

# EXHIBIT 61

# Stopping Torture: Why Professional Governance Failed, and How It Can Do Better

by Gregg Bloche

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In January 2020, former CIA psychologist James Mitchell – reputed architect of the agency’s post-9/11 torture program – shocked Guantanamo war court observers with his insouciance. He told the court he would “get up today and do it again,” characterized professional peers troubled by psychologists’ participation in interrogation as “pussies,” and said anyone concerned that his outrage over 9/11 might have clouded his professional judgment could “kiss my ass.” Amid these declarations, Mitchell also shed new light on how he and the CIA squared his actions with the ethics of his profession.

## Torture and Professional Governance

When, after the 9/11 attacks, the Pentagon embraced torture designed and overseen by health professionals, it aped an argument pressed by some in forensic psychiatry a decade earlier to rationalize their work’s moral awkwardness. Forensic psychiatrists’ (and psychologists’) testimony can have harsh consequences for criminal defendants and others whom they evaluate – a reality at odds with the Hippocratic ideal of devotion to patients’ wellbeing. A 1986 U.S Supreme Court ruling put this problem into high relief by barring execution of death-row inmates deemed mentally incompetent. This put psychiatrists and psychologists in the business of performing clinical evaluations that determined life or death.

An imaginative psychiatrist-ethicist “solved” this problem in 1990 by decreeing that forensic clinicians do not act as doctors when performing evaluations for the courts and thus needn’t worry about harm. Forensic clinicians quickly embraced this liberation from Hippocratic unseemliness. Then, in 9/11’s wake, the Pentagon invoked and extended this notion to justify health professionals’ participation in interrogation – and in military operations more broadly. As one of the architects of this rationale told me, when a doctor collaborates with interrogators “he’s not functioning as a physician,” and Hippocratic commitment to patient well-being is beside the point.

But at Guantanamo, Mitchell rejected this argument. “I’m a trained psychologist,” he told the court. “Guess what psychologists are taught to do? They’re taught to ask questions – to get the people who are reluctant to talk about topics to talk about those topics...[T]he way that Bruce [Jessen] and I did interrogations,” he said, “[is] heavily influenced by our profession as a psychologist [sic].”

Mitchell offered an example: while observing a CIA officer’s questioning of alleged 9/11 mastermind Khalid Sheikh Mohammed (KSM) concerning Al Qaeda’s efforts to acquire radioactive material, Jessen (Mitchell’s psychologist-partner) noticed that KSM “seemed anxious,” “started to say something,” then “looked away,” seeming “disturbed.” During a follow-up “process” discussion (a psychotherapeutic technique) with KSM, Jessen recounted this moment, then asked whether “there was something you wanted to tell us but weren’t telling us.” KSM replied: “Go get the lady that takes the notes” – then revealed, according to Mitchell, that he had beheaded *Wall Street Journal* reporter Daniel Pearl.

The “enhanced interrogation” program, Mitchell insisted, was grounded in psychologists’ expertise. It was a form of Pavlovian conditioning, he explained – the idea was to associate banal features of the interrogation environment (such as a towel, a light, or a room’s furniture) with terrifying experiences, so as to employ these everyday things to induce dread. This, he contended, set the stage for use of operant conditioning – with *positive* reinforcements such as privileges and creature-comforts – to pursue useful intelligence. “We wanted their ... emotional distress to go up,” he explained “so that we could relieve it when they started answering questions.”

Rather than seeking to square his actions with his profession's ethics, Mitchell dismissed the import of the latter. "[M]y ethical obligation was to save American lives," he **told** defense counsel James Connell. **Acknowledging** that some saw his activities as "unethical, maybe even monstrous," he **said**, "the bulk of Americans are grateful for the sacrifices that Dr. Jessen and I made to keep them safe." Mitchell **served up sarcasm** in response to doubts raised by the CIA Office of Medical Services (OMS) chief psychologist about the ethics of psychologists' participation in interrogation: "[S/he] seemed to think that it was somehow cheating for Dr. Jessen and I to be interrogators because we were Ph.D. psychologists who ... might be able to somehow **Svengali** these people into providing information."

OMS's concerns pushed the CIA's Counterterrorism Center to go through the motions of obtaining an **outside opinion** on the ethics of agency psychologists' new interrogation role. Rather than engaging an independent ethics expert, however, the Center sought a **rubber stamp**, turning to a CIA psychologist-contractor who invented the proposition that psychology's ethical code *required* practitioners to "protect ... the national interest" (the code said no such thing). The contractor then claimed that a code provision (**section 2.02**) allowing psychologists to provide "mental health services" outside the scope of their training in the event of *clinical* emergency authorized them to assist interrogators in (quoting the contractor) "national security emergenc(ies) where lives may be at stake."

