

The Ethics of Interrogation and the Rule of Law



A Report by the Center for Ethics and the Rule of Law

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CERL Report on The Ethics of Interrogation and the Rule of Law

I. Introduction

On January 25, 2017, President Trump repeated his belief that torture works¹ and reaffirmed his commitment to intensify the treatment of detainees in American custody.² That same day, CBS News released a draft Trump Administration executive order which would order the Intelligence Community (IC) and Defense Department to review the legality of torture as well as the potential for a revision to the Army Field Manual which would open up the possibility for harsh interrogations.³ Were the new administration to attempt to bring back enhanced interrogation, its point of entry might be the issuance of the draft executive order, or a stronger executive order authorizing torture and directing a revision of the Army Field Manual. This Report contains an evaluation of the current legal status of torture, along with an analysis of the anticipated legal steps that might be taken to revive the enhanced interrogation program.

Recent commentary, as well as the draft executive order, have received harsh criticism from lawmakers. Sen. John McCain (R-AZ) said, “The President can sign whatever executive orders he likes. But the law is the law,” he continued by saying, “We are not bringing back torture in the United States of America.”⁴ The President appears for the moment to be leaving the ultimate judgment on whether to revive the use of torture in interrogations to his national security chiefs, namely Central Intelligence Agency Director (DCIA) Mike Pompeo and Secretary of Defense James Mattis. Both rejected the use of torture in their confirmation hearings, stating that torture is illegal and that they would not carry out orders to engage in it.

In his written answers to advance policy questions presented to the Senate Armed Services Committee, Secretary of Defense James Mattis stated that he believes the Army Field Manual should be the sole standard by which military interrogations are carried out,⁵ a position that is consistent with the recent McCain-Feinstein Amendment.⁶ Previously, Secretary Mattis had expressed his skepticism of the efficacy of torture to President Trump in a private meeting with then candidate Trump, a statement by which Trump was apparently impressed.⁷ Although Director Mike Pompeo had been a harsh critic of the 2014 interrogation report,⁸ Director Pompeo testified in his confirmation hearing that he would not comply with a presidential order to bring back torture, stating that the United States was “out of the torture business.”⁹ His oral testimony, however, was contradicted by his answers to written policy questions which stated he would review the efficacy of the current interrogation practices and limitations.¹⁰ Further cause for doubt about Director Pompeo’s position lies in the fact that the President has tapped veteran CIA officer Gina Haspel to be Pompeo’s deputy. Ms. Haspel’s previous leadership roles included the oversight of a CIA “black-site” and an alleged involvement in the destruction of video tapes documenting the use of enhanced interrogation techniques.¹¹

In a letter signed by 176 flag officers, among them Adm. Bill McRaven and Gen. Stanley McChrystal, both former commanders of the elite Joint Special Operations Command, former military leaders spoke out against torture. Addressed to President Trump, the letter states: “Our greatest strength is our commitment to the rule of law and to the principles embedded in our Constitution. Our servicemen and women need to know that our leaders do not condone torture or detainee abuse of any kind.”¹²

The purpose of this briefing paper is to clarify the current legal status of torture under U.S. and international law, to explore the possible legal avenues for reviving torture, to identify several serious risks to national security were torture to be resumed, and to recommend legal action to forestall the possibility that this President or future presidents could reinstate torture by executive order.

II. The Current Legal Status of Enhanced Interrogation Techniques

Within United States domestic law, *18 U.S.C. §§ 2340A* renders illegal the act of torture or conspiracy to commit torture by a U.S. national or any individual within the United States. Torture is defined by this statute as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering...” Severe mental pain or suffering includes the “infliction of severe physical pain or suffering,” as well as “other procedures calculated to disrupt profoundly the senses of the personality.”¹³ This applies within the U.S. as well as to U.S. nationals acting abroad.

