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The Illusion of Accountability: The Idea of an American Truth Commission on Torture

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Perhaps there can be nothing more revealing about George W. Bush's presidency than his facile and repeated assertion that "the United States does not torture". And perhaps, as the American public became aware of mounting evidence to the contrary, nothing reveals more about contemporary politics in the United States than the ensuing debate over whether—and how—to bring to account persons responsible for acts of torture committed in the war on terrorism.

In the spring of 2004, a CBS news programme televised photographs depicting the abuse of prisoners at Abu Ghraib jail in Baghdad. Since then, the treatment of detainees in American custody in Iraq, Afghanistan, and Guantánamo Bay, Cuba, has been amply documented. Prisoners were slapped, kneed, choked, waterboarded, and slammed into walls. Some had their arms shackled overhead for long periods of time. Detainees were kept naked for months on end. Many were subjected to extreme temperatures. Approximately one hundred persons died in American custody; US military investigators declared over one-quarter of these deaths to be homicides.

Debate in the United States over what should be done about the mistreatment of detainees revolved around four positions. Some were willing to let Congress take the lead in conducting investigations. Others favoured criminal prosecutions. Still others, often citing South Africa's Truth and Reconciliation Commission as a model, preferred an investigative commission. Then there were those opposed to all of these alternatives, including prominent Republicans who argued that it would be unseemly for Democrats, after taking control of the White House and Congress, to sponsor investigations of the prior administration. Sentiment in favour of a commission appeared to gain ground until August 2009, when Attorney-General Eric H. Holder Jr. launched a preliminary review of CIA interrogations to determine whether the most egregious cases deserved a full criminal investigation.

Even if that leads to wide-ranging prosecutions, the public debate over accountability is in itself significant. Particularly striking were the insistent calls for a commission, especially those from influential persons sincerely disturbed by reports of torture. Investigative commissions can perform a valuable service, but is a commission appropriate in these circumstances? That question raises a host of complex legal, political, and moral issues; yet how quickly the idea took hold in the United States, and how readily leading commission advocates (not all) were willing to forgo criminal prosecutions. The argument for using a commission in lieu of prosecutions warrants further scrutiny, but so does the entire idea of an American torture commission, not only because the allegations of wrongdoing are so serious, but also because of the lasting impact the push for such a commission can have.

The Argument for a Commission

The idea of creating a torture commission drew support in the United States from prominent lawmakers, legal academics, journalists, and human-rights organisations. They certainly did not agree on everything, but some general themes emerged from the arguments they put forward.

It would not be accurate to say that commission advocates forgot America's history of investigative commissions. They pointed to the 9/11 inquiry along with lesser-known but historically important panels like the Kerner Commission that examined race relations and civil unrest in the 1960s. Commission advocates cited the work in the mid-seventies of the Church Committee on intelligence activities, even though this was an ad hoc Senate committee rather than an independent commission. No matter, the point was that new facts could be brought to light, secret activities exposed, broad historical patterns put in perspective, and significant reforms set in motion—all by virtue of bringing together a dedicated group of people for that purpose.

Judging from pro-commission rhetoric, no American precedent served the argument so well as recent developments overseas. In the last quarter of a century, over two dozen countries set up special commissions to investigate human-rights abuses committed by authoritarian regimes or during civil wars. One of the earliest was Argentina's National Commission on the Disappeared, which documented the cases of nearly nine thousand persons killed or "disappeared" by the military. Other countries followed suit, including Chile, Uganda, Guatemala, as well as South Africa. At a minimum, the goal was to create a historical record of human-rights abuses. In many cases, these commissions reported their findings with recommendations for reform. For victims, the inquiries provided an official forum where they could tell their stories on their own terms.

Not all inquiries were officially designated "truth commissions", but that is how they came to be known collectively. No doubt the implicit promise held out by that umbrella term underlay its appeal. "We need to get to the bottom of what happened—and why," said US Senator Patrick Leahy, one of the leading sponsors of an American torture commission. Truth was the "overarching goal", he said.¹ And if investigative commissions in all parts of the globe were able to pierce the veil of authoritarian rule and the chaos of civil war to obtain the truth, then surely Americans could do no less. That, at least, was the implication of the argument.

