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Dirty Hands, Clean Conscience?
The CIA Inspector General's Investigation of 'Enhanced Interrogation Techniques' in the
'War on Terror' and the Torture Debate

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Abstract

The 'War on Terror' has generated fierce debate on torture as a means of thwarting terrorist threats. The argument is polarized between those who take a utilitarian position and those who seek to uphold the absolute prohibition on torture. Within the utilitarian camp, there are those who argue that torture, while immoral, should be legalized for use in the fight against terrorism, so that it can be better controlled and regulated. This article will provide new insights through its analysis of the CIA Inspector General's 2004 Special Review of Counterterrorism, Detention and Interrogation Activities, declassified in 2009. This offers important evidence that counters the key assumptions of contemporary torture apologists. Specifically, the Inspector General's findings reinforce the argument that torture is not effective, that efforts to legalize its use under controlled conditions are futile, and that even where torture is permitted by higher authorities, recriminations against the perpetrators are still likely to ensue. Furthermore, torture tends not to be aimed at thwarting imminent threats. Its use by the CIA in the 'War on Terror' is no exception. In any case it has yielded little evidence that could not have been obtained through legitimate means.

Introduction¹

Immediately following the killing of Osama Bin Laden by US Special Forces in May 2011, former US Vice President Dick Cheney asserted that the CIA's use of 'enhanced interrogation techniques' against terror suspect Khalid Sheikh Mohammed, in particular water boarding, produced the intelligence that led the CIA to Bin Laden. He argued that the 'enhanced interrogation' program was 'a good program', 'a legal program' and that 'it was not torture' (Donilon 2011). The use of so-called 'enhanced interrogation techniques' in the 'War on Terror' has provoked substantial academic and public discussion on the use of torture as a means of thwarting perceived security threats. The argument is polarized between those who seek to uphold the absolute prohibition on torture and those who take a utilitarian position. The absolutists maintain that torture is prohibited in international law, as well as in the domestic laws of many states, including the US, and that there are no grounds whatsoever on which torture can be justified. Within the utilitarian camp, there are those who argue that while immoral, torture is an unfortunate but necessary measure in the fight against terror to ensure a greater good, specifically, saving the lives of the many by torturing the few. Nevertheless, they argue, it should be controlled.

This article will provide new insights into this debate through its analysis of recently declassified material, specifically the CIA Inspector General's 2004 Special Review of Counterterrorism, Detention and Interrogation Activities (henceforth IG report) (CIA 2004), and related declassified documents. The IG report was declassified in August 2009, and is the first substantial 'insider' body of evidence on the use of torture in the 'War on Terror', by those directly involved in the process of justifying and then applying torture methods. Although substantial portions of the report have been redacted, this material nevertheless offers important evidence that counters the key assumptions of those who argue that administrative controls over torture are possible. Central to such arguments is the ticking bomb scenario – that if the detained 'terrorist' does not talk, hundreds of people will die when the ticking bomb explodes. This underpins the arguments of US officials involved in efforts to justify torture in the 'War on Terror'. It is also central to the arguments of Harvard Law Professor, Alan Dershowitz (2001, 2004b), who galvanized debate when he argued for a system of torture 'warrants' as a means of controlling torture, since torture is likely to be used in the fight against terrorism. He claimed, 'if an actual ticking bomb situation were to arise, our law enforcement authorities would torture' and on this basis, 'The real debate is whether such torture should take place outside of our legal system or within it'. His response is, 'If we are to have torture, it should be authorized by the law' (Dershowitz 2001). Dershowitz is morally opposed to torture, but has resigned himself to it as a reality and necessary evil, and argues we should therefore be more open about its use. The IG report is highly pertinent to the debate because, as this article will show, the US Department of Justice and the CIA initiated a system whereby 'legal permission' to use torture was granted to the CIA. While this was not the same as the warrants system that Dershowitz proposed, we nevertheless learn from the CIA Inspector General's investigation that torture is extremely difficult to control once permission is granted for its use. This therefore raises deep questions about Dershowitz's torture warrants proposal.

There is a rich literature on torture, which of late has tended to focus closely on the (il)legitimacy of torture in the face of the terrorist threat (Studies include but are not limited to: Bellamy 2006; Dershowitz 2001, 2004a, 2004b; Greenberg and Dratel 2005; Lazreg 2008; Levinson 2004; MacMaster 2004; Ramsey 2006; Sands 2008). Prior to 9/11, work on torture focused on several key themes, including the history of torture (Beccaria [1764] 1995; Peters 1985), torture as a tool for punishment (Beccaria [1764] 1995; Foucault 1977), torture by totalitarian and authoritarian states (Arendt 1966; Rejali 1991, 1994), the role of the individual in torture (Cohen 2001; Huggins 1998;

¹ Many thanks for the helpful feedback on an earlier version from Anne Hammerstad, Jonathan Joseph and Laleh Khalili, and for the valuable anonymous reviewer comments, as well as the suggestions of the editor.

Huggins et al. 2002; Milgram 1974), and torture as a tool of war or counter-terrorism. The latter included excellent studies on torture by the French in Algeria (Vidal-Naquet 1963, 1972), the British in Northern Ireland (Conroy 2001), the US in Vietnam (Valentine 2000), and torture in the Latin American national security states during the Cold War (Chomsky and Herman 1979; Huggins 1998; Huggins et al. 2002). Human rights NGOs, particularly Amnesty International and Human Rights Watch, have a long history of reporting on the use of torture globally. A few scholars have theorized the use of torture, looking specifically at the functions it serves in domestic and foreign policy (Blakeley 2007, 2009; Cohen 2001; Peters 1985; Rejali 1991). These various works are important in providing insights into the effects of torture on victims, perpetrators, and society as a whole, and are therefore highly pertinent to contemporary debate. Since 9/11, two important histories of torture have been published. The first, *A Question of Torture* by Alfred McCoy (2006), provides an overview of torture as practiced by the CIA from the Cold War to the 'War on Terror'. The second, *Torture and Democracy* by Darius Rejali (2007), looks specifically at the relationship of democratic states to the use of torture, and in so doing provides a comprehensive history of the development and globalization of torture practices.