To the CIA's leaders, these claims' absurdity was beside the point. Leadership kept this "outside" ethics opinion secret even as it **relied upon** the opinion as its basis for rejecting internal criticism of Mitchell's and Jessen's role. Meanwhile, the torture program's classified status became the real means for shielding its psychologist and physician designers and overseers from professional oversight or discipline. Indeed, in a 2007 report entitled *Summary and Reflections of Chief of Medical Services on OMS Participation in the RDI Program*, the OMS's chief **reassured** psychologist and physician participants that disciplinary action by state licensing boards was unlikely, since their identities would remain anonymous.

Besides, the OMS chief said, professional-ethics objections didn't matter: they were "**utopian**," "**formulaic**," and otherwise not worth taking seriously. The choice to participate in the interrogation program was "entirely personal" but much to be admired: by playing their part, OMS's leader opined, psychologists and physicians fulfilled their "social

obligation” to “save lives.”

That these professionals’ participation was critical to the torture program’s legal rationalization is [well-documented](#). Although some say the CIA would have tortured without them, John Rizzo, the agency’s acting general counsel at the time, told me that had the psychologists and physicians refused to participate, the program would have been shut down.

## Checks and Balances

In short, America’s post-9/11 torture program was made possible by a shocking failure of independent professional-ethics governance. Much has been said about what the military, CIA, and relevant professional bodies and licensing boards should have done by way of respecting ethics norms and inquiring into reports of their violation. But there is a broader lesson here about the vital role of independent professionalism as part of America’s larger system of checks and balances.

The Constitution says nothing about professions or their governance. Yet deference to professional ethics and judgment is embedded in American law and political tradition. Such deference helps to keep state power from running amok, and it can safeguard sensible public policy against some of populism’s more troubling influences.

Consider some other examples of professionalism’s failure and success in this regard. The contempt that Justice Department lawyers displayed for their duty to restrain the rush to torture in 9/11’s wake enabled Mitchell’s misadventure just as did doctors’ ethical abdication. Rather than genuinely analyzing the CIA program’s lawfulness, the Office of Legal Counsel [cloaked an implausible, even absurdist](#) justification for torture within memoranda purporting to merely say what the law was. This breach of their duty as legal *counselors* – obliged to provide their client with the best reading of the law – was another “but for” cause for the torture program’s implementation: CIA headquarters held off on implementing the program until the lawyers said yes.

More recently, medical professionals' tolerance for **neglect** of Immigration and Customs Enforcement (ICE) detainees' health needs, separation of migrant children from their parents, and conditions of captivity that enable the spread of deadly disease has abetted **cruelty** that violates our **international-law obligations** to refugees. On the other hand, **independent health professionals** and internal medical **whistleblowers** have called out abuses at immigration detention centers that breach both Hippocratic ethics and domestic and international law. Congressional inquiries and media attention have ensued, achieving a measure of accountability in the face of hostility to immigrants' rights.

President Trump's first impeachment spotlighted professionalism's ability to check abuse of power beyond the health sphere. Trump's presidency survived, but his bid to condition \$400 million in military aid to Ukraine on that country's launching of a sham inquiry into Joe Biden was foiled by career diplomatic and military professionals who grasped that such strong-arming was wrong, then called it out to an Inspector General and, later, Congress. As scandal loomed, Trump released the aid *sans* a Biden inquest, positioning his impeachment defense team to claim that no harm had been done. Thus professional norms, not judicial or legislative power, stymied the president's bullying. Presidential power proved no match for values rooted in law but inculcated over lifetimes of diplomatic and military service.

Conversely, the professional self-restraint we expect from the bar proved startlingly **absent** among lawyers who took up Trump's quest to overturn the 2020 presidential election. Other checks and balances fortunately kicked in: judges' and election officials' commitment to constitutional duty stymied Trump's lawyers' fact-free efforts, and **professional discipline** now looms for these lawyers as a career-threatening consequence.

Today, professionalism in the health sphere is of urgent import as a bulwark against danger posed by both authoritarian and populist impulse. Trumpist hostility to efforts to contain COVID-19 has likely cost tens of thousands of **lives**. To be sure, the boundaries between the provinces of politics and medicine are murkier than the media sometimes makes out. Trade-offs among short- and long-term risks, as well as judgments about how to proceed in the face of scientific uncertainties, are the stuff of policy and politics. But pressure on physicians to purvey falsehoods and half-truths – for example, that aerosolized spread of SARS-CoV-2 is not a concern, that masks do not work, or that unproven drugs do – needs to be checked by the countervailing power of professional self-governance.

