DICK CHENEY'S FOGGY MEMORY ON BUSH'S PLAUSIBLE DENIABILITY FOR TORTURE

One of just three issues this Playboy interview [marginally SFW] with Dick Cheney pressed him on (the other two being whether Bush misjudged Putin and whether Cheney's father loved him) was whether President Bush had been briefed on the torture program.

James Rosen starts by asking whether Bush was briefed on the actual methods.

> **You have become publicly identified with the so-called enhanced interrogation techniques that CIA officers used when questioning suspected terrorists. Your critics call those techniques torture. To your knowledge, was President Bush briefed about the actual methods that were to be employed?**
> I believe he was.

It would have been useful had Rosen actually read the SSCI Torture Report, because even that explains that Bush was briefed — in 2006. "[T]he president expressed concern," the report noted, "about the 'image of a detainee, chained to the ceiling, clothed in a diaper, and forced to go to the bathroom on himself."

Rosen then presents the disagreement between John Rizzo and George Tenet, who have said Bush wasn't briefed, and the President himself. Cheney responds by describing a specific, undated briefing in Condi's office.

> **We ask because in Decision Points, the former president's 2010 memoir, he recalls having been briefed on the EITs. Yet former CIA general counsel John Rizzo, in his 2014 memoir, Company Man,**

> **disputes that and says that he contacted former CIA director George Tenet about it, after reading the president's book, and that Tenet backs him up in the belief that Bush was not briefed.**
> No, I'm certain Bush was briefed. I also recall a session where the entire National Security Council was briefed. The meeting took place in Condi Rice's office—I don't think Colin Powell was there, but I think he was briefed separately—where we went down through the specific techniques that were being authorized.

Rather than pointing out that Cheney doesn't even say Bush was at that briefing in Condi's office (or asking for a date, which I suspect is the real secret both Bush and the CIA are trying to keep), Rosen simply asks why Cheney is certain. He then raises James Risen's account of Bush being given plausible deniability, which Cheney quickly turns into an assessment of whether Risen has credibility rather than providing more details on when and how Bush was briefed.

> **Why do you say you're certain Bush was briefed?**
> Well, partly because he said he was. I don't have any doubt about that. I mean, he was included in the process. I mean, that's not the kind of thing that we would have done without his approval.
>
> **To that point, New York Times reporter James Risen wrote in State of War: The Secret History of the CIA and the Bush Administration, published in 2006, "Cheney made certain to protect the president from personal involvement in the internal debates on the handling of prisoners. It is not clear whether Tenet was told by Cheney or other White House officials not to brief Bush or whether he made that decision on his own. Cheney and senior White House officials knew**

> **that Bush was purposely not being briefed. It appears that there was a secret agreement among very senior administration officials to insulate Bush and to give him deniability."**
> I don't have much confidence in Risen.
>
> **That's not the question. Is what he alleges here true or false?**
> That we tried to have deniability for the president?
>
> **Yes.**
> I can't think of a time when we ever operated that way. We just didn't. The president needed to know what we were doing and sign off on the thing. It's like the terrorist surveillance program. You know, one of the main things I did there was to take Tenet and National Security Agency director Michael Hayden in hand and get the president's approval for what we were doing, and there's a classic example why I don't believe something like this. The president wanted personal knowledge of what was going on, and he wanted to personally sign off on the program every 30 to 45 days. To suggest that somehow we ran a system that protected the president from knowledge about the enhanced interrogation techniques, I just—I don't think it's true. I don't believe it.

I find Cheney's invocation of the dragnet really, really interesting. After all, even according to Bush's memoir, he didn't know key details about the dragnet. Cheney told him it was going to expire on March 10 that day. Moreover, when Jim Comey briefed him the following day, he learned of problems that Cheney and others had kept from Bush.

Thus, Cheney's invocation of the dragnet is actually a documented example of Bush *not* being adequately briefed.

Plus, it's interesting given the timing. If I had to guess at this point, I would say that Bush was likely briefed on details of torture in 2004, in the wake of the Abu Ghraib scandal, not 2006. Indeed, that may explain the 7 week delay between the time Tenet asked for reaffirmation of torture approval and when it actually got fully approved — not to mention Tenet's still inadequately explained resignation (in Tenet's memoir, he says it was because of the "Slam Dunk" comment attributed to him in Bob Woodward's book many weeks earlier).

Which brings us back to Cheney invoking a vaguely remembered briefing, this one in the Oval Office.

> **But can you say as a fact "I know that's not true," rather than having to surmise?**
> I can remember sitting in the Oval Office with deputy national security advisor Stephen Hadley and others—I think others were in there—where we talked about the techniques. And one of the things that was emphasized was the fact that the techniques were drawn from that set of practices we used in training our own people. I mean, we were not trying to hide it from the president. With all due respect, I just don't give any credence to what Risen says there.

Cheney's got nothing — or at least nothing he's willing to share. And certainly nothing to document Bush being briefed before torture started.

Which is, again, what I suspect to be the issue: Bush was briefed, maybe even before the 2006 briefing the Torture Report documents. But not before the bulk of the torture happened.

JIM COMEY'S CONSISTENT DODGES ON TORTURE

On March 12 of this year, Dianne Feinstein plaintively asked Jim Comey to read the full SSCI Torture Report. Before giving a really lame answer about how FBI doesn't torture to excuse why he (and his staffers) hadn't read, perhaps even opened, the report, he asserted he had read the Executive Summary. "You asked me to do it during my confirmation hearing, I kept that promise and read it."

Particularly given what we now know — specifically, that Comey concurred in an opinion retroactively authorizing the torture of Janat Gul, whom the Torture Report shows was tortured largely to get torture approved again — that led me to review precisely what transpired between Comey and Feinstein during his 2013 confirmation process. Granted, the report was not yet public, so no one could ask Comey directly whether he knew that's what CIA was scheming — to torture Janat Gul largely to get torture approved again — at least not publicly.

But what kind of commitment did they get?

First of all, at least in the public hearing, Comey did *not* promise to fulfill Feinstein's request. Moreover, she requested that he do more than read the Summary — she said he should read all 6,000 pages, emphasizing the importance of the case studies (which would show far more specifics about what was done to Janat Gul than the Summary does).

> I'd like to ask you to personally review our report. It's a big deal to review it — it's 6,000 pages. But I think it's very important. You have that background. And I think it's important

> to read the actual case studies.

During his turn, after pointing to how shoddy the memo Comey *did* concur in was, Sheldon Whitehouse reiterated Feinstein's request that Comey read the entire report, noting that the specific details of the torture cases showed how much CIA lied about what went on. (It's not clear whether the details surrounding the Janat Gul case would have been clear before Whitehouse left SSCI, so it's not clear whether he knew those specific details — the ones most pertinent to Comey's role on concurring in torture — during this hearing.)

