

Ethical Practice Under Fire: Resources for Physicians in War

Deployed physicians in the field confront difficult legal, medical and ethical questions daily. I list below some common questions for which the law provides answers. The answers to those questions are found at the end of this handout. I also list sources of guidance for further exploration of the issues.

1. *Who is a detainee?*
2. *How must detainees be treated?*
3. *What is the role of physicians in detainee operations?*
4. *Are physicians required to provide medical care to detainees?*
5. *What kind of medical treatment must physicians provide to detainees?*
6. *Can physicians provide medical care to detainees and also engage in other detainee-related activities?*
7. *What are the rules about records of medical care of detainees?*
8. *Do detainees have to consent to medical care?*
9. *Do physicians have a duty to protect detainees?*
10. *Do physicians have a duty to report detainee treatment violations?*
11. *What happens if a detainee dies?*
12. *Are medical units and physicians in war protected against harm?*
13. *What are the limits on interrogation?*
14. *Can a physician certify that a detainee is fit for interrogation?*
15. *Can a physician apply restraints to detainees?*
16. *What is torture?*
17. *What if a physician suspects that a detainee has been mistreated?*
18. *Is a commanding officer's order to a physician a sufficient defense if the order later turns out to be illegal?*
19. *Will physicians receive additional training about their obligations to detainees?*
20. *How can a physician obtain further legal guidance, when needed?*

Hierarchy of legal guidance* :

Geneva Conventions
U.S. Code
DoD Instruction
DoD Directive
Army regulation
Army Field Manual or Pamphlet

*document listed first takes priority over document below it

Sources of guidance:

1. Geneva Conventions (www.genevaconventions.org)
Protection of Civilian Person in Time of War
Treatment of Prisoners of War
2. Detainee Treatment Act of 2005, Public Law 109-163, Sections 1401-1406
(<http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php>) -
limits interrogation procedures and defines cruel, inhuman, or degrading treatment.
3. U.S. Code Title 18, Part I, Chapter 113C, Section 2340
(http://www4.law.cornell.edu/uscode/html/uscode18/usc_sec_18_00002340----000-.html)
– defines torture
4. Instruction on Department of Defense Medical Program Support for Detainee
Operations No. 2310.08E (June 6, 2006)
(<http://www.dtic.mil/whs/directives/corres/html/231008.htm>)

It . . . reaffirms the responsibility of health care personnel to protect and treat, in
the context of a professional treatment relationship and established principles of
medical practice, all detainees in the control of the Armed Forces during military
operations. This includes enemy prisoners of war, retained personnel, civilian
internees, and other detainees
5. Directive on Department of Defense Detainee Program No. 2310.01E (September 5,
2006)
(<http://www.dtic.mil/whs/directives/corres/html/231001.htm>)

Revises policy and responsibilities within the Department of Defense for a Detainee
Program to ensure compliance with all applicable laws, policies and directives.
6. Army Field Manual 27-10 The Law of Land Warfare July 18, 1956 as changed July 15,
1976 (<http://www.globalsecurity.org/military/library/policy/army/fm/27-10/>)

Other helpful resources:

Office of The Surgeon General Final Report on the Assessment of Detainee Medical Operations for OEF, GTMO and OIF (April 13, 2005)

(<http://www.armymedicine.army.mil/news/detmedopsrprt/DetMedOpsRpt.pdf>)

Very informative report giving the findings and recommendations of a team assessing detainee medical operations for OIF, OEF and GTMO. Reviewed theater-level policy and guidance, applicable standard of care, medical record training, generation and security, detainee abuse reporting

Medical Ethics and Detainee Healthcare Operations (US Army Medical Department Center and School Portal) – (<http://www.cs.amedd.army.mil/deployment2.aspx#>)

Internet-based modules on the Geneva Conventions, the Law of War, and Medical Ethics.

OTSG/MEDCOM Policy Memo 06-029 (October 20, 2006) (not yet available through internet)

Provides guidance on the Behavioral Science Consultation Policy.

The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (http://www.unhchr.ch/html/menu3/b/h_cat39.htm) (an international human rights instrument intended to prevent torture and other similar activities).

Defines torture.

The Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

(http://www.unhchr.ch/html/menu3/b/h_comp40.htm) (UN Human Rights Instrument adopted by the General Assembly resolution 37/194 of 18 December 1982).

It contains a code of health personnel ethics relevant to the protection of persons subjected to any form of detention or imprisonment against torture and other cruel, inhuman, or degrading treatment or punishment.

Basic Principles for the Treatment of Prisoners

(<http://www.ohchr.org/english/law/basicprinciples.htm>) (UN Human Rights Instrument adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990).

It contains the minimum standards for treatment of prisoners as human beings as set forth in the Universal Declaration of Human Rights, the International Covenant

on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol.

The Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (<http://www.ohchr.org/english/law/investigation.htm>) (UN Human Rights Instrument recommended by General Assembly resolution 55/89 of 4 December 2000).

