

America Abroad Media
Interrogating Torture – June 2009
Roundtable

I'm Ray Suarez and you're been listening to *Interrogating Torture* from America Abroad.

This past April, President Obama allowed the release of four memos written by the Justice Department's Office of Legal Counsel (or OLC) issued between 2002 and 2005 which lay out, in more detail than the American public has ever before seen, the harsh interrogation techniques used during this period by the CIA on high-value detainees and which also spell out the Justice Department's legal reasoning for the approval of the use of these techniques.

The release of these memos has reignited the embers of the long smoldering debate in this country over the methods the US can and should use to obtain intelligence from terror suspects and other detainees.

Now to delve in to this debate, I'm joined by David Rivkin and David Luban. Mr. Rivkin is currently a partner at Baker Hostetler in Washington DC. He served in the Office of White House Counsel and Justice Department under Ronald Reagan and George H. W. Bush and was a delegate to the U.N. Subcommission on the Promotion and Protection of Human Rights. And Professor Luban is Professor of Law and Philosophy at Georgetown University and author of *Legal Ethics and Human Dignity*.

Ray Suarez: Well to begin with—these memos, well, what do they show? I think there sort of an existential disagreement on what it is that we're even talking about. When the Obama Administration uses the word "torture," representatives of the past administration, talking about the very same practices, insist that it's not. David Rivkin?

David Rivkin: I think what's unfortunate, Ray, is that the critics take not just a position that the particular techniques outlined in these memos tantamount to torture. More broadly, they take the position that the very effort to answer questions as to what kind of coercion amounts to torture is somehow illegitimate. What they're really doing is a bait and switch tactic, they're basically suggesting that any kind of coercion, anything above the level of enormously benign techniques is impermissible, but instead of acknowledging that, they're basically saying it's torture. Now I happen to think what these memos show is the extent to which officials of a country, that was attacked on September 11th and lost 3,000 people, in an environment where follow-up attacks were viewed as imminent, exerted enormous effort to answer those difficult questions, in good faith, because remember, the key in these memos was looking at the fact that we've done these same things, 9 techniques out of 10, to over 40,000 Americans going for SERE program. By the way, it's not about physical pain, most techniques don't cause physical pain, they cause psychological damage. But the question was, was it enough

to be severe and protracted psychological damage. The answer was no—you can agree or disagree with them. But the demonization, the vilification of the whole exercise I think is unworthy of a democracy.

Ray Suarez: David Luban?

David Luban: Well, I don't think that anybody disagrees that the lawyers had to look at the techniques and say whether they were legal or not. The disagreements have been on a couple of levels—first, did they do an honest job or did they come in predisposed to approve everything? And the text of these memos suggest that they came in predisposed to approve everything because there's substantial law on the other side of the issue that simply wasn't mentioned. Now, the question they're trying to answer is, given that these techniques impose pain and suffering, is it severe pain and severe suffering? Which is the legal definition of torture. And the strategy in the memos was pretty straightforward—we're going to set the bar on what counts as severe so high that nothing that the CIA did, even in combination, would cross that bar. Things like keeping somebody awake, standing up, for 180 hours. First, giving him an all-liquid diet for a few days, stripping him naked, occasionally hosing him down with cold water. And then after keeping him awake for days on end, waterboarding him. Now, whether that's painful or not, To say that that isn't severe suffering seems to me simply to boggle the mind. The thing that doesn't hang together with these memos is that they are so coldly, clinically determined to find that nothing the CIA does is improper.

Ray Suarez: Well I knew there would be a difference of opinion on whether and what constituted torture. But let's talk about the way the debate has turned slightly on its axis in the public and now we're talking about whether or not any of this works. Former Attorney General Michael Mukasey and former CIA chief Michael Hayden have both asserted that “fully half of the government's knowledge about the structure and activities of al Qaeda came from these interrogations.” Others have said the methods are “ineffective, slow, and unreliable.” This is the testimony of Ali Soufan, former FBI agent and interrogator. Professor Luban?

David Luban: One of the torture memos quotes from the still unreleased CIA inspector general's report and says that there really isn't any convincing evidence that the stuff that was gotten through these techniques has interdicted any attack on the United States. It seems to me that the real question is not did you get valuable information by torturing people but could you have gotten the same information without. Now Ali Soufan in his testimony said that without using these techniques he got the two biggest pieces of information from Abu Zubaydah—the identity of Khalid Sheik Muhammad, the architect of 9/11 and the identity of Jose Padilla and we know that Padilla was caught months before the legal approval for the techniques came through. Ali Soufan said that he got that simply by talking with Abu Zubaydah. He said that the CIA then took Zubaydah away, subjected him to the techniques, and he clammed up. Soufan got him back, he talked again, the CIA took him away, and he clammed up again.

Ray Suarez: David Rivkin?