More was involved than simply finding facts. An American torture commission, its supporters claimed, could do many things. It could overcome political differences, deter future administrations from committing similar abuses, restore the nation's standing as a champion of human rights, and engage Americans in "a process of soul searching and national cleansing".²

Or, to restate the argument in more modest terms, a torture commission was seen as the best hope of achieving those objectives. That argument was based on making an explicit differentiation from criminal proceedings. Commission supporters expressed little doubt that a truth commission could develop a clear record for the public—that was its basic task. By contrast, they worried that prosecutors working in secret grand jury proceedings might conduct extensive investigations without publicising the results (if, for example, evidence was insufficient to prove guilt). Senator Leahy, one of the most persistent critics of the Bush administration, emphasised the need to find some middle ground to negotiate Washington's partisan atmosphere. The charge of playing politics was bound to cloud prosecutions by the Obama Justice Department, it was thought, just as a full-scale congressional investigation with public hearings would become hopelessly mired in partisan bickering. However, a properly constituted truth commission, supporters believed, could transcend politics.

Commission advocates, especially those actively opposed to criminal prosecutions, glossed over obligations the United States had under domestic and international law to prosecute (for example, the Torture Act codified at 18 USC §§2340–2340A, the Torture Convention). It was suggested that criminal prosecutions would be practically impossible to pursue. According to Yale law professor Jack M. Balkin, “enormous obstacles” stood in the way.³ Among the most important was the statutory immunity Congress had retroactively granted Americans involved in interrogating detainees. The problems prosecutors would face were enough to convince some commission advocates to do without criminal proceedings. Others vaguely suggested that prosecutions could follow the commission’s inquiry. Left unclear was what effect the commission’s work might have on subsequent prosecutions, though that could prove to be the undoing of criminal prosecutions if the commission granted immunity to witnesses.

A Dubious Analogy

Proponents of an American torture commission often pointed to the experience of truth commissions in other countries. That was an important element in their thinking. Given that truth commissions have provided a sensible alternative in some places and that, in principle, Americans may benefit from considering innovative developments in the field of human rights wherever they originate, the analogy deserves careful consideration.

For torture commission advocates willing to dispense with prosecutions, the comparison was especially useful. They seemed to suggest that if Americans looked to the truth commission abroad, they would find sufficient justification to forgo criminal prosecutions. The idea was that what was most sought after—bringing the truth to light, putting in place necessary reforms, deterring human-rights abuses—could be realised without the complications that would accompany full-scale criminal proceedings. South Africa’s experience was held out as a model for this approach, with its emphasis on truth plus reconciliation.

If Americans, going by the use of truth commissions elsewhere, wish to substitute a torture commission for prosecutions, they should reflect on the consensus of human-rights experts and victims of human-rights abuses: truth commissions are not an adequate substitute for criminal proceedings. Priscilla Hayner, a leading authority on truth commissions, is unequivocal on this point: “Nonjudicial truth bodies do not and should not be seen to replace judicial action against perpetrators, and neither victims nor societies at large have understood them to do so in those countries where truth commissions have been put in place.”⁴

True, some countries have used truth commissions in place of criminal proceedings. It is important to see why they did so. Quite often the domestic legal system was “in shambles” (as might be expected after years of authoritarian rule or civil war).⁵ If judges were not corrupt, they were easily intimidated. If judges were above reproach, prosecutors lacked the expertise necessary to handle the investigations and trials. And if judges and prosecutors had the requisite capabilities, the country’s economic condition was often so precarious that it was difficult to dedicate the financial resources needed for criminal prosecutions. The case is obviously different in the United States.