In *Boumediene v. Bush* the Supreme Court determined that prisoners detained under the Military Commissions Act of 2006 were required to be given the right to habeas corpus.¹⁴ While this is applicable to those individuals detained by the United States Military and held within the country and abroad, it does not address the clandestine detention of individuals being held by intelligence agencies.

President Obama’s January 2009 Executive Order 13491 required all government entities to bring any current and future programs in line with all international laws and treaties defining and preventing the use of torture.¹⁵ This order rescinded all previous Bush-era legal opinions. Furthermore, in 2015 the McCain-Feinstein Amendment to the 2016 National Defense Authorization Act for FY 2016 expanded the provisions of the previously enacted 2005 Detainee Treatment Act. The 2005 legislation restricted the interrogation practices of the U.S. military to those found in the Army Field Manual, effectively ruling out military-led enhanced interrogation.¹⁶ The 2015 McCain-Feinstein Amendment expanded this prevention to cover the entire U.S. government, particularly meant to prevent future CIA-led enhanced interrogation programs.¹⁷

Army Field Manual 2.22.3 Section 5-13 is the current basis for all legal interrogations carried out by the United States. Paragraph 5-51 states that the lawful treatment of “enemy prisoners of war” and civilians is dictated by the Geneva Convention Relative to the Treatment of Prisoners of War and the Geneva Conventions Relative to the Protection of Civilian Persons in Time of War respectively.¹⁸

The United States Department of Defense *Law of War Manual* states numerous times that armed conflict does not remove the international laws and norms preventing torture. Moreover, Section 5.26.2 of the text directly addresses appropriate behavior for information gathering: “Information gathering measures [may

not] violate specific law of war rules...it would be unlawful, of course, to use torture or abuse to interrogate detainees for purposes of gathering information.”¹⁹ The U.S. Military’s UCMJ 928 Art. 128 finds any service member who “inflicts grievous bodily harm with or without a weapon guilty of aggravated assault.”²⁰

With regard to international law, the United Nations Convention Against Torture (UNCAT) defines torture in Article 1 as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession....”²¹

Article 5 of the United Nations Universal Declaration of Human Rights (UNUDHR) clearly states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”²² Article 7 of the International Covenant on Civil and Political Rights (ICCPR) repeats, verbatim, the outlawing of torture found in UNUDHR. Article 5 of the ICCPR includes language²³ meant to prevent states from utilizing legal work arounds to overcome the spirit of the condemnation of torture.²⁴

Common Article 3 of the Fourth Geneva Convention provides further protections against torture in times of conflict.²⁵ It states that those in armed conflict not actively or any longer taking part in hostilities are prohibited from being subjected to “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.”²⁶ In 2006 the Supreme Court of the United States determined in *Hamdan v. Rumsfeld* that Common Article 3 must be applied to terror suspects in U.S. custody.²⁷

While it is difficult to enforce international laws and norms, the International Criminal Court (ICC) does have the ability to investigate and convict individuals charged with certain crimes. Under the Rome Statute, the ICC has jurisdiction over violations of genocide, war crimes, crimes against humanity, and crimes of aggression.²⁸ There is no statute of limitations for these crimes. The difficulty in initiating any investigations into alleged crimes is the condition of the Rome Statute that allows the ICC to investigate and prosecute only if the state itself is unable or unwilling to do so itself.²⁹ The burden of proof necessary to demonstrate the unwillingness or inability of a U.S. domestic court to prosecute individuals would be significant.

Individuals who were subjected to harsh interrogations on behalf of the United States may have grounds to challenge their treatment in U.S. courts. Under the Alien Tort Statute (28 U.S.C. § 1350), individuals who were harmed as a result of a violation of international law may bring a suit against individuals within American courts. This statute does not, however, allow for claims against state governments as these are precluded by sovereign immunity.³⁰

International laws and norms have continually suffered from a lack of universal acceptance, application, and enforcement. While prohibitions against torture, such as Article 5 of the ICCPR, contain language preventing the creation of legal loop holes to circumvent the spirit of the laws in extremis, the foundation of international law continues to rely on the voluntary compliance with international norms. There should be little debate, particularly within the United States, regarding the acceptance of the prohibitions against torture as *jus cogens*. But, as discussed above, there are adequate sources within U.S. law to warrant the conclusion that torture is illegal under domestic law, and that therefore it could not be brought back by mere executive order.