David Rivkin: Well, two things. First of all I think the administration should release the IG report and various other memoranda and I'm usually not very keen on releasing sensitive information. But to have a full debate, let's be a mature society, let's be a real democracy. Now I'm not an interrogator but just a matter of common sense Ray I would say a couple of things. Look, of course they work. I mean if they didn't work there would be nothing to debate it would be just silly cruelty or some kind of, you know, being ornery about using them. Of course they work. And let me tell you—they certainly tried to use the more traditional, non-enhanced techniques. And there were stories in the New York Times and Washington Post that they did not work. Maybe if we gave them more—but ask yourself also this, isn't it enormously hubristic? We're not talking about pickpockets here, we're talking about committed people driven by in my view very evil but very powerful ideology, who are prepared to die, who hate us terribly—do you really think that sitting them down and talking about remorse or maybe you will see your family again is gonna work?

Ray Suarez: Well, one interesting side argument over--as part of the argument over whether torture works or not, is whether it even matters whether it works. In our segment exploring the interrogation history in Northern Ireland, we heard from a number of people who said that coercive interrogation tactics did get results, but on a macro level, it caused animosity, resentment, and even fueled the conflict. So how do you do a cost-benefit equation?

David Rivkin: Very simply, I think you have to look at it in a nuanced fashion and not a simplistic fashion. Of course coercive interrogations antagonize people, and in some respects, aid the recruitment. But by the same token, so many other things do likewise. Cartoons about Mohammed in Danish newspapers! I can think of about fifty different—our support for Israel! Our support for Saudi Arabia! The fact that we live and breathe and don't want to live in a caliphate—there are so many other reasons why, unfortunately, this threat continues to grow. So we have to acknowledge the cost of these techniques, but we should not be obsessed with the notion that this is the only thing that drives them. Because let's remember: we were attacked on September 11 long before enhanced interrogation techniques, and before Abu Ghraib, and before Guantanamo.

Ray Suarez: Professor Luban, is there information that's gettable but just not worth having, given these other externalities?

David Luban: I think that for people who oppose torture, the real issue is, has there been a growth in civilization where we can draw a line in the sand and say that some things are just wrong, and that we don't do them anymore, even if they might work for something? I think that the first such line was slavery. And someone would be laughed at right now—of course there's still millions of slaves in the world, but if someone said, "Gee, in a national emergency, maybe we could enslave people, maybe we'll need a few legal memos saying that if they're given two cents a day then

it's not slavery," we would think that that was really off the table, and we would say that it really misses the point to ask, "Well, does slavery work?" And I think that for those of us who agree with the idea in the Convention Against Torture, that there aren't any exceptions that justify torture, torture's the same kind of thing.

Ray Suarez: I want to get both your impressions of what, if anything, the United States can learn from the lessons learned, the histories of other countries that have grappled with this in the past. What can we learn, if anything, from the examples in the past--and the present, in the case of Israel--of Great Britain and Israel and their struggles to cope with some of the same threats the United States has faced?

David Rivkin: I think we can learn a couple of things. With regard to Israel, the coercion is banned now, after years when it was allowed, following an Israeli Supreme Court decision, but the court recognizes the defense of necessity. So we have Israeli security services basically using rough techniques at their own risk. They're breaking the law, and if prosecuted, the interrogators involved would basically say, "I did it. It's like stealing a boat to save a drowning man." I think it's, with all due respect to Israel, it's dishonorable for the government to put people on the front line in a position that have to risk their life and liberty to save their citizens. The government owes the people who work for it greater certitude.

David Luban: I think the biggest lesson of the past is that torture metastasizes. It starts small, with rules hedging it in, but it always overflows the boundaries. In Israel, the Landau Commission in 1989 said that what they called "mild physical pressure" could be used in ticking time bomb cases. The reason that it got revisited ten years later was that these tactics were being used—and they weren't mild, by the way—against nearly everybody who was arrested. 1999, the Israeli Supreme Court says you can't do any of these things anymore, there might be a necessity defense. The General Security Service says, "Well in that case, can you give us a prior authorization for the necessity defense?" And the court says, "No no no, it's got to be fact-based, it's got to be after the fact, there has to be some risk." But it's still the case, according to the UN Human Rights rapporteur, that Israeli interrogators are routinely using rough stuff on Palestinians and writing to their boss first and saying, "I think I've got a ticking time bomb case here, so can I have permission?" It's metastasizing again. Now, it's overflowed in the United States' practices as well. There've been people that US forces, not authorized, but knowing that tough stuff was being winked at, who've tortured people to death. There was the Iraqi General Mowhoush who was smothered to death in a sleeping bag by an interrogator. You do it under what looks like careful limits, and after a while, the word gets out that it's okay, if you've got somebody that you suspect, to start playing Jack Bauer.

Ray Suarez: I want to thank you both for joining us. Professor Luban, good to talk to you.

David Luban: Thank you.

Ray Suarez: David Rivkin, always good to talk to you.

David Rivkin: Thank you.

Ray Suarez: David Rivkin is a partner at Baker Hostetler in Washington, DC. And Professor David Luban is a professor of law and philosophy at Georgetown University and author of *Legal Ethics and Human Dignity*.