U.S. Military Physicians Who Torture: How to Judge, and By Whom?

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Medical ethics is front page news once again. In a widely publicized report in The New York Times, the U.S. Central Intelligence Agency (CIA) announced that it would be closing secret overseas prisons for terror suspects at which approximately thirty prisoners were subject to “enhanced” interrogation techniques, allegedly under medical supervision. A longer companion piece which appeared in this month’s New York Review of Books extensively quoted from a confidential International Committee of the Red Cross (ICRC) Report apparently leaked to the press on the treatment of a small group of “high value” detainees in CIA custody who were subject to what the Red Cross felt was torture.

One of the most controversial and disturbing aspects of the ICRC Report concerned the role of health care professionals in the enhanced interrogation process: was the conduct of the health care professionals that of simply monitoring to protect the life of the person being interrogated, or were the medical personnel more actively involved, i.e. were they facilitators, or even more active participants in controversial techniques such as waterboarding? More importantly, who and what are these medical professionals? Some medical ethicists and legal academics immediately seized on the ICRC Report to proclaim that the Report’s findings were “a disturbing confirmation of our worst fears about medical professionals’ involvement in directing and modulating cruel treatment and torture.”

Yet, it isn’t clear what is meant by “medical professionals.” Are these former military personnel hired by the CIA or enlisted personnel? According to The New York Times, the Red Cross Report does not indicate whether the medical workers at the CIA sites who participated in torture or enhanced interrogations were physicians, other health professionals, or both. From a medical ethics point of view, it does make a difference. What is clear from reading the Report is that at some level the medical personnel were primarily “serving the interrogation process and not the patient,” and that all of the instances in which medical workers had allegedly condoned or participated in torture were reported only by the detainees.

4 Id.
6 Id.
7 ICRC Report, supra note 3.
8 Id.
Previous Reporting

The question of possible physician (military or civilian) participation in U.S. military enhanced interrogation techniques is not a new one. Both Lancet\textsuperscript{9} and The New England Journal of Medicine\textsuperscript{10} have carried reports as far back as 2004 on the possible participation of military physicians in enhanced interrogation techniques or torture of suspected terrorists at U.S. military or CIA facilities. Reporting by some of these individuals has continued to present day\textsuperscript{11} even though the Obama administration has already indicated that it is planning to shutter the interrogation facility at Guantanamo Bay\textsuperscript{12} and that it rejects the Bush administration’s policy of enhanced interrogation. The shift in positions by the new administration in Washington, D.C., notwithstanding, the question of what to do about possible health professional participation torture will have to be addressed.

The Department of Justice Guidelines Not a Complete Shield for Military Physicians

Newly-appointed CIA Director Leon Panetta may have announced that CIA officers who worked in the program “should not be investigated, let alone punished because the Justice Department under President George W. Bush had declared their actions legal,”\textsuperscript{13} but it is not clear who is being protected and what exactly such a Department of Justice shield would protect against: civil prosecution, criminal prosecution, or both?

Even if physician conduct conforming with procedural interrogation technique guidelines drawn up by the Department of Justice is protected from civil and criminal liability, such protection may not be worth anything if either medical professional societies or, more importantly, individual state medical boards elect to pursue disciplinary action against individual physicians. The New York Times has already seen this possible gap in the proffered government protection of physician conduct, calling for a full-scale investigation into abusive practices to determine the role of physicians in torture, with resulting loss of medical licenses if warranted.\textsuperscript{14}

Another possible avenue of investigation against which Director Panetta’s policy will offer little or no protection against is that of prosecution in a non-U.S. court. Under the doctrine known as Universal Justice, Spanish law gives its courts jurisdiction beyond its national borders in cases of torture or war crimes, as recently reported in The Associated

\textsuperscript{9} Steven H. Miles, \textit{Abu Ghraib: its legacy for military medicine}, 364 LANCET 725 (2004).
\textsuperscript{11} Steven H. Miles, \textit{Medical ethics and torture: revising the Declaration of Tokyo}, 373 LANCET 344 (2009).
\textsuperscript{13} Shane NYT Article, \textit{supra} note 1.
\textsuperscript{14} Editorial, \textit{Medically Assisted Torture}, THE NEW YORK TIMES, April 9, 2009, at A22.
Press. Military physicians alleged to have participated in torture would, under this doctrine, be vulnerable to international arrest warrants and extradition to a foreign country for trial; at least one of Spain’s top investigative magistrates has already opened an investigation into alleged torture of suspects at Guantanamo Bay. There is also the possibility that such personnel might be subject to proceedings in the World Court in Prague or The Hague.

Medical Ethics vs. Military Medical Ethics

Physicians’ claims that they were just following orders did not work at Nuremberg, and should not work now. There is, at least on the surface, no difference in the code of medical ethics which physicians must follow, whether they are military or civilians. This position has been emphasized by the American Medical Association (AMA) as well. Importantly, the relevant AMA Opinion Paper directly states both that (1) “[p]hysicians must neither conduct nor directly participate in an interrogation, because a role as a physician-interrogator undermines the physician’s role as healer and thereby erodes trust in the individual…and the medical profession”; and (2) “[p]hysicians must not monitor interrogations with the intention of intervening in the process, because this constitutes direct participation in interrogation.”

It would thus appear that the only legitimate role for physicians in military interrogations that would meet AMA criteria is the following: “[p]hysicians may participate in developing effective interrogation strategies for general training purposes. These strategies must not threaten or cause physical injury or mental suffering and must be humane and respect the rights of individuals.” This position statement appears to be at odds with the argument made by some previous administration officials that certain types of physician indirect participation or monitoring during the interrogation process is not a violation of established principles of medical ethics.

Unlike the scenario in the film The General’s Daughter where a senior officer tells the investigator that there is “the right way, the wrong way, and the Army way,”

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16 Id.
21 Id.
22 Id.
23 Id.
24 THE GENERAL’S DAUGHTER (Paramount Pictures 1999).
physicians do not operate under a separate code of medical ethics different from the one their civilian counterparts must adhere to. This statement is true whether the physicians involved are members of the Armed Forces, or are working outside the military for intelligence agencies such as NSA or the CIA; the ethical standard for military physicians is the same as that for civilian physicians. Faced with the prospect of participating in torture, physicians must refuse. This fiduciary duty of physicians in a treatment setting is independent of all other considerations. \(^{25}\)

In a sense, the situation is no different than the controversy about physician participate in state-ordered execution of criminals by lethal injection. \(^{26}\) Unlike the civil situation where a state may request physician participation in an execution by lethal injection, however, the state cannot “order” a physician to participate \(^{27}\) and medical professional societies and the AMA have been unanimous in their condemnation of physician participation in such procedures whether voluntary or not. \(^{28}\) In the military, it is possible that personnel who are physicians might be ordered to participate in enhanced interrogation sessions by monitoring the health of the person being interrogated to ensure that their life is not endangered by the techniques being used. Although there is no evidence in any of the published literature or news reporting that this is in fact the case, it is possible that military physicians could be placed in such a situation and be faced with the choice of either jeopardizing their license to practice medicine or court-martial for disobeying a direct order. At least under the current administration that scenario seems highly unlikely.

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http://www.law.uh.edu/healthlaw/perspectives/homepage.asp

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\(^{27}\) *Id.*

\(^{28}\) *Id.*