The state sanctioned use of harsh interrogation practices puts individual members of the administration and its apparatuses at risk. The principle of universal jurisdiction could allow for certain states to charge American officials involved in harsh interrogations with violations of international or domestic law in their own courts. An American official could be charged with domestic war crimes or crimes against humanity in absentia and detained on those charges if they travel to that state. These concerns have previously caused American policy-makers to allegedly curtail their international travel to avoid arrest.³¹

III. The Case of Extraordinary Rendition

Extraordinary rendition is the detention of an individual in one country who is then transported to a third-state outside of established judicial processes. In the case of the CIA's rendition, detention, and interrogation (RDI) program these individuals were suspected terrorists transferred to CIA "black-sites" (secret prisons) who were often subjected to the use of EITs. Other times, individuals were transferred to a third-state and removed from American custody without any guarantees that their human rights would be observed.³²

The status of rendition within American domestic and military law is not clear. President Obama's Executive Order 13491 outlines a request for the formation of an investigative committee tasked with analyzing the government's policies on detainee transfer in order to ensure their humane treatment.³³ It does not, however, outlaw extraordinary renditions which did continue under Obama's administration.³⁴

Army regulations included in the Human Intelligence Collector Operations Field Manual 2-22.3 explicitly state that an "enemy prisoner of war" may not be transferred to a third-state that is unable to guarantee the protection of the detainee's human rights.³⁵ As described above, the McCain-Feinstein Amendment requires all U.S. entities to adhere to the restrictions contained within this manual, including American intelligence operations. Therefore, any transfer of a detainee to a third-state not capable of guaranteeing the human rights of a detainee is illegal under domestic and military law.

Individuals rendered into CIA custody have had mixed success bringing claims against state parties involved in the RDI program. Khaled el-Masri was rendered into CIA custody by Macedonia and subsequently subjected to harsh interrogation practices. He was unsuccessful in bringing any claims against the United States in American courts. He did, however, succeed in bringing a claim against the government of Macedonia for their participation in his rendition and detention. The European Court of Human Rights ruled in favor of el-Masri and determined that Macedonia was "responsible for his torture and ill-treatment."³⁶

Within the legal framework of the United States' implementation of the UNCAT, "a person may be transferred to a country [for interrogation] that provides credible assurances that the rendered person will not be tortured."³⁷ The Congressional Research Service points out in their study on third-party renditions that the "[UNCAT] does *not* prohibit a State from transferring a person to another State where he or she would likely be subjected to harsh treatment that, while it would be considered cruel and unusual under the standards of the U.S. Constitution, would nevertheless not be severe enough to constitute torture."³⁸

The UNCAT framework and U.S. law make it explicitly illegal under domestic and international law for a "U.S. official to conspire to commit torture via rendition." It is unclear, however, whether or not it is

prohibited for the United States to render an individual to a third-party “without intending to facilitate torture of the rendered person.”³⁹ The necessity for the intent not to facilitate torture can be fulfilled through diplomatic assurances under both the UNCAT and domestic legal restrictions.⁴⁰ This specific framework is ambiguous regarding the unintended torture of a detainee transferred out of American custody when diplomatic assurances are in place supposedly preventing such treatment.

The United Nations General Assembly has determined “forced disappearances,” or renditions, to be a violation of international law.⁴¹ States complicit in the CIA’s RDI program have been formally censured for their participation in forced disappearances of terrorist suspects in international courts (See *Husayn (Abu Zubaydah) v. Poland*).⁴²

IV. The Challenge of Responding to Illegal Orders

As prescribed by the Uniform Code of Military Justice, soldiers are required to follow lawful orders issued by superiors within the chain of command. Failure to do so results in charges of insubordination. It can be presumed that a service-member has a positive duty to refuse an illegal order, which can be defined as an order lacking appropriate authority or one which is contrary to the laws of the United States or the laws of war.⁴³ Therefore, the operational question becomes the legality of an issued order. By transposing this to the dilemma faced by CIA officers instructed to carry out enhanced interrogation, one can identify the murkiness within which they operated.