In any case, after recommending he read the full report, Feinstein then went on to the memo Comey did concur in, asking him to explain why he had said in an email that the Principals were "unaware" or "willfully blind" when they reapproved torture.

> Feinstein: You described telling Attorney General Gonzales that CIA interrogation techniques were, quote, simply awful, end quote. That quote, there needed to be a detailed factual discussion, end quote of how they were used before approving them and that, quote, it simply could not be that the Principals would be willfully blind.
>
> Here's the question: Why did you believe that there was a danger that the Principals on the National Security Council were unaware, or willfully blind to the details of the CIA program?
>
> Comey: Thank you Senator. Because I heard … I heard no one asking that third critical question. As you recall I said [in response to a Pat Leahy question] I think there are 3 critical questions with any counterterrorism technique, but especially with the interrogations. Is it effective — something the CIA was talking about. Is it legal under the —

> Title 18 Section 2340, the legal question. And then this last question, is this what we should be doing. And instead, I heard nothing, and in fact it was reported to me that the White House's view was only the first two questions matter. If the CIA says it works and DOJ will issue a legal opinion that it doesn't violate the statute, that's the end of the inquiry. And, as you said, Senator, I thought that was simply unacceptable.

The answer is interesting given that — earlier in the hearing — he had confirmed (or at least claimed) to Pat Leahy what I believed to be true, that he was out of the loop on the Article 16 CAT memo. I've believed that because on May 31, 2005, Comey was still trying (futilely) to influence the Principals through Alberto Gonzales, while still framing the discussion in terms of the earlier May 10 memo, not the May 30 one that got finalized the day before.

He also seemed unaware in his email that (as reported by the Torture Report) CIA had started torturing Abu Faraj al-Libi 3 days earlier, based on the May 10 memos and anticipating the May 30 one.

But he should have known — because he was in the loop on some discussions going back to the previous summer — that CIA felt it needed a memo addressing whether torture complied with the Constitution and therefore the Convention on Torture. Indeed, that's what CIA had demanded in a July 29, 2003 hearing Comey attended part of; is he now claiming (which would be possible but notable) that they only addressed that demand after he and Bellinger left the meeting? That claim, given Comey's emphasis on 18 USC 2340 rather than legal questions more generally, is rather curious.

In any case, Comey's answer last week now appears all the more lame, given that Feinstein had in fact asked him to read the full report,

not just the summary.

In any case, having gotten Comey to agree during his confirmation hearing to the notion that there are things the US shouldn't do, even if they're legal, Feinstein took this principle, and tried to get Comey to apply it to force feeding at Gitmo.

> Feinstein: You have looked at the Combination of EITs, the manner in which they are administered, and you have come to the conclusion that they form torture. These are people, now, 86 of them, who are no threat to this country. They've been cleared for transfer, many of whom are being force fed to keep them alive. In my view, this is inhumane, and I am very curious what you would say about this.

Comey refused to do so, at first making the same argument he is now: force-feeding at Gitmo is not part of the FBI's job, then pleading ignorance about the practice (and, seemingly, protecting the use of force-feeding in an area where it'd be more pertinent to FBI use, especially given its use to get informants on gangs in California's Pelican Bay, in US prisons).

> Comey: If I were FBI Director, I don't think it's an area that would be within my job scope. But I don't know more about what you're describing than what you're describ—
>
> Feinstein: Well, let me just say it's within all of our job scopes to care about how the United States of America acts.
>
> Comey: I agree very much with that Senator. And I do also know that there are times in the Bureau of Prisons when the Federal authorities have had to force feed someone who's refusing to eat and they try to do it in the least

> invasive way. What you're describing I frankly wouldn't want done to me but I don't know the circumstances well enough to offer an opinion. I don't think it would be worth much at this point.

Ultimately, though, Comey didn't really fulfill his standard of reviewing to make sure counterterrorism techniques are effective and legal as well as reasonable. But that's not surprising, because he didn't exercise that standard in defending the phone dragnet either.

That's not the end of the public exchange between Feinstein and Comey during his confirmation process, however. She asked him one more question on torture while invoking the report in her Questions for the Record.

> In December 2012 the Senate Intelligence Committee adopted a bipartisan 6,300-page Study of the CIA's former detention and interrogation program. The review is by far the most comprehensive intelligence oversight activity ever conducted by the Committee. The Study—which builds a factual record based on more than 6 million pages of intelligence community records—uncovers startling new details about the management, operation, and representations made to the Department of Justice, Congress, and the White House. I believe the Study will provide an important lessons learned opportunity for Congress, the executive branch, and the American people. You have testified that you raised objections about the CIA interrogation program with Attorney General Gonzales in May 2005 before departing the Department of Justice. In one of your emails that was made public in 2009, you described telling the Attorney General that the CIA interrogation techniques were "simply awful," that "there needed to be a detailed factual discussion" of how they

were used before approving them, and that "it simply could not be that the Principles would be willfully blind." In your confirmation hearing you expressed frustration that there was not a wider policy discussion on this matter, which you believed—rightfully so—was of great importance and contrary to our values and ideals as a nation.

Should you be confirmed, how will your experience raising concerns about CIA's so-called "Enhanced Interrogation Techniques" behind closed doors influence your approach and leadership at the Federal Bureau of Investigation, your interactions with Congress, and your communications with the American people?

RESPONSE: My experience as Deputy Attorney General reinforced my long-standing view about the importance of fostering a culture of transparency, which I will bring to the FBI if I am confirmed as its new Director. I believe, as I did when I served as Deputy Attorney General, that if there are questions about whether proposed conduct is appropriate—consistent with our values —we should seek a vigorous debate about that conduct before going forward. In those circumstances, I am prepared to detail my concerns and reasoning to the relevant stakeholders, as I have done in the past. If confirmed, I intend to foster a culture at the Bureau that encourages subordinates to provide their candid advice to me and transparency with Congress and the American people, consistent with the Bureau's law enforcement and national security responsibilities, and long-standing Executive Branch confidentiality interests.

Comey's tribute to transparency is pretty absurd, given that under him his Agency has stalled on IG reports and redacted things from Congress that were shared in the previous IG Report.

But it's also a throwaway question. I think Feinstein wanted Comey to reveal that he would share things he discovered with Congress. Given his nod to "Executive Branch confidentiality interests," there's no reason to believe he would.

Still, this question was even further away from the question of, "did you know, when you concurred in torture you now claim to recognize as torture, that the victim was someone tortured in part because CIA didn't vet a fabricator (again) and in part because CIA was so anxious to win torture approval'?

It still doesn't ask the question Comey should now be asked: when you concurred in retroactively authorizing the torture of Janat Gul, did you know CIA had been lying about him for the better part of a year? Did you know you were concurring in the torture of a man largely torture for legal cover?

I asked both Senator Feinstein's office and the FBI whether any more specific question got asked in classified fashion but I got a No Comment and a non-answer.

