



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 restore the use of harsh interrogation of detainees in American custody.² That same day, CBS News released a draft Trump administration executive order that would order the Intelligence Community (IC) and Department of Defense (DoD) to review the legality of torture and potentially revise the Army Field Manual to allow harsh interrogations.³ On March 13, 2018, the President nominated Mike Pompeo to replace Rex Tillerson as Secretary of State, and Gina Haspel to replace Mr. Pompeo as Director of the CIA. Mr. Pompeo has made public statements in support of torture, most notably in response to the Senate Intelligence Committee's 2014 report on the CIA's use of torture on post-9/11 detainees,⁴ though his position appears to have altered somewhat by the time of his confirmation hearing for Director of the CIA, and Ms. Haspel's history at black site Cat's Eye in Thailand is controversial, particularly regarding her oversight of the torture of Abd al-Rahim al-Nashiri⁵ as well as her role in the destruction of video tapes documenting the CIA's use of enhanced interrogation techniques.⁶ In light of these actions, President Trump appears to be signaling his support for legalizing the Bush-era techniques applied to detainees arrested and interrogated during the war on terror.

The central purpose of this report is to clarify the current legal status of torture under U.S. and international law, to explore the avenues that might be used to revive the torture program, and to recommend legal avenues to forestall the possibility that this President or future presidents could reinstate torture by executive order.

II. Background

The President's 2017 draft executive order directing the IC and DOD to review the legality of torture and potentially revise the Army Field Manual to allow enhanced interrogation techniques has 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....We are not bringing back torture in the United States of America."⁷ For the moment, the President has signaled he would leave the ultimate judgment on whether to revive the use of torture in interrogations to his national security chiefs, Central Intelligence Agency Director (DCIA) Mike Pompeo and Secretary of Defense James Mattis.

In his written answers to advance policy questions presented to the Senate Armed Services Committee, Secretary of Defense Mattis stated that he believes the Army Field Manual should be the sole standard by

which military interrogations are carried out,⁸ a position that is consistent with the recent McCain-Feinstein Amendment.⁹ Previously, Secretary Mattis had expressed his skepticism of the efficacy of torture to President Trump in a private meeting with the then-candidate, a statement that apparently impressed Trump.¹⁰ Although Director Pompeo had been a harsh critic of the 2014 Senate Select Committee on Intelligence interrogation report,¹¹ 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.”¹² 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.¹³

In a letter signed by 176 flag officers, among them Adm. William 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.”¹⁴

While President Trump has defended the efficacy of torture, thus thrusting this question once more into public view, the consensus on this matter is now clear—torture does not work. The United States Select Committee on Intelligence (SSCI) report on the CIA’s Rendition, Detention, and Interrogation (RDI) program during the Bush administration addressed the issue of efficacy clearly.¹⁵ The majority concluded that the “use of the CIA’s enhanced interrogation techniques [EITs] was not an effective means of obtaining accurate information or gaining detainee cooperation.”¹⁶ Approved 9-6 in the Committee, the report contains a minority report that contests this finding of inefficacy. The minority report suggests that the majority’s “apparently absolute conclusion” relies on faulty premises and flawed analytical methodology.¹⁷ Then CIA Director John Brennan issued a statement in response to the report also challenging the majority’s conclusion, claiming EITs “did produce intelligence that helped thwart attack plans, capture terrorists, and save lives.” The minority authors of the SSCI report, however, were unable to cite any proof that torture is efficacious, and merely sought to cast doubt on the findings of the majority against efficacy.

While CERL endorses the majority view of the SSCI report, we note that none of the findings herein depend on that position. Were it to be conclusively proven, against the current weight of the evidence on this issue, that torture contributed causally to our counter-terrorism efforts after 9/11, CERL’s findings in the present Report would not be undermined.¹⁸

III. 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. The statute defines torture 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.”¹⁹ This prohibition applies within the United States as well as to U.S. nationals acting abroad.

For a period of time, following the signing of a memorandum by President George W. Bush in 2002,²⁰ and the now infamous “torture memos”²¹ written by then Deputy Assistant Attorney General John Yoo and then Assistant Attorney General Jay Bybee, the United States operated under a policy that argued that acts amounting to torture were justified with respect to Al Qaeda and Taliban detainees. However, international condemnation of this policy was strong, and soon after, as discussed below, the U.S. Supreme Court determined in *Hamdan v. Rumsfeld* that the prohibition against torture must be applied to all those detained under U.S. jurisdiction, including suspects of terrorism.²² Moreover, in *Boumediene v. Bush*, the U.S. Supreme Court determined that prisoners detained under the Military Commissions Act of 2006 must be given the right to habeas corpus.²³ While this ruling applies to those individuals detained by the U.S. military and held within the country and abroad, it does not address the clandestine detention of individuals being held by intelligence agencies. It does, however, suggest that a broader number of individuals than originally anticipated could challenge their detentions in U.S. federal court.