Another reason the truth commission has become increasingly popular—arguably its fundamental purpose as that institution has developed in recent decades—is its proclaimed ability to smooth the transition to a democratic society. If prosecutions remained a viable alternative, it seemed necessary to curtail them in order to induce those who committed human-rights abuses to go along with the new

government. In South Africa's case, Archbishop Desmond Tutu reported that it was "as certain as anything" that the apartheid government's police and military would have made peaceful change impossible had they been subject to criminal liability without any possibility of amnesty.⁶ Truth commissions, the thinking goes, can facilitate the changeover—a role sometimes couched in the language of reconciliation, as the official title given to South Africa's commission suggests.

While a transition to democracy is not relevant to the case of the United States, some supporters of an American torture commission have seized on the notion of reconciliation. They suggest that an American truth commission could foster a process of reconciliation just as South Africa's commission did. This was also implicit in the tone struck by proposals that non-partisan commissioners could be selected for an inquiry that could lead to a "national cleansing".

It remains unclear whether a commission could achieve such an amorphous objective, but even if it could, a larger question looms. If reconciliation requires the US Justice Department to abandon prosecutions of persons guilty of war crimes and homicide, is reconciliation an appropriate goal for the United States? When other countries sought reconciliation through truth commissions, the idea was to reconcile victims with their oppressors, distasteful as that was to many victims, because that was considered a necessary step to build a democratic government. That goal was an outgrowth of the setting in those countries: an extraordinary level of conflict and repression associated with brutal military dictatorships, bitter civil wars, or in South Africa's case, one of history's most oppressive racist regimes.

Seen in that light, the analogy between those countries and the United States is fundamentally misconceived. There was conflict in the United States during the Bush years, to be sure, but it was political conflict within an established democracy. Whatever partisan differences manifested themselves then, they pale in comparison to the raw emotions unleashed by the atrocities that have been the subject of truth commissions elsewhere. The reconciliation sought is not between detainees and those who tortured them, but rather between political opponents.

Besides, criminal prosecutions continued to play an important role in countries that went to great lengths to achieve reconciliation. South Africa's Truth and Reconciliation Commission did offer amnesty, but only to applicants who fully confessed in public. To be successful, the amnesty programme depended on the threat of prosecutions. The Truth and Reconciliation Commission itself stated that "it has always been understood" that a "bold prosecution policy" would be pursued against persons who did not apply for amnesty "in order to avoid any suggestion of impunity".⁷

What is left of this attenuated comparison with other countries is an assertion, seemingly taken as an article of faith by torture commission advocates: that a truth commission would, by definition, get to the truth.

Truth and Politics in the United States

America's own experience with investigative commissions may shed light on that proposition. That experience is, in any event, part of the argument advanced by torture commission advocates. US history certainly provides ample precedent. In times of crisis, it seems as if Americans can hardly do without an investigative commission. In the twentieth century, commissions were formed to look into the attack on Pearl Harbor (the Roberts Commission), the assassination of President John F. Kennedy (the Warren Commission), and the Iran–Contra affair involving President Ronald Reagan's administration (the Tower Commission). Throw in the 9/11 Commission (formally, the "National

Commission on Terrorist Attacks upon the United States”) for good measure and America’s own experience, according to this line of thinking, justifies establishing a torture commission.

While this shifts the historical basis of the argument, the key point for commission advocates remains the same: a commission would expose the truth about torture. Underlying that view is the assumption that investigative commissions can remain aloof from politics. Simply appoint commissioners who have no political agenda, commission advocates suggest. Without politics intruding, the commission could devote itself fully to its “straightforward mission” of finding out the truth. Moving beyond politics is crucial not only to discovering the truth, but also to getting the public to embrace the commission’s findings as the truth. So long as the commissioners are “universally recognized as fair-minded”, the investigation could be non-partisan and perceived as such.⁸ So the argument goes.

These two basic claims about truth and politics rest on an implicit understanding of US history. The record of American investigative commissions presents a more cautionary tale, however.

