THE SCOPE OF THE (HYPOTHETICAL) TORTURE INVESTIGATION

It was just last night that Newsweek floated the notion of a torture investigation, and we're already into a hot debate about the scope of any (thus far still hypothetical) investigation. Here are the posts you should read:

- Tim F @BalloonJuice arguing that an investigation of just the torturers who exceeded guidelines would be worse than no investigation
- Spencer@Attackerman arguing that focusing on the CIA—rather than the decision-makers—would be wrong
- Glenn@Salon cataloging the different stories about scope—and arguing that if the investigation focuses on CIA it'll be Abu Ghraib redux

Glenn and Spencer both point to Scott Horton—reporting that there is unlikely to be such a limit on scope—in an article I'll look at in some detail below.

My take—one derived from some weeds—is that if Holder approves an investigation, it'll be unlikely to just take on low-level CIA interrogators.

First, consider who we're talking about. We're not, actually, talking about low level CIA

interrogators. We're talking about contractors. James Mitchell, to be exact. And if James Mitchell is not the psychologist/interrogator who acknowledged he had exceeded the limits set by John Yoo's Bybee Memo, but justified it by saying he had exceeded those limits (by using way more water, for longer time, and pressing on the detainee's gut) because those things make the simulated drowning technique "for real—and … more poignant and convincing," then it's almost certainly someone who works for James Mitchell and probably used to work for the DOD entity that administers SERE.

I, frankly, have no problem with prosecuting Mr. Poignant the sadist torturer and, given his acknowledgment that he exceeded Yoo's guidelines, that's probably where an investigation would start.

Now, as I said, Mr. Poignant is either James Mitchell or someone associated with him—the "psychologist/interrogator" strongly suggests this person is a contractor, not a CIA employee.

That means that going after Mr. Poignant gets you, in either one step or two, to the contractors who worked from the start to profit off torture.

And that gets you, almost immediately, to the process that the torture architects used to authorize their torture. That's because there is a paper trail showing that the torture architects knew and intended the torture to exceed even Yoo's memo. This is a document that both Jim Haynes and John Rizzo had and—between the two of them—gave to John Yoo during the drafting process for the Bybee Memo as the basis for his description of waterboarding.

> JPRA's description of the waterboarding technique provided in that first attachment was inconsistent in key respects from the U.S. Navy SERE school's description of waterboarding. According to the Navy SERE school's operating instructions, for example,

> while administering the technique, the Navy limited the amount of water poured on a student's face to two pints. However, the JPRA attachment said that "up to 1.5 gallons of water" may be poured onto a "subject's face." While the Navy's operating instructions dictated that "[n]o effort will be made to direct the stream of water into the student's nostrils or mouth," the description provided by JPRA contained no such limitation for subjects ofthe technique. While the Navy limited the use ofthe cloth on a student's face to twenty seconds, the JPRA's description said only that the cloth should remain in place for a "short period of time." And while the Navy restricted anyone from placing pressure on the chest or stomach during the administration of this technique, JPRA's description included no such limitation for subjects of the technique.

So if I were Mr. Poignant being threatened with prosecution for my efforts to make simulated drowning more realistic, I would point to the description JPRA submitted of waterboarding, to support a claim that I was doing precisely what **that** document described and that that was what Yoo and Haynes and Rizzo and Addington knew they were talking about when they got waterboarding approved in the first place.

In other words, if you go after Mr. Poignant, he will quickly be faced with the opportunity to burn the torture architects to protect himself. (And hell, even if he's a Scooter Libby type, this stuff is all out there anyway.)

And there is some indication that Holder is very well aware of this tidbit. Scott Horton describes Holder's decision-making process this way.

> Holder's path to a decision was described as prolonged and surprising.

> Holder began his review mindful of the clear preference of President Obama's two key political advisers—David Axelrod and Rahm Emanuel—that there be no investigation. Axelrod and Emanuel are described as uninterested in either the legal or policy merits of the issue of a criminal investigation. Their concerns turn entirely on their political analysis. They have advised Obama and other senior figures in the administration that the torture issue is a "distraction," and that any attention on it would detract from Obama's ability to push through his agenda—especially health-care reform. Holder initially appeared prepared to satisfy their wishes.
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> But, then, Holder decided to take a close, personal look at the issues, and his perspective began to change. **Holder is said to have been closely engaged with three sets of documents—a group of memoranda from the Bush-era Office of Legal Counsel, since repudiated by the Justice Department; the report of the Office of Professional Responsibility on these memoranda, which has been on his desk, awaiting review and release for months; and the report of the CIA's inspector general reviewing in great detail the actual techniques used**, guidance given by the Justice Department, and results or lack of results obtained.
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> Holder released the first set of memoranda and his Justice Department publicly suggested that it would release both the related report and the CIA inspector general's report—often viewed as the Rosetta Stone of the torture controversy. **As he read through the latter two documents, my sources said, Holder came to realize the focal and instrumental role that Department of**

> **Justice lawyers had played in constructing the torture regime and in pushing it through when career lawyers raised objection. He also took note of how the entire process was orchestrated from within the Bush White House—so that more-senior lawyers in Justice, sometimes even the attorney general, did not know what was being done**. And he noted the fact that the United Nations Convention Against Torture, to which the United States is a party, requires that a criminal inquiry be undertaken whenever credible allegations of torture are presented. [my emphasis]

Whereas Klaidman had emphasized the importance of the CIA IG Report in inclining Holder to appoint a prosecutor, Horton's sources emphasize two more documents: The OLC memos, and the OPR Report. Which show—according to Horton—precisely what I just showed, the OPR Report undoubtedly in a lot more detail.

Also note the suggestion that Addington and friends went around John Ashcroft's back—just as I showed they did with the illegal surveillance program (there are more parallels that I'll hit in a post soon)—to work directly with Yoo to get their torture program approved.

Now all this doesn't mean that Dick Cheney is going to jail. But it does mean that Holder is seeing precisely what is already visible, barely, from the already public documents. There's no way you go after Mr. Poignant without also going after the lawyers who knew that Yoo's memo was just fancy window dressing for what they knew and intended to be torture.