DAVID COLE TURNS IN HIS TORTURE HOMEWORK LATE, GETS A C

I was going to simply ignore David Cole's annoying NYT op-ed, asking if the CIA got a bad rap with the SSCI Torture Report, until I saw the claims he made in his JustSecurity post on it.

> Like many others, I commented on and wrote about the Torture Report when it was initially released in December, but the demands of the 24-hour news cycle meant that I — and I'm certain, everyone else who commented in that first week — did so without having had time to read the report and its responses in full. The SSCI Report's executive summary is 525 pages, and the responses by the CIA and the Republican minority members of the SSCI total 303 pages. No one could possibly have read it all in those first few days. And of course, by the time one could read it all, the news cycle had moved on.

David Cole (he now admits 2 months later) blathered without first reading what he was blathering about, and so he insists everyone else must have too, thereby discrediting the views of those of us who actually had done their homework.

This, in spite of the fact that some of us torture critics (not to mention plenty of torture apologists) were making the very same critiques he has finally come around to in the days after the report was released: significantly, the Torture Report did not include the early renditions and Abu Zubaydah's earliest torture. And so, Cole argues, because

it's never easy to definitively show where a particular piece of intelligence comes from, we shouldn't make an argument about what a disaster CIA's torture program was and instead should just repeat that it's illegal.

Let's look at the steps Cole takes to get there, before we turn to the conclusions he ignores.

First, Cole throws up his hands helplessly in trying to adjudicate the dispute between CIA and SSCI over their intelligence.

> Without the underlying documents, it's not possible to resolve the competing claims, but many of the C.I.A.'s responses appear plausible on their face. At a minimum it is possible that the C.I.A.'s tactics did help it capture some very dangerous people planning future attacks.

In some cases, I'll grant that you can't determine where CIA (which is not always the same as US government, which is another problem with the scope of this report) learned a detail, though in others, CIA's rebuttal is fairly transparently weak. But along the way we learn enough new about how helpless the CIA was in the face of even the claims that get shared in the unclassified summary — the most telling of which, for me, is that after being waterboarded, Khalid Sheikh Mohammed got the CIA to believe for 3 months that he had sent Dhiren Barot to Montana to recruit black Muslims in Montana (yes, really!) to start forest fires — to point to the problems of using torture as a means to address CIA's intelligence gaps on al Qaeda. What an unbelievable waste of effort, all arising because torture was presented as something magic that might make KSM tell the truth.

Even more importantly, there's the way that torturing Janat Gul delayed the discovery that the intelligence implicating him in election year plots was a fabrication, but not before Gul

and the underlying fabrication served as the justification to resume torture and, in part, to roll out a dragnet treating all Americans as relevant to torture investigations. Both while he was being tortured and the following year, Gul also served as an excuse for the CIA to offer more lies to DOJ about what it was doing and why. Whether deliberately or not, torture served a very important function here, and it was about legal infrastructure, not intelligence. Exploitation.

Having declared himself helpless in the face of some competing claims but much evidence torture diverted the CIA from hunting down the worst terrorists, Cole then says SSCI has not proven its "other main finding," which is that CIA lied about efficacy.

> That conclusion in turn casts doubt on the committee's other main finding — namely, that the C.I.A. repeatedly lied about the program's efficacy.
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> So why did the committee focus on efficacy and misrepresentation, rather than on the program's fundamental illegality?

Let me interject. Here, Cole misrepresents the conclusion of the Torture Report, which leads him to a conclusion of limited value. It is not *just* that CIA lied about whether torture worked. CIA also lied about what they were doing and how brutal it was. It lied to Congress, to DOJ's lawyers, and to (this is where I have another scope problem with the report, because it is demonstrably just some in) the White House and other cabinet members. That's all definitely well documented in the Torture Report — but then, it was well-documented by documents released in 2009 and 2010, at least for those who were doing their homework.

Bracket that misrepresentation from Cole, for the moment, and see where he takes it.