The Principles outline recommended procedures related to the documentation of torture and other cruel, inhuman, or degrading treatment or punishment particularly by health care professionals.

Common questions and answers:

1. Who is a detainee?

A detainee is “[a]ny person captured, detained, held, or otherwise under the control of the DoD personnel (military, civilian, or contractor employee). It does not include persons being held primarily for law enforcement purposes, except where the United States is the occupying power.” (Directive on Department of Defense Detainee Program No. 2310.01E – citation #5 above)

2. How must detainees be treated?

“[W]ithout regard to a detainee’s legal status”, detainees are entitled to be treated according to the minimum standards listed in Common Article 3 to the Geneva Conventions of 1949 and the DoD detainee treatment policy (below). Certain categories of detainees (such as enemy prisoners of war) are entitled to additional protections not discussed in this handout. (Directive on Department of Defense Detainee Program No. 2310.01E – citation #5 above)

Common Article 3 to the Geneva Conventions of 1949:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;

- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.

DoD Detainee Treatment Policy

In addition to the requirements of Common Article 3 of the Geneva Conventions, DoD requires the following minimum standards of treatment for all detainees:

1. "All persons captured, detained, interned, or otherwise in the control of DoD personnel during the course of military operations will be given humane care and treatment from the moment they fall into the hands of DoD personnel until release, transfer out of DoD control, or repatriation, including:
 - a. Adequate food, drinking water, shelter, clothing and medical treatment;
 - b. Free exercise of religion, consistent with the requirements of detention;
 - c. All detainees will be respected as human beings. They will be protected against threats or acts of violence including rape, forced prostitution, assault and theft, public curiosity, bodily injury, reprisals. They will not be subjected to medical or scientific experiments. They will not be subjected to sensory deprivation. This list is not exclusive."
2. "The inhumane treatment of detainees is prohibited and is not justified by the stress of combat or deep provocation." (Directive on Department of Defense Detainee Program No. 2310.01E – citation #5 above).

"Only urgent medical reasons will authorize priority in the order of treatment to be administered." (Army Field Manual 27-10 The Law of Land Warfare July 18, 1956 as changed July 15, 1976– citation #6 above)

3. What is the role of physicians in detainee operations?

The role of physicians in "detainee operations is limited only to providing health care services in a professional provider-patient treatment relationship in approved clinical settings, conducting disease prevention and other approved public health activities, advising proper command authorities regarding the health status of detainees, and providing direct support for these activities. Medical personnel shall not be used to supervise, conduct or direct interrogations." The only exceptions to this rule are health care personnel assigned to or providing direct support to Behavioral Science Consultants and Armed Forces Medical Examiner personnel. (Instruction on Department of Defense Medical Program Support for Detainee Operations No. 2310.08E – citation #4 above)

4. Are physicians required to provide medical care to detainees?

It is the "responsibility of health care personnel to protect and treat, in the context of a professional treatment relationship and established principles of medical practice, all detainees in the control of the Armed Forces during military operations." (Instruction on Department of Defense Medical Program Support for Detainee Operations No. 2310.08E – citation #4 above)

5. What kind of medical treatment must physicians provide to detainees?

"Health care personnel charged with the medical care of detainees have a duty to protect detainees' physical and mental health and provide appropriate treatment for disease. To the extent practicable, treatment of detainees should be guided by professional judgments and standards similar to those applied to personnel of

the U.S. Armed Forces.” (Instruction on Department of Defense Medical Program Support for Detainee Operations No. 2310.08E – citation #4 above)

6. Can physicians provide medical care to detainees and also engage in other detainee-related activities?

Physicians providing medical care to detainees may not participate in any “detainee-related activities for purposes other than health care. Such health care personnel shall not actively solicit information from detainees for other than health care purposes.” Except in emergency circumstances, health care personnel engaged in non-treatment activities may not engage in any detainee health care treatment. (Instruction on Department of Defense Medical Program Support for Detainee Operations No. 2310.08E – citation #4 above)

7. What are the rules about records of medical care of detainees?

“Accurate and complete medical records on all detainees shall be created and maintained. Medical records must be maintained for all medical encounters, whether in fixed facilities or through medical personnel in the field.” “Health care personnel shall safeguard patient confidences and privacy within the constraints of the law.” “. . . there is no absolute confidentiality of medical information for any person.” Patient-specific medical information may be disclosed for various permissible purposes including prevention of harm, maintenance of public health, etc., but the details of the disclosure shall be recorded. If the medical unit commander is concerned the medical information may be used for an improper purpose, the officer may seek a senior command determination on the propriety of the disclosure. (Instruction on Department of Defense Medical Program Support for Detainee Operations No. 2310.08E – citation #4 above)

8. Do detainees have to consent to medical care?

“In general, health care will be provided with the consent of the detainee. To the extent practicable, standards and procedures for obtaining consent will be consistent with those applicable to consent from other patients.” Standard exceptions apply for lifesaving treatment for patients unable to consent. Involuntary treatment is possible if needed to prevent death or serious self-harm and must be approved by the commanding officer. (Instruction on Department of Defense Medical Program Support for Detainee Operations No. 2310.08E – citation #4 above)