If history is any guide, the life of an investigative commission in the United States is interwoven with politics: commissions are born of a political context, created by political actors for political reasons, in some cases used as a political instrument to deflect accountability, and are invariably subject to political pressures during the course of an investigation which everyone understands has political consequences. Indeed, commissions are often formed when the political stakes are greatest, but whether the implications are large or small, the process of selecting commissioners offers little hope of sidestepping politics. The appointment process itself provides politicians with a clear opportunity to shape the commission’s investigation. In the usual case, commissioners are selected by the president acting alone or jointly with Congress. The roll of appointees on the most prominent investigative commissions is dominated by former lawmakers, executive officials, and other Washington insiders.

Among the most well-known commissions from America’s past are presidential commissions which were not, in point of fact, established to get to the bottom of what happened. When the Iran–Contra scandal threatened Reagan’s presidency, the White House created the Tower Commission to investigate the actions taken by Reagan’s own national-security team (supplying arms to Iran for hostages held in Lebanon and secretly diverting funds to support the Contra rebels in Nicaragua). Public relations was uppermost in the minds of administration officials. At a minimum, they sought to cast the president’s actions in the best light possible, though they would not have been disappointed if the commission sidetracked a more thorough investigation elsewhere.

A torture commission would be launched in different circumstances, but could it operate without politics intruding? The challenge lying ahead was unintentionally foreshadowed by *New York Times* columnist Nicholas D. Kristof. After suggesting the appointment of non-partisan national-security experts, Kristof recommended placing Republicans in the commission’s “three most prominent” positions in order to inoculate its work against criticism from conservatives.⁹ Yet there is no sign that Republican lawmakers would embrace a torture commission even then. The treatment of detainees at Guantánamo and elsewhere remains a highly charged political issue in the United States. And suppose a commission blamed President Bush for authorising and promoting the systematic use of torture? It is hard to imagine his supporters readily acceding to that conclusion, no matter who was on the commission.

Even if commissioners established their non-partisan credentials to everyone’s satisfaction, there

are reasons to doubt the institutional capacity of investigative commissions to discover the truth. The history of earlier commissions does not inspire confidence on this score, including those with distinguished members of integrity. What stands out are the notable misses—of commissions that overlooked vital evidence, relied on questionable investigative procedures, or shied away from the key point in question. Questions linger over the investigation conducted by the Warren Commission, but that is only the most famous example.

Rather than being historical anomalies, the lapses in earlier investigations can be traced to the nature of the institution itself. Some problems are easily remedied; others less so. Taken altogether, though, the institutional make-up of commissions—how they are put together, how they function, what attitudes commissioners typically bring to an investigation—explains why commissions often have difficulty in getting to the truth and what obstacles a torture commission would have to overcome.

In the usual case, commissioners are quickly thrown together to address the crisis of the moment. Unlike elected members of Congress (the Church Committee, for example), commissions do not have a natural power-base of support to contend with the inevitable pushback from those under investigation. Ad hoc creations, commissions do not have standard operating procedures. This can affect everything a commission does, from hiring staff to dispensing with investigative procedures that an established congressional committee or an experienced prosecution team would consider routine.

Political opponents have numerous opportunities to frustrate a commission's investigation. A commission depends on Congress and the president for its budget. Elected officials can limit the scope of the inquiry. They can appoint commissioners sympathetic to their own position. One of the easiest ways to undercut a commission is to mandate short deadlines. This can present serious problems in matters of national security when classified information is sought, as would be the case in a torture investigation. Tight deadlines can also undercut a commission's negotiating position when trying to secure testimony from recalcitrant witnesses. Politicians can limit the commission's investigative powers; in some cases, commissions were not granted powers that would seem indispensable. The Tower Commission was not given subpoena power to compel the testimony of witnesses, and the two key figures at the centre of the Iran–Contra scandal (Lt.-Col. Oliver North and national-security adviser John Poindexter) simply refused to appear before the commission.

