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Perspectives on the Senate Select Committee on Intelligence (SSCI) “Torture Report” and Enhanced Interrogation Techniques: In Brief

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Introduction

Men like Sheikh Mohammed who have been taken alive in this war are classic candidates for the most cunning practices of this dark art [of interrogation]. Intellectual, sophisticated, deeply religious, and well-trained, they present a perfect challenge for the interrogator. Getting at the information they possess could allow us to thwart major attacks, unravel their organization, and save thousands of lives. They and their situation pose one of the strongest arguments in modern times for the use of torture.¹

Much of the controversy over the recently released *Senate Select Committee on Intelligence (SSCI) Study of the Central Intelligence Agency's (CIA's) Detention and Interrogation (D&I) Program (SSCI Study)*² has focused on the CIA's use of Enhanced Interrogation Techniques (EITs) on certain detainees.³ Background information on what, when, why and how EITs were used (and what restrictions currently apply) provides context for this examination of current perspectives on the use of EITs by U.S. government agencies. The **Appendix** provides a non-exhaustive list of ten EITs approved for use by the Director of Central Intelligence (DCI) in January 2003, with brief guidelines on their use.⁴

This report discusses views as expressed by public officials, academics and commentators voiced in a variety of sources to include the *SSCI Study*, the *Minority Views* of SSCI Members,⁵ *Additional Views*,⁶ the official and unofficial *CIA Responses*⁷ to the *SSCI Study*, the *Congressional Record*,⁸ and a number of press reports. Perspectives on EITs are multifaceted, ranging from those who say "never again" to their future use to those who argue they are a necessary tool in an interrogator's toolbox. Views reflect answers to three main questions:

¹ Mark Bowden, "The Dark Art of Interrogation," *Atlantic Monthly*, vol. 292, no. 3 (October 1, 2003): 51-76, p. 53, at <http://www.theatlantic.com/magazine/archive/2003/10/the-dark-art-of-interrogation/302791/>.

² U.S. Congress, Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, 113th Cong., 2nd sess., December 3, 2014, at <http://www.intelligence.senate.gov/study2014/sscistudy1.pdf>.

³ For a discussion of other issues raised by the study, see CRS Insight IN10197, *The SSCI Study of the CIA's Detention and Interrogation Program: Issues to Consider*, by Anne Daugherty Miles.

⁴ Additional EITs are discussed in the Background Section.

⁵ U.S. Congress, Senate Select Committee on Intelligence, *Minority Views of SSCI Members Senators Burr, Risch, Coats, Rubio, and Coburn, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, 113th Cong., 2nd sess., December 3, 2014, at <http://www.intelligence.senate.gov/study2014/sscistudy3.pdf>.

⁶ U.S. Congress, Senate Select Committee on Intelligence, *Additional Views to the Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (by Senators John D. Rockefeller, Ron Wyden, Mark Udall, Martin Heinrich, Angus King and Susan Collins), undated, at <http://www.intelligence.senate.gov/study2014/sscistudy2.pdf>.

⁷ *CIA Comments on the Senate Select Committee on Intelligence Report on the Rendition, Detention, and Interrogation Program* with cover letter from John O. Brennan, Director of the Central Intelligence Agency, June 27 2013, at https://www.cia.gov/library/reports/CIA_June2013_Response_to_the_SSCI_Study_on_the_Former_Detention_and_Interrogation_Program.pdf. See also

George Tenet, Porter Goss, Michael Hayden, John McLaughlin, Albert Calland and Stephen Kappas, "Ex-CIA Directors: Interrogations Saved Lives," Opinion, *Wall Street Journal*, December 10, 2014, at <http://www.wsj.com/articles/cia-interrogations-saved-lives-1418142644>. The first three authors are former CIA Directors; the second three authors are former CIA Deputy Directors.

⁸ See for example, Remarks of Senators Dianne Feinstein, John McCain, John (Jay) Rockefeller, Lindsey Graham, Mark Udall, Patrick Leahy, John Cornyn, Harry Reid, and Sheldon Whitehouse, *Congressional Record*, daily edition, vol. 160, no. 149 (December 9, 2014), pp. S6405-S6434.

1. Did the CIA's use of EITs constitute torture—thereby violating principles of U.S. and international law?
2. Did the CIA's use of EITs run counter to American values and morals?
3. Were the EITs effective in producing valuable intelligence, not otherwise obtainable through standard interrogation techniques?

Background

The United States has had a long history of government attention to, and concerns about, D&I practices. Policymakers have repeatedly found themselves balancing democratic principles and the rule of law with the need to obtain potentially vital information from an enemy who is well-trained to resist talking if captured.⁹ The terrorist attacks against the United States on September 11, 2001 (9/11) and the subsequent capture of individuals associated with persons or entities responsible for those attacks ushered in another such period of public debate.