The analysis of the IG report in this article is intended to contribute both empirically and theoretically to existing literature. Empirically, the article analyses the CIA Inspector General's findings within the context of earlier CIA practices that had ostensibly been outlawed as the Cold War drew to a close. In this respect the article provides an important update to work completed by scholars between 2004 and 2007, prior to the release of the IG report (Greenberg and Dratel 2005; Levinson 2004; McCoy 2006; Rejali 2007).

Theoretically, the article shows what the implications of the IG report are for the current debate. Specifically, it shows that the IG report challenges three key theoretical assumptions central to the contemporary argument that while torture is immoral, it is likely to be used, so should be legalized and can thereby be controlled. These assumptions are: firstly, that torture is effective as a means of securing intelligence to thwart imminent security threats; secondly, that the use of torture can be controlled, thereby limiting its use; and thirdly, that by legitimizing some torture, officials involved in its use would be unlikely to face recriminations. The IG report offers the first empirical evidence from the 'War on Terror' against which these theoretical assumptions can be tested.

The article begins by assessing the effectiveness of torture as used by the CIA in the 'War on Terror'. It shows that the CIA Inspector General raised considerable doubt over its effectiveness, just as his predecessors had in the twilight years of the Cold War. The article then examines the ways in which the CIA sought sanction for torture from the Department of Justice's Office of Legal Counsel (OLC), as a means of offering protection from recriminations for agents involved in its use. It shows that in so doing both institutions concealed their own consciousness of illicit practices and their effects in the past and present, dismissed important ethical values, and rejected the evidence that torture is rarely effective. I will show that the CIA's deployment of 'enhanced interrogation techniques' (EITs) since 2001, constitutes a re-adoption of Cold War practices tantamount to torture and other cruel, inhuman and degrading treatment. Their re-adoption was led by the CIA, and retroactively sanctioned by the OLC under the Bush administration. Furthermore, the CIA initiated harsher measures over time, for which again it retroactively sought permission from the OLC; permission which the OLC granted. In this regard, the tail was wagging the dog; the law was not dictating policy and practice, rather CIA practices were dictating law. Finally, the article demonstrates that rather than controlling torture, efforts to sanction it led to bureaucratic chaos within the CIA, and to torture practices that went far beyond what had been permitted. Thus, the paper concludes that efforts to legalize torture under controlled conditions are futile, since there is little assurance that its use can be contained. In any case, its use is rarely aimed at thwarting imminent threats, and it is far from clear that it yields any evidence that could not be obtained through legitimate means.

The CIA Inspector General Report and the (in)efficacy of torture

A substantial portion of the CIA IG report is devoted to evaluating the effectiveness of the ‘Enhanced Interrogation Techniques’ (EITs). As discussed in more detail below, the EITs constitute torture, defined by the Convention Against Torture 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, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity (UN 1985)

Approval was sought by the CIA’s Office of General Counsel for the use of the EITs under the CIA’s Counterterrorist Program. These were intended to provide a number of measures that went beyond the ‘Standard Interrogation Techniques’ (SITs). The SITs included sleep deprivation up to 72 hours, continual use of light or darkness in a cell, loud music, and white noise, approved for use by the CIA (CIA 2004: 40). The rationale for the EITs was that they would be effective in securing intelligence from detainees that were unresponsive to the SITs, thereby increasing the capacity of the US to prevent future terrorist attacks. The EITs were intended for use against the first so-called ‘High Value Detainee’, Abu Zubaydah, who the CIA argued was resistant to the standard techniques (CIA 2004: 3-4). The initial list of EITs for which the CIA sought approval included: 1) the attention grasp; 2) walling; 3) the facial hold; 4) the facial insult or slap; 5) cramped confinement; 6) insects placed in confinement box; 7) wall standing; 8) stress positions; 9) prolonged sleep deprivation; 10) the waterboard (CIA 2004: 15). The CIA had concluded long before 9/11 that torture, including techniques very similar to the EITs, was neither authorized or accepted, that it was not effective, and that there was a risk of recriminations against agents involved in its use (CIA 1983: 5). The reasons for the outlawing of torture towards the end of the Cold War were documented by the CIA Inspector General in his 2004 report. He shows that they were prohibited following controversy surrounding the Human Resource Exploitation (HRE) program, introduced in the 1980s in the CIA’s training of foreign liaison officers. The HRE program was a resurrection of earlier Vietnam practices. The IG report notes that there had been a decline in the use of interrogation by the Agency following the Vietnam War (CIA 2004: 9). This was in part a response to revelations of the highly repressive Phoenix Program, established by the CIA in Vietnam to improve intelligence and wipe out what the CIA had assumed to be the Vietcong infrastructure. It in fact involved the widespread use of torture in interrogations and the killing of many thousands of Vietnamese, as Douglas Valentine’s seminal work shows (Valentine 2000). As the 2004 IG report notes, the HRE program was eventually shut down:

In 1984, OIG investigated allegations of misconduct on the part of two Agency officers who were involved in interrogations and the death of one individual [several words blacked out]. Following that investigation, the Agency took steps to ensure Agency personnel understood its policy on interrogations, debriefings, and human rights issues. Headquarters sent officers to brief Stations and Bases and provided cable guidance to the field. In 1986, the Agency ended HRE [Human Resource Exploitation] because of allegations of human rights abuses in Latin America [two lines blacked out] (CIA 2004: 9-10).

