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Experts Decry Torture Deja-Vu in Trump Presidency

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As President-elect Donald Trump fleshes out his cabinet, experts across the spectrum are voicing alarm that the new administration has not heeded any of the lessons brought to light by exposure of the CIA's clandestine torture program.

Confirmation in 2007 that the CIA had waterboarded suspected members of al-Qaida spurred outrage across the globe, but Trump scoffed at these critics nearly a decade later during the early days of the presidential primaries.

Defending the need for what he called a "minor form" of torture like waterboarding, the Republican said he would approve "a hell of a lot worse."

"Believe me, it works OK," Trump said at one February speech in South Carolina.

The boast was concerning but former CIA analyst John Kiriakou said in an interview that he had hoped the real estate mogul was exaggerating.

Back in 2007 Kiriakou was the first U.S. government official to confirm the CIA's use of waterboarding, a practice he characterized as torture.

"I can't even believe that we have to have a conversation like this. It's sick to me, just sick," Kiriakou said in a phone interview. "It's as though we just as a country, we just don't learn our lessons."

Kiriakou is speaking out now out of concern that Trump's words are more than the braggadocio he put on display in debates.

"I've been appalled so far by his national-security appointments because I realize that he wasn't exaggerating and he wasn't kidding," said Kiriakou. "The only thing that prevents me from actively fearing for the nation on this issue is the fact that torture is patently illegal."

The hawkish Kansas congressman whom Trump picked for CIA director, Rep. Mike Pompeo, recently defended the Bush-era torture program, saying all Americans who carried out torture are "patriots."

And Trump's pick for national security adviser, retired Defense Intelligence Agency chief Lt. Gen. Michael Flynn, has said he would not rule out the use of "enhanced interrogation techniques."

Though Trump has not had a press conference since his Nov. 8 election, the president-elect has reportedly expressed a more nuanced view of torture thanks to a meeting with the retired Marine Corps general whom Trump is reportedly planning to tap as defense secretary.

Mattis, who once led the U.S. Central Command, reportedly told Trump that torture wasn't useful – something Trump told The New York Times he was surprised to learn.

“I'm not saying I changed my mind,” Trump told the Times on Tuesday. He followed that by saying maybe torture is “not going to make the kind of difference that a lot of people are thinking.”

One voice in the broad consensus that torture is actually ineffective is Kiriakou.

“Talk to any FBI agent past or present and they'll tell you that these techniques just simply don't work,” Kiriakou said.

The 2014 Senate Intelligence Committee report on CIA torture and the CIA Inspector General's report, which was leaked in 2009, show “definitively” that torture produced no intelligence that thwarted attacks against Americans or saved American lives, he noted.

Some years after Kiriakou blew the whistle on waterboarding, he faced prosecution for repeatedly disclosing classified information to journalists. Having served a two-year prison term as part of a plea deal, Kiriakou is vocal about his belief that his prosecution was retaliatory.

Noting that it's painful for him to compliment the FBI, Kiriakou nonetheless said the agency is good at what it does.

“They're terrific interrogators,” he said. “And the reason they're terrific interrogators is because they have decades – almost a century of experience – establishing a rapport with their subjects.”

“It works,” Kiriakou added. “It's boring and it's slow, but it works.”

Kiriakou said he cannot see a scenario where any CIA or counterterrorism director would risk their freedom and reputation. The CIA is not “bold and daring,” he said. “It's a big lumbering, conservative bureaucracy.” Any revival of the torture program would eventually become public, he said.

No Way, Jose

Jose Rodriguez, a primary architect of the CIA torture program, was apparently among those president-elect Trump considered to head the CIA, according to a post-election document published by law and lobbying firm Dentons, which the Intercept reported on Nov. 11.

Rodriguez, who headed the National Clandestine Service in the CIA from November 2004 to September 2007, helped develop the program's secret black-site prisons overseas, where interrogators used waterboarding and other torture tactics.

Chris Anders, the deputy director of the American Civil Liberty Union's legislative office in Washington, said in an interview that “it would be exceedingly difficult” to restart the program Rodriguez helped design.

That's because torture is illegal under federal law, which was bolstered in 2015 with the McCain-Feinstein amendment to the National Defense Authorization Act. The amendment

reinforces already-existing restrictions on interrogation techniques, which are limited to those authorized in the Army Field Manual, which forbids CIA techniques.

The language of the McCain-Feinstein amendment was focused on the intelligence community, and the CIA specifically, Anders said.

“There are no questions – there should be no doubt in anybody’s mind that the program that was used during the Bush administration is clearly illegal, clearly unconstitutional and is clearly a crime,” he added.

Despite broad bipartisan support for the amendment, the 21 votes against it included President-elect Trump’s pick for attorney general, Alabama Sen. Jeff Sessions.

Anders noted, however, no president can change the law on his own: It would take an act of Congress to accomplish that.

Like Kiriakou, Anders also expressed faith that a change in culture in the intelligence community provides an additional buffer.

“You’re not going to be able to find anybody to carry out the program,” he said, pointing to comments that Gen. Mike Hayden, the former director of the CIA and National Security Agency, made to CNN’s Jake Tapper on Feb. 23.