Congress enacted the Authorization for the Use of Military Force (AUMF) (P.L. 107-40) on September 18, 2001 to combat those entities involved in planning and executing the attack. Through the AUMF, Congress authorized the President to use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed, or aided the terrorist attacks that occurred on 9/11, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.¹⁰ The CIA D&I Program that ran from 2001-2007 was one of a number of human intelligence collection activities that involved efforts to obtain information from persons taken into U.S. custody as a result of actions taken in accordance with the AUMF.¹¹ The EITs discussed in the *SSCI Study* were requested particularly for use on those individuals labelled "high value" detainees (HVDs).¹²

With the knowledge that Al Qaeda personnel had been trained in the use of resistance techniques, the CIA and Department of Defense (DOD) believed it appropriate to identify interrogation techniques that the CIA could lawfully use to overcome their resistance. In this context, the CIA's Counterterrorism Center (CTC) proposed techniques based on the recommendations of two psychologists with experience in the USAF's Survival, Evasion, Resistance and Escape (SERE) training program.¹³ The CIA and DOD sought and received guidance from the Department of

⁹ Mark Bowden's article offers a historical perspective on this debate.

¹⁰ P.L. 107-40.

¹¹ Robert A. Fein, "U.S. Experience and Research in Educating Information: A Brief History," Prologue in *Educating Information, Interrogation: Science and Art*, Washington, DC: NDIC Press, 2006, p. xi, at <http://www1.umn.edu/humanrts/OathBetrayed/Intelligence%20Science%20Board%202006.pdf>.

¹² The "CTC distinguishes targets according to the quality of the intelligence that they are likely to be able to provide about current terrorist threats against the United States. Senior Al-Qaida planners and operators ... fall into the category of 'high value' and are given the highest priority for capture, detention, and interrogation. CTC categorizes those individuals who are believed to have lesser direct knowledge of such threats, but to have information of intelligence value, as 'medium value.'" See Office of the Inspector General, *Special Review: Counterterrorism Detention and Interrogation Activities (September 2001-October 2003)*, Report no. 2003-7123-IG, May 7, 2004, p. 3 (footnote 4) and p. 86 "access to significant actionable intelligence," at <http://www2.gwu.edu/~nsarchiv/torturingdemocracy/documents/20040507.pdf>.

¹³ *IG Special Review*, p. 13. The military services offer SERE training to those forces with the greatest risk of being captured and subjected to harsh interrogation practices, such as aircrews and Special Forces.

Justice's (DOJ's) Office of Legal Counsel (OLC), the National Security Council (NSC), and the White House Counsel on the legal status of detainees and to what extent EITs could legally be used.¹⁴ The Federal Bureau of Investigation (FBI) followed a "rapport-based" approach and did not allow its agents to participate in joint interrogations of detainees held by other agencies if EITs were used.¹⁵

According to a *Special Review* of the CIA's EIT program in 2003 by the CIA Inspector General (IG), guidance was provided to both interrogators and medical personnel. George Tenet, then-Director of Central Intelligence (DCI), provided guidelines to CIA interrogators and required signatures to verify they had read the guidance.¹⁶ (See **Appendix**) The *IG Special Review* noted that the DCI guidance did not specifically prohibit improvised actions,¹⁷ and documented a number of unauthorized techniques to include mock executions, blowing smoke into a detainee's face, and "hard takedowns."¹⁸ Guidance provided by the CIA Office of Medical Services (OMS) in December 2004 approved additional techniques such as shaving, stripping, hooding, isolation, white noise or loud music, continuous light or darkness, an uncomfortably cool environment, and dietary manipulation.¹⁹ OMS also provided goals and limits on the use of EITs.²⁰

Revelations concerning the interrogation and treatment of detainees at the Abu Ghraib²¹ and other military detention centers in Iraq and at Guantanamo Bay in 2004 described many instances in which guards and interrogators disregarded or misinterpreted guidance on the use of EITs. Domestic and international outrage led to new legal interpretations²² and prompted a number of congressional hearings,²³ internal investigations, and the Detainee Treatment Act (DTA) of 2005. The DTA required that all persons placed in DOD custody or effective control (or detained in a

¹⁴ A compilation of memos by administration officials, some arguing for and others arguing against the use of EITs, to include memos written by DOJ lawyers John Yoo and Jay Bybee, DOD lawyer William (Jim) Haynes, White House Counsel Alberto Gonzales, Secretary of State Colin Powell, and Secretary of Defense Donald Rumsfeld, at "A Guide to the Memos on Torture," *New York Times*, http://www.nytimes.com/ref/international/24MEMO-GUIDE.html?_r=0.

¹⁵ Testimony of DOJ IG Glenn Fine, in U.S. Congress, Senate Committee on the Judiciary, *Coercive Interrogation Techniques: Do They Work, Are They Reliable, and What Did the FBI Know About Them?*, S.Hrg. 110-941, 110th Cong., 2nd sess., June 10, 2008 (Washington, DC: GPO, 2008), p. 8, at <http://www.gpo.gov/fdsys/pkg/CHRG-110shrg53740/content-detail.html>. According to Fine, the FBI rationale articulated by Pasquale D'Amuro, then-head of FBI's Counterterrorism Division: (1) EITs not as effective at developing accurate information, (2) EIT derived intelligence not admissible in any court, and (3) EITs would help Al Qaeda spread negative views of the United States.

¹⁶ George Tenet, "Guidelines on Confinement Conditions for CIA Detainees," January 28, 2003, in *IG Special Review*, Appendix D; and George Tenet, "Guidelines on Interrogations Conducted Pursuant to the (redacted)," January 28, 2003, in *IG Special Review*, Appendix E.

¹⁷ *Ibid.*, p. 30.