My guess is that Feinstein didn't come to a realistic understanding of just how cynical the CIA is and was until they started spying on her earlier this year, and so didn't ask the questions during confirmation that might have made Comey's willingness to — again — play useful idiot to the CIA's crimes (including in investigating their spying on Congress).

But it deserves to be noted, even then, Comey was claiming that it is not the FBI Director to investigate the crimes committed by agents of the government.

THE STANDARDS FOR CIA CRIMES

In the interest of describing why CIA's efforts to invent a reason to torture Janat Gul are so important, I wanted to do a very quick summary of what I understand CIA's legal means of avoiding criminal prosecution was.

Torture began — certainly at surrogates overseas — long before anyone even thought of having OLC write memos for it. At that point, the legal cover for the torture would have been only the Presidential Finding signed September 17, 2001 (which said nothing explicit about torture; but then, it probably also said nothing about killing US citizens with drones though it did cover the use of killing high value Al Qaeda figures with drones).

I believe Ali Soufan's complaints about the methods used at the Thai black site created a problem with that arrangement. When he — an FBI Agent — came away saying what they were doing was "borderline torture," it created legal problems for the CIA, because an FBI Agent had witnesses a crime. I think Soufan's reaction to the coffin-like box they intended to use with Abu Zubaydah caused particular problems.

All that came to a head in July 2002, when lawyers responding to "an issue that had come up" asked for a pre-declination memo from Chertoff, even while they were trying, among other things, to get approval to use "mock burial." I don't know that Criminal Chief Michael Chertoff was all that squeamish about torture, except with Soufan's complaint about the coffin, it made mock burial (and with it, I suspect, mock execution) unsupportable by DOJ.

On July 13, 2002, three things happened. John Rizzo presented the torture techniques to people at DOJ. Having had that presentation, Chertoff

refused to pre-decline to prosecute. So John Yoo wrote a fax that CTC would ultimately use in crafting the legal direction to torturers (and in recommending against prosecution in the future).

Three days later, David Addington appears to have told Yoo to include presidential immunity language in more public OLC memos. All the important work was being negotiated via back channels (remember, Jay Bybee was busy protecting Cheneys' Energy Task Force from any oversight); the front channels involving Condi Rice were in a large part show.

But that led to the position where CIA was working off a two page fax that Yoo had freelanced to produce which provided absolutely no description of or limitation on techniques. But DOJ held CIA it to the August 1, 2002 memo.

Within short order, CIA was using techniques that had never been approved. Importantly, they hosed down Gul Rahman before he froze to death, not waterboarding, per se, but an additional technique not approved by DOJ.

When Inspector General John Helgerson started investigating in early 2003, DOJ told him he could develop the fact pattern to determine if any crimes had been committed. So CTC worked with Jennifer Koester and John Yoo to develop their own legal guidelines that not only would include some more of the torture techniques they had used but not approved, but also include a "shock the conscience" analysis. That's what the IG used to assess whether any crimes had been committed, which is important, because he found that torture as executed did humiliate detainees (and therefore violated the Constitution), but could point to (invalid) legal analysis pre-approving this. (Remember, Dick Cheney got an early review of all this.)

The problem was, DOJ's OLC refused to accept that document. In June 2003, Patrick Philbin refused. And in May 2004, Jack Goldsmith did again.

So it was not *just* that Goldsmith withdrew the Bybee Memos (though said CIA could use all the torture techniques except waterboarding while he worked on a replacement). It's that DOJ refused to accept CIA's own legal analysis as DOJ's official opinion. CIA was more anxious about getting some document judging the torture didn't violate the Constitution. That's what (as I'll show) CIA was demanding when they raised the case of Janat Gul to get the Principals to reauthorize the use of torture in July 2004.

Just on the case of Janat Gul — who was detained based off a fabricated claim of election year plotting — CIA got OLC's Daniel Levin to authorize all the old techniques (including waterboarding) as well as the 4 that CIA had used but not approved. Significantly, that included water dousing, the "technique" that had contributed to Gul Rahman's death.

But that left two other concerns: the constitutional problem, and the use of techniques in combination, which (among other things) had led to severe hallucinations in 2004. That's what the 2005 memos were meant to do: use the torture Hassan Ghul and Janat Gul had survived in 2004 to provide a rubber stamp on both the combination issue and the Constitutional one, and provide it roughly in time to be able to use to torture Abu Faraj al-Libi (though the third 2005 memo actually got signed after al-Libi's torture began).

Neither Hassan Ghul (who was very cooperative before torture) nor Janat Gul should have been tortured. The latter probably was largely just to have one tortured body, any body, on which to hang new OLC memos.

JOHN BRENNAN'S CAREFUL DODGE OF SAUDI ARABIA'S HUMAN RIGHTS ABUSES

In his appearance as the Council on Foreign Relations today, a woman with Human Rights Watch listed (starting at 56:30) a number of abuses our "partners" in the fight against ISIL engage in, including,

- The ABC report of egregious abuses committed by some of Iraq's elite military units
- Iraqi militias carrying out ISIS like atrocities
- Beheadings and violent attacks on journalists in Saudi Arabia

She then asked, "How do you think Iraqi Sunni civilians should distinguish between the good guys and the bad guys in this circumstance"?

After clearing his throat, Brennan responded,

> It's tough sorting out good guys and bad guys in a lot of these areas. It is. And human rights abuses, whether they take place on the part of I-S-I-L or of militias or individuals who are working as part of formal security services, needs to be exposed, needs to be stopped. In an area like Iraq and Syria, there has been some horrific, horrific human rights abuses and this is something that I think we need to be able to address. And when we see it, we do bring it to the attention of authorities. And we will not work with entities that are engaged in such activities.

Brennan changed a question that twice explicitly included Saudi Arabia to one that included only Syria and Iraq. Which he would have to do — because the US is not about to stop working with "entities" like Saudi Arabia, even if they do behead as many people as ISIL.

CIA HEADQUARTERS ORDERED JANAT GUL'S TORTURE TO KEEP GOING FOR AN OLC APPROVAL

I'm working on a longer post on how the torture of Hassan Ghul and Janat Gul relate to the three May 2005 OLC memos, which — as Mark Udall has pointed out — were based on a series of lies from CIA.

But for the moment, I want to point to a narrower point.

As I have explained, CIA got the White House and DOJ to approve the resumption of torture in 2004 by claiming that Janat Gul had information on a pre-election threat. By October 2004, CIA confirmed that claim was based on a fabrication by a CIA source.

But even before CIA's source admitted to fabricating that claim, on August 19, 2004, CIA's torturers had come to the conclusion that Gul didn't have any information on an imminent threat. The "team does not believe [Gul] is withholding imminent threat information," they wrote in a cable that day. Two days later, folks at CIA headquarters wrote back and told the torturers to keep torturing. The cable "stated that Janat Gul 'is believed' to possess threat information, and that the 'use of enhanced

techniques is appropriate in order to obtain that information.'"

