THE OBAMA ADMINISTRATION DEBATE ON THE CONVENTION AGAINST TORTURE AND ANAS AL-LIBI

For some reason, the NYT decided to bury this article from Charlie Savage on page A21. It explains that the Obama Administration is debating internally whether to overturn Obama's ban against cruelty (which is also mandated by the Detainee Treatment Act). Some intelligence lawyers, apparently, believe Obama's torture ban and the DTA are too limiting.

> It is considering reaffirming the Bush administration's position that the treaty imposes no legal obligation on the United States to bar cruelty outside its borders, according to officials who discussed the deliberations on the condition of anonymity.
>
> [snip]
>
> State Department lawyers are said to be pushing to officially abandon the Bush-era interpretation. Doing so would require no policy changes, since Mr. Obama issued an executive order in 2009 that forbade cruel interrogations anywhere and made it harder for a future administration to return to torture.
>
> But military and intelligence lawyers are said to oppose accepting that the treaty imposes legal obligations on the United States' actions abroad. They say they need more time to study whether it would have operational impacts. They have also raised concerns that current or future wartime detainees abroad might

> invoke the treaty to sue American officials with claims of torture, although courts have repeatedly thrown out lawsuits brought by detainees held as terrorism suspects.

There were remarkable amounts of denial in response to this, from people who seem totally unaware of the kind of practices — that appear to include isolation, sleep deprivation, food manipulation, and other forms of coercion — currently used by High Value Interrogation Group (HIG), the inter-Agency group used to interrogate terrorist suspects. And this post from David Luban, which lays out some of the loopholes the government might be using to engage in abuse, misses a few.

We know, for example, that there are 2 OLC opinions that say Presidents don't have to change the text of Executive Orders they choose to ignore, meaning Obama could ignore his torture ban "legally." There's also the Appendix M OLC opinion that has approved whatever DOD wants to sneak into the sometimes classified appendix in advance.

All of these issues have been invoked in the case of Anas al-Libi, who recently testified in his challenge to the use of the statements he made to FBI's Clean Team in his trial, invoking the anxiety produced by the "CIA" interrogation al-Libi experienced on the USS San Antonio. (The interrogation was conducted by the HIG; note that while al-Libi has retained counsel, Bernard Kleinman, I believe he also still has public defenders, including Sabrina Shroff, who has represented HIG-interrogated defendants before, so she can attest to the continuity of the methods involved.)

> Al-Libi, a 50-year-old Libyan whose legal name is Nazi Abdul al-Ruqai, testified before U.S. District Judge Lewis Kaplan in an evidentiary hearing tightly focused on the moments following

> al-Libi's transfer on October 12, 2013, from military to civilian custody.
>
> Given the situation, "I couldn't concentrate on anything," al-Libi told the court through an Arabic translator. When asked by his attorney, Bernard Kleinman, why he signed the papers waving his *Miranda* rights and paving the way for an FBI interview, al-Libi said, "You have no choice but to sign it."

And in a filing calling on the government to preserve videotapes and any other records of his shipboard interrogation, al-Libi's Libyan-retained lawyer invoked precisely the law and Executive Order in question.

> 18. Upon information and belief he was subjected to daily interrogation by professsional interrogator[s] of the CIA in an unrelenting, hostile, and extraordinary manner.
>
> 19.Upon information and belief this interrogation was conducted in a manner in violation of the Defendant's rights under the Fifth and Sixth Amendments to the federal Constitution, and under applicable treaties and conventions to which the United States is a signatory.2
>
> 20.Furthermore, this interrogation was conducted in a manner of inhumane treatment. Notwithstanding the changes effected by both Congress3 and the President4 after the revelations of physical abuse and torture as conducted by the CIA in the name of national security, such measures (even if actually observed by the participants and interrogators) could easily lead to harsh, improper and inhumane treatment that would taint any and all subsequent interrogations, even if preceded by a Miranda warning and waiver execution, and conducted by the FBI or some other

federal law enforcement agents.

21. Upon information and belief, these interrogations were videotaped, and otherwise recorded by the CIA, among other U.S. Government agencies.

22.It is, furthermore, reasonable and logical to presume that the interrogator[s] produced hard copy notes of their actions, and provided reports to other representatives of the United States Government (both in the Executive and Legislative branches).

3 In 2005 Congress passed the Detainee Treatment Act, Pub. L. No. 109-148, codified at U.S.C. §§ 2000dd, 2000dd-0, and 2000dd-J, which applied the U.S. Army Field Manual to all military interrogations. It should be noted that the Act specifically provides that

> No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

The degree and extent to which the United States Government violated this statute in the kidnapping, abduction, and interrogation of the Defendant are issues to be raised similarly in any subsequent motions made pursuant to Rule 12(b).

4 On January 22, 2009, President Obama issued Executive Order 13491, which directed the CIA to adopt the methods of interrogation as set forth in the U.S. Army Field Manual. See E.O. 13491,74 Fed. Reg. 4893 (Jan. 22, 2009).

5 Both the Detainee Treatment Act and

> E.O. 13491 refer to the U.S. ARMY FIELD MANUAL, HUMAN INTELLIGENCE COLLECTOR OPERATIONS, referenced as FM 2.22.3 (Sept. 2006 ed.).

I think there are probably a number of HIG-interrogated individuals — including some who were interrogated entirely within the US — who could claim they were subject to degrading treatment. But in this case, the person in question has a privately-retained lawyer, which may present significant concerns for the interrogators in question.

Meanwhile, the government is not providing al-Libi cancer treatment doctors at Duke said during the summer he needs to address liver cancer. Maybe the government is just hoping al-Libi will succumb to cancer before he can press these issues?

Whatever the plan, the government is at least entertaining widening the loopholes that they used in the past to protect torturers.