“Any future president, including a president Trump, if he wants someone waterboarded, he better bring his own bucket,” Hayden had said.

Torture is an issue Anders said the ACLU will watch carefully, but he expressed confidence in U.S. laws to prevent it from happening again.

“Obviously these are areas of concern, but until and unless Congress changes the law, these are crimes and clearly illegal acts and there’s no wiggle room,” he said. “There’s no glimmer of ambiguity on it – these are bright line laws that can’t be broken.”

As reported by the Associated Press, Sen. John McCain said at the International Security Forum in Halifax, Nova Scotia, on Saturday that any attempts to revive torture would be quickly met with a court challenge.

“I don’t give a damn what the president of the United States wants to do or anybody else wants to do,” said McCain, an Arizona Republican who experienced torture himself as a prisoner of war in Vietnam. “We will not waterboard. We will not do it.”

Difficult but Not Impossible

Others are less optimistic, however, about the strength of U.S. law to prevent the re-emergence of torture.

“In the national-security arena, too often the law simply doesn’t matter,” said Patrick Eddington with the Cato Institute, a libertarian think tank.

“There are going to be plenty of people who are going to make the argument that it’s going to be so much more difficult to do that this time out,” Eddington said in an interview. “I disagree.”

Eddington noted that torture was just as illegal when the George W. Bush administration implemented the program. But rather than resist the orders to torture, the CIA asked John Yoo for a “get-out-of-jail-free card,” he said.

Yoo worked in the Justice Department’s Office of Legal Counsel during the Bush administration, and authored a 2002 memo outlining how Bush officials could circumvent the Geneva Conventions in its treatment of al-Qaida and Taliban detainees.

For the law to matter, Eddington said people have to be willing to adhere to it, and there must be an accountability mechanism for those who break the law.

Kiriakou said the McCain-Feinstein amendment would enable prosecutions for torture, but Eddington insisted that we still have an “accountability problem.”

Eddington said he is skeptical that a legal challenge would get anywhere because of judicial reluctance to interfere in policy disputes.

Additionally, the destruction of 92 video tapes of CIA interrogations by Jose Rodriguez, combined with Yoo’s memo, effectively created a “legal shield” that made it impossible to charge officials for torture, Eddington said.

“That’s what I mean when I say that at the end of the day, in the national-security arena, the law doesn’t matter – because the law is made essentially to whatever the executive branch wants it to be,” he said.

“I think it’s a really troubling – deeply troubling problem – that we’re potentially staring in the face here,” Eddington said. “I just don’t think that there are genuine barriers to Trump restarting something like this.”

One way to revive the torture program would be to secretly outsource it to countries that have a close working intelligence relationship with the United States, he said – dismissing those who would say that international law would prevent this. Those countries could facilitate the program and U.S. officials would simply be there as observers, he said.

That is something the American public would only find out about after the fact.

“I believe that that’s a very real pathway that is almost certainly being explored by Trump and the people that are advising him,” Eddington said.

Not Impossible but Still Unlikely

Katherine Hawkins with the Constitution Project said in an interview that she thinks it would be “legally dubious and very high risk” to revive the torture program. She does see an opening, however, for the return of rendition and secret prisons.

“If Trump wants to get cozy with Syria,” Hawkins said, “what’s one more war crime to Assad? What’s one more example of torture in Egypt?”

The United Nations has condemned Syrian President Bashar Assad for dropping chemical bombs on civilians in his country's civil war, but Assad just this week called Trump a "natural ally" in his joint campaign with Russia and Iran against the Islamic State.

The president of Egypt meanwhile, Gen. Abdel-Fattah el-Sisi, was among the first international leaders to call president-elect Trump to congratulate him on his win.

Hawkins said that the safeguards against transferring people for torture were not strong enough even under the Obama administration, where suspects were sent to Afghanistan.

What Trump does have going for him, Hawkins noted, was his campaign promise "that he wasn't going to ask troops or intelligence officers to violate the law."

"It's absolutely unambiguous that torture, that the CIA's EIT program, violated the law," Hawkins said, abbreviating enhanced interrogation techniques.

Hawkins noted that the Constitution Project is watching the issue closely, but that they lack sources in the intelligence community. The torture program ended the first time around because it leaked, she noted.

As Kiriakou's conviction shows, however, whistleblowers must tread a careful line.

"With leak prosecutions having increased in recent years – I hope it would leak again," Hawkins said. "I don't know."

Meantime, Eddington said that disclosure of the full Senate torture report would make it "vastly more difficult, at least from a PR standpoint," for the U.S. to torture again. Kiriakou told Courthouse News in February that he hopes someone leaks the full report.

Echoing Hawkins' concerns on Tuesday, however, the former CIA officer called this unlikely.

"I can't imagine any scenario over the next four years where a national-security whistleblower is going to decide that it's better to come forward with his information than it is to just keep his mouth shut," he said.

Kiriakou noted that Pompeo, the prospective new CIA head, has called for Edward Snowden to be executed.

"It's deeply troubling to me," Kiriakou said.