

Why an Independent Bipartisan Commission is the Right Vehicle to Address Bush Administration Interrogation and Torture Policies

By Raj Purohit and Howard Salter

In the waning days of the Bush administration, the President and Vice-President discussed their authorization of interrogation techniques that included those that rose to the level of torture under U.S. and international law. In a mid-December interview with ABC news, Vice-President Cheney was asked whether he stood by his decision to authorize the water-boarding of a senior al-Qaeda operative. Mr. Cheney's response was illuminating:

"I was aware of the program, certainly, and involved in helping get the process cleared, as the agency in effect came in and wanted to know what they could and couldn't do. And they talked to me, as well as others, to explain what they wanted to do. And I supported it. It's been a remarkably successful effort, and I think the results speak for themselves."

Discussing the same interrogation program, President Bush displayed similar sentiments to his Vice-President noting to Fox News that:

"...when people study the history of this particular episode, they'll find out...we gained good information from Khalid Sheikh Mohammed in order to protect our country. We believe that the information we gained helped save lives on American soil...."

While the majority of President Bush's inner circle mirrored these sentiments, a dissenting voice from within his administration was heard in early January. Susan Crawford, responsible for determining which Guantanamo detainees should be brought to trial before a military commission, gave an interview to the Washington Post. She made clear that the alleged 20th 9/11 hijacker Mohammed al-Qahtani could not be brought to trial because he had been tortured.

"The techniques they used were all authorized, but the manner in which they applied them was overly aggressive and too persistent.....You think of torture, you think of some horrendous physical act done to an individual. This was not any one particular act; this was just a combination of things that had a medical impact on him, that hurt his health. It was abusive and uncalled for. And coercive. Clearly coercive. It was that medical impact that pushed me over the edge [to call it torture]"

The combination of President Bush's push to shape his administration's legacy, Crawford's comments and the desire of many anti-torture activists to secure a break with the Bush era has reignited a vigorous debate. It is centered on what the Obama administration should do to address the past use of torture and interrogation.

To date, there are three options that the new administration has available. The first is simply to do nothing, and during the transition, then President-elect Obama himself left open that possibility.

He stated on the news program "This Week With George Stephanopoulos" that prosecutions were appropriate if "somebody has blatantly broken the law" but also noted "a belief that we need to look forward as opposed to looking backwards." Perhaps recognizing that his comments would raise concerns among torture activists, Mr. Obama also addressed the comments being made by the outgoing Bush administration.

"Vice President Cheney, I think, continues to defend what he calls extraordinary measures or procedures when it comes to interrogations and from my view, waterboarding is torture."

The possibility that the new administration would resist the calls to prosecute their predecessors has been suggested in a number of quarters. Bradford Berenson, a former Bush White House lawyer and Harvard law classmate of the new President, said in a New York Times interview, "A new president doesn't want to look vengeful ...and the last thing a new administration wants to do is spend its time and energy rehashing the perceived sins of the old one."

The second option available to the Obama administration would be to prosecute those responsible for violating U.S. and international law. Supporters of a prosecutorial approach from the new administration have been heartened by the confirmation hearing comments made by then Attorney General nominee Eric Holder. He made clear that waterboarding is torture and also stated, in reference to alleged Bush administration crimes, that, "No one is above the law and we will follow the evidence, the facts, the law, and let that take us where we should."

For anti-torture activists, the hope raised by these comments would have been tempered by Holder's qualification that policy differences should not be criminalized.

It is fair to say that the suggestion, during the transition period, that the new administration may not look to prosecute those responsible for torture has not been well received by many anti-torture activists. Jonathan Turley, a Constitutional Law Professor at George Washington University, captured their core concerns in an interview on MSNBC's Rachel Maddow Show when he stated:

"We have third world countries that when they have found that their leaders committed torture war crimes, they prosecuted them. But the most successful democracy in history is just, I think, about to see war crimes, [and] do nothing about it. And that's an indictment not just of George Bush and his administration. It's the indictment of all of us if we walk away from a clear war crime and say it's

time for another commission.”

Turley and many others believe that the new administration should either use the current criminal division at the Department of Justice or a special prosecutor to bring members of the Bush administration responsible for these crimes to trial.

While this position is both reasonable and understandable, it may not be the most appropriate option for the Obama administration to take. The third option available to them is supporting the creation of an Independent Bipartisan Commission on Torture and Interrogation Policy. This option may prove to be the most beneficial to the country in the short and long term.

We have always believed that the issue of torture, interrogation and extraordinary rendition was one that was too broad to hand over to a special prosecutor or the Department of Justice. The consequences of U.S. actions from Abu Ghraib to Guantanamo require our government to carry out a range of interlinked tasks including:

- The need to publicly and internationally recommit to international human rights law;
- develop and enforce a new rights-respecting interrogation regime within our military and intelligence forces;
- ensure that all the individuals swept up in the CIA rendition and secret prisons programs are accounted for; and,
- undo the harm we have caused to a global anti-torture system that we initially helped to build. Many of these tasks go well beyond the skill set of our best prosecutors and will require the engagement of a number of different actors.

An Independent Bipartisan Commission would bring together the range of experts able to collectively comprehend the totality of this issue, its consequences and necessary policy prescriptions. The experts would be drawn from the intelligence, foreign policy, law enforcement, military leadership, and the legal and human rights community. They could look holistically at an issue that has become increasingly complicated and multifaceted.