An intelligence officer or service-member can only rely upon the judgment provided them by the legal apparatus they operate within. Though many involved in the operational aspects of the interrogation programs questioned its application, they seemingly were abiding by lawful orders as they were explained to them by executive branch legal authorities. As far as the individuals were aware, the orders were legal, approved by the Commander-in-Chief, and had been briefed to the necessary congressional leadership. Therein lies the conflict. One’s duty is to obey a lawful order and disobey an unlawful order is complicated when one is given assurances and justifications that the orders are in fact legal—even if one knows them to be amoral. The relationship between one’s duty to obey superiors within the chain of command and the positive duty to disobey illegal orders creates extreme conflict.

In such a conflicting situation, an individual has limited options. They can refer the order to a superior, if such a situation is possible. They may refuse to carry out such an order, however, they risk significant professional and personal consequences for doing so. Or they may resign their position in protest. Unfortunately, in many situations such as time-sensitive operations or active combat, these options are not possible.

In the case of classified matters, the leaking of any information to the public is unlawful and not protected by any whistle-blower protections that would similarly cover unclassified leaks. There are protections in place for individuals who report through appropriate channels, such as inspectors general, on classified matters they believe are unlawful. It is inappropriate to condone the release of classified national security information for any purpose—therefore improvements should rather be made on the internal channels of dissent available to individuals working on classified matters.⁴⁴ Individuals must be confident that their dissent will be treated seriously via these official channels and therefore will not be driven to leak classified information.

V. *The Status of Torture under the Trump Administration*

One of the primary concerns moving forward is preventing the reversal of recently enacted legislation banning the use of torture by the United States. The potential return of torture to U.S. policy has been made extremely difficult to accomplish and would require open congressional debate or extremely unprecedented circumstances to occur.

Does the U.S. president have the power to circumvent existing laws to bring back enhanced interrogation by way of executive order?

In his capacity as Commander-in-Chief, the president may “in times of emergency...override congress and issue executive orders with almost limitless power.”⁴⁵ This would have to involve an executive order that renders null the Military Commissions Act of 2006, the Detainee Treatment Act of 2005, the McCain-Feinstein Amendment to the 2016 Defense Appropriations Authorization, and which would have to circumvent the legal standing of *18 U.S.C. §§ 2340-2340*. This could be carried out by a Presidential National Security Directive rather than a traditional executive order — which would have the ability to remain classified and avoid public scrutiny.

While the president may by way of his executive authority authorize the emergency use of techniques which amount to torture, he does not have the authority to alter the illegality of such acts. In October 2016, the Fourth Circuit Court of Appeals ruled that “even the president” does not have the legal capability to “declare [torture to be] legal.”⁴⁶

With regard to Congress, the president would be required to notify the “Gang of Eight” which includes the majority and minority leaders of the House and Senate, as well as the chair and ranking minority member of the House and Senate committees on intelligence. Law requires that this group is notified in a “timely” fashion of any sensitive covert action taken by the intelligence community.⁴⁷ In 2002, this did not prove to be a hurdle. Due to the circumstances surrounding the time-period and the persistent fear gripping Americans and their leadership, approval was not hard to come by. After years of harsh criticism surrounding the breaches of human rights committed on behalf of the American people by their government in the name of security, it is unlikely that Congress would approve any use of enhanced interrogation methods once more.