9. Do physicians have a duty to protect detainees?

“Health care personnel have a duty in all matters affecting the physical and mental health of detainees to perform, encourage, and support, directly and indirectly, actions to uphold the humane treatment of detainees and to ensure that no individual in the custody or under the physical control of the Department of Defense, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment. . . .” (Instruction on Department of Defense Medical Program Support for Detainee Operations No. 2310.08E – citation #4 above)

10. Do physicians have a duty to report detainee treatment violations?

If a physician suspects or observes a violation of the standards for the protection of detainees, the physician must report the circumstances to the chain of command. If the physician believes the report is not acted upon properly, should report the circumstances to the medical program leadership or other reporting mechanisms. Physicians should also make a written report of all such suspected or observed violations in the facility commander’s reportable incident log. (Instruction on Department of Defense Medical Program Support for Detainee Operations No. 2310.08E – citation #4 above)

11. What happens if a detainee dies?

The facility commander (or commander of unit exercising control over the decedent) must immediately report the death to the Military Criminal Investigation Organization. "The determination of the cause and manner of death will be the sole responsibility of the Armed Forces Medical Examiner. . . ." (Instruction on Department of Defense Medical Program Support for Detainee Operations No. 2310.08E – citation #4 above)

12. Are medical units and physicians in war protected from harm?

"Medical personnel exclusively engaged in the search for, or collection, transport or treatment of the wounded or sick, or in the prevention of disease . . . shall be respected and protected in all circumstances." "Although medical personnel may carry arms for self-defense, they may not employ such arms against enemy forces acting in conformity with the law of war. These arms are for their personal defense and for the protection of the wounded and sick under their charge against marauders and other persons violating the law of war. Medical personnel who use their arms in circumstances not justified by the law of war expose themselves to penalties for violation of the law of war and, provided they have been given due warning to cease such acts, may also forfeit the protection of the medical unit or establishment of which they form part or which they are protecting."

"Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict." This protection is continuous "unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy."

(Army Field Manual 27-10 The Law of Land Warfare July 18, 1956 as changed July 15, 1976– citation #6 above)

13. What are the limits on interrogation?

No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment. In this section, the term 'cruel, inhuman, or degrading treatment or punishment' means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

(Detainee Treatment Act of 2005 – citation #2 above)

14. Can a physician certify that a detainee is fit for punishment?

Health care personnel can certify or participate in the certification of the fitness of detainees for and the administration of treatment or punishment but only if that treatment or punishment is in accordance with applicable law. (Instruction on Department of Defense Medical Program Support for Detainee Operations No. 2310.08E – citation #4 above)

15. Can a physician apply restraints to detainees?

"Health care personnel shall not participate in any procedure for applying physical restraints to the person of a detainee unless such a procedure is determined to be necessary for the protection of the physical or mental health or the safety of the detainee, or necessary for the protection of other detainees or those treating, guarding, or otherwise interacting with them. Such restraints, if used, shall be applied in a safe and professional manner. (Instruction on Department of Defense Medical Program Support for Detainee Operations No. 2310.08E – citation #4 above)

16. What is torture?

- (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
- (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—
 - (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
 - (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
 - (C) the threat of imminent death; or
 - (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality. (U.S. Code – citation #3 above)

Torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." (The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment – cited under "other helpful resources above").

17. What if a physician suspects that a detainee has been mistreated?

You must report "possible, suspected, or alleged violations of the law of war, and/or detention operations laws, regulations, or policy, for which there is credible information, or conduct." (Directive on Department of Defense Detainee Program No. 2310.01E – citation #5 above)

18. Is a commanding officer's order to a physician a sufficient defense if the order later turns out to be illegal?

"The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful." "In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be controversial; or that an act otherwise amounting to a war crime may be done in obedience to orders conceived as a measure of reprisal. At the same time, it must be borne in mind that members of the armed forces are bound to obey only lawful orders." (Army Field Manual 27-10 The Law of Land Warfare July 18, 1956 as changed July 15, 1976– citation #6 above)

19. Will physicians receive additional training about their obligations to detainees?

The Under Secretary of Defense for Personnel and Readiness is responsible for “education and training programs . . . in the areas of language, culture, customs, and related matters” to assure that you have the “requisite training, knowledge and skills, necessary to perform detainee operations duties.” The Assistant Secretary of Defense for Health Affairs is responsible for developing “policies, procedures, and standards for medical program activities”. (Directive on Department of Defense Detainee Program No. 2310.01E – citation #5 above).

20. How can a physician obtain further legal guidance, when needed?

First, attempt to contact the legal advisor for the unit or mission at issue. If that is not clear, contact the legal office at your home station and that office can determine the appropriate legal office and contact information. If these options fail, you can contact the JAG office at WRAMC and they will direct you appropriately.