What to Do About the Torturers?

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By David Cole

Torture Team: Rumsfeld's Memo and the Betrayal of American Values
by Philippe Sands
Palgrave Macmillan, 254 pp., $26.95

The Trial of Donald Rumsfeld: A Prosecution by Book
by Michael Ratner and the Center for Constitutional Rights
New Press, 242 pp., $23.95

Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond
by Jameel Jaffer and Amrit Singh
Columbia University Press, 374 pp., $29.95; $22.50 (paper)

The story of America's descent into torture in the wake of the terrorist attacks of September 11, 2001, has been told now by many writers. Mark Danner, Jane Mayer, and Ron Suskind have written brilliant expositions of the facts, showing how the drive to prevent the next attack led the administration's highest officials to seek ways around the legal restrictions on coercive interrogation of suspects. After the abuses at Abu Ghraib came to light, the military itself commissioned three detailed investigative reports, including highly critical ones by Major General Antonio Taguba and by a panel led by former defense secretary James Schlesinger. Among other factors, they blamed ambiguity in the standards governing interrogation—an ambiguity ultimately attributable to the attempts at evasion directed from the top. Congressional committees have held numerous public hearings into the use of coercive interrogation tactics at both Abu Ghraib and Guantánamo. The Center for Constitutional Rights, the ACLU, and the NYU Center on Law and Security have each published collections of official documents, which effectively indict the government using its own words.

But undoubtedly the most unusual and deeply revealing take on the subject is the work of the British lawyer and law professor Philippe Sands. As Alexis de Tocqueville showed long ago, sometimes it takes the eyes of an outsider to show us ourselves. Sands, a leading international lawyer and a professor at University College London, took it upon himself to conduct his own personal investigation of one aspect of the torture policy—the Army's adoption of coercive tactics to interrogate suspects at Guantánamo. This policy was not the worst of the post–September 11 abuses. As far as we know, no one has been waterboarded at Guantánamo, as some were at the CIA's secret "black sites," nor have any suspects been killed in interrogation, as happened on several occasions elsewhere. No one we know of has been rendered from Guantánamo to another country to be tortured, although some prisoners who were earlier subject to rendition and torture have since been transferred to Guantánamo.

But precisely because the Army's interrogation policy was not the worst of the worst—to borrow a phrase—its story may actually be more instructive. The CIA has always operated to a significant degree outside the law. The military, by contrast, is at its core an institution committed to discipline and order, strictly governed by the laws of war. So the fact that illegal abusive tactics were officially authorized at the Pentagon's highest levels is in some sense more shocking than the CIA's crimes. We should expect more of the military.
America's experiment with torture presents the Obama administration with one of its most difficult challenges: how should the nation account for the abuses that have occurred in the past, what are the appropriate remedies, and how can we ensure that such abuses not happen again? *Torture Team* offers new insight into what will surely be one of the leading human rights issues of the next several years.

1.

Sands began his investigation, as any good lawyer would, with the documents—from a memo drafted by Lieutenant Colonel Diane Beaver, a staff lawyer for the Army stationed at Guantánamo; to a log detailing the interrogation of "Detainee 063," Mohammed al-Qahtani; to a one-page memo drafted by William Haynes, Department of Defense general counsel, and signed by Defense Secretary Donald Rumsfeld himself, authorizing a series of coercive interrogation tactics beyond anything the military had previously permitted. In signing that memo, which approved sixteen coercive tactics, including forcing suspects to stand for up to four hours straight, Rumsfeld scribbled in the margin, "I stand for 8–10 hours a day. Why is standing limited to 4 hours?" As that comment itself suggests, these documents chillingly underscore the mundane banality with which cruelty and torture became official policy of the United States Department of Defense.

