



## The dark pursuit of the truth

*The Economist (print edition), 1<sup>st</sup> of August 2009, p. 20-22.*

Copyright © 2009 The Economist Newspaper and The Economist Group. All rights reserved.

### Torture still casts a long shadow in the battle between spies and terrorists

- 1 JACK BAUER famously does whatever it takes to save America from disaster, be that disaster nuclear, biological or computer attack. Week after week, the hero of "24" acts brutally, and endures brutality, for the greater good. It is a sign of the times that this year's season opened with Bauer being hauled before a congressional committee to face the charge of committing torture. He was unrepentant.
- 2 This television character, who first appeared in 2001, has been oddly at the heart of the arguments over the conduct of America's "war on terrorism". Critics in the American army have complained that he encourages young soldiers to abuse prisoners. Supporters, such as Antonin Scalia, a Supreme Court justice, praised him for the episode in which he saved Los Angeles from nuclear attack, even though it meant staging the mock execution of a family to get a Middle Eastern villain to talk. "Is any jury going to convict Jack Bauer? I don't think so," said the judge.
- 3 In contrast with Europeans, who strongly reject the use of torture, the American public is pretty evenly divided about its use to extract information from terrorists (see charts). But President Barack Obama, for one, is clear. No sooner had he been sworn into office than he banned torture, rescinded legal opinions allowing simulated drowning and other harsh methods, ordered all American agencies to comply with the army's field manual on interrogation, announced he would close the prison at Guantánamo Bay within a year and ordered a series of policy reviews on detention and interrogation. "From Europe to the Pacific", Mr Obama said in May, "we've been the nation that has shut down torture chambers and replaced tyranny with the rule of law." Dick Cheney, George Bush's vice-president, sneered at such talk as "recklessness cloaked in righteousness".





- 4 Many people thought that Mr Obama's election would finally settle the controversies about counter-terrorism's "dark side" (as Mr Cheney once put it); a darkness that concealed secret prisons, abusive interrogation and "rendition" to countries that practise torture. The distorted DIY legal framework that treated suspected terrorists as neither criminals nor prisoners-of-war, leaving them in an unprotected grey zone between civil and military law, would, many liberals hoped, be put right.
- 5 In April, against the wishes of current and former CIA directors, Mr Obama released four secret memos from the Department of Justice, written in 2002 and updated in 2005, that made legal the CIA's use of "enhanced" interrogation techniques such as the use of the "waterboard" (simulated drowning), sleep deprivation, "walling" (hurling a prisoner against a partition wall), "stress positions" and strange practices like placing a "high-value prisoner" in a cramped box with an insect to exploit his phobia about bugs. It revealed that one prisoner, Khaled Sheikh Mohammed, the operational head of the September 11th 2001 attacks on America, was waterboarded 183 times.
- 6 Mr Obama said that he did not want to prosecute those who operated within these rules. He knows that if he takes action against interrogators he could be accused of seeking scapegoats; if he goes after the CIA chiefs he would be charged with undermining America's security; and if he investigates leaders of the Bush administration he would look as if he were conducting a witch-hunt against his political rivals. "Nothing will be gained by spending our time and energy laying blame for the past," he argued.
- 7 Yet the past casts a long shadow. Some of Mr Obama's supporters want a "truth commission" to establish what happened and, perhaps, recommend prosecutions. Congress is incensed that the CIA did not tell it of a secret programme (which may have had to do with the assassination of terrorists), apparently under orders from Mr Cheney, bringing the former vice-president a step closer to formal investigation. The attorney-general, Eric Holder, is thought to be about to appoint a special prosecutor to investigate those interrogators who exceeded the already lax limits set by the so-called "torture memos".
- 8 Even before this, CIA officials had been hiring lawyers in anticipation of trouble. Some of Mr Obama's favourite spooks have been unable to take up senior appointments because of their association, sometimes only peripheral, with the interrogation programme. John Brennan, a veteran CIA figure, was withdrawn from consideration as the agency's director and was given a job in the White House instead. Philip Mudd, a respected intelligence man currently on secondment to the FBI, pulled out of his nomination to the senior intelligence post in the Department of Homeland Security. The Obama administration may have chosen these men but it put little effort into backing its choices.