The investigation conducted by the 9/11 Commission remains fresh in the minds of many, and torture commission advocates have often cited its work to show what an independent commission can accomplish. Not everyone agrees that the commission got to the bottom of what happened concerning 9/11, but whatever success it scored was not due to its institutional character, but in spite of it (and with a considerable boost from the victims' families). The political context was inescapable. According to Tom Kean and Lee Hamilton, the commission's chairmen, the commission was "set up to fail". In their view, the appointment process could not have been "more partisan".¹⁰ The White House and many congressional Republicans initially opposed establishing the commission. The original deadline of eighteen months was impossible to meet.

Having failed to block the commission's creation, many Republican lawmakers sought to keep the budget low and the deadline tight. The basic tasks involved in organising the inquiry (hiring staff, acquiring office space) took several valuable months. Obtaining classified information was a constant concern. And questions persist about whether Philip Zelikow, hired as the commission's executive director, was properly vetted, as he had worked on President Bush's transition team, reorganised the National Security Council's counter-terrorism apparatus, had served on a White House intelligence

advisory board in 2001, and had close ties with Condoleezza Rice, Bush's national-security adviser. While serving as the commission's executive director, he was in contact with Karl Rove, Bush's political adviser.

Getting the Truth on Torture

While the history of investigative commissions in the United States presents a mixed record at best, torture commission advocates have pressed ahead with their claims that a commission represents the most promising means of uncovering the whole truth. They are quick to dismiss the possibility that prosecutions could do that. "Anyone who wants the full truth to come out," wrote David Corn, "cannot count on a special prosecutor."¹¹ Prosecuting crimes and getting the truth were presented as mutually exclusive alternatives. "Do we punish wrongdoing or discover the truth?", asked one commission advocate. His answer—"we should opt for the truth"—left the impression that criminal proceedings were ill-suited for that purpose.¹²

Yet when due consideration is given to what information is sought and how best to get it, prosecutors appear to stand a better chance of getting the truth about torture, even if everything falls into place for a torture commission (adequate funding, reasonable deadlines, and so forth).

Today, neither a commission nor a prosecutor would be working from a blank slate. A substantial body of information on the treatment of detainees has been made public, thanks to reporters such as Mark Danner and Jane Mayer, congressional committees (notably the Senate Armed Services Committee), investigations within the executive branch (the CIA's inspector-general), the International Committee of the Red Cross, and US Army investigations like that headed by Major-General Antonio M. Taguba, not to mention a blue-ribbon commission on military detention practices chaired by former defence secretary James R. Schlesinger.

No doubt more facts will be unearthed. Some of the reports were heavily redacted, with several pages blacked out. Still, an extraordinary level of detail has been made public. It is now known, to take but one example, that the Bush administration's governing rules on interrogation authorised the immersion of detainees in water as cold as 41° Fahrenheit for up to twenty minutes without a break. And while several of the investigations had a special focus (on either the CIA or the military, for example), it is possible to piece together an overall picture of the Bush administration's detention policies and practices, from the origins of the enhanced interrogation methods (survival training for American soldiers during the Korean War) to their eventual dissemination to Guantánamo, Iraq, and Afghanistan.

What is missing at this point is a more exact account of the knowledge and responsibility going up the chain of command. In August 2009, the *New York Times* called for a "fearless airing" of "who gave" the orders on interrogations and "how the orders were issued".¹³ Who authorised what, who knew what, and when did they know it: in cases of malfeasance, this sort of information is often closely held by persons who are unwilling to divulge it. It is reasonable to assume that at major points in a torture inquiry it will be necessary to induce witnesses with inside knowledge to disclose what they know. Prospective defendants have a constitutional right to refuse to answer questions which may incriminate them.

Prosecutors have various tools to compel witnesses to come forward and testify truthfully. They can subpoena witnesses and documents and grant immunity to witnesses who invoke the privilege against self-incrimination. If witnesses still refuse to co-operate, they may be subject to civil or

criminal contempt. Anyone lying under oath can be charged with perjury. While a commission may have similar powers (it can refer contempt and perjury cases to the Justice Department), the odds are that a prosecutor still has a better shot at uncovering hidden facts about torture than a commission would.