The smoking gun is the Army's log of the interrogation of Mohammed al-Qahtani. Al-Qahtani was thought to be the twentieth hijacker; he was denied entry to the United States in August 2001 at Orlando Airport, where Mohamed Atta, the leader of the September 11 attacks, was waiting to meet him. It was his interrogation that prompted the military to authorize new coercive techniques. The log of al-Qahtani's interrogation, leaked to the press and initially published by *Time* magazine, provides a detailed, minute-by-minute account of the tactics employed against al-Qahtani, all of which had been approved by Rumsfeld in his one-page memo.

Over fifty-four days, beginning in late 2002, al-Qahtani was interrogated for eighteen to twenty hours each day, denied anything more than four hours sleep per night, threatened with dogs, stripped naked, hooded, forced to wear women's underwear on his head, humiliated sexually by female interrogators, subjected to extreme heat and cold and loud noises, doused with cold water, and injected with intravenous fluid and not allowed to go to the bathroom so that he urinated on himself. The account has been public for some time, but Sands brings it to life, using it as a kind of drumbeat of reality throughout the book by closing nearly every chapter with a short excerpt from the log.

The Army investigated the interrogation of al-Qahtani and concluded that no laws were broken and that nothing inhumane was done. Sands took the log to Dr. Abigail Seltzer, a London-based psychiatrist who consults with the Medical Foundation for the Care of Victims of Torture, in order to obtain an expert assessment. She was exceedingly thorough, marking each time that al-Qahtani was subjected to abusive treatment, required medical care, or expressed distress, but also noting each time his rights were respected. She was cautious in her analysis, remarking on the absence of physical violence and the extremely organized and disciplined way in which the tactics were employed. (Only the US Army could conduct—and record—torture with such meticulous attention to detail.)

When Sands asked Dr. Seltzer whether she thought the treatment had produced severe physical or mental pain, the legal threshold for torture, she pointed to the Army's own recording of al-Qahtani's expressions of distress. Sands puts them together in a single quotation, editing out the tactics that produced the reactions. It is the closest thing we have to seeing the experience through the eyes of its victim, and it is truly harrowing. Here is a portion:

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Dr. Seltzer concluded that al-Qahtani had undoubtedly suffered severe emotional and possibly physical distress.

What makes Sands's book most intriguing, however, is that he does not merely analyze the documentary evidence. Instead, he personally set out to interview as many of the participants in this sordid tale as would talk to him. Remarkably, nearly all of them did—including Diane Beaver; Major General Michael Dunlavey, commanding officer at Guantánamo until November 2002; Douglas Feith, a leading neoconservative and, as undersecretary of defense for policy, the number three man in the Department of Defense; and General Richard Myers, chairman of the Joint Chiefs of Staff. Sands also interviewed FBI lawyers, military interrogators, the general counsels for the Department of Defense and the Navy, and several others involved in the decision-making process.

Why would so many people willingly talk to a stranger about their roles in the development and implementation of a policy that led to torture, one of the most harshly condemned practices known to mankind? In part, Sands's ability to gain access may have turned on his outsider status—as a British lawyer studying the role of lawyers in the war on terror, he was not obviously identified with any side of the warring camps within the United States on this subject. A Google search, however, would have quickly led the people he interviewed to see that his previous book, Lawless World: America and the Making and Breaking of Global Rules from FDR's Atlantic Charter to George W. Bush's Illegal War,[3] was a biting critique of the United States' role in the realm of international law in recent years. In fact, several of the officials he approached appear to have done just that, and after initially agreeing to an interview, sought to back out at the last moment. But Sands always managed to talk his way into getting the interview anyway, and in most cases was able to build a strong rapport with his subjects, leading them to be remarkably candid in their responses to his questions.