So, as had happened in the past, the torturers had decided the detainee had given up all the information he had, but HQ ordered them to keep torturing.

But that's not all HQ did.

As I sort of lay out here (and will lay out at more length in my new post), we know from the May 30, 2005 CAT memo that several of the August 2004 OLC letters authorizing torture pertained to Janat Gul. At a minimum, that includes a request in response to which John Ashcroft authorized the use of most torture techniques approved in 2002 on July 22, 2004, and a series of requests in response to which Daniel Levin authorized the use of the remaining technique — the waterboard — on August 6, 2004.

And an August 25, 2004 letter in response to which Daniel Levin authorized four new techniques: dietary manipulation, nudity, water dousing, and abdominal slaps. [Update: The May 10, 2005 Techniques memo — which Comey described as "ready to go out and I concurred" in an April 27, 2005 email — served to retroactively approve all these memos and Gul's treatment.]

That August 25, 2004 letter had to have made the claim (because Levin repeated the judgment in his letter) — 6 days after the torturers had told HQ Gul was not withholding any imminent threat information and 4 days after HQ had said, no, Gul "is believed" to have threat information — that Gul "is believed to possess information concerning an imminent terrorist threat to the United States."

That is, CIA's HQ made the torturers resume torturing a guy who had already asked to be killed so as to sustain the claim he had imminent threat information so as to be able to get OLC to cough up another memo.

Significantly, there's no indication all of those four new techniques — or waterboarding —

were ever used on Gul. Indeed, here's what the torture report describes in its last description of the specific torture used on Gul.

> On August 25, 2004, CIA interrogators sent a cable to CIA Headquarters stating that Janat Gul "may not possess all that [the CIA] believes him to know."824 The interrogators added that "many issues linking [Gul] to al-Qaida are derived from single source reporting" (the CIA source).825 Nonetheless, CIA interrogators continued to question Gul on the pre-election threat. According to an August 26, 2004, cable, after a 47-hour session of standing sleep deprivation, Janat Gul was returned to his cell, allowed to remove his diaper, given a towel and a meal, and permitted to sleep.826

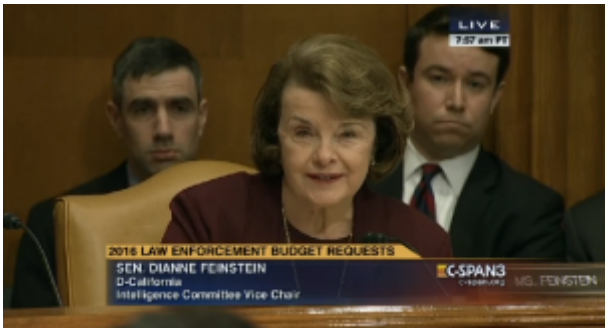
They got their memo, authorizing techniques that had been used without any official authorization from OLC on detainees in the years before (including on Gul Rahman before he died). And then they finally let the suicidal Janat Gul sleep.

And only months later did they get around to checking (perhaps using a polygraph?) whether their original source had been bullshitting them, as at least one CIA officer had surmised back in March.

I reported in December that they used Gul and the threat of an election year threat to get OLC to reauthorize torture generally. But this sequence makes it clear that they continued to torture Gul, all in the name of getting OLC to approve torture techniques they had already used without approval, even after the torturers were convinced he was not withholding any information.

No wonder Jim Comey doesn't want to read any more details about Gul's torture, which he retroactively signed off on.

JIM COMEY'S LEARNED HELPLESSNESS ABOUT THE TORTURE REPORT



Dianne Feinstein used the Federal Law Enforcement Appropriations hearing as an opportunity to implore Jim Comey to read the Torture Report.

I'm surprised neither by her request nor by her plaintive manner, given how most Federal Agencies have simply blown off the Report. But I am interested in the content of the exchange (my transcription).

> Feinstein: One of my disappointments was to learn that the six year report of the Senate Intelligence Committee on Detention and Interrogation Program sat in a locker and no one looked at it. And let me tell you why I'm disappointed. The report – the 6,000 pages and the 38,000 footnotes – which has been compiled contains numerous examples of a learning experience, of cases, of interrogation, of where the Department could learn – perhaps – some new things from past mistakes. And the fact that it hasn't been opened – at least that's what's been reported to me – is really a great disservice. It's classified. It's meant for the appropriate Department. You're certainly one of them. I'd like

> to ask if you open that report and designate certain people to read it and maybe even have a discussion, how things might be improved by suggestions in the report.
>
> Comey: And I will do that Senator. As you know, I have read the [makes a finger gesture showing how thick it was] Executive Summary. You asked me to do it during my confirmation hearing, I kept that promise and read it. There's a small number of people at the FBI — as I understand it — who have read the entire thing. But what we have not done — and I think it's a very good question, is have we thought about whether there are lessons learned for us? There's a tendency for me to think "we don't engage in interrogation like that, so what's there to learn?"
>
> Feinstein: You did. And Bob Mueller pulled your people out, which is a great tribute to him.
>
> Comey: Yeah. So the answer is yes, I will think about it better and I will think about where we are in terms of looking at the entire thing. I don't know enough about where the document sits at this point in time and you mentioned a lock box, I don't know that well enough to comment on it at this point.

Feinstein and Comey appear to have differing understandings of whether anyone at FBI has actually read the report, with Comey believing someone has read it — and professing ignorance about a "lockbox" — and Feinstein referring to a report that no one has read it, a belief that may come in part from the responses the government is making to FOIA requests. Is FBI lying about whether anyone has opened this in its FOIA responses?

But I'm also interested both that Comey hasn't read further and that he hasn't considered whether FBI might have anything to learn from it.

Tellingly, Comey suggests FBI would have nothing to learn because "we don't engage in interrogation like that, so what's there to learn." But as Feinstein corrects, FBI *did* engage in "interrogation like that," but then Bob Mueller withdrew his interrogators. Remember that Ali Soufan was present at the Thai black site for Abu Zubaydah's first extreme sleep deprivation and long enough to see the torturers bring out a coffin-like box. His partner, Steve Gaudin, stayed even longer. That stuff doesn't appear in the summary (the report's silence on this earlier phase of Abu Zubaydah's torture is one of CIA's legitimate complaints). Moreover, there are moments later in the torture program when one or another FBI Agent (including Soufan) were present for other detainees' interrogation, particularly for isolation. Comey wanted to suggest FBI was never involved in torture, but Feinstein reminded him they were.

Still, Feinstein seems to believe that Mueller withdrew Agents out of some kind of squeamishness. I think the record (especially from FBI Agents in Iraq who declined to write certain things down) suggests, instead, that Mueller withdrew his Agents to ensure that the FBI would never be witness to crimes committed against detainees which might force them to investigate those crimes. Indeed, it seems that in summer 2002 — at a time when US Attorney Jim Comey was relying on Abu Zubaydah's statements to detain Jose Padilla — DOJ found a way to bracket the treatment that had already occurred and remain mostly ignorant of that which would occur over the next several years. Feinstein should know that but seems not to; Comey almost certainly does.