### **The big chill**

- 9 How will all this affect future intelligence operations? There is a distinct chill. Some reckon that the CIA and other agencies face their worst crisis since the post-Watergate inquiries in the 1970s uncovered evidence of spying on Americans and plots to assassinate foreign leaders. "There is undoubtedly some nervousness," says one senior source. "It does not stop you taking action, but it makes you think twice and talk to your lawyer."
- 10 Britain's close relations with America are causing it similar problems. Its intelligence agencies are being dragged into the legal limelight, not for torturing suspects but for allegedly colluding



in their maltreatment by others—whether they are Americans, Pakistanis or Moroccans. One member of MI5, Britain’s domestic intelligence agency, is under police investigation.

11 Increasingly lawyers are being brought in to scrutinise British intelligence before it can be passed on. Will handing over the name of a suspect to America lead to him being killed by an unmanned aircraft in Pakistan? Will sharing a telephone number with, say, Egypt’s spies, lead to the arrest and torture of somebody who should instead be merely watched? Will submitting questions to be asked of a man held in a foreign prison mean that British agents will be held responsible for his treatment?

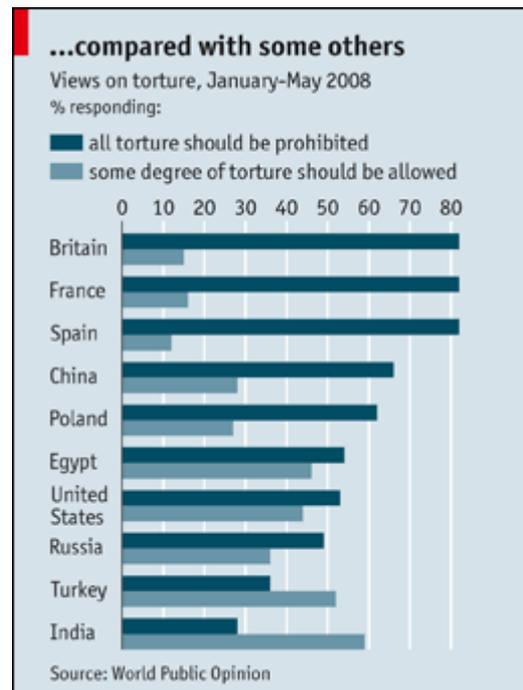
13 Agents have become warier of questioning detainees abroad for fear that they will be blamed for any abuse they may have suffered. The number of requests by officials in MI6 (Britain’s foreign intelligence service) for the legal cover known as “Article 7”, in which the foreign secretary approves actions that are illegal in Britain, has shot up.

14 Many of the woes of British agencies are embodied in the case of Binyam Mohamed, an Ethiopian asylum-seeker in Britain, who gave up his drugs habit after rediscovering Islam. He went to Taliban-ruled Afghanistan to see an Islamic state at work. There he underwent some form of military training—to help the resistance in Chechnya, he says, not to fight the Americans. He was arrested trying to leave Pakistan in 2002 on a forged passport. He was beaten in prison, where he was seen by members of the FBI and MI5. He was then taken by the Americans to Morocco, where he says he was tortured by a questioner called Marwan, who took a sharp blade to his chest and penis while asking questions that had plainly been fed to him by MI5.

15 The British authorities say that once Mr Mohamed had left Pakistan, they did not know his whereabouts or conditions of detention; all questions were submitted through the Americans. Much of America’s programme of secret detention and interrogation was formally hidden from allies. The top-secret “torture memos” were classified “NOFORN” (no foreign nationals). But stories of prisoners being abused by the Americans were already circulating in 2002. Indeed some British officials had expressed concern at what they saw.