The more convincing explanation for why so many decided to talk to Sands is that they felt they had done nothing wrong. Douglas Feith, for example, practically gloats about his role in formulating the administration's policy that the Geneva Conventions did not protect al-Qaeda or Taliban fighters. This determination, announced publicly by President Bush in February 2002, cleared the way for coercive interrogation, because if the Geneva Conventions applied, any cruel, inhumane, or degrading treatment of detainees was absolutely forbidden by Common Article 3, which sets a minimum baseline of human rights protections for all detained persons, whether or not they are uniformed fighters. Sands pressed this point with Feith, prompting a striking admission. As Sands relays the dialogue:

I was...curious about the connection between the decision on Geneva and the new interrogation rules approved by Rumsfeld at the end of 2002.... I observed to Feith that his memo to the President and the Geneva decision meant that its constraints on interrogation didn't apply to anyone at Guantánamo. "Oh yes, sure," he shot back. So that was the intention, I asked. "Absolutely," he replied, without any hesitation. Under the Geneva Conventions no one there was entitled to any protection. "That's the point."

Sands's interviews sometimes persuaded him to adopt a more sympathetic understanding of particular protagonists in the torture story. Thus, he portrays Diane Beaver, the lawyer who wrote the initial Army
memo justifying coercive interrogation, including waterboarding, as well-meaning if deeply wrong. She was simply out of her depth, Sands suggests, since she had no real experience or serious training in the legal issues about which she was asked to give her opinions.

What's more, Sands contends, Beaver was in reality a scapegoat. The administration sought to portray the decision to use coercive tactics as originating from Guantánamo, but Sands makes a convincing case that the decision in fact came from the top—from Feith, Rumsfeld, Haynes, David Addington (Dick Cheney's legal counsel at the time), Justice Department lawyer John Yoo, and White House Counsel Alberto Gonzales, among others. Beaver's October 2002 memo was largely unnecessary, since it was written after the critical legal decisions had already been made in Washington. By the time Beaver wrote it, President Bush had already publicly declared that Guantánamo detainees were not protected by the Geneva Conventions, and John Yoo and Jay Bybee had already written the infamous August 2002 Justice Department "torture memo" at Gonzales's request. This memo argued that as commander in chief, the president could order torture without fear of criminal liability, and that in any event the torture statute did not prohibit threats of death, as long as the threatened death was not imminent; nor did it prohibit the infliction of intense physical pain, so long as the pain did not rise to the severity associated with organ failure or death itself. In the wake of such opinions, what a staff lawyer at Guantánamo thought was beside the point.

Others are also portrayed in a surprising light. General Richard Myers, chairman of the Joint Chiefs of Staff when the Rumsfeld memo was adopted, had, by his own account, astoundingly little understanding of what was at stake. At one point, he told Sands that all the coercive measures approved by Rumsfeld were already authorized by the Army Field Manual; in fact, none of the tactics were permitted under the manual. Sands concludes that Myers was "hoodwinked" by Rumsfeld and Haynes. General James Hill, who headed the Southern Command and passed Diane Beaver's memo up the chain to Washington, admits to Sands that he would never have approved some of the tactics Rumsfeld okayed. And military intelligence experts closely involved with the Guantánamo interrogations tell Sands that no valuable information was obtained from al-Qahtani.

Sands's book prompted the House Judiciary Committee to launch hearings last summer into the role of lawyers in the development of the interrogation policies, and those hearings in turn led the Senate Armed Services Committee to hold still further hearings. Addington, Yoo, Feith, and Haynes all testified very defensively, often refusing to answer political questions or not recalling key details. But documents disclosed in the course of the hearings now show that when the coercive measures were under consideration, top lawyers for every branch of the military—the Army, Navy, Air Force, and Marine Corps—objected that the tactics might be illegal. The comments encouraged Jane Dalton, legal counsel to General Myers, to undertake a more detailed review of the legal questions posed—until General Myers, at Haynes's request, ordered that the legal inquiry be quashed. It appears that General Myers may not have been hoodwinked after all.