Which makes Comey's explanation all the more nonsensical. There's stuff like the anal rape, even in the Executive Summary, that probably

wasn't investigated (though the statute of limitations probably has expired on it). There's probably far, far more evidence of crimes that have never been investigated in the full report. And yet … the premier law enforcement agency may or may not have taken the report out of storage in a lock box?

Consider me unconvinced.

Besides, Comey's claim that "we don't engage in interrogation like that" ignores that FBI is supposed to be the lead agency in the High Value Interrogation Group, about which there have been numerous hints that things like food and sleep deprivation have been used. His explanation that "we don't engage in interrogation like that," is all the more curious given FBI's announcement earlier this week that the guy in charge of one HIG section just got assigned to lead the Dallas Division.

> Director James B. Comey has named Thomas M. Class, Sr. special agent in charge of the FBI's Dallas Division. Mr. Class most recently served as section chief of the High Value Detainee Interrogation Group in the National Security Branch (NSB) at FBI Headquarters (FBIHQ). In this position, he led an FBI-lead interagency group that deploys worldwide the nation's best interrogation resources against significant counterterrorism targets in custody.

Who's in charge of HIG, then? And is it engaging in isolation?

Finally, I am specifically intrigued by Comey's apparent lack of curiosity about the full report because of his actions in 2005.

As these posts lay out (one, two), Comey was involved in the drafting of 2 new OLC memos in May 2005 (though he may have been ignorant about the third). The lies CIA told OLC in 2004 and then told OLC again in 2005 covering the same torture were among the worst, according to Mark

Udall. Comey even tried to hold up the memo long enough to do fact gathering that would allow them to tie the Combined memo more closely to the detainee whose treatment the memo was apparently supposed to retroactively reauthorize. But Alberto Gonzales' Chief of Staff Ted Ullyot told him that would not be possible.

> Pat [Philbin] explained to me (as he had to [Steven Bradbury and Ted Ullyot]) that we couldn't make the change I thought necessary by Friday [April 29]. I told him to go back to them and reiterate that fact and the fact that I would oppose any opinion that was not significantly reshaped (which would involve fact gathering that we could not complete by Friday).
>
> [snip]
>
> [Ullyot] mentioned at one point that OLC didn't feel like it would accede to my request to make the opinion focused on one person because they don't give retrospective advice. I said I understood that, but that the treatment of that person had been the subject of oral advice, which OLC would simply be confirming in writing, something they do quite often.
>
> At the end, he said that he just wanted me to know that it appeared the second opinion would go [Friday] and that he wanted to make sure I knew that and wanted to confirm that I felt I had been heard.

Presuming that memo really was meant to codify the oral authorization DOJ had given CIA (which might pertain to Hassan Ghul or another detainee tortured in 2004), then further details of the detainee's torture would be available in the full report. Wouldn't Comey be interested in those details now?

But then, so would details of Janat Gul's torture, whose torture was retroactively authorized in an OLC memo Comey himself bought off on. Maybe Comey has good reason not to want to know what else is in the report.

AP ALSO NOTES THE TORTURE AND DRONES DOUBLE STANDARD

After the Torture Report came out, I argued we ought to take a broader lesson from it about failures of accountability in CIA's covert programs. Specifically, I noted how the drone program — which operated under the same Memorandum of Notification as torture for years — appeared to suffer from the same problems as the torture program.

> On the second day of Barack Obama's presidency, he prohibited most forms of physical torture. On the third, a CIA drone strike he authorized killed up to 11 civilians.
>
> [snip]
>
> Other reporting may explain why the report portrays Bush, rightly or wrongly, as so uninvolved in the torture program. Both Woodward and Mayer explain that the Sept. 17, 2001, MON was designed to outsource all the important decision-making to the CIA. "To give the President deniability, and to keep him from getting his hands dirty," Mayer writes in *The Dark Side*, "the [MON] called for the President to delegate blanket authority to Tenet to decide on a case-by-case basis whom to kill, whom to kidnap, whom to detain and interrogate, and how." Whether or not

> Bush had knowledge of what was going on, the very program itself was set up to insulate him from the dirty work, giving him the ability to claim ignorance of a torture program everyone else knew about. (Later, Bush claimed that he was fully briefed.)
>
> But as we know, this insulation created the conditions for a program that was allowed to spin so horribly out of control that the CIA was able to misplace 29 detainees and not worry all that much.
>
> The implications of this subterfuge, however, do not end with the torture program. Nor with George W. Bush. This is the same MON that authorizes the CIA's current drone program. Presumably that means the drone program is characterized by the same unaccountable structures.
>
> Indeed, after Obama escalated the CIA's use of drones when he took office, the program suffered from some of the same problems as the torture program. The CIA appears to have misinformed Congress about the details, given claims by people like House Intelligence Committee ranking member Dutch Ruppersberger (D-Md.) that the program had "very minor" civilian casualties, despite the fact that evidence shows that more than 1,000 people have been killed while targeting fewer than 50 terrorists. And like the CIA's detention and torture of the wrong suspects, a number of drone strikes have killed the wrong people — but with even greater frequency.
>
> Top-ranking members of Congress, including Sen. Dianne Feinstein (D-Calif.), the chair of the Senate Intelligence Committee, have long insisted they have more oversight over the drone program than they did over

> torture. But the number of significant mistakes — take, for example, the attack on a wedding party earlier this year — suggests that oversight isn't preventing the same kind of mistakes that happened with torture. Moreover, as with the torture program, the congressional intelligence committees aren't able to get the information they request from the White House and the CIA. It was only after years of requests that the intelligence committees were allowed to review the administration's justification for having the CIA kill Anwar al-Awlaki, a U.S. citizen, with a drone strike. Worse, the reports that the CIA killed Awlaki's 16-year-old son, Abdulrahman, are also shrouded in secrecy and full of inconsistencies.

AP's Ken Dilanian has a long article in similar vein, noting that the drone and Non Official Cover program have never been scrutinized this closely, in spite of complaints of abuse.

> Yet the intelligence committees have never taken a similar look at what is now the premier counterterrorism effort, the CIA's drone-killing program, according to congressional officials who were not authorized to be quoted discussing the matter.
>
> Intelligence committee staff members are allowed to watch videos of CIA drone missile strikes to monitor the agency's claims that civilian casualties are limited. But these aides do not typically get access to the operational cables, message traffic, interview transcripts and other raw material that forms the basis of a decision to kill a suspected terrorist.
>
> Nor have they been able to examine cables, emails and raw reporting to investigate recent perceived

> intelligence lapses, such as why the CIA failed to predict the swift fall of Arab governments, Russia's move into Ukraine or the rapid military advance of the Islamic State group.
>
> And there have been no public oversight reports on the weak performance of the CIA's multibillion-dollar "nonofficial cover" program to set up case officers posing as businessmen, which has met with some criticism.