First, providing witnesses with immunity from prosecution does not guarantee full disclosure, but if immunity is granted, prosecutors are more likely to use that power effectively. As a general rule, federal prosecutors refuse to confer immunity without a clear proffer of proposed testimony from the witness. As Lawrence Walsh, the prosecutor in the Iran–Contra affair, explained, “a good prosecutor will want to know the facts that the person being given immunity is going to testify. Ordinarily, you do not want to give immunity to somebody who simply testifies against himself and who is going to exculpate everybody else.”¹⁴ Whether members of an independent commission would follow standard prosecutorial practices is an open question. The Iran–Contra affair illustrates the difficulty, though in this case it was a congressional committee which granted immunity to Colonel North without getting any proffer at all. This single act had a devastating effect on the committee’s own inquiry and Walsh’s criminal investigation.

Second, prosecutors have at least one power that an investigative commission, however resourceful, cannot match: the power to plea-bargain. From the earliest stages of a criminal investigation, when witnesses are called before a grand jury (where they are not entitled to have their counsel present), no one can be blind to the threat the prosecutor represents. The prospect of conviction and imprisonment provides prosecutors with leverage to secure testimony in exchange for a plea to a lesser charge. This has been a classic technique used by prosecutors to unravel complex political scandals from Watergate to Iran–Contra. Prosecution teams patiently built the case against high-ranking officials by securing pleas and proffers from those below. For defendants unwilling to plead, prosecutors can still proceed to trial. If the jury convicts, prosecutors have substantial leverage to negotiate (a more lenient sentence in exchange for testimony).

Third, members of investigative commissions are often reluctant to use powers they do have to their fullest extent. While this is not a structural constraint, it is an attitudinal tendency so pronounced that it can hamper any investigation. Prosecutors regard subpoenas as routine, and often necessary to ensure prompt and comprehensive responses. Members of investigative commissions, for whatever reason (perhaps because the commission’s role and procedures are less well-defined), are more likely to view subpoenas as “confrontational” and “punitive”.¹⁵ As for the conditions under which witnesses testify, commissioners appear more willing than prosecutors to accede to the demands of witnesses, particularly powerful public officials, to testify only in private, or not under oath, or without any official transcript.

These differences between prosecutors and commissions could have an enormous impact on uncovering basic facts. Yet the truth about torture goes to something more than simply stringing together factual details. It involves making sense of those facts and giving them meaning. Depending on the overall purpose of the torture inquiry, it appears that prosecutors have a distinct advantage here, too.

The questions that beg to be answered fall within the traditional province of criminal justice. They involve determining who is blameworthy for a deliberate policy that led to the perpetration of war crimes. Efforts within the Bush administration secretly to circumvent legal obligations raise issues of criminal intent. Significantly, questions like these will not be decided by prosecutors alone, but by all of the institutions that take part in the criminal justice system: the grand jury, the petit jury, trial

judges, and the appellate courts. As for a larger meaning that criminal prosecutions can give to such episodes, consider what Watergate would mean today without the convictions of President Richard M. Nixon's most powerful aides (not to mention two of his attorneys-general), and the fact that the grand jury named the president an un-indicted co-conspirator.

Why not let a commission examine the matter before prosecutions are initiated, as some commission advocates suggest? The short answer is that the statute of limitations on criminal offences renders any delay at this point prejudicial to prosecutions. The more complicated answer is that this suggestion is a prescription for failure all around. The outstanding threat of criminal prosecutions undercuts the chances of reconciliation and complicates the commission's efforts to uncover the truth. Any witness concerned about criminal liability would probably assert a constitutional right to avoid testifying. The commission can overcome this by granting immunity, but that places an exceptional burden on prosecutors. They would have to demonstrate that the evidence used against defendants did not derive from the defendants' testimony. That has turned out to be a difficult task, as demonstrated by the Iran-Contra affair, when the appellate court reversed the convictions of Colonel North and Admiral Poindexter on precisely those grounds.