¹⁸ *Ibid.*, pp 69-78. Hard takedowns were rough handling techniques "done for shock and psychological impact and signaled the transition to another phase of the interrogation," (pp. 77-78).

¹⁹ CIA Office of Medical Services, "OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation, and Detention," December 2004, p. 8, declassified/redacted version at <http://documents.nytimes.com/c-i-a-reports-guidelines-for-interrogators>; also available in *IG Special Review*, Appendix F.

²⁰ *Ibid.*, pp 8-9.

²¹ See Seymour Hersh, "Torture at Abu Ghraib," *The New Yorker*, May 10, 2004, at <http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>.

²² See, for example, "Justice Department Gets Tougher on Use of Torture," *Los Angeles Times*, January 1, 2005, <http://articles.latimes.com/2005/jan/01/nation/na-torture1>.

²³ See, for example, U.S. Congress, Senate Committee on Armed Services, Subcommittee on Personnel, *Review of Department of Defense Detention and Interrogation Policy and Operations in the Global War on Terrorism*, S.Hrg., 109-471, 109th Cong., 1st sess., July 13-14, 2005, (Washington, DC: GPO, 2005).

DOD facility) be subjected to only interrogation techniques authorized by and listed in the *Army Field Manual* (AFM).²⁴ On September 6, 2006, the DOD amended the AFM to prohibit the "cruel, inhuman, or degrading treatment" of any person in the custody or control of the U.S. military.²⁵ Eight techniques were expressly prohibited from being used in conjunction with military intelligence interrogations:

- forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner;
- placing hoods or sacks over the head of a detainee; using duct tape over the eyes;
- applying beatings, electric shock, burns, or other forms of physical pain;
- waterboarding;
- using military working dogs;
- inducing hypothermia or heat injury;
- conducting mock executions;
- depriving the detainee of necessary food, water, or medical care.²⁶

The CIA's D&I Program was not publicly disclosed until September 6, 2006²⁷ and EITs continued to be used by the CIA on HVDs until November 8, 2007, with the exception of waterboarding—discontinued in March 2003.²⁸ President Barack Obama signed Executive Order (E.O.) 13491, "Ensuring Lawful Interrogations," on January 22, 2009—restricting the interrogation techniques used by *any* U.S. government agency in the context of an armed conflict to only those techniques included in the AFM, but allowing the rapport-based techniques used by agencies such as the FBI.²⁹ Among other things, E.O. 13491 stated that detainees shall not be subjected to violence to

²⁴ FM 2-22.3 (FM 34-52), *Human Intelligence Collector Operations*, Headquarters, Department of the Army, at http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm2_22x3.pdf. This statutory requirement did not apply to persons held in the custody of other U.S. government agencies.

²⁵ The CIA is an independent agency and not part of the DOD. The congressional intelligence committees debated and eventually included a provision in the Intelligence Authorization Acts for FY2008 and FY2009 to prohibit the use of any interrogation treatment or technique not authorized by the AFM on any individual in the custody or effective control of any element of the IC. Both bills failed to pass. See discussion in U.S. Congress, Senate Select Committee on Intelligence, *Report of the Senate Select Committee on Intelligence Covering the Period January 4, 2007-January 2, 2009*, S.Rept. 111-6, 111th Cong., 1st sess. (Washington, DC: GPO, March 9, 2009), p. 10.

²⁶ CRS Report RL33655, *Interrogation of Detainees: Requirements of the Detainee Treatment Act*, by Michael John Garcia. The Manual restricts the use of certain other interrogation techniques, but these restrictions may be due to other legal obligations besides those imposed by the DTA.

²⁷ "President Bush Reveals the Existence of Secret Prisons," *ABC News*, September 6, 2006. Public disclosure by the president was largely due to revelations by investigative journalist Dana Priest, "CIA Holds Terror Suspects in Secret Prisons," *Washington Post*, November 2, 2005, at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>. There was some public discussion earlier than 2006. See for example, Dana Priest, "CIA Avoids Scrutiny of Detainee Treatment," *Washington Post*, March 3, 2005, at <http://www.washingtonpost.com/wp-dyn/articles/A2576-2005Mar2.html>.

²⁸ SSCI Study, Finding #19, p. 16 of 19; see also *CIA Comments on the Senate Select Committee on Intelligence Report on the Rendition, Detention, and Interrogation Program*, June 27, 2013, p. 6, at https://www.cia.gov/library/reports/CIAs_June2013_Response_to_the_SSCI_Study_on_the_Former_Detention_and_Interrogation_Program.pdf.

²⁹ E.O. 13491, "Ensuring Lawful Interrogations," January 22, 2009, §3(c), at http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations.

life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment).³⁰

Perspectives on EITs and Torture

Did the CIA's use of EITs constitute torture, thereby violating U.S. and international law? The answer to this question depends, in part, on whether the EITs are considered 1) individually, 2) collectively,³¹ 3) used within specified guidelines, and/or 4) used without regard to guidelines. It also depends on how torture is defined. *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (also known as the Torture Convention, or CAT), was ratified by the United States in 1994.³² Article 1 of the CAT defines "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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.³³

In giving its approval to U.S. ratification of CAT, the Senate included several understandings in its Resolution of Ratification that provided additional explanation of how the United States interpreted the scope of conduct covered by CAT's definition of "torture," particularly as it relates to mental pain and suffering. According to one of the understandings included in U.S. ratification materials:

in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe pain or suffering, or the

³⁰ E.O. 13491, §3(a).