Thus, one important aim of the 2004 report was to look at whether there were good grounds for the introduction of the EITs, which really constituted a re-introduction of methods previously deemed to have been neither legal nor effective. Specifically, the IG was concerned to examine whether they had been effective in securing intelligence to thwart terrorist attacks, whether they fell within the law, and whether agents involved in their use could avoid recriminations, having deployed these practices. Before looking at the IG’s conclusions, a brief examination of the HRE will show firstly, how closely the EITs resemble the practices that had been outlawed, and secondly why the HRE program was deemed to have explicitly advocated torture.

The HRE manual was used by CIA personnel for the training of foreign liaison officers between 1982 and 1987 (CIA 1983). It, along with the KUBARK manual (CIA 1963), was acquired by the Baltimore Sun newspaper in 1997. It contained passages which, if enacted, would constitute torture and inhuman and degrading treatment. The manual permitted time, space and sensory deprivation that may be intolerable (CIA 1983: H26, paragraph F), and which was intended to ‘disorient the subject and destroy his capacity to resist’ (CIA 1983: K2, paragraph L3). Solitary confinement was advocated as a means of subjecting individuals to extreme stress and it was acknowledged in the manual that this would be likely to lead to delusions, hallucinations and other pathological effects (CIA 1983: K6-7, paragraph L10). The manual also referred explicitly to the use of torture and the role it can play in the interrogation process:

The torture situation is an external conflict, a contest between the subject and his tormentor. The pain which is being inflicted upon him from outside himself may actually intensify his will to resist. On the other hand, pain which he feels he is inflicting upon himself is more likely to sap his resistance. For example, if he is required to maintain rigid positions such as standing at attention or sitting on a stool for long periods of time, the immediate sources of pain is not the ‘questioner’ but the subject himself. His conflict is then an internal struggle. As long as he maintains this position he is attributing to the ‘questioner’ the ability to do something worse. But there is never a showdown where the ‘questioner’ demonstrates this ability. After a period of time, the subject is likely to exhaust his internal motivational strength (CIA 1983: K9-10, paragraph L12)

The coercive techniques alluded to in the HRE manual violate International Humanitarian Law in that they condone the use of torture and degrading and humiliating treatment for interrogation purposes. The CIA was keenly aware that this was the case, since the program was outlawed. Indeed, in the copy of HRE manual obtained by the Baltimore Sun, a disclaimer had been retrospectively added to the manual sometime after its original publication and before it was handed over to the newspaper which stated that ‘The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind as an aid to interrogation is prohibited by law, both international and domestic; it is neither authorized nor condoned’ and that force in interrogations was considered ‘a poor technique’ that ‘yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear’, (CIA 1983: 5). Despite this, the EITs adopted in the ‘War on Terror’ are very similar to those outlawed towards the end of the Cold War. For example, as in HRE, a preferred method in the ‘War on Terror’ has been the use of stress positions. Sensory, space and time deprivation methods are common to both sets of CIA practices too. The use of solitary confinement as advocated in HRE is mirrored in the EITs, in which the CIA advocated the use of large and small boxes used to confine detainees in the ‘War on Terror’ (Bybee 2002a: 3).

One of the main purposes of the CIA IG report is to demonstrate the effectiveness of the EITs in preventing further terrorist attacks. However, the findings are far from conclusive, and instead suggest that the conclusion of the CIA at the end of the Cold War still stands – torture is illegal and there is insufficient evidence to conclude that it is effective as a tool to thwart terrorist attacks. The IG report states that over 3,000 reports were produced from the intelligence provided by the High Value Detainees subjected to EITs (CIA 2004: 86). This shows that a substantial amount of time, effort and resources must have been allocated to the production of the reports. How they precisely contributed to the US’ counter-terrorism efforts is expressed in only broad and vague terms:

The detention of terrorists has prevented them from engaging in further terrorist activity, and their interrogation has provided intelligence that has enabled the identification and apprehension of other terrorists, warned of terrorist plots planned for the US and around the world, and supported articles frequently used in the finished intelligence publications for senior policymakers and war fighters. In this regard there is no doubt that the Program has been effective (CIA 2004: 85)

There is no discussion of how many of these 3,000 reports consisted simply of duplicated and repeated material from one interrogation to another. The IG does not offer any evaluation of how many of the reports turned out to offer true or false leads, or indeed of how the Agency followed up on these reports. Neither is there any comment on what proportion of all other intelligence sources

these 3,000 reports constitute. It would certainly be interesting to evaluate how these reports compared with other sources obtained by the CIA from more acceptable methods. The presence of thousands of documents generated from the interrogations where EITs were used does indicate that there was something of a penchant among the leadership of the CIA for producing documentary 'evidence', off the back of the interrogations. It is likely that such documentary material was intended, at least in part, to demonstrate the effectiveness of EITs, which in turn would serve as further grounds for continuing their use. What is far from clear is if, and how precisely, this material served any useful purpose in preventing terrorism.

The IG report notes that none of the plots uncovered were imminent, although it offers no comment at all on how many plots were uncovered, or any detail pertaining to these supposed plots (CIA 2004: 88). Furthermore, it states that measuring the effectiveness of EITs 'is a more subjective process and not without some concern' (CIA 2004: 85). Specific challenges outlined in the report were, firstly, that 'the Agency cannot determine with any certainty the totality of intelligence the detainee actually possesses'; secondly, 'each detainee has different fears and tolerance of EITs'; thirdly, 'the application of the same EITs by different interrogators may have different results' (CIA 2004: 89). A final challenge has been redacted. Indeed, in relation to the two cases referred to in the IG report where water boarding was used, the IG states that it is not possible to say definitively that this caused an increase in the amount of intelligence obtained from Abu Zabaydah, or whether instead another factor, such as the length of his detention, led him to be more cooperative (CIA 2004: 90). In relation to Al-Nashiri, the report concludes that 'because of the litany of techniques used by different interrogators over a relatively short period of time, it is difficult to identify exactly why Al-Nashiri became more willing to provide information' (CIA 2004: 91). There is no comment in the IG report on the veracity of the information provided. Furthermore, the CIA IG raised considerable doubt about the legality of the methods, irrespective of whether they could be deemed to have been in any way useful in the quest to secure credible intelligence.