The 2015 McCain-Feinstein Amendment, Army Field Manual, and Law of War Manual

President Barack 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.²⁴ This order rescinded all previous Bush-era legal opinions. Furthermore, the 2015 McCain-Feinstein Amendment to the National Defense Authorization Act for fiscal year 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-applied enhanced interrogation.²⁵ The McCain-Feinstein Amendment expanded this prevention to cover the entire U.S. government, a provision particularly meant to prevent future CIA enhanced interrogation programs.²⁶

The McCain-Feinstein Amendment also required the FBI-led High-Value Detainee Interrogation Group,²⁷ created pursuant to Executive Order 13491, to “report to DOD and other specified agencies on best practices for interrogation that do not involve the use of force.”²⁸ This report was delivered in August 2016 and outlines the HIG’s determined best practices and what it considers the most effective methodological approach for interrogation of high-value detainees without the use of force or cruel, inhumane, or degrading treatment.²⁹

Army Field Manual 2.22.3 Section 5-13 is now the basis for all legal non-law enforcement 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.³⁰

The Army Field Manual is not an article of United States law and exists outside of the direct oversight responsibilities of Congress. The creation and revision of the various Army Field Manuals are subject to internal Department of Defense protocols. The specific language of the McCain-Feinstein Amendment, however, appears to provide strict parameters for the scope of revisions pertaining to interrogation practices. The legislative mandate specifically allows for revisions that would “revise Army Field Manual

2–22.3, as necessary to ensure that Army Field Manual 2–22.3 complies with the legal obligations of the United States and the practices for interrogation described therein do not involve the use or threat of force.”³¹ Any future revisions to the Army Field Manual 2.22.3 would be required to adhere to this mandate.

The Army Field Manual is still a source of controversy notwithstanding the ethical and legal commitments mentioned above. The revised 2006 Manual deleted language contained in the 1992 version that explicitly prohibited the use of stress positions and sleep manipulation during interrogations.³² Furthermore, the 2006 version includes a new appendix, Appendix M, which contains guidelines for the interrogation of detainees who are not prisoners of war. Human rights groups have criticized Appendix M for its allowance of sleep manipulation and sensory deprivation, which some have called “torture lite.”³³ The United Nations Committee Against Torture (UNCAT), in its Concluding Observations regarding “Physical Separation” and “Field Expedient Separation,” argued that abuse of these techniques allowed by Appendix M could lead to violation of Articles 1 (torture), 2 (duty to prevent abuse), 11 (duty to systematically review interrogation rules), and 16 (prohibition on CIDT) of the treaty.³⁴ UNCAT stated that limiting detainees to four hours of sleep every 24 hours for up to 30 days, or more, with permission “amounts to authorizing sleep deprivation—a form of ill treatment—and is unrelated to the aim of... preventing communication among detainees.”³⁵ UNCAT added that “prolonging the shock of capture by applying goggles or blindfolds and earmuffs to generate a perception of separation” can cause a “state of psychosis.”³⁶ The U.S. government’s response to these accusations has centered on the Manual’s guarantees that detainees will be afforded humane treatment.³⁷ To a wide array of experts, this answer rings hollow. Thus, many are calling for a major overhaul or outright removal of Appendix M from the Army Field Manual and the reinsertion of language prohibiting stress positions and sleep manipulation.

Section 5.26.2 of DoD’s *Law of War Manual* also directly addresses appropriate behavior for information gathering: “Information gathering measures [may not] violate specific law of war rules...[I]t would be unlawful, of course, to use torture or abuse to interrogate detainees for purposes of gathering information.”³⁸ Moreover, the U.S. military’s UCMJ § 928 Art. 128 provides that any service member who “inflicts grievous bodily harm with or without a weapon [is] guilty of aggravated assault.”³⁹

International Laws and Norms

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....”⁴⁰

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.”⁴¹ 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 language⁴² meant to prevent states from utilizing legal work-arounds to overcome the prohibitions of torture.⁴³

Common Article 3 of the Fourth Geneva Convention provides further protections against torture in times of conflict.⁴⁴ 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.”⁴⁵ In 2006, the U.S. Supreme Court determined in *Hamdan v. Rumsfeld* that Common Article 3 must be applied to terror suspects in U.S. custody.⁴⁶