³¹ Memorandum from Jay S. Bybee, "Interrogation of al Qaeda Operative," to John Rizzo, Acting General Counsel of the CIA DOJ/OLC, August 1, 2002, in *IG Special Review*, Appendix C. See also CIA "Background Paper on CIA's Combined Use of Interrogation Techniques," December 30, 2004, declassified version at <https://www.aclu.org/sites/default/files/torturefoia/released/082409/olcremand/2004olc97.pdf>.

³² U.S. Congress, Senate Committee on Foreign Relations, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Report to accompany Treaty Doc. 100-20, S.Exec.Rpt. 101-30, 101st Cong., 2nd sess., August 30, 1990, at http://detaineeataskforce.org/wp-content/uploads/2013/04/S.-Comm.-on-Foreign-Relations-Report-on-Convention-Against-Torture-and-Other-Cruel-Inhuman-or-Degrading-Treatment-or-Punishment-S.-Exec.-Rep.-No_.pdf.

³³ Article 1, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, June 26, 1987, S. Treaty Doc No. 100-20, 1465 U.N.T.S. 113, at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality sanctions.³⁴

In a series of legal opinions issued in the years immediately following the 9/11 attacks, the DOJ's OLC—often charged with providing interpretive guidance to executive agencies regarding the laws which they administer—provided further elaboration regarding the Administration's interpretation of the degree of pain and suffering rising to the level of "torture."³⁵ In a memo to the White House General Counsel Alberto Gonzales, torture was defined this way:

Torture as defined in the CAT, "covers only extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like posttraumatic stress disorder."³⁶

In essence, the opinions determined that provisions in the 1949 Geneva Conventions (GC), the U.N. Convention Against Torture (CAT), and the War Crimes Act (WCA) (1996) did not prohibit the use of EITs against certain Al Qaeda and Taliban detainees (defined as "unlawful enemy combatants") and EITs did not meet the CAT definition of torture.³⁷ President Bush accepted the DOJ's legal opinion in terms of guidance to the CIA and DOD, but stated in a memo that Al Qaeda and Taliban detainees should and would be treated in a manner "consistent with" the GC.³⁸

Concerns raised both publicly³⁹ and privately⁴⁰ prompted a review of DOJ guidance. Critics argued the OLC construed the legal definition of "torture" too narrowly. However, DOJ memos

³⁴ Article 1, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, S. Treaty Doc No. 100-20, 1465 U.N.T.S. 113, at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>. These understandings are also reflected in definition of "torture" found in the Federal Anti-Torture Statute, 18 USC §§2340-2340A, which criminalizes acts of torture occurring outside the United States.

³⁵ See for example, Memorandum from John Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, "Application of Treaties and Laws to al Qaeda and Taliban Detainees," to William J. Haynes II, General Counsel, Department of Defense, January 9, 2002, p. 1., at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>; Memorandum from Alberto Gonzales, "Decision re application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban," to President George W. Bush, January 25, 2002, at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>.

³⁶ Memorandum from Jay S. Bybee, "Standards of Conduct for Interrogation under 18 USC §§2340-2340A," to Alberto Gonzales, Counsel to the President, August 1, 2002, "Conclusion," p. 46, at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf>. This was superseded by another OLC memo in 2004, which found that the earlier memo erred in treating severe physical suffering as identical to severe physical pain, and concluded that "severe physical suffering" may constitute torture under U.S. law even if such suffering does not involve "severe physical pain." DOJ/OLC, "Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A," December 30, 2004, at http://www.justice.gov/sites/default/files/olc/opinions/2004/12/31/op-olc-v028-p0297_0.pdf.

³⁷ Several CRS Reports discuss legal issues associated with D&I. See for example, CRS Report RL32567, *Lawfulness of Interrogation Techniques under the Geneva Conventions*, by Jennifer K. Elsea; CRS Report RL32438, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, by Michael John Garcia.

³⁸ Memorandum from President George W. Bush, "Humane Treatment of al Qaeda and Taliban Detainees," to the Vice President, Secretary of State, Secretary of Defense, Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, Chairman of the Joint Chiefs of Staff, February 7, 2002, at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>.

³⁹ See, for example, Dana Priest and R. Jeffrey Smith, "Memo Offered Justification for Use of Torture," *Washington Post*, June 8, 2004, at <http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html>.

