



## Talking about Torture Accountability

*Why should municipal bodies consider executive accountability?*

### Summary

- Executive accountability is not an issue of right versus left, but rather one of right versus wrong in which all Americans—especially our sons and daughters who have paid the ultimate price for torture authorized by their civilian commanders—share an interest.
- Torture, human experimentation, and impunity have endangered national security and cost the lives of American service members.
- Our nation is failing its international commitments by refusing to prosecute senior officials responsible for torture, human experimentation, and other human rights abuses.
- Torture with impunity undermines the rule of law and threatens the legitimacy of the criminal justice system.
- Accountability is an imperative from a legal, moral, distributive, or consequentialist perspective.
- States and towns have a crucial role to play in defending international human rights.

### **Torture, human experimentation, and impunity have endangered national security and cost the lives of American service members.**

Torture undermined US national security interests by extracting unreliable intelligence, displacing experienced interrogators whose traditional methods are more effective, driving recruits into the arms of our enemies, discouraging our allies from supporting our international efforts, and undermining the narrative promoted by our non-state supporters abroad.

Our government continues to hide evidence of degrading treatment (including thousands of photos depicting abuses as severe as rape), leaving unanswered persisting allegations of torture by US military personnel and intelligence officials. **Sweeping the evidence under the rug undermines our nation's claim to defend human rights and democracy. That erosion of our legitimacy, in turn, drives recruits into the arms of our enemies, and places Americans taken captive abroad at greater risk of inhumane treatment.**

Victims of torture often make false confessions, as did many detainees abused by US officials at Guantánamo Bay, Abu Ghraib, Bagram Air Force Base, various CIA “black sites,” and elsewhere. In contrast, **non-coercive techniques have been consistently successful. For instance, the head of the US military interrogation team whose interrogations revealed the leader of Al-Qaeda in Iraq has publicly denounced coercive techniques and supports prosecution** of federal officials complicit in them.

Experienced military intelligence officers and FBI agents have repeatedly objected to torture. In many cases, their more effective traditional interrogation methods were replaced by torture at the request of

untrained civilian contractors and CIA agents. **Professional interrogators—including many who sought to resist illegal orders in the first instance—have been demoralized by the free pass given to their civilian commanders.**

Failing to hold accountable those who authorized and committed torture sends the wrong message to the international community. To restore our international standing and ensure the strength of our alliances, we must disclose the evidence, prosecute wherever the evidence leads, and establish that we are a nation of laws.

Torture undermines the legitimacy of US military intervention in societies where our presence is contested. Over and over again, experienced interrogators who have served in Iraq and Afghanistan have confirmed that **captured militants have cited torture by US authorities as among their primary motivators. In the battle for hearts and minds, torture is profoundly counterproductive.**

### **Our nation is failing its international commitments by refusing to prosecute senior officials responsible for human rights abuses.**

International agreements we fought to establish in World War II require—as a matter of law—that *all* allegations of degrading treatment be investigated and referred to prosecutors. Those agreements permit no exceptions, under any circumstances.

**The Justice Department’s ongoing investigation of torture remains limited and gives a free pass to senior officials accused of international crimes.** Those who authorized torture remain immune from investigation by federal authorities, who have limited their investigation to junior CIA agents who exceeded “authorized” torture techniques.

The Justice Department’s internal ethics investigation was co-opted by its targets, who were allowed to contest the government’s findings before their release and ultimately reversed an initial conclusion that they had committed ethical violations.

### **Torture with impunity undermines the rule of law and threatens the legitimacy of the criminal justice system.**

The lack of accountability for top officials scapegoats lower level agents and makes a mockery of the rule of law. Law grounds its legitimacy in the consistent application of neutral rules across differing contexts—but the rules governing who faces what kinds of punishment have been politicized.

Letting powerful people violate laws with impunity is the very antithesis of law. Instead, **the free pass for senior officials reflects an institutional bias favoring politically powerful people, at the expense of millions of working Americans who confront far more severe penalties for far less serious offenses every day.**

### **Accountability is an imperative from a legal, moral, distributive, or consequentialist perspective.**

**Legal:** Torture with impunity today invites more human rights abuses around the world in the future by eroding the legal prohibition on torture.