Legal Distinctions between Torture and CID Treatment

There are legal distinctions between torture and cruel, inhumane, and degrading (CID) treatment. Under U.S. domestic law, namely 18 U.S. Code § 2340, torture is defined as an act intended to inflict “severe physical or mental pain or suffering,” including, *inter alia*, threats of imminent death, the administration of mind altering substances, and other procedures that “disrupt profoundly the senses or personality.”⁴⁷ Similarly, CAT, ratified by the United States, defines torture as “severe pain or suffering, whether physical or mental intentionally inflicted...”⁴⁸ 42 U.S. Code § 2000dd, which prohibits “cruel, inhuman, or degrading treatment” of persons under or control of the U.S. government, defines CID by reference to the prohibitions against such treatment as contained by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.⁴⁹ The European Court of Human Rights (ECHR) and the UN Committee against Torture have both addressed the legal distinction between torture and CID, focusing on “the intensity of pain and the purpose for its infliction.”⁵⁰

While it is difficult to enforce international laws and norms, the International Criminal Court (ICC) does have the ability to investigate, try, and convict individuals charged with certain crimes. Under the Rome Statute, which the United States has yet to ratify, the ICC has jurisdiction over violations of genocide, war crimes, crimes against humanity, and crimes of aggression.⁵¹ There is no statute of limitations for these crimes. The difficulty in initiating any investigations into alleged crimes is the requirement 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.⁵²

Legal Challenges to Treatment in U.S. Courts

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.⁵³ The legislation does allow for claims against individual actors identified as complicit in the harsh interrogation of an individual claimant. It is possible that an American citizen could be held responsible if sufficient evidence of individual culpability in the violation of international law could be proven.

Lawsuits within the U.S. court system that implicate the American government and the EIT Program have faced legal challenges. The U.S. government has historically been able to shield itself from judicial review by invoking the state secrets privilege and the political question doctrine. The state secrets privilege allows the government to refuse to hand over any information that would cause harm to national security.⁵⁴ The

Bush administration used this privilege broadly, e.g., in *el-Masri v. Tenet*, as did the Obama administration, e.g., *Mohamed v. Jeppesen Dataplan*—notwithstanding an ostensibly restrictive 2009 policy directive from then Attorney General Eric Holder—leaving plaintiffs without sufficient evidence to pursue their cases, the result usually being dismissal of the lawsuit at the pleadings stage.⁵⁵

On March 8, 2018, President Trump invoked the privilege to block CIA testimony in the case of *Salim v. Mitchell*, a case brought by the ACLU under the Alien Tort Statute on behalf of detainees who were allegedly tortured under the CIA RDI Program.⁵⁶ During the initial phase of the litigation, the Obama administration, to the surprise of many, did not assert the state secrets privilege—an apparent attempt to open the Bush era interrogation tactics to the judicial system.⁵⁷ The defendants in the case are two ex-CIA contractors, psychologists, who played a role in designing the program according to the SSCI Report’s Executive Summary. The U.S. government intervened as an interested third party to protect classified information requested by the defendants.⁵⁸ While some judges review government *ex parte* filings *in camera* before deciding whether the assertion of the privilege is appropriate, they oftentimes defer to the government’s discretion.⁵⁹ Notably, the privilege was rejected during the Obama administration in the case of *Ibrahim v. Department of Homeland Security*, in which a Stanford student was mistakenly put on the no-fly list and couldn’t reenter the country.⁶⁰ In *Ibrahim*, the court decided the government overreached in its assertion of the privilege.⁶¹

Critics of the state secrets privilege, especially in the context of EITs, have argued for Congress to enact state secrets reform legislation to guide judges on the applicability of the privilege. As one commentator noted, the privilege “require[s] clarification: when the government can invoke the privilege and⁶² what can be protected from disclosure; whether it is appropriate to grant a motion to dismiss based on a state secrets claim at the initial pleadings stage; what is the appropriate relief for a valid claim of the privilege; and how deeply the court must examine the government’s claim.”⁶³

The political question doctrine has also been used by the U.S. government to shield itself from liability in EIT-related litigation. The political question doctrine is based upon the notion of justiciability and whether the judicial branch of the government is the proper branch to resolve an issue.⁶⁴ The U.S. Supreme Court has held that “cases challenging the way the executive is using that power present political questions.”⁶⁵ However, “the Supreme Court has repeatedly stressed...that the political question doctrine is a *narrow* exception to the general responsibility of federal courts to resolve all disputes within their jurisdiction, and generally requires the presence of either a “textually demonstrable commitment” of the underlying question to a branch other than the judiciary or “judicially unmanageable standards” that prevent courts from resolving the dispute.”