⁴⁰ See *IG Special Review*, the CIA D&I Program "diverges sharply from previous Agency policy and practice, rules that govern interrogations by U.S. military and law enforcement officers, statements of U.S. policy by the Department of State, and public statements by very senior U.S. officials, including the President," pp. 101-102. See also Jeffrey (continued...)

and NSC guidance reaffirmed the legal use of EITs, with the exception of the waterboard.⁴¹ A 2005 DOJ memorandum concluded that *if* the specified EITs were (1) “subject to the limitations and safeguards described herein,” (2) applied according to “representations we have received from you (or officials of your Agency),” and (3) used separately, *then* EITs would not violate torture statutes (with two possible exceptions—use of sleep deprivation and waterboard).⁴²

Federal courts, asked to consider a multitude of petitions from those affected by U.S. detention policies, issued little guidance concerning EITs with one notable exception. In the case of *Hamdan v Rumsfeld* (2006), the Supreme Court concluded that, at a minimum, Common Article 3 of the GC applied to persons captured in the conflict with Al Qaeda, and accorded to them a minimum baseline of protections.⁴³

In July 2007, President Bush issued E.O. 13440, setting new boundaries on the use of EITs, but (despite the *Hamdan* ruling) “reaffirming” his belief that “members of al Qaeda, the Taliban, and associated forces were unlawful enemy combatants and therefore, not entitled to the protections that the Third Geneva Convention provides to prisoners of war.”⁴⁴ Many debated the continued legal justifications for EITs found in E.O. 13440.⁴⁵ In 2009, the OLC withdrew these opinions, concluding that they no longer reflected its views.⁴⁶ On January 22, 2009, President Obama’s E.O. 13491 restricted interrogation techniques to only those techniques included in the AFM, and specifically prohibited any use of DOJ guidance issued between September 11, 2001, and January 20, 2009 in conducting interrogations.⁴⁷

The *SSCI Study* concluded that certain HVDs were tortured. Senator Dianne Feinstein, Chairman of the SSCI when the study was made public in December 2014, explained the conclusion in reference to both the CAT definition of torture and the way EITs techniques were administered in practice. The *SSCI Study* found a number of instances in which the EITs were used collectively and without regard to guidelines. Senator Feinstein stated, “[U]nder any common meaning of the term, CIA detainees were tortured. I also believe that the conditions of confinement and the use of

(...continued)

Rosen, “Conscience of a Conservative,” *New York Times*, September 9, 2007, at <http://www.nytimes.com/2007/09/09/magazine/09rosen.html?pagewanted=all>.

⁴¹ See *SSCI Study*, Memorandum from Condoleezza Rice, Assistant to the President for National Security Affairs, “re: Janat Gul,” to George Tenet, DCI, July 6, 2004, permitting the use of EITs, p. 136 of 499.

⁴² Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, “Re: Application of 18 U.S.C. §§2340-2340A to Certain Techniques That May be Used in the Interrogation of High Value al Qaeda Detainee,” to John Rizzo, Senior Deputy General Counsel, CIA, May 10, 2005, p. 5., at <http://www.justice.gov/sites/default/files/olc/legacy/2013/10/21/memo-bradbury2005-3.pdf>.

⁴³ See CRS Report R41156, *Judicial Activity Concerning Enemy Combatant Detainees: Major Court Rulings*, by Jennifer K. Elsea and Michael John Garcia.

⁴⁴ E.O. 13440, “Interpretation of Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency,” July 20, 2007.

⁴⁵ See for example, Karen De Young, “Bush Approves New CIA Methods,” *Washington Post*, July 21, 2007, at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/20/AR2007072001264.html>. See also U.S. Congress, Senate Select Committee on Intelligence, *U.S. Interrogation Policy and Executive Order 13440*, S.Hrg. 110-849, 110th Cong., 1st sess., September 25, 2007, (Washington, DC: GPO, 2007).

⁴⁶ DOJ/OLC, “Withdrawal of Office of Legal Counsel CIA Interrogation Opinions,” April 15, 2009, at http://www.justice.gov/sites/default/files/olc/opinions/2009/04/31/withdrawalofficelegalcounsel_0.pdf; and “Withdrawal of Office of Legal Counsel Opinion,” June 11, 2009, at http://www.justice.gov/sites/default/files/olc/opinions/2009/06/31/memo-barron2009_0.pdf.

⁴⁷ E.O. 13491, §3(c).

authorized and unauthorized interrogation and conditioning techniques were cruel, inhuman, and degrading. I believe the evidence of this is overwhelming and incontrovertible."⁴⁸ According to the *SSCI Study*,

[T]he CIA applied its enhanced interrogation techniques with significant repetition for days or weeks at a time. Interrogation techniques such as slaps and 'wallings' ... were used in combination, frequently concurrent with sleep deprivation and nudity.... The waterboarding technique was physically harmful, inducing convulsions and vomiting.... Sleep deprivation involved keeping detainees awake for up to 180 hours, usually standing or in stress positions, at times with their hands shackled above their heads. At least five detainees experienced disturbing hallucinations during prolonged sleep deprivation ... [T]he CIA nonetheless continued the sleep deprivation.⁴⁹

In the current debate, those who argue that the EITs did not constitute torture tend to support the soundness of the DOJ's legal reasoning (i.e., that EITs were administered within specified guidelines), and /or the view that EITs were not overly painful and did no lasting physical harm. For example, former Attorney General Michael Mukasey stated,

It [waterboarding] was not torture, for at least two reasons. First, Navy SEALs⁵⁰ for years have undergone waterboarding of that sort as part of their training, and they report that the procedure does not cause much physical pain at all; their splendid careers show that it also does not cause severe mental pain or suffering as defined in the law. Second, 9/11 mastermind Khalid Sheikh Mohammed ... eventually came to know the precise limits of the procedure and was seen to count the seconds by tapping his fingers until it was over. Some torture. Arguably, what broke him was sleep deprivation, but in any event he disclosed reams of valuable information. At last report, he is doing just fine.⁵¹