16 It was under torture, Mr Mohamed says, that he admitted to meeting Osama bin Laden and to taking part in plots including the detonation of a dirty bomb. This is what he would be accused of when he got to Guantánamo Bay in 2004, via a secret prison in Afghanistan. But, like many others, Mr Mohamed was released in February this year without charge.

17 By then Mr Mohamed’s lawyers, among them Clive Stafford Smith, founder of a legal charity called Reprieve, had been in full swing on both sides of the Atlantic. They sued the British government to release documents that might prove Mr Mohamed’s innocence, obtaining a High Court judgment that was critical of MI5 and led to the police investigation of one of its officials, known only as “Witness B”. In a parallel case in America, Mr Mohamed and other





Guantánamo inmates are suing Jeppensen DataPlan, a subsidiary of Boeing, which allegedly provided aircraft for the CIA's rendition programme.

- 18 Mr Mohamed's release has not stopped the litigation in either America or Britain. Both governments argue that the lawsuits should be thrown out because state secrets cannot be divulged. Indeed, the Obama administration has warned Britain that intelligence-sharing would be jeopardised if secret information provided by the CIA were to be revealed in British courts. Similarly, officials in Britain are alarmed by what may be disclosed in America.

### **Waterboarding the agencies**

- 19 These days it is the intelligence agencies that find themselves under interrogation. Each snippet they provide produces requests for more information. And the courts, suspicious of what the agencies may be hiding, are demanding ever more disclosure. One source of information has been the succession of freedom-of-information requests for official documents, including the "torture memos", by the American Civil Liberties Union (ACLU).
- 20 Legal campaigners are waging an information-gathering effort that earns the grudging respect of intelligence operatives. "They are chasing the paper trail and winning," says one. "They are chipping away at state-secret privilege [the doctrine that courts can dismiss lawsuits if classified information will be released]. They could disclose an awful lot of information—names of interrogators and medical personnel. If secrets start seeping out, countries that have been sharing information may be disinclined to do so."
- 21 The controversies show the extent to which torture and other forms of harsh interrogation—even though they may have been abandoned—cloud the legitimate work of counter-terrorism. American sources say that in the latter years of the Bush administration, European agencies, worried that they might be caught up in America's abusive practices, became reticent about sharing intelligence. Today, America's partners may hold back out of fear that America will not be able to protect their information. Officials lament that the machinery of Western intelligence-sharing is becoming "gritted up"—though information about "life-threatening" plots is still swapped briskly.
- 22 Intelligence-sharing is vital. America, with its vast resources, has become the main repository of information on global terrorism. Though Britain has well-regarded intelligence services, it obtains more than half its reports on terrorism from other agencies, principally American. And about half of America's intelligence reports on al-Qaeda until 2006, says a former senior official, came from detainees.
- 23 The Justice Department's memos were prompted by the arrest in 2002 of Abu Zubaydah, a man with close links to al-Qaeda. The CIA wanted clearance to exert greater pressure on the first of its "high-value detainees"—even though FBI investigators would later claim that Mr Zubaydah was already talking freely.

### **Degrees of pain**

- 24 The memos gave the CIA licence to use "enhanced" techniques derived from American training advice to pilots and other personnel on how to withstand torture if they should fall into enemy hands. They are shocking for their bureaucratic punctiliousness. They parse the degrees of pain that would constitute forbidden torture ("an intensity akin to the pain accompanying serious physical injury"). They set out in incongruous detail the limits of abuse.