Because so many of the facts surrounding the torture policy are now well known, Sands's book is illuminating not so much for breaking new factual ground as for the human insight he brings to the events. Through his interviews, he tells a story about how ordinary human beings, all working within an institution designed to fight by the rules, felt tremendous pressure to bend the rules—and in most cases did so without apparent concern or self-doubt. A narrowly pragmatic ethos guided virtually all actors. The real arguments were for the most part not about whether coercive tactics were legally or morally acceptable, but about whether they worked. Some, especially those in the FBI, felt strongly that they were counterproductive, and that building rapport through noncoercive questioning was the only way to gain credible intelligence from captives. Others thought the idea of building rapport with al-Qaeda suspects was foolish; it could not be done. But with the courageous exception of Navy General Counsel Alberto Mora, few argued that coercive tactics were wrong because they were immoral and illegal, whether or not they worked. In America after September 11, idealists were few and far between, and an
amoral, blinkered pragmatism ruled the day.

Sands is an unabashed idealist. He considers it the government lawyer's obligation to be the guardian of legality, even (and especially) where one's clients, the politically elected and appointed decision-makers, have decided that the law and the rules are inconvenient. Sands argues that torture is ineffective, and that building rapport with suspects is the better course. Indeed, he demonstrates in his own interviews the power of rapport to get subjects talking candidly. But in the end, his argument is not a pragmatic one—it is an argument of principle. The prohibition against torture is absolute, and expresses a fundamental norm about human decency, not a practical judgment about what produces results in interrogation.

2.

The critical question, now that the administration is changing hands, is how to address the fact that the United States after September 11 adopted an official practice of cruel, inhuman, and degrading interrogation tactics, some of which, including at a minimum the interrogation of al-Qahtani and the waterboarding of CIA suspects, rose to the level of torture. Some, including current Attorney General Michael Mukasey and former Bush administration lawyer Jack Goldsmith, have argued that no further investigations, much less prosecutions, are needed, and we should simply move on.[5]

Mukasey insists that everyone acted in good faith—but his judgment is compromised by his refusal even to acknowledge that waterboarding is torture. He never squares his finding of "good faith" with the fact that Haynes and Myers cut off an inquiry into the legality of the Army's tactics after the military's top lawyers objected that the tactics were illegal, or that Yoo and Bybee failed even to cite important contrary legal authority in their torture memo. And while good faith is certainly a factor to be considered in making the discretionary decision whether to prosecute, it is not in itself a legal defense to the crimes of torture or cruel, inhumane, or degrading treatment.

In Jack Goldsmith's view, the facts are already known, the normative judgments have been made, and the real risk is that an extensive investigation will induce federal officials to be overly risk-averse in their approach to controversial national security issues. Goldsmith, however, is not a disinterested party; he was Haynes's top lawyer on international law when Haynes drafted the Rumsfeld memo on interrogation tactics. Later, as head of the Office of Legal Counsel, he oversaw a review of the Yoo-Bybee "torture memo" that, while it ultimately resulted in the memo's replacement, did not reverse the office's authorization of any of the CIA's coercive tactics, including waterboarding.[6]

Others, such as Michael Ratner and the Center for Constitutional Rights, call for criminal prosecution. Their book, The Trial of Donald Rumsfeld, convincingly makes the case that Rumsfeld committed war crimes, and is a useful companion to Torture Team because it includes excerpts from all the critical evidence and a lucid explanation of the legal issues. The center has formally petitioned the German and French governments to bring criminal charges, but both have thus far declined.[7]

Sands's prescription is similar. His book begins with a discussion of the film Judgment at Nuremberg, which featured the trial of judges and lawyers complicit in Nazi atrocities, and closes with a discussion of the principle of "universal jurisdiction," which holds that any country has the right to prosecute certain war crimes and crimes against humanity, no matter where or by whom they were committed, so long as it observes the fundamental requirements of a fair trial. Sands himself played a part in the landmark UK extradition case against General Augusto Pinochet of Chile, in which the UK's Law Lords ruled that even a former head of state was not immune to prosecution by a foreign country (Spain) for torture and other crimes against humanity.