Congress would have no authority to prevent the decisions issued by the president after they have been notified. Preventing the directive from being carried out would require the “Gang of Eight” to release the information to the public in order to blunt the president’s mandate, representing an extreme breach in national security that would likely end their careers in government service. Furthermore, upon releasing the information it would require measures as extreme as impeachment to overcome the authority of the presidential orders if public pressure alone did not succeed.

Another possible route which does not require the repeal of the McCain-Feinstein Amendment or the use of covert action would be the revision of the current Army Field Manual which dictates lawful methods of interrogation. This possibility was alluded to in the previously mentioned draft executive order released by CBS News. Such a revision would not be able to avoid public scrutiny, however. Unlike covert action,

and just as with repealing the McCain-Feinstein Amendment, a move such as this would likely be met with extreme public backlash.

Under normal, non-emergency conditions it is nearly impossible for the current legal standing of torture to be augmented by the executive branch. Such a reversal, however, cannot be entirely ruled out in a time of crisis. An emergency repudiation of the anti-torture legislation would require unprecedented uses of executive authority far beyond those that authorized the original program in the wake of 9/11. The issuance of a presidential order authorizing torture would require notification of the “Gang of Eight” as well as the acceptance of the national security leadership tasked with carrying out the order.

VI. The Efficacy of Torture

Defenders of the former enhanced interrogation program support its effectiveness in gathering accurate, actionable intelligence that has the ability to save American lives.⁴⁸ Others argue that the use of enhanced interrogation does not constitute an effective intelligence tool at all.⁴⁹

Numerous sources with first-hand knowledge and experience related to torture have spoken out against its efficacy. Senator John McCain stated, “I know from personal experience that the abuse of prisoners will produce more bad than good intelligence. I know that victims of torture will offer intentionally misleading information if they think their captors will believe it.”⁵⁰ Even the CIA Office of the Inspector General found that the limited quantifiable successes attributed to the use of EITs were “insufficient in themselves to justify the use of EITs....”⁵¹

Those involved with the use of EITs in both the military and intelligence communities have repeatedly asserted their belief that torture is ineffective. One military interrogator under the pseudonym “Matthew Alexander” wrote in his book *Kill or Capture*: “The argument that supporters of torture make is that torture and abuse are necessary to save lives. That is a lie...it slows the progress of interrogation or results in bad information.”⁵² Another former interrogator who worked with the CIA, Glenn Carle, believes that “the decisive factor in gaining useful information was ‘the rapport the interrogator has with the detainee,’ which cannot be achieved through pain and fear.”⁵³

No definitive studies exist that point to the successful use of single-sourced intelligence gained from the use of enhanced interrogation techniques that led to a terror attack being prevented by the United States.

VII. Secondary Consequences of the Torture Program

In a series of investigative articles, the New York Times released a comprehensive overview of the effects of the enhanced interrogation program on former detainees. Of the 39 individuals identified as having been part of the program, the Times found that at least half of the individuals “have since shown psychiatric problems.”⁵⁴ The Times likened the lasting psychiatric impacts to those experienced by American prisoners of war held captive by previous brutal authoritarian enemies.

General Stephen N. Xenakis (Ret.), a member of CERL’s Executive Board and a retired Army psychiatrist, is featured prominently in the series. In Gen. Xenakis’s extensive experience with former detainees as a

medical consultant, he witnessed symptoms in former detainees that led him to conclude what he was seeing was post-traumatic stress injury. Gen. Xenakis told Times reporters that he had seen such circumstances before at the Letterman Army Medical Center which “was often the first stop for American prisoners of war after they had left Vietnam” where they experienced horrific treatment.⁵⁵

Participation in enhanced interrogations left a measurable moral impact on intelligence officers and armed forces service-members who were involved. This has come to be called moral injury by mental health professionals. Retired U.S. Navy psychiatrist William Nash defines moral injury as “damage to your deeply held beliefs about right and wrong. It might be caused by something that you do or fail to do, or by something that is done to you – but either way it breaks that sense of moral certainty.”⁵⁶ Psychologists are finding that moral injury manifests itself in a physical injury to the brain’s Broca’s center, which controls language, and can actually shut it down.⁵⁷ This leaves many individuals quite literally speechless.