Al Shimari v. CACI Premier Technology, Inc. illustrates the battle over whether the political question applies to torture cases. This case, which relies on the Alien Tort Act, arose in 2008 on behalf of former detainees at Abu Ghraib, claiming torture and mistreatment by CACI (a military contractor) personnel.⁶⁶ A lower court dismissed the case on the grounds that sensitive military fall within the purview of the Executive Branch, and that, *inter alia*, because torture and CID are ambiguous and malleable terms, the case lacked judicially manageable standards.⁶⁷ This was the case, according to the court, despite the fact that the use of enhanced interrogation in this instance was carried out by third party contractors. The

Fourth Circuit reversed and remanded, making several instructive holdings: (1) “When a military contractor acts contrary to settled international law or applicable criminal law, the separation of powers rationale underlying the political question doctrine does not shield the contractor's actions from judicial review;” (2) “[W]hen a contractor has engaged in unlawful conduct, irrespective of the nature of control exercised by the military, the contractor cannot claim protection under the political question doctrine”; and (3) “[T]he Fourth Circuit said that ‘torture’ and ‘war crimes’ are well defined in the U.S.C. The court said that it may be a hard question, but it's not one that lacks standards.”⁶⁸ The Fourth Circuit therefore found that the political question doctrine does not apply.

The importance of this ruling is underscored by President Trump’s remarks in support of torture. As a concurring judge noted: “It is beyond the power of even the President to declare [torture] lawful.”⁶⁹ The government also tried to invoke the political question doctrine in the *Mitchell* case; the federal district court, however, rejected it and ruled that “the Supreme Court has made clear that the federal courts are capable of reviewing military decisions, particularly when those decisions cause injury to civilians.”⁷⁰

Both *Shimari* and *Mitchell* are promising advances for detainees seeking justice within the U.S. judicial system. The continued rejection of the applicability of the political question doctrine in EIT-related litigation will decrease the manifold challenges these detainees face when alleging torture on the part of the U.S. government or those under its control.

Conclusion

While prohibitions against torture, such as Article 5 of the ICCPR, contain language preventing the creation of legal loop holes to circumvent the requirement of the laws under any circumstance, the foundation of international law continues to be the voluntary compliance of the states themselves. There

should be little debate, particularly within the United States, regarding the acceptance of the prohibitions against torture as *jus cogens*. Regardless, 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 who supported this practice at risk. In some States around the world, 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.⁷¹ An American official could thus be charged with domestic war crimes or crimes against humanity in absentia and detained on those charges if they travel to that state, as was the case in the Italian conviction of former CIA officers in 2009.⁷² In the case of the Italian convictions, a CIA officer convicted in absentia as part of that case was detained in Portugal and is facing extradition to Italy. She was traveling on a Portuguese passport at the time and is therefore not being treated as an American traveling abroad.⁷³ These concerns have previously caused American policy-makers suspected of having authorized or applied torture to allegedly curtail their international travel to avoid arrest.⁷⁴

IV. The Practice 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, a number of suspected terrorists were rendered to CIA "black-sites" (secret prisons) without the use of any judicial process and often subjected to the use of EITs. Other times, individuals were rendered to a third state and removed from American custody without any guarantees that their human rights would be observed.⁷⁵ The practice of extraordinary rendition seeks to take advantage of a loophole within U.S. intelligence law that exempts the United States for responsibility for torture inflicted on detainees within its custody, as long as the torture is being carried out by another country and the U.S. involvement does not amount to a "joint venture."⁷⁶

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.⁷⁷ It does not, however, outlaw extraordinary renditions, which continued under Obama's administration albeit under stricter guidelines.⁷⁸

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.⁷⁹ 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 abused while in CIA custody have had mixed success bringing claims against the U.S. and other 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 its 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."⁸⁰

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."⁸¹ The Congressional Research Service points out in its 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."⁸²

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.”⁸³ The necessity for the intent not to facilitate torture can be fulfilled through diplomatic assurances under both the UNCAT and domestic legal restrictions.⁸⁴ 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.⁸⁵ States complicit in the CIA’s RDI program have been formally censured for their participation in forced disappearances of terrorist suspects in international.⁸⁶

V. The Status of Torture under the Trump Administration

One of the primary concerns moving forward is preventing the reversal of legislation enacted during the Obama administration that strengthened the prior statutory prohibitions against the use of torture by the United States. The precision and comprehensiveness of that legislation would make the reinstatement of the Bush-era torture policy an extremely difficult feat to accomplish legally and would require open congressional debate and extensive legislative modification.