In his conclusions the CIA Inspector General acknowledged that 'The EITs ... are inconsistent with the public policy positions that the US has taken regarding human rights' (CIA 2004: 91). He also noted that frequently the US State Department calls other states on similar practices, which it describes as torture, such as threats to families and forcing detainees to lie on hard floors, depriving them of sleep and hooding and stripping prisoners naked (CIA 2004: 92-93). Finally, he acknowledged that the advice received from the OLC never adequately addressed the question of whether the application of both SITs and EITs was at odds with the undertaking, accepted conditionally by the US, regarding Article 16 of the Torture Convention to prevent cruel, inhuman and degrading treatment (CIA 2004: 101).

The report does little, therefore, to challenge the CIA's previous judgment in the late 1980s that torture is both illegal and ineffective. If anything, it adds weight to the argument that torture is an unreliable method by which to secure information, since it is impossible to determine the degree of knowledge possessed by detainees in the first place, detainees have different fears and levels of tolerance in relation to different methods, their response to torture can be different depending on who is inflicting it, and it is by no means certain that the methods used rather than some other cause led to detainees offering information to their captors, be it true or not. In addition to raising doubt over the efficacy of torture, the CIA IG report demonstrates that despite the comprehensive measures taken by the CIA in collusion with the OLC to provide protection for CIA interrogators involved in torture, it was unlikely that these measures would provide any shelter for agents from recriminations and prosecution.

The CIA IG report and attempts to provide legal protection for those involved in torture

The CIA was involved in a series of exchanges with the OLC that were aimed at securing sanction for the EITs – practices that clearly constitute the use of force, mental torture, threats, and exposure to unpleasant and inhumane treatment – as an aid to interrogation. The purpose of these exchanges was to try and ensure protection for CIA agents from recriminations and prosecution. The various exchanges show that it was not the OLC that took the lead in developing the Bush administration's torture policy. Rather, illicit practices were frequently already in use within the CIA, and the OLC was simply being called upon to provide retroactive legality and rationale for these practices. These exchanges also show that over time the CIA was adopting more and harsher techniques for which again, it retroactively sought sanction.

On behalf of the OLC, Jay Bybee approved all of the EIT's for which the CIA had sought approval (listed above) on 1 August 2002, albeit with some restrictions. For example, confinement in larger spaces should not exceed 18 hours, or 4 hours for smaller spaces, and sleep deprivation should not last longer than 11 days at a time (Bybee 2002b: 3). The IG report demonstrates that CIA interrogators went much further in the use of these various techniques than Bybee had sanctioned. As a result, by 2005 the CIA was seeking further permission from the OLC for harsher methods, permission which was granted in a memo from Steven Bradbury, Principal Deputy Assistant Attorney General, to John Rizzo, Senior Deputy General Counsel for the CIA, on 10 May 2005 (Bradbury 2005). Comparing the Bybee and Bradbury memos, we find that by 2005, more and harsher methods had been added to the list of EITs, and permission was given for more prolonged and repeated use of existing ones. The additional techniques were: dietary manipulation; nudity; abdominal slap; and water dousing (Bradbury 2005: 7-8). Interestingly, water dousing was identified by the IG report as an improvised technique that was widely used in interrogations but had not been sanctioned by the Bybee memo, although the IG noted that they were included in draft guidelines as a standard measure as early as 2003 (CIA 2004: 76). Regarding nudity, while explicitly outlawing 'sexual abuse or threats of sexual abuse', permission was granted for female interrogators involved in the interrogation process to 'see the detainees naked', clearly a means of humiliating and degrading detainees, particularly since many were devout Muslims. The Bybee memo made specific reference to two types of stress position, the first being forcing detainees to sit on the floor with legs extended in front of him and arms above his head, and the second, forcing the detainee to kneel on the floor while leaning back at a 45 degree angle (Bybee 2002b: 3). The Bradbury memo adds a third more extreme position, in which the detainee is forced to lean against a wall about three feet away from the detainees feet, with only his head touching the wall, while his wrists are handcuffed in front of him or behind his back (Bradbury 2005: 9). The Bradbury memo also increases the limit on sleep deprivation, permitting it for up to 180 hours (Bradbury 2005: 12). Finally, whereas the Bybee memo indicated that the CIA had indicated that each water board session would not last more than 20 minutes (Bybee 2002b: 3-4), by the time Bradbury had issued his memo, water board sessions (defined as the time for which a detainee was strapped to the board) were lasting two hours (Bradbury 2005: 14). As I will show, it would appear that the OLC issued guidance in the interim which sanctioned the increase of each water boarding session to two hours. Furthermore, Bradbury issued a whole set of other rules, which stemmed from the ways in which the CIA had been using the water board in the period since Bybee's recommendations were made. I will discuss these below in more detail with reference to the CIA IG's findings which show that CIA interrogators went far further than the CIA leadership and Bybee's memo had allowed.