## Professionalism and Self-Constraint

Effective self-governance demands more than mechanisms of professional discipline. Yes, professional associations and licensing bodies should enforce ethics rules that safeguard the rights of patients and clients and prevent distortion of judgment in response to political demands. Such enforcement arms professionals who serve in national security and other government settings to resist pressures to shortchange their ethical duties. The absence of such enforcement as America's post-9/11 torture program unfolded not only gave a free pass for health professionals' and lawyers' complicity; it kept conscientious professionals from credibly invoking the prospect of disciplinary action as reason for refusing to collaborate.

Within national-security and other public-service settings, moreover, compliance with professional ethics precepts should be mandatory. The U.S. military requires health professionals to **comply** with civilian medical ethics (though this obligation has often been **honored in the breach**). The CIA, in contrast, does not. Had such a requirement bound CIA psychologists and physicians in 9/11's wake, America's misadventure in torture might have been thwarted.

More important than disciplinary procedures, however, are the means by which professions nurture community and common values. Shared educational experiences, early-career training, journals and conferences, and other mechanisms by which practitioners in diverse settings foster common cultural norms and ethical commitments are critical counterweights to the hierarchical arrangements that increasingly govern work settings in medicine, law, and other professions. To the degree that members of a profession identify with its values and obligations rather than hewing exclusively to the expectations of the organization that employs them, they are more likely to fulfil professionalism's unwritten role in America's scheme of checks and balances.

## Professions, Politics, and Law: Negotiating the Boundaries

To be sure, professionals should not have last, sole say over all public matters that implicate professional expertise. The COVID-19 crisis is illustrative: formulation of policies that balance multiple epidemiologic, economic, and social risks in the face of myriad uncertainties is the province of public officials (though these officials should not cross the

line into denying scientifically-established truths). And in the national-security realm, there is unavoidable tension between physicians' and psychologists' Hippocratic commitment to the well-being of patients and the potential of biomedical and behavioral-science expertise to advance warfighting and intelligence-gathering missions. Entirely rejecting this potential, I've argued [elsewhere](#), goes too far. Use of such expertise in ways that are compatible with international human rights and the law of armed conflict – and that don't require clinical caregivers to break faith with their Hippocratic promise to their patients – should be deemed legitimate.

What's needed to negotiate such ethical boundaries is an ongoing process of mutual feedback and adjustment among professions, the political and legal institutions that employ their expertise, and the public. At times, these institutions will call on professionals to act beyond their established ethical boundaries, as the CIA did with psychologists and physicians in the course of its post-9/11 frisson with torture. And at times, political and legal actors will claim authority to make decisions on matters within the realm of professional expertise, as the Trump administration did repeatedly in response to COVID-19. Within a well-functioning system of checks and balances, professionals resist, leveraging their [organizations' influence](#), law's [deference to their authority](#), and the [soft power of public opinion](#). Courts, political leaders, activists, and others weigh in. Professional bodies respond, at times pushing back against political and legal actors' demands and at other times incorporating these demands into their ethical norms.

Society-wide negotiations of sorts thereby play out, arriving at resolutions which can change over time. With respect to the question of whether psychologists can ethically participate in the crafting of national-security interrogation strategies, public and professional outrage over CIA psychologists' complicity in torture led the American Psychological Association to issue a sweeping [ban](#) in 2015. More recently, though, some of the torture program's sharpest critics have [urged](#) that behavioral-science professionals be ethically permitted to provide evidence-based guidance to national security interrogators, so long as interrogation methods comport with international and domestic law, construed in good faith.

How this debate will play out is uncertain. But the good news is that it is now playing out in public. A lesson to be drawn from the CIA's and James Mitchell's misadventure in professional governance is that norms of conduct developed and effected through subterfuge, absent public reckoning with rival perspectives and hard choices, invite backlash and rejection.

More than this, such public reckoning enables professional values and judgment to check state power's excesses and to counter authoritarian and populist "contempt for facts." The last several years have served up shocking reminders of what we lose when professionalism fails in this regard. The breakdowns of governance that brought psychologists and physicians into the business of torture were a harbinger for these failures. Securing our institutions of professional governance and nurturing practitioners' commitments to professional obligation in the face of organizational pressure are critical for sustenance of democracy that respects rights and reason.

*Image: U.S. psychologist James Mitchell (L) speaks with an interviewer at the American Enterprise Institute in Washington,DC on December 6, 2106. Mitchell, who helped the CIA develop its "enhanced interrogation" program and who waterboarded suspects in the months after the September 11, 2001 attacks, hit back at critics. (Photo credit: THOMAS WATKINS/AFP via Getty Images)*

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