In addition to the nice review of how Dianne Feinstein's staffers' managed to do this work (which you should click through to read), Dilanian also got a fairly scathing interview with Feinstein herself (though she insists drones get enough oversight). In it, she professes to have lost her faith that CIA is telling the truth in briefings.

> The torture investigation, she said in an interview with The Associated Press, has "changed how I view management in the CIA. It's changed how I view the brotherhood of the CIA. I believe you do not lie to your oversight committee. And I think the way the program was managed was sloppy."
>
> The lesson for traditional intelligence oversight, she said, was that "you can sit and listen to a report ??? you don't know whether it's all the truth, you don't know what gets left out. And part of (CIA) tradecraft is deception."
>
> She said she believes the CIA continues to lie about the effectiveness of torture.

And she dishes on White House collaboration with the CIA to overclassified the report.

> But while Obama publicly supported releasing the report's findings and

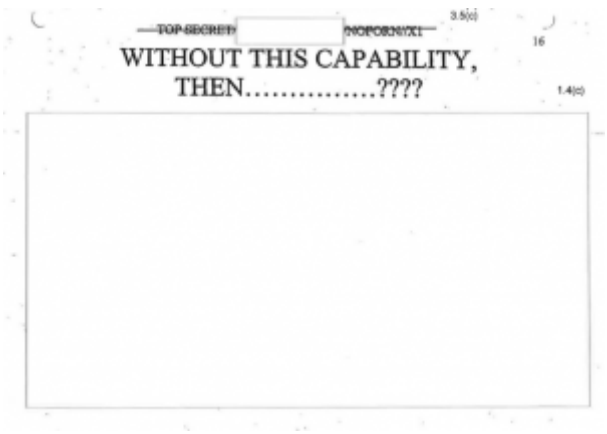
> conclusions, the administration privately pushed to keep significant parts of the summary secret, Feinstein said.
>
> "The president said that he agreed the report should be made public, that he doesn't condone (the harsh interrogations), but it sort of ends there," Feinstein said.
>
> She said she perceived "an incredible closeness" between Obama's chief of staff, Denis McDonough, and Brennan, "and the president and John Brennan." In negotiations with Feinstein about what parts of the summary should be censored, McDonough spoke for the White House, but there was no daylight between him and the CIA, she said.
>
> Feinstein said both wanted to black out large chunks of the executive summary in the name of protecting sensitive information.

It also provides more details on the attempt to fearmonger DiFi into suppressing the report at the last minute, including that Democrats found James Clapper's report on the dangers of releasing it to be all that convincing.

This is, I think, one of the necessary conclusions to draw from the Torture Report: oversight isn't working, because — as DiFi notes — CIA's tradecraft is all about deception.

Let's hope she really has learned a bit from this process, even if it's too late to do anything about it as Chair.

DAVID COLE'S SHINY OBJECTS



David Cole persists in reading some selected documents in isolation from a far more extensive record and patting himself on the back that he has discovered what many of us have been saying for years: that some in the White House were also responsible for torture. But along the way he entirely misses the point.

I will return to the documents that have so entranced Cole at a later time (several other issues are more pressing right now). But for now, here are some significant problems with his latest.

Cole once again presents the CIA Saved Lives site as some mysterious cache, in spite of the fairly clear genealogy and the WSJ op-ed signed by a bunch of people who managed torture introducing it.

> The documents, which were uploaded to a mysterious website by the name of ciasavedlives.com, provide dramatic new details about the direct involvement of senior Bush administration officials in the CIA's wrongs.

It's as if Cole has never heard of PR and therefore absolves himself of presenting this as a fourth self-interested viewpoint, that of those who managed the torture — the other three being SSCI Dems plus McCain, SSCI Republicans, and official CIA — which doesn't even

encapsulate all the viewpoints that have been or should be represented in a complete understanding of the program.

And so Cole accepts that the narrative presented here is a transparent portrayal of the truth of the torture program rather than — just like the SSCI report, the CIA response, the CIA IG Report, the SASC Report, and the OPR Report — one narrative reflecting a viewpoint.

As a result, some of the conclusions Cole draws are just silly.

Back when his new CIA-friendly opinion was in its early stages at the NYT, Cole accepted as a fair critique (as do I) that Abu Zubaydah's torture started well before the SSCI report considered, in April with his extreme sleep deprivation and not August when the waterboarding program started (if we can believe CIA records).

> The committee contended that the most useful information from Mr. Zubaydah actually came while the F.B.I. was questioning him, using noncoercive tactics before he was waterboarded. But the C.I.A. points out that Mr. Zubaydah had been subjected to five days of sleep deprivation, a highly coercive and painful tactic, when the F.B.I. interrogated him.

I'd actually say — and Cole should, given that elsewhere in his NYT piece he admits we should also look at the torture done in foreign custody — that the timeline needs to come back still further, to Ibn Sheikh al-Libi's torture in January and February 2002, using the very same techniques that would be used with Abu Zubaydah, in Egyptian custody but with CIA officers present (and, importantly, authorized by the same Presidential finding). But once you do that, Cole's depiction of the original approval process for the program becomes nonsensical.

> Even though the program had been approved at its outset by National Security Adviser Condoleezza Rice in July 2002 and by Attorney General John Ashcroft in August 2002,

Of course, all that points back to a place that Cole so studiously avoids it's hard to imagine it's not willful, to the September 17, 2001 Memorandum of Notification that CIA and SSCI both agree (though the CIAsavedlives leaves out) authorized this program. (President Obama also went to some length to hide it from 2009 to 2012, when he was busy using it to kill Anwar al-Awlaki.)

Condi didn't give primary approval for this (and the record is not as clear as Cole claims in any case). President Bush did, months earlier, well before the February 7, 2002 date where CIAsavedlives starts its narrative. And that's the detail from which the momentum endorsing torture builds (and the one that a Constitutional law professor like Cole might have far more productive input on than details that he appears to be unfamiliar with).

I'm not trying to protect Condi here — I believe I once lost a position I very much wanted because I hammered her role in torture when others didn't. But I care about the facts, and there is no evidence I know (and plenty of evidence to the contrary) to believe that torture started with Condi (there is plenty of reason to believe CIA would like to implicate Condi, however).

Cole goes onto rehearse the three times CIA got White House officials to reauthorize torture, two of which were reported years and years ago (including some limited document releases) but which he seems to have newly discovered. In doing so, he simply takes these documents from the CIA — which has been shown to have manipulated documents about briefings in just about every case — on faith.

Dan Froomkin pointed out some of the problems with the documents — something which Cole has already thrown up his hands in helplessness to adjudicate.