One of the CIA's justifications for approval of EITs was that assessments had been made of their possible long-term effects through analysis of the Survival, Evasion, Resistance and Escape (SERE) techniques, used to train US military personnel. Psychologists and psychotherapy academics had advised the CIA that there were no long term effects resulting from SERE training, including from the water board which was considered 'the most taxing technique' (CIA 2004: 14). Quite apart from

the fact that both the federal and state court cases and the US Department of State consider water boarding torture (Paust 2009b), and that the use of the water board had been abandoned in all US military training except among the Navy ‘because of its dramatic effect on the students who were subjects’ (CIA 2004: 14), the comparison between its use on military personnel in training and on actual detainees is flawed. In training exercises the military personnel know that the experience, however traumatic, will be short-lived, that doctors are on hand, that they are not going to be killed, and that they have access to legal counsel. Actual detainees, by contrast, are deliberately disoriented, in many cases in the ‘War on Terror’ have been held for months if not years on end, do not know if the practice is going to kill them, have no knowledge of whether they will be treated medically, and crucially, have no access at all to the outside world, including legal representatives. They are definitely not made aware of measures that are being taken to avoid killing them. Furthermore, the above techniques were used after detainees had been subjected to many SITs (CIA 2004: 30). None of this was lost on Bybee, who in his memo regarding Zabaydah, acknowledged that the detainee would not be made aware of any of the ‘precautions’ that his captors were taking to ‘ensure the subject’s mental and physical safety’, and that the use of the water board ‘constitutes a threat of imminent death’ since it ‘creates in the subject the uncontrollable physiological sensation that the subject is drowning’ (Bybee 2002b: 15). Yet Bybee was concerned with providing a ‘proper interpretation’ of the torture statute of the US Code. Section 2340A prohibits US citizens from committing torture outside of the USA and stipulates punishments for such acts ranging from fines to imprisonment, or in the event that an individual dies as a result of the torture, imprisonment or the death penalty.

Bybee sought to offer an interpretation of what was meant by the term torture, concluding that ‘Section 2340A proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering whether mental or physical’ (Bybee 2002a: 1). He also concluded that the acts must be of an ‘extreme nature’ and that ‘certain acts may be cruel, inhuman, or degrading, but will not produce pain and suffering of the requisite intensity to fall within Section 2340A’s proscription against torture’ (Bybee 2002a: 1). His understanding of what it would mean to inflict pain of the ‘requisite intensity’ was as follows:

Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g. lasting months or even years (Bybee 2002a: 1)

As professor of law, Jordan Paust, has argued, Bybee’s advice was erroneous because:

1) Physical pain that is ‘severe’ within the definition of torture, (addressing ‘severe physical or mental pain or suffering’) manifestly need not occur over a ‘protracted period of time;’ 2) physical ‘suffering’ that is ‘severe’ manifestly need not occur over a ‘protracted period of time;’ and 3) mental harm that is ‘severe’ within the definition of torture need not ‘disrupt profoundly’ or ‘fundamentally’ change a person’s personality (Paust 2009b).

Paust is not an anti-torture activist. He is a former Judge Advocate General Officer of the US Army. The Judge Advocate General’s corps is staffed by Army officers who are also lawyers. It provides legal services and counsel to all levels of command within the Army. Bybee was relying on his own interpretation of a single US statute, which in any case prohibits torture, whereas, as Paust argues:

Torture, cruel, and inhumane treatment are proscribed under two sets of federal statutes that allow prosecution of relevant customary and treaty-based laws of war, but there was no attention to such legislation or to any laws of war in the second Bybee memo. Torture, cruel, and inhumane treatment are also proscribed under the Convention Against Torture, and foreign states and international tribunals can prosecute such conduct, but there was no attention to any international agreement, customary international law in any relevant form, or the clear possibility of prosecution in foreign and international fora. There was merely a facially improper reading of one U.S. federal statute (Paust 2009b).

Under the Convention Against Torture there can be no derogation from the prohibitions set out in the Convention. Bybee’s reliance on his reinterpretation of a single statute of US law as a means of

providing cover for US personnel in the event that they did violate the Convention was flawed. It could in no way counter the substantial body of international law that prohibits torture, inhuman and degrading treatment in all circumstances (Paust 2009a). Paust notes, ‘the prohibition applies universally and without any attempted limitations in reservations with respect to a particular treaty’. Furthermore, ‘As customary human rights prohibitions, they also apply universally and in all social contexts as part of the legal obligation of all members of the United Nations under the United Nations Charter to ensure “universal respect for, and observance of, human rights”’ (Paust 2009a: 1537).² It is difficult to see how Bybee’s counsel would offer any real protection to agents of the CIA who had been complicit in the sanctioning and use of torture in the ‘War on Terror’. These practices constitute torture, cruel, inhuman and degrading treatment, and Bybee’s defense of them was indeed flimsy. Yet despite the flimsy grounds on which Bybee sought to justify torture, his analysis underpinned the repeated approval granted by the OLC for the use of EITs against specifically named individuals. EITs were also used more widely than the OLC had deemed permissible.

The CIA IG report, bureaucratic chaos, and the failure to control the use of torture