The free pass for top officials complicit in torture undermines the international prohibition on torture. The international legal regime our country established after WWII created a global prohibition against torture, allowing no exceptions. But the US, the country that prosecuted the Nuremberg Trials, has now inverted its central premise: 60 years ago, "just following orders" was rejected as a defense or justification for alleged human rights violations; today, we have granted wholesale immunity to even the individuals who *wrote* the orders from mere investigation.

Prosecution of all individuals complicit in torture is the only way to deter torture from recurring in the future. By setting a precedent that officials responsible for human rights violations can be immunized from even mere investigation, our government is effectively inviting future torture, not just in the US, but around the globe. **This precedent effectively invites torture by rulers around the world eager to claim the Bush-Obama immunity doctrine as a defense for their own human rights abuses.**

***Moral:* Accountability for human rights abuses is not an issue of right versus left, but rather one of right versus wrong.**

Support for human rights and robust accountability transcends party lines and ideology. Accountability concerns all Americans, whether concerned about offenses to human dignity, the national security costs of torture, restoring checks and balances, or executive secrecy.

**The civilian commanders who authorized torture policies bear greater responsibility** for detainee abuse than the junior agents tasked with following ambiguous, counterproductive, illegal, and unconstitutional orders.

***Distributive:* Senior officials are getting a free pass for international crimes, while everyday Americans routinely face prosecution for far less severe violations.**

Despite having only 4 percent of the world's population, the US has 25 percent of its prisoners because our incarceration rate is the highest of any country in the world. **Millions of Americans languish in prison, many for non-violent status offenses such as drug possession. Yet the individuals accused of our species' gravest crimes have never faced investigation**—and some even draw substantial government salaries and occupy powerful positions.

***Consequentialist:*** By undermining the rule of law, torture with impunity taints other national security debates, such as those concerning surveillance and racial profiling.

The public debate about constitutional liberties impacted by the "war on terror" has been tainted by the participation of potential criminals. **If the former officials responsible for torture were defending themselves from criminal prosecution, their radical vision of a police state would be less credible in the ongoing debates surrounding arbitrary detention and dragnet surveillance policies.**

## States and towns have a crucial role to play in defending international human rights.

All three branches of our federal government have approved the decision to sweep evidence of torture—comprising thousands of acts, some as severe as outright rape of detainees—under the rug. This collusion spans the Bush administration, which committed illegal acts under illegal policies, as well as the Obama administration, which has curtailed those policies but continues to violate its international obligation to prosecute those acts. Congress even amended the Freedom of Information Act specifically to give the Defense Department the authority to hide its criminal trail.

In addition to our constitutional separation of powers among three branches of government, our government is also defined by a separation between federal and state institutions. **Our Constitution carefully guards the sovereignty of states, which, along with municipalities, have a crucial role to play in enforcing international human rights.**

The international legal system our nation helped create after WWII reflects a commitment by the international community to protect individual rights, even when that protection requires international intervention *within* states (as it has in East Timor, the former Yugoslavia, and other areas in crisis around the globe). **International human rights rely on universal jurisdiction: the power of *any* court to extend jurisdiction over alleged human rights abuses, regardless of where they occurred.**

Other countries (such as Spain and Italy) have already pursued investigations of US officials complicit in human rights abuses, but our federal government has refused to cooperate with those investigations, while also failing to undertake its own investigation up the chain of command.

In this context, **state courts are not only authorized—they are obligated—to assert universal jurisdiction under well-established principles of international law.** By authorizing district attorneys to pursue accountability in state courts, individual towns can do what the federal government has not: defend human rights by applying the law equally, without exceptions for the politically powerful. BORDC has compiled further legal research supporting the authority of towns and state courts to assert universal jurisdiction under principles of international law. Even to the extent a state's assertion of universal jurisdiction is found unsustainable, such a finding would require the federal government to first assert its exclusive authority to enforce international human rights norms—which would, itself, be a major step forward.

Finally, **municipalities unwilling to challenge the federal government over human rights abuses may still pass a declaration supporting an independent commission to investigate allegations of torture.**