Global terrorist groups, namely the Islamic State, immediately seized upon the U.S. torture program’s public disclosure as a recruitment and propaganda tool — going so far as to label the United States as a terrorist state for its past behavior.⁵⁸ While the atrocities committed by the Islamic State, and groups like them, far surpass the actions of the United States, the propaganda war greatly undermines U.S. credibility. Furthermore, a return to harsh interrogations and detentions could open the door for reprisals on behalf of other state and non-state adversaries gaining legitimacy under international norms.

The U.S.-European cooperative structure enshrined in the NATO alliance has been the foundation of U.S. global security and foreign policy since the end of the Second World War. Unfortunately, the revelations surrounding the mistreatment of detainees by the U.S. armed forces and intelligence community severely damaged that relationship. Not only did the interrogation program undermine the common values that are championed by the U.S. and Europe, but the report and the allegations that flowed from it directly implicated several European partners as willing and knowledgeable accomplices in the interrogation program.⁵⁹ The public acknowledgement of European cooperation with the CIA has had a negative effect on the individual states as well as U.S.-European multilateral relations.⁶⁰

The implementation of the post-Second World War international institutions has been largely supported by the legitimacy and international power possessed by the United States. The international blowback and condemnation that would result from a return to enhanced interrogations would significantly erode the stability of these institutions. Furthermore, the United States itself faces a very serious risk of international isolation and condemnation on behalf of these bodies if it were to authorize any further violations of international law via harsh interrogation practices. Additionally, the utilization of harsh interrogations could serve to legitimize their use by rogue regimes and non-state actors on the basis of reprisals.

VIII. CERL’s Findings

- **Under the McCain-Feinstein Amendment, interrogations by any U.S. government entity must conform to the guidelines of the Army Field Manual. Within the current Army Field Manual, lawful treatment of “enemy prisoners of war” and civilians is dictated by the Geneva Convention**

Relative to the Treatment of Prisoners of War and the Geneva Conventions Relative to the Protection of Civilian Persons in Time of War respectively.

- **Torture could not be brought back without changes to the Army Field Manual. Changes to the Army Field Manual might still not render torture permissible, because torture is prohibited by other sources of law, including but not limited to 18 U.S.C. §§ 2340-2340A.**
- **Exposure to enhanced interrogation techniques caused significant and lasting mental injury for individuals exposed to harsh interrogations. The existence of persistent mental health repercussions in former detainees directly contradicts asserts in the original “torture memos” that techniques like waterboarding did not count as torture because they did not leave lasting physical or psychological damage or inflict pain that rose to a level similar to that experienced in death or organ failure.⁶¹**
- **Participation in the enhanced interrogation of detainees led to “moral injury” for those administering the interrogation techniques. Doctors have found that this moral injury may manifest itself in the form of a physical injury to the brain’s communication center.**
- **The enhanced interrogation program and the subsequent debates have fueled anti-American propaganda, while increasing the ability of terrorist organizations like the Islamic State to attract new recruits. A return to torture is therefore likely to reduce, rather than enhance, the success of America’s fight against terror.**
- **The enhanced interrogation program had a negative impact on America’s international standing. The public revelation of the program has strained the cooperative relationship between the United States and Europe which has been the bedrock of global security since the Second World War.**

IX. Reasserting the Rule of Law and Preventing Future Breaches

The implementation of the interrogation program required the unprecedented use of unilateral executive authority to implement and significantly harmed the rule of law. The irresponsible actions of government lawyers in determining the justifications and legality of the interrogation program only furthered the damage done to the rule of law.

The rule of law values embodied within domestic and international law became distorted when it began to appear that the traditional laws of armed conflict would constrain intelligence gathering and the ability to enhance interrogations. Conveniently, the removal of lawful combatant status for al Qaeda and its associated forces removed the requirement to bring those detained before U.S. domestic courts.⁶² This kept the existence, treatment, and results of the detainees’ detention and interrogation from the public.