While a number of measures were taken to control and regulate the use of EITs, the IG report shows that many of these were inadequate, and led to a situation in which rules and guidelines were neither understood nor followed. Consequently, not only was oversight of the use of EITs chaotic, but their use extended far beyond what had been sanctioned by the OLC. Flaws in the training on the use of EITs and in the oversight of staff were apparent from the outset. From November 2002, a program was implemented to train, qualify and certify interrogators to administer EITs. The program was just two-weeks long (CIA 2004: 25, 31). Debriefers, defined as individuals involved in the questioning of detainees, were not permitted to use EITs, but they, along with interrogators who would apply the EITs, were required to sign acknowledgements that they had read the Guidelines on the use of EITs in interrogation (CIA 2004: 7). The IG report reaches a number of striking conclusions about the inadequacies of the training. Firstly, the IG report concludes that even though individuals involved in interrogation were required to sign acknowledgements that they had read the Guidelines, this did not overcome the problem that the Guidelines left ‘substantial room for misinterpretation and do not cover all Agency detention and interrogation activities’ (CIA 2004: 7). Secondly, the CIA failed to keep any systematic records of which individuals had been briefed. Thirdly, the requirement for staff to sign acknowledgements that they had read the Guidelines was not enforced (CIA 2004: 29). Fourthly, the CIA failed to put in place any ‘formal mechanisms’ to ‘ensure that personnel going to the field were briefed on the existing legal and policy guidance’ (CIA 2004: 41). Finally, the IG report indicates that the CIA ‘lacked adequate linguists or subject matter experts and had very little hard knowledge of what particular Al-Qa’ida leaders – who later became detainees – knew’. This, the IG concluded, led analysts ‘to speculate about what a detainee “should know”’. Furthermore, when a detainee ‘did not respond to a question posed to him, the assumption at Headquarters was that the detainee was holding back and knew more; consequently, Headquarters recommended resumption of EITs’ (CIA 2004: 83). Thus, there appears to have been no consideration given to the possibility that detainees were unresponsive simply because the language skills of the interrogators were insufficient for the detainees to even understand the questions they were asked, rather than because they were refusing to cooperate.

As well as inadequacies in training and oversight, the IG report shows that frequently interrogators deviated from the guidelines, using methods than had not been sanctioned, and using those that had been sanctioned in more prolonged and harsher ways than had been permitted. Interrogators developed various ‘improvised techniques’, all of which violate the Convention Against Torture.

² For further discussion of the legal issues, see Joseph Bialke, ‘Al-Qaeda and Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict’, *Air Force Law Review*, 5 (Spring Spring 2004), Philippe Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (London, New York: Allen Lane, 2008).

These included the threatening of a detainee, Al-Nashiri, at an undisclosed location, with a power drill and handgun:

The debriefer entered the cell where Al-Nashiri sat shackled and racked the handgun once or twice close to Al-Nashiri's head. On what was probably the same day, the debriefer used a power drill to frighten An-Nashiri ... the debriefer entered the detainee's cell and revved the drill while the detainee stood naked and hooded (CIA 2004: 41-42)

As the IG report states, debriefers were not even permitted to use EITs, only interrogators were. Al-Nashiri was also subjected to the waterboard in the same manner that Zabaydah had been, was bathed by his captors using a stiff floor cleaning brush, and his captors stood on his ankle shackles causing cuts and bruising (CIA 2004: 44). Al-Nashiri was held for four years in a CIA Black Site believed to be in Jordan, having been captured in the United Arab Emirates. He was then transferred to Guantánamo Bay (Cageprisoners 2004). He was, according to a witness that reported his encounters with Al-Nashiri and the CIA debriefer to the CIA Inspector General, also subjected to threats that members of his family would be harmed:

The same debriefer ... threatened Al-Nashiri by saying that if he did not talk, 'we could get your mother in here', and 'We can bring your family here. The [word blacked out] debriefer reportedly wanted Al-Nashiri to infer, for psychological reasons, that the debriefer might be [word blacked out, but presumably a nationality] intelligence officer based on his Arabic dialect, and that Al-Nashiri was in [word blacked out, but presumably a specific country] custody because it was widely believed in Middle East circles that [word blacked out, bur presumably a specific country] interrogation technique involves sexually abusing female relatives in front of the detainee (CIA 2004: 42-43)

Khalid Sheikh Mohammed was also subjected to similar threats, including being told that if any further terrorist attack occurred in the US, 'we're going to kill your children' (CIA 2004: 43). The CIA Inspector General found that numerous other 'improvised techniques' had been used widely, including mock executions, and the use of forced inhalation of tobacco smoke to the point that detainees were sick (CIA 2004: 70-73). The IG concluded that the development of these improvised techniques was 'illustrative of the consequences of the lack of clear guidance at that time' and a lack of oversight of interrogations (CIA 2004: 69). As well as introducing methods that had not been sanctioned, those that were permitted were used excessively and more harshly than the guidelines allowed. This raises serious questions about Dershowitz's assumptions that by regulating torture, its use can be contained. The opposite appears to be the case.

Despite approval from Bybee about the manner in which water boarding would be carried out, the IG report demonstrates that in practice, the use of water boarding was far more severe. Instead of the controlled pouring of a small amount of water over the damp cloth, placed over the mouth and nose, consistent with SERE training, the IG found that water boarding involved 'the continuous application of large volumes of water' (CIA 2004: 37). One interrogator acknowledged this difference to the IG, arguing that the difference is because in the case of interrogating high value detainees, the technique is 'for real' and is 'more poignant and convincing' (CIA 2004: 37). Again this illustrates the fact that legitimizing torture does not help limit or contain its use. Rather it offers a green light to interrogators to push the boundaries.

Furthermore, recognizing the illegitimate ways in which the water boarding was being carried out, the CIA Office of General Counsel lied about the the fact that the water board was being used in a manner that far exceeded what had been sanctioned. In October-November 2002, an attorney from the CIA's Office of General Counsel reviewed the video tapes of interrogations involving EITs and reported that there was no deviation from the OLC's guidance, or from the written record of how the EITs has been used (CIA 2004: 36). Clearly the IG's findings with regard to the excessive manner in which the water was applied show this to have been untrue. The IG also found that video tapes of interrogations had been wiped or damaged. From video tapes and logs, the IG identified 83 water boarding applications in the case of Abu Zabaydah during August 2002. However, 11 interrogation videotapes of Zabaydah were found by the IG to be blank. Two others were blank except for a couple of minutes of recording, and a further two were broken. The IG checked the existing videotapes

against logs, and identified a 21-hour period in which two further water-boarding sessions took place that were not captured on the tapes, but it is not clear how many applications of water were administered (CIA 2004: 36-37). We also cannot be certain that all incidences of waterboarding were logged. The IG found that Khalid Sheikh Mohammed was subjected to 183 applications of the water board in March 2003, although most of the material in the IG report pertaining to his case remains classified (CIA 2004: 91). As with Zabaydah, evidence may also be partial. The untruths emanating from the CIA's Office of General Counsel and the wiping of tapes highlight the fact that within the CIA, agents and the leadership were fully aware of the illegality of their practices and the risks of recriminations.