> The new documents don't actually refute any of the Senate report's conclusions — in fact, they include some whopper-filled slides that CIA officials showed at the White House.
>
> [snip]
>
> But the slides also contained precisely the kind of statements that the Senate report showed were inaccurate:

While it doesn't excuse White House actions, the CIA demonstrably lied about the efficacy of the program. It's not that the White House was being told they were approving a torture program that had proven counterproductive. They were told, falsely, they were approving a program that was the one thing that could prevent another attack and that it had already saved lives. That is, the people approving the torture were weighing American lives against respecting Khalid Sheikh Mohammed's human rights, based on inaccurate information. And note — as the image above shows — the torture managers aren't revealing what implicit threats they made if Bush's aides didn't reapprove torture (though elsewhere they make it clear they said ending torture might cause "extensive" loss of life), which is significant given that the next year they claimed they had to torture to prevent election year plotting that turned out to be based partly on a fabrication.

Those aren't the only known lies in the documents. Take the record of the July 29, 2003 briefing and accompanying slides. Among the whoppers — even according to CIA's own documents! — that appear are:

- The deaths by torture did not include approved

torture. They only make that claim by fudging what happened with Gul Rahman. (The silence about Rahman is of particular import for the CIAsavedlives crowd given the reports that Stephen Kappes left the CIA amid allegations he coached field officers to cover up Rahman's death.)

- The senior leadership of the Intelligence Committees had been briefed. Jay Rockefeller had not been briefed (one of his staffers was, which the slides admits, though I have new reason to doubt some of CIA's claims about which staffers have been briefed). In addition, according to CIA documents, no one was briefed on torture in Spring 2002, as CIA would have had to do to comply with the National Security Act. Furthermore, there is now serious question whether the CIA ever did the new briefing after the break, as CIA said it would do in the memo.
- Safeguards. Many of the safeguards described were imposed in early 2003, after a number of abuses.

- Islam permits confession under torture. The claim that Abu Zubaydah tied confessing under torture to Islam is apparently something Alfreda Bikowsky got from a walk in.
- Amount of torture. The summary of the Ammar al-Baluchi torture doesn't describe his simulated drowning. And the number of waterboards is wrong.

The fact that the CIA misrepresented how many times both Abu Zubaydah and Khalid Sheikh Mohammed had been waterboarded is significant, because that's also related to the dispute about whether Muller's account of the meeting was accurate. According to John Ashcroft, Muller misrepresented his comments to mean that CIA could waterboard more than had been approved in the Techniques memo, whereas what he really said is that CIA could use the techniques approved in that memo with other detainees. This does not mean — contrary to Cole's absurd insinuation — that "Ashcroft is my hero." It means there is a public dispute on this issue. Cole has gone from refusing to adjudicate disputes to simply taking CIA's word on faith, in spite of the well-documented problems — even based entirely on CIA's own documents — with their own accounts of briefings they gave.

Note, too, that whether the Abu Zubaydah memo could be used with other detainees was being discussed in 2003, when even by CIA's count it had already subjected 13 more detainees to torture, is itself telling.

Finally, the Legal Principles are worth special note. They were, per the CIA IG Report, the OPR Report, and declassified documents, one key tension behind this July 29, 2003 briefing. As

the record shows, DOJ permitted CIA's IG to develop the agency's own fact set about the violations that had occurred by January 2003 to determine whether doing things like mock execution with Abd al Rahim al-Nashiri and killing Gul Rahman were crimes. So CIA set about writing up its own summary of Legal Principles DOJ had given it — it claimed to John Helgerson — with the help of John Yoo and Jennifer Koester (but not, at least according to Jack Goldsmith, the involvement of Jay Bybee or the review of other OLC lawyers, which would be consistent with other facts we know as well as Bybee's sworn testimony to Congress). That is, CIA was basically writing its own law on torture via back channel to OLC. The record shows that on several occasions, CIA delivered those documents as a fait accompli, only to have DOJ lawyers object to either some provisions or the documents as a whole. The record also shows that CIA used the memos to expand on authorized techniques (something the DOD torture memo process in 2003 also did) to include some of the ones they had used but hadn't been formally approved by DOJ. That is, one tension underlying this meeting that Cole doesn't discuss is that some in DOJ were already trying to limit CIA's own claims to authorization, which devolved in part to a debate over whether bureaucratic manipulation counts as approval.

I raise all this because it gets at the underlying tension, one which, I suspect, created a kind of momentum that doesn't excuse those involved but probably explains it. Very early after 9/11, certain people at CIA and in the White House decided to affirmatively torture. Torture started — and the Iraq War was justified — early, long before Cole presents. But at each step, that momentum — that need to, at a minimum, protect not only those who had acted on the President's orders but also the President himself — kept it going such that by 2004, CIA had an incentive to torture Janat Gul just for the sake of having an excuse to torture again (and having an excuse to get Jay Rockefeller to buy off on torture for what

appears to have been the first time).

It's that very same momentum — the need to protect those who tortured pursuant to a President's order, as well as the office of the presidency itself — that prevents us from holding anyone accountable for torture now. Because ultimately it all comes down to the mutual embrace of complicity between the President and the CIA. That's why we can't move beyond torture and also why we can't prevent it from happening again.

Cole and I agree that there are no heroes in the main part of the narrative (though there were people who deserve credit for slowing the momentum, and outside this main part of the narrative, there were, indeed, heroes, people who refused to participate in the torture who almost always paid a price). What he is absolutely incorrect about, given the public record he is apparently only now discovering, is that CIA did manipulate some in the White House and DOJ and Congress, to cover their ass. I don't blame them, They had been ordered to torture by the President, and had good reason not to want to be left holding the bag, and as a result they engaged in serial fraud and by the end, crimes, to cover their collective asses. But the evidence is, contrary to Cole's newly learned helplessness to investigate these issues, that CIA lied, not only lied but kept torturing to protect their earlier torture.

All that said, Cole's intervention now is not only laughably credulous to the CIA. But it also is not the best use to which he could put his soapbox if his goal is to stop torture rather than do CIA's bidding.

First, we actually have no idea what went on at the White House because on President Obama's request though not formal order, CIA withheld the documents that would tell us that from SSCI. Why not spend his time calling for the release of those documents rather than parroting CIA propaganda credulously? I suspect Obama would take Professor Cole's calls to release the

documents CIA protected at the behest of the White House more seriously than he has taken mine. Let's see what really happened in discussions between CIA and the White House, in those documents the White House has worked hard to suppress.

Just as importantly, though Cole has not mentioned it in any of his recent interventions here, what appears to have set the momentum on torture rolling (as well as the execution of an American citizen with no due process) is the abuse of covert operation authority. This is something that a prestigious Constitutional law professor might try to solve or at least raise the profile of. Can we, as a democracy, limit the Article II authority of the President to order people to break the law such that we can prevent torture?

Because if not, it doesn't matter who we blame because we are helpless to prevent it from happening again.

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.
>
> [snip]
>
> 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.
>
> 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.
>
> 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.
>
> 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.