Ethical judgment on the part of the government is required to help support the rule of law. Adhering to the rule of law must not be thought of as one would adhere to tax code. One cannot skate right up to the edge and hope to maintain legality. Instead, ethical judgment must act as an insulating force for the protection of the rule of law. To be sure, there are gaps where the law is not explicit. And this is certainly

so in the realm of national security policy, armed conflict, and counterterrorism. Ethical judgment, however, is necessary to interpret these gaps — in the absence of this judgment the law is fragile and indeed unstable. Adherence to the rule of law is not merely about following the letter of the law. It is an internalization of value, not simply a form of conduct.⁶³

The implementation of the interrogation and detention program in the aftermath of 9/11 was ill-advised, ill-conceived and damaging to the rule of law. The EIT program's dubious legal justifications introduced confusion into the law of armed conflict as well as domestic national security legal frameworks. It affirmed to the world that the U.S. was indifferent regarding violations of international laws and norms and raised questions as to American credibility when dealing with human rights.

X. CERL's Recommendations

- **In order to ensure that torture is not brought back via changes to the Army Field Manual, Congress should pass strict legislation directly addressing the use of interrogation practices that violate 18 U.S.C. §§ 2340-2340A, UNCAT, and Common Article 3.**
- **A Congressional investigation should be undertaken by the Senate Judiciary Committee to determine whether the EIT program violated U.S. domestic law as well as U.S. commitments to international human rights laws and norms.**
- **Investigations into the actions of medical and legal professionals complicit in the enhanced interrogation program should be conducted by the American Medical Association, the American Psychological Association, and the American Bar Association. This will set a precedent moving forward that warns against un-ethical cooperation with and assistance to government programs. Legal and medical codes of conduct should be amended to allow for disobeying orders, without penalty, that individuals believe violate domestic or international laws.**
- **President Trump, Secretary Mattis, and Director Pompeo should issue a joint statement that unequivocally condemns the use of torture and clearly states that the United States will not reinstate any harsh interrogation programs and does not support similar actions taken by partner forces.**

XI. About the Center for Ethics and the Rule of Law

The Center for Ethics and the Rule of Law (CERL) at the University of Pennsylvania is a non-partisan interdisciplinary institute dedicated to the preservation and promotion of the rule of law in twenty-first century national security. The only center of its kind housed within a law school, CERL draws from the study of law, philosophy and ethics to answer the difficult questions that arise in times of war and

contemporary transnational conflict. CERL has made addressing the legacy and prevention of state sanctioned harsh interrogation practices a cornerstone of its recent work.

CERL's Founder and Director, Professor Claire Finkelstein, Algernon Biddle Professor of Law and Professor of Philosophy at the University of Pennsylvania, <https://www.law.upenn.edu/cf/faculty/cfinkels/>, routinely conducts briefings and advises on national security matters, including briefings at the Pentagon before the Army JAG Corps as well as the J5 Middle East Division and special operations forces in the U.S. and abroad. In July, CERL conducted a briefing with Senior members of the Army JAG Corps at the Pentagon. This briefing paper grew out of this consultation.

Consultants on this paper were:

Professor Claire Finkelstein, CERL's Founder and Director, is the Algernon Biddle Professor of Law and Professor of Philosophy at the University of Pennsylvania. She is a frequent advisor on national security matters, including briefings given to U.S. military service-members and leadership, as well as American and foreign special operations units.

The Honorable Alberto Mora, a Senior Fellow at the Harvard Kennedy School, who beginning in 2001, as the General Counsel of the Navy, led efforts in the Department of Defense to oppose Bush administration legal theories that allowed harsh interrogation tactics at the U.S. detention camp in Guantanamo Bay, Cuba.