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

It is doubtful that on the issue of torture the President has this power, particularly since President George W. Bush sought to do precisely that but was checked by Congress and the courts. But the issue is not without its complexities.

On the one hand, in his capacity as Commander-in-Chief, the president may “in times of emergency...override congress and issue executive orders with almost limitless power.”⁸⁷ 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 so as to attempt to maintain a higher degree of confidentiality and avoid unwanted public scrutiny.

But on the other hand, while the president may by way of his executive authority authorize the emergency use of techniques that 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.”⁸⁸ Any presidential assertion of an unbridled Article II commander-in-chief power to order the use of torture would clash with Congress’ Article I legislative authority to criminalize torture and with the courts’ Article III judicial power to declare the president’s use of torture to be illegal.

A further complication would be the role of 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 of any decision to use the CIA to implement the use of torture. This is pursuant to a law requiring that this group be notified in a “timely” fashion of any sensitive covert action taken by the intelligence community.⁸⁹ The Bush administration maintains that it complied with the requirement with respect to the EIT program. In the immediate aftermath of 9/11, this did not prove to be a barrier to the enactment of the program. Due to the pervasive fear and fury that gripped most Americans and their leadership during that period, approval—or, perhaps more precisely, an unwillingness to object—was not hard to come by. At the time, most of the members of the Gang of Eight supported the program, and the few who had qualms felt that they had no authority to prevent the decisions issued by the president. Furthermore, they understood that preventing the directive from being carried out would have required them to release the information publicly in order to seek legislation to block the president’s decision, representing an extreme national security breach that could have ended their political careers. They chose not to act; years later, after the RDI program was exposed, these members would question the sufficiency and accuracy of the notification provided to them.

Any administration that would seek to reinstate the torture program is likely to find that the Congress will be much less passive than before. Having been burned by the arguably incomplete notifications of the Bush administration, Congress is much more likely to insist on detailed and complete information on the programmatic details and would neither be likely to defer to an administration’s representations of the necessity for torture nor to remain silent when in possession of actual knowledge of illegal conduct by the executive branch.

VI. Moral and Psychological 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.”⁹⁰ 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.⁹¹

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.”⁹² 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.⁹³ This leaves many individuals quite literally speechless.

The psychology profession was itself criticized for its role in the EIT programs. In response, The American Psychology Associated (APA) commissioned what has become known as the Hoffman Report to investigate “whether APA officials colluded with DoD, CIA, or other government officials ‘to support torture.’”⁹⁴ The Hoffman Report rebuked several psychologists, some of whom held influential positions within the APA during the Bush administration, for colluding to ensure their professional code of ethics were no more restrictive than the government’s—an effort to curry favor with the DoD, which wanted their continued participation in EITs. It also alleges a joint effort to silence CIA psychologists’ dissent and a purposeful mishandling of ethical complaints in order to maintain the EIT status quo within the CIA. This is in addition to conflict of interest accusations, which consider the close ties that these psychologists had with government officials in charge of EIT programs.⁹⁵ In late February 2016, a group of these psychologists sued Hoffman and his law firm for defamation, claiming that they are scapegoats and victims of Hoffman’s tendentious research.⁹⁶

Since issuing an apology over the scandal, the APA has been unequivocal in its stance against torture. On January 27, 2017, the APA issued a press release calling on Trump not to issue an Executive Order to reinstate the CIA EIT program, citing the U.S. Constitution, international law, and its professional opinion that torture is an ineffective means of intelligence gathering.⁹⁷ Finally, its code of ethics now reflects a much stronger position regarding psychologists and interrogations, stating:

Any direct or indirect participation in any act of torture or other forms of cruel, inhuman, or degrading treatment or punishment by psychologists is strictly prohibited. There are no exceptions. Clear violations of APA's no torture/no abuse policy include acts such as waterboarding, sexual humiliation, stress positions [and] exploitation of phobias.⁹⁸

The process of removing and transferring detainees has brought to light cases of wrongful detention that persisted for over a decade as officials relied on incorrect information and intelligence assessments. Publicly available, unclassified records indicate that in January 2016 the Periodic Review Board at the Guantanamo Bay detention facility recommended that Mustafa al-Shamiri be transferred out of the facility.⁹⁹ The review board’s recommendation was based, in large part, on the determination that the intelligence his indefinite detention relied upon had been discredited by further analysis. The board found that activities attributed to al-Shamiri justifying his classification as a high risk were actually carried out by “other known extremists with names or aliases similar to [al-Shamiri].”¹⁰⁰ This determination reveals that al-Shamiri was held for over 13 years without due process on false claims and incorrect intelligence.