Vice President Cheney stated that within the context of 9/11 and the pursuit of actionable intelligence, nothing done within that framework constituted torture, regardless of how those techniques were applied.⁵² Senator Saxby Chambliss, then-Vice Chairman of the SSCI, stated that EITs like waterboarding were not torture because "they were deemed not torture and in compliance with the Geneva Convention by legal experts in the DOJ."⁵³

The CIA acknowledged some fault in this area but did not use the word torture. CIA Director John Brennan stated that "in a limited number of cases, Agency officers used interrogation techniques that had not been authorized, were abhorrent, and rightly should be repudiated by all. And we fell short when it came to holding some officers accountable for their mistakes."⁵⁴ The

⁴⁸ SSCI Chairman Dianne Feinstein, "Foreword," *SSCI Study*, p. 4, and Remarks of Senator Feinstein, *Congressional Record*, daily edition, vol. 160, no. 149, (December 9, 2014), p. S6406.

⁴⁹ *SSCI Study*, Finding 3.

⁵⁰ According to the *IG Special Review*, "According to individuals with authoritative knowledge of the SERE program, the waterboard was used for demonstration purposes on a very small number of students in the class. Except for Navy SERE training, use of the waterboard was discontinued because of its dramatic effect on the students who were subjects," p. 14, footnote 14.

⁵¹ Michael B. Mukasey, Opinion, *Wall Street Journal*, December 16, 2014, at <http://www.wsj.com/articles/michael-b-mukasey-the-cia-interrogations-followed-the-law-1418773648>. Attorney General—November 2007 to January 2009.

⁵² Interview with Richard Cheney by Chuck Todd, "Meet the Press," *NBC News*, December 14, 2014, at <http://www.nbcnews.com/watch/meet-the-press/cheney-on-the-senate-intelligence-report-372288067934>.

⁵³ Interview with Senator Saxby Chambliss by Norah O'Donnell on *Face the Nation*, December 14, 2014, at <http://www.cbsnews.com/news/face-the-nation-transcripts-december-14-mccain-chambliss-and-king/>.

⁵⁴ John Brennan, "Statement on SSCI Detention and Interrogation Program," press release, December 11, 2014, at (continued...)

official *CIA Comments* stated that the Study's claims were exaggerated. In some rare cases, "unauthorized techniques" were used, but it was only during the first two years of the program, and corrective measures were put into place after that time.⁵⁵

Perspectives on EITs and Values

Did the CIA's use of EITs run counter to American values and morals? Those who believe they did violate American ideals suggest that the United States lost some of its "moral high ground" and damaged its image. President Barack Obama stated, "These techniques did significant damage to America's standing in the world and made it harder to pursue our interests with allies and partners."⁵⁶ Some say it has damaged our ability to use "smart power." According to Dr. Joseph Nye (the professor who coined the term),

Smart power is the combination of hard and soft power. Soft power is the ability to get what you want through attraction rather than coercion or payments. Opinion polls show a serious decline in American attractiveness in Europe, Latin America and, most dramatically, the Muslim world. The resources that produce soft power for a country include its culture (when it is attractive to others), its values (when they are attractive and not undercut by inconsistent practices) and policies (when they are seen as inclusive and legitimate).⁵⁷

Some support for Nye's perspective arguably may be found in international media reports from countries frequently at odds with U.S. policies, such as China, Iran, North Korea and Russia, and by organizations such as the United Nations (U.N.).⁵⁸ A number of accounts accuse the United States of hypocrisy in casting itself as the standard-bearer of democracy and human rights.⁵⁹ Additionally, the U.N.'s Special Rapporteur on torture stated that the United States' use of torture has "created a set-back in the global battle against the practice."⁶⁰

In remarks on the Senate floor, Senator Feinstein stated, "It's really about American values and morals. It's about the Constitution, the Bill of Rights, our rule of law. These values exist

(...continued)

<https://www.cia.gov/news-information/press-releases-statements/2014-press-releases-statements/statement-from-director-brennan-on-ssci-study-on-detention-interrogation-program.html>.

⁵⁵ *CIA Comments*, p. 6.

⁵⁶ Barack Obama, quoted by Massimo Calabresi, "Senate Torture Report Describes CIA Interrogation Program," *Time Magazine*, December 9, 2014, at <http://time.com/3625453/torture-report-senate-cia-interrogation/>.

⁵⁷ Joseph Nye, "The U.S. can reclaim 'smart power,'" *Los Angeles Times*, January 21, 2009, at <http://www.latimes.com/la-oe-nye21-2009jan21-story.html>

⁵⁸ See for example, Yi Zhang, "How much longer can America pretend to be Human Rights Defender?" *Xinhua News*, December 10, 2014, at <http://www.xinhuanet.com/world/jrch/427.htm>; David M. Herszenhorn, "Russia Denounces U.S. Over C.I.A. Torture Report," *The New York Times*, December 11, 2014, at http://www.nytimes.com/2014/12/12/world/europe/russia-us-cia-torture-report.html?_r=0; Tania Branigan, "CIA torture report: China and North Korea quick to settle scores," *The Guardian*, December 10, 2014, at <http://www.theguardian.com/us-news/2014/dec/10/cia-torture-report-china-and-north-korea-quick-to-settle-accounts>; "Iran calls Senate report on CIA torture 'shocking,'" *Press TV*, December 11, 2014 at <http://www.presstv.ir/detail/2014/12/11/389697/iran-calls-cia-torture-report-shocking/>.