Professor Kevin Govern, Professor of Law at the Ave Maria School of law, began his legal career as an Army Judge Advocate, he served 20 years at every echelon during peacetime and war in worldwide assignments involving every legal discipline. He has also served as an Assistant Professor of Law at the United States Military Academy and has taught at California University of Pennsylvania and John Jay College.

Dr. Stephen Xenakis, is a retired brigadier general and Army medical corps officer with 28 years of active service. He is an adjunct clinical professor at the Uniformed Services University of Health Sciences. Dr. Xenakis serves as an anti-torture advisor to Physicians for Human Rights and belongs to the group of retired generals and admirals convened by Human Rights First.

Carlton Haelig, CERL Junior Fellow, 2016-17.

Nicholas Saidel, CERL Senior Fellow, Spring 2017.

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¹ This rhetoric echoes similar statements made on the campaign trail where the President repeatedly touted the efficacy of torture and told American voters that he would bring back “a hell of a lot worse” than the previous interrogation methods— “[The United States is] going to have to do things that are unthinkable almost.” (See endnote 2)

² “Trump Says Torture Works as His Government Readies a Review,” ABC News, January 25, 2017, at: <http://abcnews.go.com/Politics/wireStory/trump-draft-order-seeks-review-terror-interrogations-45036877>

“Trump Amps Up His Call For Torture: ‘We’re Going To Have To Do Things That Are Unthinkable,’” Huffington Post, July 1, 2016, at: http://www.huffingtonpost.com/entry/trump-torture-waterboarding_us_5775d740e4b04164640f6597

³ “Trump Draft Order on Reviewing ‘Black Site’ Prisons, Terror Interrogations,” CBS News, January 25, 2017, at: https://www.scribd.com/document/337542845/Trump-Draft-Order-on-Reviewing-Black-Site-Prisons-Terror-Interrogations#from_embed

⁴ “Trump Says Torture Works as His Government Readies a Review,” ABC News, January 25, 2017.

⁵ “Advance Policy Questions for James N. Mattis Nominee to be Secretary of Defense,” United States Senate Armed Services Committee, at: http://www.armed-services.senate.gov/download/mattis-apq-responses_01-12-17

⁶ “Advance Policy Questions for James N. Mattis Nominee to be Secretary of Defense,” Senate Armed Services Committee, at: http://www.armed-services.senate.gov/imo/media/doc/Mattis%20APQ%20Responses_01-12-17.pdf

⁷ “Trump ‘surprised by Mattis waterboarding comment,’” CNN, November 23, 2016, at: <http://www.cnn.com/2016/11/23/politics/waterboarding-trump-mattis/>

⁸ Pompeo publicly criticized Sen. Diane Feinstein (D-CA) for releasing the SSCI report at the time. “Mike Pompeo and the Question of Torture,” The New Yorker, January 12, 2017, at: <http://www.newyorker.com/news/amy-davidson/mike-pompeo-and-the-question-of-torture>

⁹ “Pompeo would ‘absolutely not’ obey torture order from Trump,” The Hill, January 12, 2017, at:

<http://thehill.com/policy/national-security/313972-pompeo-would-absolutely-not-obey-torture-order-from-trump>

¹⁰ “Kansas Rep. Pompeo, Toying With Torture, Confirmed as New CIA Chief,” Foreign Policy, January 23, 2017, at: <http://www.foreignpolicy.com/2017/01/23/kansas-rep-pompeo-toying-with-torture-confirmed-as-new-cia-chief>

¹¹ “New CIA Deputy Director, Gina Haspel, Had Leading Role in Torture,” NY Times, February 2, 2017, at: https://www.nytimes.com/2017/02/02/us/politics/cia-deputy-director-gina-haspel-torture-thailand.html?_r=0

¹² 176 Flag Officers to President Donald Trump, January 6, 2017, original at:

<https://assets.documentcloud.org/documents/3259263/Retired-Military-Leaders-to-Trump-Letter-on.pdf>

¹³ “18 U.S.C. § 2340 – Definitions,” at: <https://www.law.cornell.edu/uscode/text/18/2340>

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