domestic law. Much of this conduct was authorized at the highest levels of government, with the involvement of the White House, the Justice Department, and the Defense Department.

Given the gravity of the conduct described in the report, the Justice Department has a duty to investigate issues of criminal responsibility. A criminal investigation is an unequivocal obligation under international law. It is also necessary to repair our country's damaged moral authority and prevent similar abuses from occurring again.

The Justice Department Should Appoint a Special Prosecutor

To ensure that the investigation of the torture program is comprehensive and insulated from political interference, Attorney General Eric Holder should appoint a special prosecutor from within the Justice Department and transfer to that special prosecutor all of his authority to investigate and prosecute crimes relating to the program. A special prosecutor would be able to make prosecutorial decisions without having to seek the attorney general's permission.

The special prosecutor's mandate should be broad. It should include the authority to investigate and prosecute decisions to approve torture, to carry it out, and to conceal it. The special prosecutor should also examine CIA efforts to impede or improperly access the Senate's investigation of CIA torture.

There is precedent for the appointment of a special prosecutor. Deputy Attorney General James Comey appointed Patrick Fitzgerald to conduct the investigation into the leak that exposed Valerie Plame as an undercover CIA agent, and delegated to Fitzgerald the attorney general's full investigative and approval authority. The U.S. District Court for the District of Columbia upheld that delegation of authority, finding it was within the attorney general's statutory powers.

When he appointed Fitzgerald, Comey explained that he wanted to ensure that the investigation, which eventually implicated the White House, would be seen as credible by the American public. Comey assured the public that Fitzgerald did not regularly interact with the intelligence agencies implicated in the investigation, and that he would be outside the ordinary Justice Department chain of command.

Similar considerations make it equally important here that the criminal investigation be conducted by a special prosecutor. It is already clear that the decision to authorize torture was made by some of the Bush administration's most senior officials. Some of the intelligence officials who supervised or implemented the torture program still work for the government, with as many as 200 CIA employees who participated in the torture program reportedly still at the agency. Justice Department employees wrote legal memos to justify the use of torture, and the

Justice Department is now involved in the military-commissions prosecutions of some of the men who were tortured.

Only the appointment of a special prosecutor can ensure that a criminal investigation into the torture program would be, and be seen as, independent.

The Justice Department Has The Tools To Hold Those Who Authorized Torture Accountable

Multiple federal statutes supply the Justice Department with authority it could use to hold accountable those who used or authorized torture and abuse. These include:

- The federal torture statute, which makes it a crime to inflict severe physical or mental pain or suffering on another person with specific intent if the conduct takes place outside the United States. The statute also criminalizes conspiracy to commit torture.
- The war-crimes statute, which criminalizes violations of the Geneva Conventions, including torture and cruel or inhuman treatment.
- Section 804 of the Patriot Act, which provides federal jurisdiction to prosecute crimes such as murder or assault committed by U.S. nationals in certain locations overseas, including U.S. military bases.
- The federal conspiracy statute, which supplies independent authority to prosecute those who entered into agreements to commit federal crimes, such as like murder or assault, so long as at least one member of the conspiracy acted to further the conspiracy.

Liability for federal crimes also extends to those who aided and abetted the crimes or counseled, commanded, induced, procured, or willfully caused another to commit the crimes. If officials endeavored to cover up torture in order to evade oversight, other criminal statutes — such as those relating to making false statements or obstructing justice, for example — may be implicated.

While some of the abuses took place a decade ago, the statute of limitations has not run out on many of the most serious crimes. Most importantly, there is no statute of limitations under the torture statute when the abuse risked or resulted in serious physical injury or death. There is no statute of limitations on war crimes that resulted in death. The federal conspiracy law's five-year statute of limitations runs from the date of the last act taken in furtherance of the conspiracy; the last act can include an effort to conceal the conspiracy. There would be no time bar to a prosecution for any crime committed in connection with efforts to impede the Senate Committee's investigation.

Neither the Detainee Treatment Act of 2005 nor the discredited memos written by the Office of Legal Counsel provide a “golden shield”

Some have suggested that those who authorized or engaged in torture cannot be prosecuted because memos written by the Office of Legal Counsel provide immunity. This is incorrect.

The Detainee Treatment Act of 2005 provides a defense to those who can show that they “did not know that the practices were unlawful and [that] a person of ordinary sense and understanding would not [have known] the practices were unlawful.” The law also provides that “good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful.”

This defense, however, is available only to those who “engag[ed] in specific operational practices” — it does not cover those who authorized torture. Nor does it cover those who went beyond the scope of the legal opinions, either by inflicting abuses that were not authorized or by exceeding what was authorized (e.g. by applying a technique in a manner inconsistent with what was authorized).

Moreover, even for those who stayed within the four corners of the Office of Legal Counsel’s memos, the statutory defense provides that good-faith reliance on legal advice is “an important factor” to be considered. It is not a golden shield.

A Comprehensive Criminal Investigation is Long Overdue

The Senate Intelligence Committee report describes serious violations of domestic and international law. A comprehensive, independent, and effective criminal investigation, including into the role of the senior officials who authorized the torture program, is long overdue.

The principal Justice Department investigation into torture and abuse by CIA agents was conducted by John Durham. Durham was charged with investigating the CIA’s destruction of interrogation videotapes and conducting a preliminary investigation into incidents in which interrogators inflicted abuses different from those authorized by the Office of Legal Counsel memos. We have no assurance that Durham investigated the role of senior officials in approving the program, or that he investigated whether crimes were committed when the CIA misled Congress, the Justice Department, or others about the scope of the program. Durham did recommend full criminal investigations of two cases — one involving the death of Gul Rahman at the Salt Pit prison in Afghanistan in 2002 and another involving the death of Manadel al-Jamadi in Iraq in 2003 — but the Justice Department ultimately closed both investigations without charging anyone with a crime.

We similarly have no assurance that the Justice Department’s earlier investigations into the torture program included a top-to-bottom review of potential criminal liability. Approximately two dozen cases were referred to the Justice Department during the Bush administration but only one of these cases resulted in a prosecution. (A CIA contractor, David Passaro, was convicted of assault in connection with the death of Abdul Wali after a brutal interrogation in Afghanistan in 2003.)

Criminal investigations by the military have ignored the role of those who approved torture. Some low-ranking soldiers have been convicted of crimes related to detainee abuse, but no senior military leader has been prosecuted. Nor has any civilian leader been prosecuted for the abuses that took place in military facilities — though civilian leaders, including the then secretary of defense, are known to have authorized some of the abuses.

In our system, no one should be above the law or beyond the law's reach, no matter how senior the official. A thorough and credible criminal investigation is a legal and moral imperative. And it is the best way to ensure that the United States never tortures again.