VII. Strategic Consequences of the Torture Program

The public knowledge of the United States' role in widespread violations of human rights over an extended period of time has significantly undermined the country's strategic standing internationally.¹⁰¹ The revelations have been a boon to terrorist recruiting, caused significant damage to American diplomatic efforts, and harmed relationships with important allies, all while hampering the ability of the United States to present itself as a positive international role model. Instead, the United States showed the world that a

state could commit human rights violations without punishment—other states may very well follow this example and point to American actions as a sufficient justification.

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.¹⁰² 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 United States 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.¹⁰³ 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.¹⁰⁴

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. Accountability and the Ethics of Professional Responsibility

There have been no large-scale attempts within the U.S. government to hold those individuals responsible for the development and authorization of the enhanced interrogation program accountable. Particularly, there has not been any action taken against those government lawyers who provided the legal interpretations that were embodied in the “torture memos.”

The Justice Department has been repeatedly criticized for its failure to sufficiently investigate the misconduct of legal professionals associated with the program nor held those guilty of clear misconduct culpable. In September 2015, Amnesty International submitted a formal complaint with the Department of Justice's Office of the Inspector General. In response to the public release of the SSCI report on the CIA's RDI program, the complaint requested an immediate and comprehensive review of the conduct of Department of Justice officials between 2002 and 2008. The complaint concludes that Americans involved in the program have evaded accountability under international law.¹⁰⁵

For its part, the Department of Justice did undertake a comprehensive accountability review that was completed in July 2009. The Department of Justice's Office of Professional Responsibility's report analyzed the Office of Legal Counsel's "torture memos" and the participation of individual lawyers in the development and ultimate approval of the CIA's detention and interrogation program.¹⁰⁶ The report concluded that Deputy Assistant Attorney General John Yoo and Assistant Attorney General Jay Bybee intentionally committed professional misconduct in the crafting and approval of the "torture memos."¹⁰⁷ The report did not result in any official action being taken other than the notification of the bar council in the states where the two were licensed.

The U.S. Congress undertook in-depth investigations into the role of the intelligence community and military in the country's detention and interrogation programs. Its analysis provided a wide ranging analysis of the development, execution, and evolution of the RDI program. It is, therefore, quite surprising that a similar inquiry has not been undertaken by the relevant legislative bodies into the role of the Department of Justice.

Professional organizations have repeatedly called for the United States to reaffirm its stance on torture while holding itself accountable for past transgressions.

In the fall of 2014, the president of the American Bar Association (ABA) sent a letter to President Obama that called for an affirmation of the United States' interpretation of the UNCAT abroad. The letter called for an "explicit and unequivocal statement" that would acknowledge the "extraterrestrial application of [cruel and unusual treatment]." The desired statement would have made it clear that no individuals in the "custody or control of the United States [would be subjected] to torture or cruel, inhuman or degrading treatment or punishment *no matter where detained*."¹⁰⁸

In June 2015, the ABA again challenged the Obama administration on its handling of detainee treatment by expressing an explicit concern that the United States had not held those responsible for the RDI program accountable. ABA president William C. Hubbard, writing to Attorney General Loretta Lynch, called on the administration to comprehensively review and account for "all available evidence, and if warranted to initiate 'appropriate proceedings against any persons who...committed, assisted, authorized, condoned, had command responsibility for, or otherwise participation in such [human rights] violations.'"¹⁰⁹

The June 2015 letter reiterates its request from 2014 that the United States affirm its interpretation of the UNCAT and its application domestically and internationally. The key concern of the ABA is that there remains ambiguity regarding the application of the UNCAT "wherever the United States exercises *de jure* or *de facto* control."¹¹⁰

In September 2016, President Obama delivered his final speech to the United Nations General Assembly.¹¹¹ In that speech he praised the impact of global integration and championed the cause of global human rights initiatives. While this speech went to great lengths to mention the need to right the wrongs of the past, it did not, however, go far enough. Despite the willingness of many prominent American

leaders to proclaim the sanctity of human rights, there has not been a demonstrated domestic effort to seriously pursue accountability for the former detention and interrogation program.

In contrast to similar American inquiries, the United Kingdom's investigations into their role in the detention and interrogation program have taken a more forceful tone. Rather than addressing only the details and the program itself, the so-called "Gibson Inquiry" extends its analysis of U.K. involvement to the responsibility of the individual actors involved.¹¹² The actions of the United Kingdom may in fact be borne of a national desire to hold themselves accountable for their transgressions, or it may be an attempt to stem the possibility of international legal action taken against individuals within the U.K.

