

Chronology and Legality of American Interrogation Techniques Against Al-Qa'eda Detainees

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One of the key elements in the long running “War on Terror” (President Obama called it a “War with Al-Qa’eda” on 8 January 2010) is the need for accurate intelligence about the plans and operations of radical Islamic terrorists. Keeping in mind that the goal of any antiterrorism effort is to stop or eliminate the terrorists before they commit murderous attacks, there are four general tools that mesh together in this effort: (1) using informants and undercover agents to infiltrate the terror cell (known as HUMINT sources); (2) using surveillance, searches, and wiretaps to learn of locations, organizational structure, and plans for future attacks; (3) arresting and/or detaining terrorists before they commit a terrorist attack; and (4) interrogation of detainees. This short assessment addresses the fourth category and presents a brief chronology of the interrogation techniques used against some al-Qa’eda and Taliban detainees by the United States from 2001 until today.

Under the parameters of domestic criminal law, once an individual suspect is arrested they must be advised of their right to remain silent (Miranda rights). If the suspect invokes that right, all questioning must cease. If the suspect does not invoke the right to remain silent, he can be questioned by authorities but no physical force may be applied.

On the other hand, under the rule of law associated with armed conflict, the legal picture is quite different. Since all al-Qa’eda detainees are unlawful enemy combatants (now called unprivileged enemy belligerents under the recently passed 2009 Military Commissions Act), they are not entitled to Miranda rights, nor are they entitled to the special protections associated with prisoners of war (lawful enemy combatants). With the 2006 release of the 14 “high-value” detainees held by the CIA in “undisclosed” locations, all illegal enemy combatant detainees are currently held either at Bagram Air Force Base in Afghanistan (about 750) or the American run detention facility, Camp Delta, at Guantanamo Bay, Cuba (about 200).

Under the law of war, the purpose of detaining enemy combatants is to ensure that they do not return to join enemy forces and, in this unique

situation, to allow American officials the opportunity to gather any necessary intelligence about the terrorists' organizational infrastructure, financial network, communication system, weapon supply lines, and plans for future terror attacks. As is the practice in all wars, the purpose of detention is not to punish the enemy combatant, but to protect the host nation from future acts of violence by the enemy.

Again, the majority of these illegal enemy combatants were captured on the battlefields of Afghanistan. Although all of the detainees are said to be participants in the War on Terror, the Bush Administration initially did not recognize these detainees as eligible for prisoner of war status under the Third Geneva Convention, nor did the Bush Administration apply Common Article 3 of the Geneva Conventions. The Obama Administration also does not confer prisoner of war status on the detainees because both the Taliban fighters and the al-Qa'eda fighters fail to qualify as lawful enemy combatants under the applicable provisions of international law. Prisoner of war status is only conferred on persons who are "[m]embers of armed forces of a Party to the conflict" or "members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party ... provided that such ... fulfill[s]" four specific conditions:

- That of being commanded by a person responsible for his subordinates;
- That of having a fixed distinctive sign recognizable at a distance;
- That of carrying arms openly; and
- That of conducting their operations in accordance with the laws and customs of war.

With the passage of the Detainee Treatment Act in 2005, uniform standards for interrogation of individuals in custody of the military were set out. Most importantly, the Act expressly prohibited *cruel, inhuman, or degrading treatment* of detainees in the custody of any U.S. agency. Then, in 2006, the Supreme Court in *Hamdan* ruled that the detainees at Guantanamo Bay also must be treated in accordance with the provisions of Common Article 3 of the Geneva Conventions. Both the 2006 and 2009 Military Commissions Act also provide similar protections.

In short, since 2005-2006, the interrogation techniques associated with said detainees involve only the simplest of voluntary conversations. For example, the rules practiced today at Guantanamo Bay prohibits a non-

Muslim American guard from even touching the Koran in order to hand it to a detainee as we have self-interpreted this act to be “degrading” treatment!

The primary concern regarding “illegal” interrogation techniques took place in the time period between 2001 and 2005, when the United States later admitted to “enhanced interrogation” techniques approved by the Bush Department of Justice (the most sensational was the practice of “waterboarding” used on numerous occasions for three al-Qa’eda leaders) in a small number of instances and other “stress and duress” techniques in other cases. The key question is what, if any, laws did these techniques violate?

Prior to 2005, the primary guiding legal document was the 1984 United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention). The most common allegation in the 2001-2005 timeframe was that the United States engaged in torture.

Allegations of torture roll off the tongue with ease. Recognizing that not every alleged incident of mistreatment necessarily satisfies the legal definition of torture, it is imperative that one view such allegations with a clear understanding of the applicable legal standards set out in law and judicial precedent. In this manner, claims of illegal interrogation practices can be properly measured as falling above or below a particular legal threshold. Only then can one hope to set aside the worn out rhetoric by such groups as Amnesty International, who call the Guantanamo detention facility the “gulag of our time.”

Under the Torture Convention, all nations must abide by the provisions and prosecute anyone who ordered or carried out torture. Article 2 of the Torture Convention absolutely excludes the notion of exceptional circumstances to serve as an excuse to the prohibition of torture. “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture.”

According to the Torture Convention, for torture to exist the following criteria must be present: (1) the act must be intentional; (2) it must be performed by a State agent; (3) the act must cause severe pain or suffering to body or mind; and (4) it must be accomplished with the intent to gain

information or a confession.

In the Anglo-Saxon legal tradition, we generally look to authoritative judicial decisions to define key terms in treaty and legislation. Perhaps the leading international case in the realm of defining “severe pain or suffering” in the context of interrogation practices comes from the often cited European Court of Human Rights ruling, *Ireland v. United Kingdom*. By an overwhelming majority vote, the *Ireland* court found certain interrogation practices of English authorities to interrogate suspected terrorism in Northern Ireland to be “inhuman and degrading,” i.e., ill-treatment, but not severe enough to rise to the level of torture. According to the Court, the finding of ill-treatment rather than torture “derives principally from a difference in the intensity of the suffering inflicted.” In *Ireland*, the Court considered the use of five investigative measures known as “the five techniques” which were practiced by British authorities for periods of “four or five” days pending or during interrogation sessions.

- Wall-standing: Forcing the detainee to stand for some period of hours in a stress position described as “spread-eagled against the wall, with their fingers put high above their head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers.” Wall-standing was practiced for up to 30 hours with occasional periods for rest.
- Hooding: Placing a dark hood over the head of the detainee and keeping it on for prolonged periods of time.
- Subjection to noise: Holding the detainee in a room where there was a continuous loud and hissing noise.
- Deprivation of Sleep: Depriving detainee of sleep for prolonged periods of time.
- Deprivation of Food and Drink: Reducing the food and drink to suspects pending interrogations.

Considering the level of interrogation practices set out in the *Ireland* case, the conclusion about the legality of U.S. interrogation practices during the period 2001-2005 is clear. Even the worst of the American (CIA) techniques that were authorized - waterboarding - would not constitute torture. To those familiar with the approved method used during this time period, the technique used by the CIA was similar to what the military has

done hundreds and hundreds of times to its own military special operations personnel and pilots in military training courses on escape and survival.

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