It is clear that the IG's findings in relation to the use of the water board fed into subsequent advice that was issued by Bradbury on behalf of the OLC to the CIA. The Bybee memo had stated in 2002 that the CIA had itself indicated that each water board session would not last more than 20 minutes (Bybee 2002b: 3-4). According to the Bradbury memo, this was increased to two hours on 19 August in either 2002, 2003 or 2004, in a further letter that was sent to the CIA's Office of General Counsel (Bradbury 2005: 13-14). That letter remains classified, and the year in which the letter was sent has been redacted from the Bradbury memo. Nevertheless, it is clear from the IG report that as early as August 2002, water boarding sessions were lasting longer than Bybee had permitted, and the quantity of water used in each application far exceeded the guidelines. By 2005, Bradbury, on behalf of the OLC, was advising the CIA that water boarding sessions should be restricted as follows:

The waterboard may be authorized for, at most, one 30-day period, during which the technique can actually be applied on no more than five days [...] Further, there can be no more than two sessions in any 24-hour period. Each session – the time during which the detainee is strapped to the waterboard – lasts no more than two hours. There may be at most six applications of water lasting ten seconds or longer during any one session, and water may be applied for a total of no more than twelve minutes during any 24-hour period (DoJ 2005: 15)

This would mean detainees could not be subjected to no more than 10 water boarding sessions, and 60 individual applications of water in a 30-day period. The implementation of these rules would therefore suggest that the OLC was influenced by the IG's conclusions that the treatment of Zabaydah and Khalid Sheikh Mohammed had been excessive (Bradbury 2005: 29). Again, though, the case highlights the ways in which the OLC was repeatedly having to respond to practices that were already being used by the CIA, rather than leading the way in establishing the laws on torture.

Implications

The CIA readopted many of the same torture practices in the 'War on Terror' that it had outlawed towards the end of the Cold War, on the grounds that torture was neither legal nor effective. Rather than following the law, however, the CIA sought retroactive legal sanction from the OLC for its torture practices. In this regard, the CIA's own consciousness of illicit practices and their effects in the past and present was pushed aside, important ethical values were dismissed, and the evidence that torture is rarely effective was rejected. Most importantly, the CIA ignored the law, and repeatedly pushed the OLC to also circumvent domestic and international law for the sake of the illicit practices that the CIA was already deploying.

The CIA Inspector General's investigation into post-9/11 torture practices, and its ensuing conclusions, serves to reinforce the claims that have been made many times before by critics of the use of torture. Therefore, the Inspector General's findings also pose a significant challenge to the three key assumptions that characterize the contemporary utilitarian argument that torture should be legalized so as to control its use. The first of these is the assumption that torture is an effective means of securing intelligence to thwart imminent security threats. The CIA Inspector General's findings show the 'ticking bomb' scenario to be an inaccurate representation of how and why torture was used in practice. The IG report makes no reference to any imminent terrorist attacks being prevented

through the use of torture. More often than not, it was simply unclear whether detainees supplied information because of the torture or as a result of some other cause. We also do not know if the information given was reliable. Following the recent operation to locate and kill Osama Bin Laden, the debate on whether EITs work has been reignited, with some arguing that the interrogations of certain detainees caused them to offer up the name of Bin Laden's personal courier, which in turn led US intelligence agents to his hideout (Isikoff, 2011). Others, however, claim that in fact all these detainees offered was the 'nom de guerre' of the courier, and that the water boarding of numerous detainees failed to secure anymore than that. One former counter-terrorism agent stated to NBC news, 'They waterboarded KSM (Khaled Sheikh Mohammed) 183 times and he still didn't give the guy up ... Come on. And you want to tell me that enhanced interrogation techniques worked?' (Isikoff, 2011). Ultimately, the identity of the courier was determined through more orthodox intelligence gathering using surveillance and monitoring that led them first to the true identity of the courier, and then to Bin Laden's hideout. This latest round of claims and counter-claims does little to counter the IG's findings. The efficacy of torture is far from proven, and there is very little evidence to support the claim that it works and secures the quality of intelligence that it is often claimed it does. Irrespective, however, of whether the methods offered anything of any real value, under Article 15 of the Convention Against Torture, statements secured through torture are inadmissible in court. This is because such statements cannot be relied upon. This adds further weight to the argument that any information obtained through torture should not be considered valid. Why is it any more reliable in the fight against terrorism than it is in the courts of law? This is precisely the challenge the Obama administration now faces. In February 2009 all charges were dropped against Al-Nashiri, but with the possibility left open to charge him again at a later date. He remains in Guantánamo (Worthington 2010). At the time of writing, Zubaydah remains in custody at Guantánamo, and Khalid Sheikh Mohammed is awaiting trial by Military Commission, in a reversal of President Obama's long-held plan to bring him and other detainees to trial in US federal courts (Finn 2011). In all three of these cases, and in many others, the biggest challenge to any legitimate kind of trial is the fact that the detainees have been subjected to torture, and therefore any statements they have made simply cannot be used as grounds to sentence them.