In a first of its kind, the International Criminal Court (ICC) is weighing in on potential U.S. war crimes allegedly committed by the military and CIA during the interrogation of detainees in Afghanistan. The ICC's Report on Preliminary Examination Activities published in November 2016 states in part that based on available information, "members of the US armed forces and the [CIA] resorted to techniques

amounting to the commission of the war crimes of torture, cruel treatment, outrages upon personal dignity, and rape."¹¹³

The report further alleges: "These alleged crimes were not the abuses of a few isolated individuals. Rather, they appear to have been committed as part of approved interrogation techniques in an attempt to extract 'actionable intelligence' from detainees."¹¹⁴ Mostly during 2003-2004 at least 61 people were subjected to illegal treatment in Afghanistan, and at least 27 by the CIA in Afghanistan or at "black-sites" in Eastern Europe.¹¹⁵

These preliminary findings may lead to a full investigation and prosecution. While the United States is not a party to the Rome Statute, which created the ICC, Afghanistan is a signatory and therefore jurisdiction is arguably established. This does not mean the ICC will be able to enforce any hypothetical ruling against U.S. officials or interrogators. As noted above, the ICC can only take action when the state in question is unable or unwilling to conduct an investigation of its own—a significant obstacle in the case of the United States, which has a robust, independent judicial system, and a domestic statute under which individuals may be prosecuted for the commission of war crimes.¹¹⁶ The War Crimes Act of 1996 renders illegal, *inter alia*, any "grave breach of common Article 3," including "torture" and "cruel or inhuman treatment," which respectively turn on the intent to inflict "severe" or "serious" physical or mental pain or suffering.¹¹⁷ Second, the United States has worked hard to protect itself—and its soldiers—from the legal arm of the ICC. Notably, Congress passed 22 U.S. Code § 7421—the American Service-Members' Protection Act of 2002 (ASPA), which puts in place extreme protections for American service members against the ICC.¹¹⁸

In 2005, Congress also passed "the Nethercutt Amendment" to the foreign operations appropriations bill, prohibiting disbursement of selected U.S. assistance to an ICC party unless the country has entered into a bilateral agreement not to surrender U.S. persons to the ICC (commonly known as an Article 98 agreement).¹¹⁹ Finally, the ICC has no police force and must rely on national police services to capture and transfer a wanted individual to The Hague.¹²⁰ ICC member states have refused to comply in the past

for diplomatic reasons.¹²¹ With these substantial hurdles in mind, it will be interesting to see how this potential international legal crisis plays out. President Trump is often unsupportive of international law and some fear he may attempt to shut down respected international fora such as the UN or the ICC. Whether these concerns have any merit remains to be seen. In contrast to the UN, the United States does not fund the ICC, so President Trump cannot use the power of the purse. He can, however, further restrict ties to the ICC and hinder its efforts to fulfil its mission.

IX. The Challenge of Responding to Illegal Orders

Aside from high level accountability and legal responsibility, there is also the problem of individual criminal responsibility for those lower down the chain of command who are faced with orders to commit what amounts to illegal torture. 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. 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.¹²² Although, as civilians, CIA officers are not subject to the military's legal obligation to obey a lawful order, they still face similar professional obligations and consequences when it comes to obeying direct orders.

An intelligence officer or service member should be able to rely upon the judgment provided to them by the legal apparatus in which they operate. Though many involved in the operational aspects of the interrogation programs questioned its application, they were assured that they were abiding by lawful orders as so determined by the responsible executive branch legal authorities. The senior military and CIA officials knew that the RDI program had been approved by the Commander-in-Chief, the Attorney General, and the full National Security Council. Junior officers were assured that the program had received full legal and policy approval at higher levels. Therein lies the conflict. One's duty 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 may know them to be amoral or even suspect illegality. The relationship between one's duty to obey superiors within the chain of command and the positive duty to disobey illegal orders can create extreme conflict.

Individuals have limited options in such a situation. They can refer the order to a superior, if such a situation is possible. They may refuse to carry out such an order, but 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. The ambiguity of this dilemma has been given significant clarity in the wake of the public revelations surrounding the use of EITs. It is now entirely clear that any abuse is viewed by the United States as cruel, inhumane, and degrading treatment and thus unacceptable.

Despite the moral clarity that now pervades the American national security apparatus the consequences of disobeying an order can have a range of impacts on an individual. Civilians who disobey an illegal order risk, at worst, the loss of their job if their refusal is proven wrong. A member of the military, however,

risks facing a court-marshal and criminal penalties if his or her refusal is proven to be unjustified. The risks the two groups face have the potential to affect their willingness to disobey an order they believe to be illegal unless they have full knowledge of the use of cruel, inhumane, or degrading treatment.