⁵⁹ They cite, for example, descriptions of human rights abuses in Saudi Arabia, in *U.S. State Department, 2002 Country Reports on Human Rights Practices*, at <http://www.state.gov/j/drl/rls/hrrpt/2002/>.

⁶⁰ "After CIA torture revelations, US must now recover moral high ground—U.N. expert," *U.N. News Centre*, December 11, 2014, at <http://www.un.org/apps/news/story.asp?NewsID=49578&Cr=Torture&Cr1=#.VItTRFfwy5I>.

regardless of the circumstances in which we find ourselves. They exist in peacetime and in wartime. And if we cast aside these values when convenient, we have failed to live by the very precepts that make our nation a great one.”⁶¹ This perspective is supported by a number of others—most notably, perhaps, by Senator John McCain, a former prisoner of war (POW) who was himself subject to torture. In a speech on the Senate floor, McCain rejected the “ends justify means” argument and stated, “I know the use of torture compromises that which most distinguishes us from our enemies, our belief that all people, even captured enemies, possess basic human rights, which are protected by international conventions the U.S. not only joined, but for the most part authored.”⁶²

A number of individuals have argued that the *SSCI Study* should not have been released publicly because it provided damaging information that may be used against the United States in the future.⁶³ That perspective was countered by those who suggested that the *SSCI Study* offered concrete evidence of democracy at work. In this view, it may enhance the United States’ image abroad because it demonstrates efforts to investigate wrong doing and take corrective measures. In a message to the Intelligence Community workforce, Director of National Intelligence (DNI) James Clapper stated, “I don’t believe that any other nation would go to the lengths the United States does to bare its soul, admit mistakes when they are made and learn from those mistakes. Certainly, no one can imagine such an effort by any of the adversaries we face today.”⁶⁴

Former Vice President Cheney, CIA officials, some SSCI Members,⁶⁵ and others, have taken the position that values such as national security and “saving lives” should be the most important priority for policy makers (as opposed to other values such as maintaining the moral high ground). Former Attorney General Mukasky wrote, “I think it is important that we resist the New Age conceit of seeing each act of our government as an expression of who we are, and each act by its officials as an expression of who they are. Brave and serious men and women ... devised and executed a program to get intelligence from captured terrorists who refused to cooperate.”⁶⁶

Those with the “saving lives” perspective have suggested that severe methods directed against a suspected terrorist is the right thing to do regardless of detainee pain and suffering.⁶⁷ They argue EITs produce life-saving information for purposes related to national security—particularly necessary in time-sensitive situations. Several former POWs have taken this approach. For example, former POW Lee Ellis argues that the United States used EITs appropriately—to get critical information that saved lives—while EITs used against Americans were used inappropriately. In his words, “What the communists did to us was torture us to say a lie, to make a statement against our government, to make propaganda for their cause to defeat our country. So

⁶¹ Remarks of Senator Dianne Feinstein, *Congressional Record*, p. S6410.

⁶² Senator John McCain, “Floor Statement on Senate Intelligence Committee Report on CIA Interrogation Methods,” December 9, 2014, at <http://www.mccain.senate.gov/public/index.cfm/press-releases?ID=1a15e343-66b0-473f-b0c1-a58f984db996>.

⁶³ See, for example, remarks by Representative Michael Rogers, as reported by Patrick Goodenough, “Democrats Insist on Releasing CIA Report that Could Harm Americans,” *CNSnews.com*, <http://cnsnews.com/news/article/patrick-goodenough/democrats-insist-releasing-cia-report-could-harm-americans>

⁶⁴ James Clapper, “DNI Message to the Intelligence Community Workforce on the Release of the SSCI Report,” December 9, 2014, press release, at <http://www.dni.gov/index.php/newsroom/press-releases/198-press-releases-2014/1149-dni-message-to-the-intelligence-community-workforce-on-the-release-of-the-ssci-report>.

⁶⁵ See the SSCI’s *Minority Views*.

⁶⁶ Mukasky Editorial.

⁶⁷ Cheney, Meet the Press.

to me, there's a huge difference there."⁶⁸ Former POW Leo Thorsness suggested that the moral perspective has to take second place to value of actionable intelligence. In his words, "In a perfect world we wouldn't do this. But the world isn't perfect."⁶⁹

Perspectives on EITs and Effectiveness

Were the EITs effective in producing valuable intelligence, not otherwise obtainable through standard interrogation techniques? The *IG Special Review* defined standard interrogation practices as "effective" because they (1) enabled the identification and capture of other terrorists; (2) warned of terrorist plots planned for the United States; (3) helped to verify ("vet") information from other detainees; and (4) provided information about Al Qaeda operations.⁷⁰ Labelling EITs "effective" seems to have rested on a higher standard—on their ability to provide

1. information beyond what had been offered willingly before the EITs,⁷¹ and
2. accurate, actionable intelligence on imminent threats.⁷²