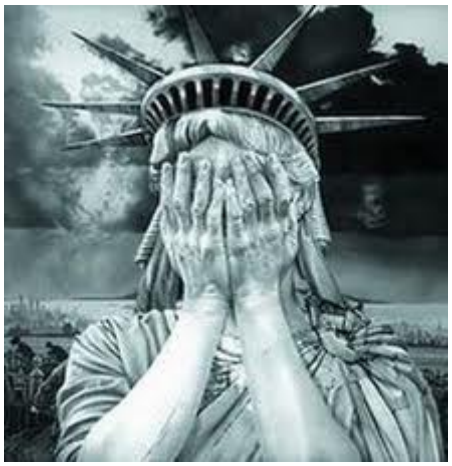
Finally, Cole remains silent about a very important confirmation from the Torture Report — one which President Obama had previously gone to some lengths to suppress — one which gets at why the CIA managed to get away with breaking the law. While SSCI may not have pursued all the documents implicating 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.

LORETTA LYNCH IS A DUBIOUS NOMINEE FOR ATTORNEY GENERAL



Loretta Lynch is an excellent nominee for Attorney General, and her prior actions in whitewashing the blatant and rampant criminality of HSBC should not be held against her, because she didn't know that at the time she last whitewashed that criminal enterprise, right?

No. Nothing could be further from the truth.

This is a cop out by Lynch's advocates. Lynch either knew, or damn well should have known. She signed off on the HSBC Deferred Prosecution Agreement (DPA), if she was less than fully informed, that is on her. That is what signing legal documents stands for….responsibility. Banks like HSBC, Credit Suisse, ING etc were, and still are, a cesspool of criminal activity and avoidance schemes. Willful blindness to the same old bankster crimes by Lynch doesn't cut it (great piece by David Dayen by the way).

But, all the above ignores the Swiss Alps sized mountains of evidence that we know Lynch was

aware of and blithely swept under the rug by her HSBC DPA. So, we are basically left to decide whether Lynch is a bankster loving toady that is her own woman and cravenly whitewashed this all on her own, or whether she is a clueless stooge taking orders to whitewash it by DOJ Main. Both views are terminally unattractive and emblematic of the oblivious, turn the other cheek to protect the monied class, rot that infects the Department of Justice on the crimes of the century to date.

And that is only scratching the real surface of my objections to Lynch. There are many other areas where Lynch has proven herself to be a dedicated, dyed in the wool "law and order adherent" and, as Marcy Wheeler artfully coined, "executive maximalist". Lynch's ridiculous contortion, and expansion, of extraterritorial jurisdiction to suit the convenient whims of the Obama Administration's unparalleled assault on the Rule of Law in the war on terror is incredibly troubling. Though, to be fair, EDNY is the landing point of JFK International and a frequent jurisdiction by designation. Some of these same questions could have been asked of Preet Bharara (*see, e.g. U.S. v. Warsame*) Loretta Lynch has every bit the same, if not indeed more, skin in the game as Bharara, whether by choice or chance.

Lynch has never uttered a word in dissent from this ridiculous expansion of extraterritorial jurisdiction. Lynch's record in this regard is crystal clear from cases like *US v. Ahmed, Yousef, et. al.* where even Lynch and her office acknowledged that their targets could not have "posed a specific threat to the United States" much less have committed specific acts against the US.

This unconscionable expansion is clearly all good by Lynch, and the ends justify the means because there might be "scary terrists" out there. That is just dandy by American "executive maximalists", but it is toxic to the Rule of Law, both domestically and internationally (See,

supra). If the US, and its putative Attorney General, are to set precedents in jurisdictional reach on common alleged terroristic support, then they ought live by them on seminal concerns like torture and war crimes under international legal norms. Loretta Lynch has demonstrated a proclivity for the convenience of the former and a toady like disdain for the latter.

And the same willingness to go along to get along with contortion of the Rule of Law in that regard seems beyond certain to extend to her treatment of surveillance issues and warrant applications, state secrets, over-classification, attack on the press and, critically, separation of powers issues. Those types of concerns, along with how the Civil Rights Division is utilized to rein in out of control militarized cops and voting rights issues, how the OLC stands up to Executive overreach, whether OPR is allowed to continue to shield disgraceful and unethical AUSAs, and whether she has the balls to stand up to the infamously insulated inner Obama circle in the White House. Do you really think Loretta Lynch would have backed up Carolyn Krass and OLC in telling Obama no on the Libyan War Powers Resolution issue?

For my part, I don't think there is a chance in hell Lynch would have stood up to Obama on a war powers, nor any other critical issue, and that is a huge problem. Krass and Holder may have lost the Libyan WPR battle, but at least they had the guts to stand up and say no, and leave a record of the same for posterity.

That is what really counts, not the tripe being discussed in the press, and the typically preening clown show "hearing" in front of SJC. That is where the rubber meets the road for an AG nominee, not that she simply put away some mobsters and did not disgrace herself – well, beyond the above, anyway (which she absolutely did) – during her time as US Attorney in EDNY. If you are a participant in, or interested observer of, the criminal justice system as I

am, we should aspire to something better than Eric Holder. Holder may not have been everything hoped for from an Obama AG when the Administration took office in January of 2009, but he was a breath of fresh air coming off the AG line of the Bush/Cheney regime. Loretta Lynch is not better, and is not forward progress from Holder, indeed she is several steps down in the wrong direction. That is not the way to go.

The fact that Loretta Lynch is celebrated as a great nominee by not just Democrats in general, but the so called progressives in specific, is embarrassing. She is absolutely horrible. If Bush had put her up for nomination, people of the progressive ilk, far and wide, would be screaming bloody murder. Well, she is the same person, and she is a terrible nominee. And that does not bode well for the Rule of Law over the remainder of the Obama Administration.

And this post has not even touched on more mundane, day to day, criminal law and procedure issues on which Lynch is terrible. And horrible regression from Eric Holder. Say for instance pot. Decriminalization, indeed legalization, of marijuana is one of the backbone elements of reducing both the jail and prison incarceration rate, especially in relation to minorities. Loretta Lynch is unconscionably against that (See, e.g., p. 49 (of pdf) et. seq.). Lynch appears no more enlightened on other sentencing and prison reform, indeed, she seems to be of a standard hard core prosecutorial wind up law and order lock em up mentality. Lynch's positions on relentless Brady violations by the DOJ were equally milquetoast, if not pathetic (See, e.g. p. 203 (of pdf) et. seq.). This discussion could go on and on, but Loretta Lynch will never come out to be a better nominee for Attorney General.

Observers ought stop and think about the legal quality, or lack thereof, of the nominee they are blindly endorsing. If you want more enlightened criminal justice policy, to really combat the prison state and war on drugs, and to rein in the out of control security state and

war on terror apparatus, Loretta Lynch is a patently terrible choice; we can, and should, do better.