> Possibly because that meant it could cast the C.I.A. as solely responsible, a rogue agency. A focus on legality would have rightly held C.I.A. officials responsible for failing to say no — but it also would have implicated many more officials who were just as guilty, if not more so. Lawyers at the Justice Department wrote a series of highly implausible legal memos from 2002 to 2007, opining that waterboarding, sleep deprivation, confinement in coffinlike boxes, painful stress positions and slamming people into walls were not torture; were not cruel, inhuman or degrading; and did not violate the Geneva Conventions.
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> The same can be said for President George W. Bush, Vice President Dick Cheney and all the cabinet-level officials responsible for national security, each of whom signed off on a program that was patently illegal. The reality is, no one in a position of authority said no.
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> This may well explain the committee's focus on the C.I.A. and its alleged misrepresentations. The inquiry began as a bipartisan effort, and there is no way that the Republican members would have agreed to an investigation that might have found fault with the entire leadership of the Bush administration.
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> But while the committee's framing may be understandable as a political matter, it was a mistake as a matter of historical accuracy and of moral principle. The report is, to date, the closest thing to official accountability that we have. But by focusing on whether the program worked and whether the C.I.A. lied, the report was critically misleading. Responsibility for the program lies not with the C.I.A. alone, but also with

> everyone else, up to the highest levels of the White House, who said yes when law and morality plainly required them to say no.

Now, I'm very sympathetic with the argument that there are others, in addition to CIA, who need to be held responsible for torture — as I've noted repeatedly, apparently without even reading the entire set of reports, according to Cole. I think Cole brushes with too broad a brush; we have plenty of detail about individuals who are more culpable than others, both within DOJ and the White House, and we shouldn't just throw up our hands on this issue, as Cole did with efficacy arguments, and claim to be unable to distinguish.

But Cole keeps coming back to the issue of legality, as if the people who went out of their way to put CIA back in the business of torturing give a flying fuck that torture is illegal.

And this is why it's important to emphasize that the Torture Report shows CIA lied *both* about efficacy and about what they were doing and when: because until we understand how everyone from Dick Cheney on down affirmatively and purposely implemented a torture program in spite of an oversight structure *and* won impunity for it, it will happen again, perhaps with torture, perhaps with some other Executive abuse.

Let me point to one of the key new revelations from the Torture Report that goes precisely to Cole's concern to explain why.

As I pointed out four and a half years ago, CIA decided to destroy the torture tapes right after giving their first torture briefing to Congress, to Porter Goss and Nancy Pelosi. Along with deciding to destroy the torture tapes, they also altered their own record of that briefing. In ACLU's FOIA that had liberated that information, CIA managed to hide what it was they took out of the contemporaneous record of that briefing.

The Torture Report revealed what it was.

> In early September 2002, the CIA briefed the House Permanent Select Committee on Intelligence (HPSCI) leadership about the CIA's enhanced interrogation techniques. Two days after, the CIA's [redacted]CTC Legal [redacted], excised from a draft memorandum memorializing the briefing indications that the HPSCI leadership questioned the legality of the program by deleting the sentence: "HPSCI attendees also questioned the legality of these techniques if other countries would use them."2454 After [redacted] blind-copied Jose Rodriguez on the email in which he transmitted the changes to the memorandum, Rodriguez responded to email with: "short and sweet."

According to the CIA's own records, in the very first briefing to Congress — which was already 5 months late and only told Congress about using torture prospectively — someone raised questions about the legality of the techniques (at least if done by other countries).

More than 12 years ago, someone — precisely the people our intelligence oversight system entrusts to do this — was raising questions about legality. And CIA's response to that was to alter records, destroy evidence (remember, the torture tapes were altered sometime in 2002 before they were destroyed in 2005), and lie about precisely what they were doing for the next 7 years.

Finally, Cole remains silent about a very important confirmation from the Torture Report — one which President Obama had previously gone to some lengths to suppress — one which gets at why the CIA managed to get away with breaking the law. While SSCI may not have pursued all the documents implicating presidential equities aggressively enough, it did make it very clear that torture was authorized not primarily by a series of OLC memos, but by the September 17, 2001 Presidential Finding, and that neither CIA

nor the White House told Congress that’s what had happened until 2004.

Torture was authorized in the gray legal zone that permits the President to authorize illegal actions. The rest follows from there. The remaining question, the question you need to answer if you want to stop the Executive when it claims the authority to break the law — and this is elucidated in part by the Torture Report — is how, bureaucratically, the rest of government serves to insulate or fails to stop such illegal activity. Of course, these bureaucratic questions can get awfully inconvenient awfully quickly, even for people like David Cole.

Did the CIA get a bum rap in the Torture Report? In part, sure, they were just doing what they were ordered, and the CIA routinely gets ordered to do illegal things. But if you want to prevent torture — and other Executive abuses — you need to understand the bureaucratic means by which intended oversight fails, sometimes by design, and sometimes by the deceit of the Executive. Some of that — not enough, but some key new details — appear in the Torture Report.