

Lawyers Told Gina Haspel Torture Was Legal. But It Never Was.

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As the Senate considers Gina Haspel's nomination as director of the C.I.A., it is time to dispel the false narrative about her record. That narrative says that Ms. Haspel's involvement in torture, as well as the order she drafted authorizing the destruction of videotapes documenting this abusive practice, was legal and justifiable.

Torture — “enhanced interrogation,” as it was called — was supposedly legal because Justice Department lawyers had given it their blessing at the time, and destroying evidence of it was legal not only because government lawyers said it was, but also because Ms. Haspel was just following orders.

But Ms. Haspel's supporters, many of whom are lawyers, should know better: the faulty advice of government lawyers and bosses cannot make illegal conduct legal. And C.I.A. investigations that rely on these specious justifications to excuse her decisions should be given no weight.

In 2002, Ms. Haspel ran a secret detention site in Thailand, code-named Cat's Eye, that was known for its use of harsh interrogation techniques that amounted to torture. She was also chief of staff to Jose Rodriguez, director of the National Clandestine Service for the agency. While her exact role in the torture of detainees at Cat's Eye remains unclear, she unquestionably bears some responsibility for the use of so-called enhanced interrogation techniques, including waterboarding, that occurred on her watch.

Lawyers from the Justice Department's Office of Legal Counsel wrote memos asserting that waterboarding and other forms of torture were legal. But the rationale these memos provided distorted domestic and international law, and the Justice Department later rescinded them. The legal status of those now-abandoned memos has been the source of great confusion, a muddle worsened by President Barack Obama, who immunized anyone against prosecution who had acted based on the memos.

The Nuremberg trials after World War II established that following orders is not a defense for conduct that is patently illegal. Under the Geneva Conventions, torture, like genocide, belongs in that category. A similar principle says that incorrect legal advice cannot shield one from liability when such advice is promoting transparently unlawful conduct. Torture, like genocide, is of such patent illegality that we are entitled to hold all who engage in it responsible, whether they knew it was illegal or not. Under both domestic and international law, a manifestly evil act puts perpetrators on notice they are committing a crime, and they can be held responsible for such knowledge.

This has implications for Ms. Haspel's role in the agency's decision to destroy videotapes of C.I.A. interrogations. Mike Morell, then the deputy director, exonerated Ms. Haspel in his 2011 memo, arguing

that “it was not her decision to destroy the tapes, it was Mr. Rodriguez’s.” Mr. Morell’s memo, however, should be taken as implicating, not exonerating Ms. Haspel, since it confirms her role in the destruction of the tapes.

Indeed, Mr. Morell said that he “found fault with the performance of Mr. Rodriguez” in the matter, and issued a letter of reprimand against him, though he imposed no sanctions. Mr. Morell explained this slap-on-the-wrist approach was warranted by the laudable motives Mr. Rodriguez had for ordering the destruction of the tapes: namely, to protect against leaks that might set off a backlash similar to the violence that occurred after the release of the photos of torture from the Abu Ghraib prison in Iraq. That kind of reaction might endanger interrogators and damage the C.I.A.’s standing, he asserted.

The destruction of the videotapes looks much less defensible once it is clear that the tapes contained evidence of legal violations, possibly implicating Ms. Haspel herself. That Ms. Haspel acted on Mr. Rodriguez’s orders cannot absolve her from culpability, since it would not be legally or ethically permissible to destroy evidence of known criminal wrongdoing, especially if conducted for the purpose of protecting C.I.A. interrogators who carried out the torture.

Ms. Haspel’s nomination presents a defining moment for the rule of law in the United States. It raises the age-old question of whether a person engaged in immoral activity while obeying the orders of a superior deserves blame for her actions. The Senate should put zero stock in the Morell memo, which reflects the agency’s attempt to cover up its own illegal and immoral conduct. Ms. Haspel was a participant in this cover-up, and if she becomes the director of the C.I.A., any remaining documentation of the torture program, and her own role in it, will be placed at risk.

That Mr. Morell’s incriminating memo was released to clear Ms. Haspel’s name demonstrates the degree to which the agency maneuvers under the cover of law. The agency seems to view destroying evidence of torture as a minor, but well-intentioned perfidy. While no love is lost between President Trump and our intelligence services, Ms. Haspel’s fidelity to the agency’s involvement with torture, and her confirmed role in covering it up, are evidently appealing to Mr. Trump, who has repeatedly stated his belief that torture works.

In January 2017, a draft executive order by the Trump administration called for allowing the reopening of black sites and possibly revising the Army Field Manual to allow coercive interrogation techniques. The president has the power to alter the Army Field Manual without congressional approval. This is most likely the door through which torture would re-enter, if the government can demonstrate that the changes are in accordance with domestic and international law.

The use of torture and cruel and degrading treatment in the war on terrorism has distorted our justice system, impaired our reputation internationally and emboldened our enemies. Accountability for misconduct, particularly of our own agencies, is the first step toward restoring the rule of law. Whether to put the country on the path of restoration or to continue to elide a disgraceful chapter in our history is the choice the Senate now faces.

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