UNCAT PROCESS EXPOSES FLAW IN US TORTURE COVERUP: DOJ NOT FINAL AUTHORITY

A combination of factors is forcing the issue of US torture back into the international spotlight and there are even hints that progress on some fronts is occurring. Consider, for instance, James Risen's report this morning that the American Pyschological Association, greatly embarrassed by the revelations in Risen's just-published book, has re-opened an investigation into the role the association played in giving cover to pyschologists who lent their credentials to the torture program in an effort to pronounce it medically ethical. We also have gotten the first official hint from Mark Udall himself that he has not ruled out using the Senate's speech and debate clause to enter the Senate Intelligence Committtee's report on torture into the record (the way that Mike Gravel disclosed the Pentagon Papers), bypassing the two year old debate about redactions.

We should pay special attention, though, to word filtering out of Geneva as the United Nations Committee Against Torture reviews the report submitted by the US. As a signatory to the Convention Against Torture, the US is required to make periodic reports to the committee. The process, however, is exceedingly slow. The current report from the US (pdf) is finally getting around to answering questions submitted to the US in 2006 and 2010. A New York Times story from Charlie Savage shows that the committee has been paying close attention both to what the US is saying and to what the US is doing. Consider this blockbuster:

> Alessio Bruni of Italy, a member of the United Nations committee, pressed the delegation to explain Appendix M of the manual, which contains special

> procedures for separating captives in order to prevent them from communicating. The appendix says that prisoners shall receive at least four hours of sleep a day — an amount Mr. Bruni said would be sleep deprivation over prolonged periods and unrelated to preventing communication.
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> Brig. Gen. Richard C. Gross, the top legal adviser to the Joint Chiefs of Staff, said that reading the appendix as intended to permit sleep deprivation was a misinterpretation. Four hours is "a minimum standard; it's not the maximum they can get," he said, adding that the rule had to be read in the context of the rest of the manual, including a requirement for medical and legal monitoring of treatment "to ensure it is humane, legal and so forth."
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> Mr. Bruni was not persuaded. He said that calling the provision a minimum standard still meant four hours a night for long periods was "permissible." He suggested that Appendix M "be simply deleted."

This exchange counts as a huge victory for the community of activists who have fought hard to abolish all forms of torture by the US. When it comes to the Appendix M battle, though, perhaps nobody has been more determined to expose the torture still embedded in Appendix M practices than Jeff Kaye, and he is to be congratulated for the support he provided in getting this question to the forefront.

The most important part of the proceedings, though, pertains to the questions about US investigation of torture since it now openly admits torture took place. Returning to Savage's report:

> A provision of the treaty, the Convention Against Torture, requires

> parties to investigate and provide accountability for past instances of torture. The American delegation said that the United States had investigated the C.I.A. program, and that the coming publication of a Senate Intelligence Committee report would add to the public record.
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> The American officials pointed to a criminal investigation by John H. Durham, an assistant United States attorney in Connecticut, whom Michael B. Mukasey, then attorney general, appointed in 2008 to look at whether the C.I.A. had broken the law by destroying videotapes of its interrogations of Qaeda suspects.
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> In 2009, Attorney General Eric H. Holder Jr. expanded Mr. Durham's mandate to look at C.I.A. torture that went beyond what the Justice Department had said was legal. Mr. Durham eventually closed the investigation without indicting anyone.
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> Another member of the United Nations panel, Jens Modvig of Denmark, pressed for details. He asked if Mr. Durham's team had interviewed any current or former detainees.

It is clear from Modvig's question that he feels the US investigation fell short of what is required. To get a good feel for that, we can look to this terrific "shadow report" (pdf) to the UNCAT prepared by "Advocates for US Torture Prosecutions" at Harvard Law School.

The report does an excellent job of framing the questions at hand, beginning with the observation that "The U.S. Government's criminal program of torture was authorized at the highest levels" (fitting nicely with Marcy's post earlier today about it being authorized by the President). But when we get to inadequacy of

Durham's investigation, we see this (footnotes removed):

> The United States seems not to have criminally investigated senior officials for involvement in torture and ill-treatment of detainees. The United States' Periodic Report was either vague or referred to investigations that, based on statements made by the government, would seem to exclude those in command. In particular, the investigation called by Attorney General Eric Holder in August 2009 and led by prosecutor John Durham, seemed to have an excessively limited mandate. According to Holder, Durham investigated only "possible CIA involvement" and focused primarily on CIA interrogators, and whether they used "unauthorized interrogation techniques." In 2009, the Attorney General said that officials who "*acted reasonably* and *relied in good faith on authoritative legal advice*" (emphasis added) from the Justice Department, and conformed their conduct to that advice, would not face federal prosecutions for that conduct. For reasons that are unclear, the Attorney General's stated rationales for declining to prosecute have been a moving target. By 2011, the Attorney General's view of what merited prosecution had narrowed even further. He began to refer to his prior statements regarding the OLC's legal memos as promises of protection to those who "*acted in good faith **and** within the scope of the legal guidance given by the Office of Legal Counsel*" (emphasis added). In dropping the references to reliance and reasonableness, Holder may have been suggesting that any behavior falling within the OLC's outlier definition of legality (whether done with knowledge of this legal guidance or not) would be protected, irrespective of

> whether an individual relied upon, reasonably believed in, or even knew of or had access to the contents of the memos.

But the shadow knows. It knows that the sophistry engaged in by Holder and the Obama administration is in direct violation of the CAT. After noting that "Reliance on severely flawed legal advice cannot be invoked as a defense to torture", the report goes on to describe how the prohibition against torture is absolute:

> The United States' shielding of senior military and civilian officials who authorized, acquiesced or consented to torture violates the principle of non-derogability as understood in the Committee's General Comment No. 258 and places the United States in continued breach of its obligations under the Convention. The Convention provides that neither exceptional circumstances nor an order from a superior officer may be invoked as a justification of torture. In elaborating on the absolute character of the prohibition in its General Comment, the Committee described it as "essential that the responsibility of any superior officials … be fully investigated through competent, independent and impartial prosecutorial and judicial authorities."

The process will be long. It will be slow. But make no mistake that in questioning just how the US carried out its investigation into the torture it readily admits took place, the committee is on a path that will lead it directly to a finding much like that in the paragraph above from the shadow report. Holder and Obama cannot simply brush the events under the rug and claim they were investigated. Under the CAT, those responsible for torture must be held to account.

The process will get even longer and slower should the committee eventually come to the conclusion that the US has fallen short of its requirement to hold those responsible accountable, because the committee then would ask the UN Security Council to refer the issue to the International Criminal Court. Of course the US would not allow the referral to happen, but the mere activation of that pathway would stand as a ringing rebuke to the utter failure by the US to live up to the standards of a treaty to which it is a party. And there will forever be the threat that someday, somehow, the balance of power could shift and those who authorized these heinous acts will find themselves standing before a judge.