Criminal prosecution within or outside the United States is highly unlikely. At home, the Justice Department's "torture memo" would be a legal defense for any but the lawyers who wrote it, and
Congress, in the Military Commissions Act, granted retrospective immunity to officials involved in the interrogation of al-Qaeda suspects in the wake of September 11. The latter immunity, Sands points out, actually makes US officials more susceptible to prosecution overseas, because it removes a major impediment to international prosecution—namely, the principle that universal jurisdiction should not be exercised as long as domestic remedies are available. Still, as a matter of realpolitik, it is difficult to imagine any nation greeting the Obama administration with an international prosecution of former high-level US officials.

But even if criminal prosecution seems unlikely, the acts of the past administration demand accountability. Here's what Eric Holder, whom Obama will nominate as attorney general, said several months ago:

Our government authorized the use of torture, approved of secret electronic surveillance against American citizens, secretly detained American citizens without due process of law, denied the writ of habeas corpus to hundreds of accused enemy combatants and authorized the procedures that violate both international law and the United States Constitution.... We owe the American people a reckoning.

That "reckoning," owed not just to the American people but to the world, will be made especially difficult by the fact that complicity in the torture policy reaches the very top of the Bush administration. The tactics used by the CIA in its interrogations of Khalid Sheikh Mohammed and other "high-level" detainees, including waterboarding, were specifically approved in the White House situation room by Vice President Dick Cheney, Director of Central Intelligence George Tenet, Attorney General John Ashcroft, National Security Adviser Condoleezza Rice, and Secretary of State Colin Powell. Ashcroft is reported to have remarked that "history will not judge us kindly," but none of the participants is reported to have objected to the tactics. On December 15, Vice President Cheney acknowledged for the first time that he had authorized and continues to support techniques including waterboarding. "I was aware of the program, certainly, and involved in helping get the process cleared," Cheney told ABC News. Apparently CIA officials insisted on such high-level approval as a form of insurance against future prosecution.

This poses a real political dilemma: How is President Obama, committed to bipartisan leadership, to hold such officials accountable? A prosecution of any of these men would be as divisive a criminal case as the United States has ever seen—even if it could surmount the legal hurdles identified above. Just launching an investigation will be bruisingly controversial.

Must we then settle for the judgment of history that Ashcroft worried about? In some sense, that judgment has already begun to take shape, thanks to the efforts of Sands, Ratner, enterprising journalists like Mark Danner and Jane Mayer, and especially the ACLU, which forced the disclosure of over 100,000 documents on the interrogation policy by filing a lawsuit under the Freedom of Information Act. Administration of Torture, a guide to those documents with excerpts from the most interesting, will prove an immensely useful resource for future historians.

Without prosecutions or an independent investigation, significant progress toward repudiating the administration's approval of cruelty and torture has already been made. In 2006 the Supreme Court rejected President Bush's position that the Geneva Conventions do not apply to the conflict with al-Qaeda. The military rescinded its authorization of coercion, and has limited itself, in the Army Field Manual, to noncoercive interrogation tactics. The CIA has reportedly abandoned waterboarding, and there have been no reports of renditions to torture in foreign countries for several years. The Justice Department rescinded the August 2002 "torture memo"—although, as noted above, the replacement memo did not alter the department's approval of illegal CIA tactics. Congress, under the leadership of Senator John McCain, resoundingly rejected a White House interpretation that the Torture Convention's
prohibition on cruel, inhuman, and degrading treatment exempted foreign nationals held outside the United States; the McCain Amendment provides that the prohibition applies to all persons held by US officials, no matter where they are located.

Critically, however, while the administration has been forced to retreat, there has been no official acknowledgment of high-level criminal wrongdoing. The treatment of prisoners authorized by the administration clearly violated the prohibitions on cruel, inhumane, and degrading treatment contained in Common Article 3 and the Torture Convention; and waterboarding unquestionably qualifies as torture. All these violations were war crimes. Yet no high-level official has been held accountable for the torture policy. The only officer convicted of any crime with respect to the Abu Ghraib scandal, for example, Lieutenant Colonel Steven Jordan, had his conviction reversed on appeal in January 2008. (And even that conviction was not for any role in the abuse itself, but for disobeying an order not to talk about the investigation.) No one has even been charged for any abuse inflicted at Guantánamo.