Prosecutions: Prospects and Principles

What is left of the argument for a torture commission is the notion that the obstacles to prosecution are so great that a commission remains the best alternative. It is true that criminal proceedings would raise a number of complicated legal questions—too complicated to resolve here or by commission advocates in the terse commentary of newspaper op-ed pages. Better to let a team of seasoned prosecutors work through the complexities.

Yet it does appear that commission advocates overrate the difficulties when they suggest that prosecutions are virtually impossible. Consider two of the most challenging issues. One involves legislation like the Military Commissions Act of 2006, which granted retroactive immunity to interrogators. Despite the difficulties, this legislation did not make prosecutions impossible, as some commission advocates suggest. The statutory language is unclear and open to interpretation. Congress did not shield every prospective defendant. Nor did the legislation confer blanket immunity on those covered. Anyway, Congress does not have the last word. A plausible argument can be made that the legislative immunities are unconstitutional. And if existing statutory immunities were absolutely clear and comprehensive, why do commission advocates insist on giving the torture commission the power to grant immunity?

Another issue has to do with the legal advice furnished by the Office of Legal Counsel of President Bush's Justice Department. Based on a novel interpretation of torture, the office issued legal memoranda which approved a number of enhanced interrogation techniques. These opinions were designed to provide a ready-made defence to interrogators, who could claim they relied on the lawyers' official interpretation. The legal defence, proclaimed one commentator, is "nearly airtight".¹⁶

Yet prospective defendants may still have cause for concern. Intuition suggests that not everything the lawyers say goes. There must be some limits. Suppose the president ordered the military to wipe out an entire civilian population based on an internal legal opinion that the decision was for the president alone as commander-in-chief? Besides, the defence does not operate in the abstract; it depends on particular facts and circumstances—whether, for example, interrogators actually relied on the opinions or whether they went beyond what the legal opinions allowed. In any event, legal

doctrine requires “reasonable” reliance. Without going into legal technicalities, it seems worth noting that substantial concerns were expressed within the government over the legality of enhanced interrogation techniques. At one point, the Air Force said that “some of these techniques could be construed as ‘torture,’ as that crime is defined” in the Torture Act; the Marine Corps said several interrogation techniques “arguably violate federal law, and would expose our service members to possible prosecution”; the Army said that some techniques “appear to be clear violations of the federal torture statute”; and the FBI warned of “possible illegality”.¹⁷

Such practical considerations are important to consider, but choosing between a commission and criminal prosecutions involves more than a tactical assessment of their relative prospects of success. There are fundamental principles at stake in America’s torture controversy—principles that have been central to American government since its founding and that the United States helped to establish globally in the aftermath of the Second World War. Yet an insidious conception of law seems to be taking hold in the United States. Some describe criminal prosecutions of torture as acts of “vengeance” or “criminal vendettas”,¹⁸ as if prosecutions were the equivalent of summary executions instead of full and fair trials in which defendants would be accorded all rights the accused have under the American legal system.

“Essential to the idea of a law,” American founding father Alexander Hamilton noted, is “a penalty or punishment for disobedience.” Otherwise, “commands which pretend to be laws” will “amount to nothing more than advice or recommendation”.¹⁹ Hamilton favoured a strong presidency, but he surely did not envision that the American executive would one day set up hideaway prisons by presidential fiat, torture suspects in US custody, and deliver others to foreign countries to be tortured there. Nor could he have imagined that, with all that going on, the public would be satisfied to wait until the president’s natural term of office expired and then to follow up with a commission to figure out what went wrong. Yet this—or taking no action at all—is what passes for accountability in the United States today. In the final analysis, torture is a crime and an abuse of power, its punishment a legal imperative, and a torture commission, however well-intentioned its supporters, is a poor substitute for what the law prescribes.

ENDNOTES

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