The second key assumption underpinning the contemporary argument that torture can be controlled and regulated is that by doing so, the use of torture will be limited. The CIA Inspector General's findings indicate that the opposite was true. When torture is permitted, its use always extends. Amnesty International point out that in all the decades they have researched torture, it has always gone far beyond small numbers of individuals connected to imminent security threats:

We have not found a single state which tortures 'only once', or only in a few extreme cases. Whenever and wherever torture and cruelty are accepted as legitimate tools of government 'in extreme circumstances' they become widespread – the means used become increasingly extreme and the circumstances in which they are used increasingly less so. Moreover, those states which use torture and ill-treatment against political opponents do not stop at these acts, but resort also to other violent and repressive measures, such as disappearances' and extrajudicial executions, not only against detainees, but also against a wider population associated with the 'enemy' (AI 2006).

Even though there was an 'additional level of prior review', whereby the OLC acted as a judge, determining whether EITs could be used against specific individuals, the use of those torture techniques was extended. Individuals responsible for detainees deviated considerably from those practices that had been sanctioned. This is evident in the various cases of water boarding discussed in the IG report, where in each case, individuals were subjected to more severe and more prolonged torture than had been permitted, and in the invention of improvised techniques. The IG report shows how more severe techniques were developed by the CIA and approved retroactively by the OLC. The impulse to go further and further drove the law. Therefore, whereas apologists assume we can control torture and lessen the severity and extent of the use of torture, the IG report reveals that the opposite is true. It is not therefore clear how the granting of torture warrants by a judge would mitigate against the propensity of agents to go beyond what had been sanctioned. Thus the findings of Amnesty International should serve as a sober warning about the risks involved when torture is legitimized.

The third key assumption underpinning the contemporary argument that torture can be controlled and regulated is that by instigating some kind of legal status for some torture, reprisals against perpetrators of 'legitimate' torture can be avoided. However, the IG's conclusions show that despite permission being granted at the highest levels, there was no real protection for individual agents and there was considerable concern that they would face reprisals. EITs and the additional actions carried out by agents of the CIA such as mock executions and threats against family members are all violations of the Convention Against Torture. The IG concluded that there were inadequate guidelines for agents and that a number of them are right to be concerned that they may face reprisals for their actions in light of this. He also noted that there was evidence that EITs had been used without justification against detainees because often interrogators were basing their decisions on what they presumed an individual should know with little evidence to justify such presumptions (CIA 2004: 104-5). We cannot tell from this report what the IG recommended, since this part of the report has been redacted. Nevertheless, what we can conclude is that even though permissions had been secured, albeit retroactively, for the use of torture, it was understood by the IG that such permissions would be insufficient to protect those involved from legal proceedings. It is difficult to see how the granting of torture warrants using the mechanisms proposed by apologists for torture would be any different. Furthermore, the IG report would seem to indicate that those involved in interrogation practices enhanced by torture were very well aware that torture is not legal, and cannot be controlled in such a way that their actions can be considered beyond reproach. There was considerable anxiety among interrogators and senior officials within the CIA, evidenced by the efforts to destroy evidence of torture through wiping and damaging video tapes, providing untruthful accounts of the content of those tapes, and by the considerable effort invested by senior staff to prove that the interrogation program was valuable.

Finally, the findings of the IG are also important because they show that the contemporary defense of torture in the face of assumed terrorist threats is flimsy. The ticking bomb argument is a rhetorical device that bears little resemblance to the actual practice of torture. Research has consistently shown that torture is rarely used to thwart imminent threats. Its use by the CIA in the 'War on Terror' was no exception. Torture has been outlawed for many decades, as it is immoral, illegal and ineffective. Despite the frequent bending and flouting of the law by the CIA, and the various measures taken to secure retroactive sanction for its practices from the OLC, there is very little evidence that torture has served any meaningful purpose in the fight against terrorism.

Yet the US continues to be complicit in the use of torture. Obama never revoked the Executive Order issued by President Bush on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Bush 2001). This stipulated that individuals detained under the Order, known as 'enemy combatants' need not be tried, but when they are, this should be by military commission. It also allowed for the detention of individuals at an appropriate location designated by the Secretary of Defense outside or within the US. It was this Order that paved the way for the arbitrary detention of thousands of detainees in Afghanistan and Iraq at sites intended for this purpose, including at the Bagram Airbase, in Iraq, including the Abu Ghraib prison, as well as for the system of rendition, which has seen the detention and torture of thousands of individuals in multiple detention sites in various territories (Cageprisoners 2006). In his Executive Orders issued in January 2009, outlawing the use of secret CIA prisons, banning EITs while they were reviewed, and stipulating that Guantánamo should be closed, Obama chose not to outlaw renditions (Obama 2009a; 2009b; 2009c). It is evident therefore that the Obama administration is in no hurry to bolster the rule of domestic and international law with regard to the use of torture. Obama has failed to close Guantánamo Bay, and has reversed an earlier decision to halt the military commissions established to try detainees in Guantánamo. He has therefore given the green light to the use of evidence against detainees obtained through torture. Furthermore, the killing of Osama Bin Laden does not necessarily augur well for the future of these practices in the fight against terrorism. Already, the hawks are pointing to the

'effectiveness' of EITs as a key component in intelligence gathering. And by choosing to kill rather than prosecute Bin Laden, Obama has missed the opportunity to re-establish respect for due process, and to establish a counter-terrorism policy that upholds rather than circumvents international law. In this regard he would appear to be providing continuity rather than change in US counter-terrorism tactics. The death of Bin Laden does not signal the end of the 'War on Terror'. Rather, it indicates that scrutiny of the illicit practices of the US and its allies is as urgent now as it was under the Bush administration, and will continue to be so for as long as the 'terror' is fought along these lines.

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