On December 11, the leaders of the Senate Armed Services Committee, Carl Levin and John McCain, released an important report on abusive interrogations that concluded that Donald Rumsfeld and other top Bush administration officials had solicited information on how to use aggressive (interrogation) techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.

Most of the report was classified, however. And apart from this, Congress has largely acted symbolically, avoiding any real measures to enforce accountability. The McCain Amendment, for example, provides no sanctions for its violation. The Military Commissions Act not only retrospectively gave immunity to interrogators, but prospectively watered down the War Crimes Act so that inhumane and degrading treatment of detainees is no longer a war crime.

While the CIA claims to have abandoned waterboarding, the administration has refused to say what tactics CIA interrogators are still permitted to use. Its secret prisons, into which suspects are disappeared for incommunicado interrogation, remain open. The administration has never repudiated the practice of rendering suspects to third countries for interrogation by torture, and has never held anyone accountable for that practice. And several still-secret and still-governing Justice Department memoranda from 2005 reportedly authorize the CIA to continue using coercive tactics even after the McCain Amendment was passed. In March 2008, President Bush vetoed a bill that would have required the CIA to limit itself to interrogation techniques approved in the Army Field Manual.

In short, the United States has never taken full responsibility for the crimes its high-level officials committed and authorized. That is unacceptable. In the long run, the best insurance against cruelty and torture becoming US policy again is a formal recognition that what we did after September 11 was wrong—as a normative, moral, and legal matter, not just as a tactical issue. Such an acknowledgment need not take the form of a criminal prosecution; but it must take some official form. We have been willing to admit wrongdoing in the past. In 1988, President Reagan signed the Civil Liberties Act, officially apologizing for the Japanese internment and paying reparations to the internees and their survivors. That legislation, a formal repudiation of our past acts, provides an important cultural bulwark against something similar happening again. There has been nothing of its kind with respect to torture.

We cannot move forward in reforming the law effectively unless we are willing to account for what we did wrong in the past. The next administration or the next Congress should at a minimum appoint an independent, bipartisan, blue-ribbon commission to investigate and assess responsibility for the United States' adoption of coercive interrogation policies. If it is to be effective, it must have subpoena power, sufficient funding, security clearances, access to all the relevant evidence, and, most importantly, a charge to assess responsibility, not just to look forward. We may know many of the facts already, but absent a reckoning for those responsible for torture and cruel, inhumane, and degrading treatment—our
own federal government—the healing cannot begin.

—December 17, 2008

Notes


[4] For an argument by a seasoned military interrogator that rapport-building is far more effective than torture and cruelty, see Matthew Alexander with John R. Bruning, *How to Break a Terrorist: The US Interrogators Who Used Brains, Not Brutality, to Take Down the Deadliest Man in Iraq* (Free Press, 2008). Alexander, a pseudonym, led an interrogation team in Iraq that located Abu Musab al-Zarqawi, the leader of al-Qaeda in Iraq. For a more detached historical account drawing the same conclusion, and finding that there is no evidence that torture "works," see Darius Rejali, *Torture and Democracy* (Princeton University Press, 2007).


[7] I am a member of the Board of the Center for Constitutional Rights, although I did not take part in the efforts to have criminal proceedings initiated against Rumsfeld.


[9] The International Center for Transitional Justice, which focuses on the question of how new governments can pursue accountability for the crimes of former regimes—a problem more common in the developing world, but one that the United States itself must now confront—has written a very useful brief on the benefits of such a commission, and on how it should be constituted: *Policy Brief: US Inquiry into Human Rights Abuses in the "War on Terror"* (November 2008).

Letters

March 26, 2009: David Cole, *Where Reagan Stopped*