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.¹²³ 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.

X. Conclusion

There is no ambiguity under international law that torture is illegal and that cruel and inhuman treatment falls under this legal prohibition. Under U.S. law it is also uncontested that torture is illegal and that “cruel, inhuman, or degrading treatment” is prohibited by statute. At a time when the President has nominated individuals with controversial positions on torture, and possible involvement in torture, it is imperative that all entities within the United States government remain committed to reinforcing the understanding that there is no ambiguity regarding what constitutes unacceptable treatment of detainees. Furthermore, these entities should implement effective channels of internal dissent that allow for the legal, proper handling of complaints involving classified national security information.

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 2016, CERL conducted a briefing with senior members of the Army JAG Corps at the Pentagon. This report grew out of this consultation.

Consultants on this report:

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 Director of Research, graduated from the International Security Program at George Mason University's Schar School of Policy and Government. He has served as a research assistant for the Office of the Secretary of Defense Historical Office within the Department of Defense. Additionally, Carlton was a 2017 Student Fellow at the Schar School's Center for Security Policy Studies. The views expressed in this paper are independent and do not reflect those of the U.S. Department of Defense.

Nicholas Sidel, CERL Fellow, was most recently Associate Director of the Institute for Strategic Threat Analysis & Response (ISTAR). He received a B.A. in Political Science from the University of Pennsylvania, an M.A. in Islamic and Middle Eastern Studies from the Hebrew University, and a J.D. from the Georgetown University Law Center. Nicholas contributed opinion pieces to publications including Fox News, The Huffington Post, and the Daily Beast. Before coming to CERL, he was an Associate at the law firm of Wolf Block LLP, a Legislative Aide to United States Congressman Robert A. Brady (1st. Pa), and a Fellow at the Foreign Policy Research Institute (FPRI).

For more information about CERL and our upcoming programming, or to join our e-mail list, please visit our web site: <https://www.law.upenn.edu/institutes/cerl/>. Contact CERL via e-mail any time at cerl@law.upenn.edu.

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)

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<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 https://www.scribd.com/document/337542845/Trump-Draft-Order-on-Reviewing-Black-Site-Prisons-Terror-Interrogations#from_embed

⁴ <http://www.kansas.com/news/politics-government/election/article115636563.html>

⁵ “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

⁶ On April 20, 2018, the CIA released a declassified memo by former CIA Deputy Director Michael Morell in which he stated that Gina Haspel “acted appropriately” in carrying out orders to destroy videotapes of harsh interrogations. “CIA declassifies memo on nominee’s handling of interrogation tapes,” The Hill, April 20, 2018, at: <https://thehill.com/policy/national-security/384205-cia-declassifies-memo-on-nominees-handling-of-interrogation-tapes>. See CIA memo at

<https://drive.google.com/file/d/0ByVu4fDHYJgVX0dkSINhVGJ1U0FjT3d3b185T2RJWJGZNBdGw/view>

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<http://www.cnn.com/2016/11/23/politics/waterboarding-trump-mattis/>

¹¹ 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>

¹² “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>

¹³ “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>

¹⁴ 176 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>

¹⁵ See “SSCI Study: Findings and Conclusions,” Conclusion #1, at: http://www.feinstein.senate.gov/public/_cache/files/a/9/a992171e-fd27-47bb-8917-5ebe98c72764/7889A5C19ACFE837C78C2192B0876B90.sscistudyfindingsandconclusions.pdf

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¹⁷ See “SSCI Study: Findings and Conclusions,” Conclusions #1 and #2, at:

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

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http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf

²¹ <https://archive.nytimes.com/www.nytimes.com/ref/international/24MEMO-GUIDE.html>

²² “*Hamdan v. Rumsfeld*,” at: <https://www.law.cornell.edu/supct/html/05-184.ZS.html>

²³ “*Lakhdar Boumediene, et al. v. George W. Bush*,” at: <https://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/06-1195.htm>

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<http://www.cfr.org/terrorism-and-the-law/detainee-treatment-act-2005-hr-2863-title-x/p9865>

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Full amendment text: <https://www.congress.gov/amendment/114th-congress/senate-amendment/1889/text>

²⁷ “High-Value Detainee Interrogation Group,” Federal Bureau of Investigation, at: <https://www.fbi.gov/about/leadership-and-structure/national-security-branch/high-value-detainee-interrogation-group>

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