- 25 A prisoner could be deprived of sleep, but for no more than 180 hours before being allowed to rest for eight. He could be stripped naked but only if the room was warmer than 68°F (20°C). He could be doused in water but it had to be potable. He could be waterboarded with cold (saline) water poured onto his face but each application should not last more than 40 seconds, there should be no more than six applications per session, no session could last more than two hours and there could be only two sessions in 24 hours.
- 26 The ACLU's next target is a comprehensive and still largely secret internal CIA report written in 2004 by John Helgerson, then the agency's inspector-general. This is believed to be particularly damning, providing evidence of abuse that went well beyond the permitted guidelines. Compared with the antiseptic legal memos, writes Jane Mayer, the author of a book called "The Dark Side", the Helgerson report is a "Technicolor horror show", including accounts of people who died in custody. A version of the report, so heavily redacted with black deletion marks as to be barely comprehensible, was released in 2008. A more complete version is expected in the coming weeks, although the Obama administration has asked for delays.
- 27 Crucially, the report is critical of the value of the information obtained through harsh interrogation. It apparently concludes that there is no evidence that such intelligence prevented any imminent attacks. But this argument was strongly contested by the Bush administration.
- 28 Michael Hayden, the CIA's director from 2006 until earlier this year, wrote in April that enhanced interrogation had led the agency from one big fish to another. Abu Zubaydah, he says, was forced to give information that led to the capture of Ramzi bin al-Shibh (one of the planners of the September 11th attacks); he, in turn, helped lead to the capture of Khaled Sheikh Mohammed (which, the memos claimed, foiled a "second wave" plot to crash an aircraft into Los Angeles). Mr Hayden said that of the thousands of people captured as "unlawful combatants", fewer than 100 were held under the CIA's interrogation programme and fewer than one-third of those were subjected to the "enhanced" techniques set out in the memos. Just three people were waterboarded. This, however, ignores all manner of abuses committed in military prisons.
- 29 That there was no follow-on attack on America after September 11th was thanks in large measure, argues Mr Cheney, to the Bush administration's policies, including the enhanced techniques. Though he denounced the release of the memos that allowed these methods, he now wants further documents to be published that would, he says, demonstrate their success.
- 30 People familiar with the inner workings of intelligence suggest a more ambiguous story. Intelligence, they argue, is about piecing together fragments of information and building up spider diagrams of connections between suspects. "Intelligence is grains of sand; you don't usually get the whole beach," says one veteran.
- 31 It is true that in 2001, a time when the CIA and other agencies were woefully ignorant of al-Qaeda's methods, the prisoners captured after the overthrow of the Taliban were the first rich source of information to help "map the enemy", as one intelligence source puts it. But, says a former counter-terrorism official, the most valuable information from Mr Zubaydah's capture came not from his interrogation but from his address book. With Mr Mohammed, says another analyst, the most important factor in stopping further attacks on America was not what the terrorist said under duress, but that he had been captured in the first place.
- 32 Intelligence officials maintain that detainees under interrogation provided as many, perhaps more, specks of information as other sources of intelligence on terrorism, including signals and agents. The question that nobody can answer is how much of this could have been obtained without torture.



### **Bleak choices**

- 33 The danger for Mr Obama, as he seeks to overhaul the intelligence system, is that a fresh attack on the American mainland would immediately expose him to the accusation of being soft on terrorism. In May Congress revolted against any attempt to move detainees from Guantánamo to American soil before a plan for the disposal of its 229 prisoners had been drawn up. Yet three task-forces examining the matter, including future policy on detainees, have delayed issuing their reports because of the complexity of the problem.
- 34 Mr Obama has decided to keep the reviled military commissions, albeit with reforms. And he may yet seek a form of indefinite detention for some prisoners, with judicial and congressional oversight. Lurking in the background are the lesser-known problems of America's prison at Bagram, its main base in Afghanistan, where detainees are being held with much less scrutiny than those at Guantánamo.
- 35 Holding terrorism suspects has become a huge headache for America. One fear is that if, in future, it tracks down important al-Qaeda figures, it may prefer one of two bleak options: either turn them over to countries with far fewer qualms—or just drop a bomb on them. Jack Bauer would be delighted.