Furthermore, a Commission that holds its hearings in the open and releases its findings for the world to see will also serve a critical public purpose; it will help to reshape U.S. public opinion on torture that has alarmingly become more tolerant of human rights abuses in the fight against terrorism. Between the politicization of the battle against al-Qaeda by many in, and supportive of, the Bush administration and the corrosive impact of entertainment programs that painted torture as a necessary tool to fight America’s enemies, the public view of this crime has changed dramatically. A World Public Opinion survey on torture noted that:

“Support for making exceptions for torture in the case of terrorists has grown

among Americans since 2006 (44%, up from 36%), while the majority opposing the use of torture in all cases has fallen slightly (53%, down from 58%).”

The fact that the shift in these numbers is based, in large measure, on incorrect assumptions, including a false belief that torture is an effective interrogation tool, suggests that the next administration must take corrective actions to ensure that the public understands the realities of this issue. Only by making clear that torture does not work and showing how it harms U.S. national security interests can we correct the falsehoods shaping U.S. public opinion on this issue.

And it is not only the public attitudes that have troublingly shifted on this issue. A recent survey of U.S. troops in Iraq paints a bleak picture of an Army that is not doing enough to drum home the importance of lawful conduct to its troops. One statistic in particular that caught our attention showed that roughly two-thirds of Marines and half the Army troops surveyed would not report a team mate for mistreating a civilian or for destroying civilian property unnecessarily. As the Army report notes:

“Less than half of soldiers and Marines believed that noncombatants should be treated with dignity and respect...”

A Commission holding hearings in public would be able to respond to this erosion in public and military values by highlighting studies such as the January 2007 Intelligence Science Board study (sponsored by the Defense Intelligence Agency and the Pentagon’s Counterintelligence Field Activity) which indicated that there is no credible scientific evidence to back up the use of controversial interrogation techniques/torture in the fight against terrorism. The study also suggested that torture could actually undermine intelligence gathering.

These findings contradict the rhetoric of the outgoing administration and need to be shared with a public that has been fed misinformation for a number of years. Similar points were raised a few months ago in the Washington Post in an op-ed from a U.S. interrogator in Iraq who made clear that when his team went against the grain and did not use torture they got the intelligence that led to the discovery of the terrorist Zarqawi. He also noted that Abu Gharib and Guantanamo caused foreign fighters to flood to Iraq and calculated the number of US troop casualties caused by this flocking of foreign fighters. The interrogator wrote:

“I learned in Iraq that the No. 1 reason foreign fighters flocked there to fight were the abuses carried out at Abu Ghraib and Guantanamo. Our policy of torture was directly and swiftly recruiting fighters for al-Qaeda in Iraq. The large majority of suicide bombings in Iraq are still carried out by these foreigners. They are also involved in most of the attacks on U.S. and coalition forces in Iraq. It’s no exaggeration to say that at least half of our losses and casualties in that country have come at the hands of foreigners who joined the fray because of our program of detainee abuse. The number of U.S. soldiers who have died because of our torture policy will never be definitively known, but it is fair to say that it is close to the number of lives lost on Sept. 11, 2001. How anyone can say that torture keeps Americans safe is beyond me — unless you don’t count American

soldiers as Americans.”

Along similar lines, when Senator McCain was interviewed on “This Week With George Stephanopoulos” he noted that a high level al-Qaeda in Iraq member made clear to him that their success was driven by two issues - one of which was Abu Gharib and Gitmo as a recruiting tool.

“Let me just tell you a brief story. Not that long ago, a year and a half ago, Senator Lindsey Graham and I were in Iraq. We were in the prison. The general, our U.S. general in charge of prison had us in a secluded area and met a former high-ranking member of Al Qaida, one of the toughest guys I’ve ever seen. I said, how did you succeed so well after the initial American victory?

He said, “Two things” — he said, “One” — he said, “there was no control by your troops. It was total lawlessness. There was rape, looting, pillage, murder, settling of old scores. So there was lawlessness. Second, the greatest recruiting tool we had — we were able to recruit thousands of young men,” he said, “was Abu Ghraib.” So you can’t underestimate the damage that our treatment of prisoners, both at Abu Ghraib and other...”

One of President Bush’s closest political allies Karen Hughes, who played a public diplomacy role at the State Department, echoed this sentiment in a Financial Times interview. “The toughest thing I’ve told the president is that he needed to improve the detainee policy...I felt it was important it was understood that was how we were being seen in the world.”

Beyond understanding that torture produces intelligence of questionable value and creates an atmosphere that will generate enemies for those who use it, a Commission would also expose other systems, beyond the executive branch, that failed. While virtually all the focus to date has been on the conduct of the Bush administration, journalists such as the Atlantic’s Marc Ambinder have examined the role of Congress and observed that:

“...a growing mass of evidence suggests that the intelligence oversight panels were cowed by the President at crucial junctures, intimidated by the exigencies of politics and war. And they knew. They knew that Abu Zubaida was subject to enhanced interrogation methods; that extraordinary renditions were frequently assigned; that the administration had vastly expanded the NSA’s collection of metadata inside the United States.”

If the authors of the Intelligence Science Board study, the U.S. interrogator who wrote so compellingly in the Washington Post, those who have reported on the failures of Congressional oversight and many others with critical information to share were to present it in public to a high profile Commission, we could ensure that the public and our policy makers have the information required to make informed judgments on such matters.

The incoming head of the Department of Justice, Office of Legal Council, Dawn Johnson **perhaps best articulated why we need a public discussion of this issue:**“Our constitutional democracy cannot survive with a government shrouded in secrecy, nor can our nation’s honor be restored without full disclosure.”

We too believe that there must be “full disclosure” for the torture crimes our nation committed. However, before the pursuit of criminal charges, President Obama must appoint a Commission. This would support the administration’s efforts to restore our nation’s moral standing and its findings would provide substantial, widespread support for any appropriate future legal action.

By supporting a Commission, President Obama can make clear that this is the first, not the last, step on the road to removing the stain of torture from our country.

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