Neither the *IG Special Review* (in 2003) nor the *SSCI Study* found sufficient evidence to suggest that the use of EITs met the higher standard of effectiveness. The *IG Special Review* did suggest efforts be made to measure the effectiveness of EITs but noted that doing so would be "challenging" for a number of reasons.⁷³ The *SSCI Study* acknowledged the value of standard techniques but argued that not enough evidence was provided in CIA documents to support the continued use of EITs.⁷⁴

Senator McCain questioned the effectiveness of EITs when he stated, "I know from personal experience that the abuse of prisoners will produce more bad than good intelligence. I know that victims of torture will offer intentionally misleading information if they think their captors will believe it. I know they will say whatever they think their torturers want them to say if they believe it will stop their suffering."⁷⁵

The *SSCI Minority Views* and comments offered by a group of former CIA directors supported the CIA's contention that EITs were effective at producing valuable, actionable intelligence "that saved lives."⁷⁶ However, CIA Director John Brennan offered the following caveat: "We have not

⁶⁸ Interview with Lee Ellis quoted by Marc Thiessen in "Another Vietnam POW for waterboarding," *AEI Institute*, September 4, 2012, at <http://www.aei.org/publication/another-vietnam-pow-for-waterboarding/>.

⁶⁹ Interview with former POW Leo Thorsness, *FOX News*, December 11, 2014, posted on <http://forums.roadbikereview.com/politics-only/torture-report-yes-no-342760-11.html>.

⁷⁰ *IG Special Review*, pp. 85-88.

⁷¹ *CIA Comments*, p. 20.

⁷² *IG Special Review*, pp 86 and 88. *CIA Comments* suggest the information should also be "unique," p. 21.

⁷³ *IG Special Review*, pp. 85-90. For example, measuring effectiveness would be difficult because each detainee had a different fear of and tolerance for EITs, p. 89.

⁷⁴ Finding 1, "Findings and Conclusions," *SSCI Study*, p. 2 of 19.

⁷⁵ Senator John McCain, "Floor Statement on Senate Intelligence Committee Report on CIA Interrogation Methods," December 9, 2014, at <http://www.mccain.senate.gov/public/index.cfm/press-releases?ID=1a15e343-66b0-473f-b0c1-a58f984db996>.

⁷⁶ *CIA Comments*, pp 12-13; George Tenet, Porter Goss, Michael Hayden, John McLaughlin, Albert Calland and Stephen Kappas, "Ex-CIA Directors: Interrogations Saved Lives," Opinion, *Wall Street Journal*, December 10, 2014, at <http://www.wsj.com/articles/cia-interrogations-saved-lives-1418142644>.

concluded that it was the use of EITs within that program that allowed us to obtain useful information from detainees subjected to them. The cause and effect relationship between the use of EITs and useful information subsequently provided by the detainee is, in my view, unknowable."⁷⁷

Former Vice President Cheney defended the interrogation techniques, including waterboarding and rectal hydration, because they produced results.⁷⁸ Former POW Leo Thorsness suggests that they should be in an interrogator's toolbox because the fear of EITs can make detainees cooperate.⁷⁹

Next Steps

Debate over the policy and oversight implications of the *SSCI Study* will continue and many proposals for reform may be debated in the 114th Congress. Some legislative action has already taken place. Section 321 of the Intelligence Authorization Act for FY2014 (P.L. 113-126), passed in July 2014, was designed to increase the Intelligence Committees' ability to examine legal opinions relevant to the Committees' oversight functions.⁸⁰ The CIA has suggested reforms to improve the planning, execution and oversight of covert operations.⁸¹ The DOJ has withdrawn, updated and/or reissued a number of policy documents related to detainee detention and interrogation.⁸²

Some argue that remedial legislative action is needed and a number of recommendations have been offered. For example, Senator Susan Collins has recommended "outlawing water boarding of detainees once and for all," and strengthening the DOJ review process.⁸³ Senator Feinstein has recommended 1) closing any legislative "loopholes" that allowed administration lawyers to interpret U.S. law, or international law, to permit EITs; 2) codifying E.O. 13491 to ensure that the AFM is the governing document for all U.S. government personnel; 3) ensuring access to detainees by the International Committee of the Red Cross; and 4) prohibiting CIA detention of detainees beyond a short-term, transitory basis.⁸⁴

⁷⁷ "Remarks as Prepared for Delivery CIA Director John O. Brennan Response to *SSCI Study* on the Former Detention and Interrogation Program," December 11, 2014, at <https://www.cia.gov/news-information/speeches-testimony/2014-speeches-testimony/remarks-as-prepared-for-delivery-cia-director-john-o-brennan-response-to-ssci-study-on-the-former-detention-and-interrogation-program.html>. "Unknowable" also found in *CIA Comments*, p. 20.

⁷⁸ "Cheney defends CIA interrogation techniques, calls Senate report 'deeply flawed,'" *Fox News*, December 11, 2014, at <http://www.foxnews.com/politics/2014/12/11/cheney-defends-cia-interrogation-techniques-calls-senate-report-flawed/?intcmp=latestnews>.

⁷⁹ Thorsness interview.

⁸⁰ CRS Report R43793, *Intelligence Authorization Legislation for FY2014 and FY2015: Provisions, Status, Intelligence Community Framework*, by Anne Daugherty Miles, pp 12-13.

⁸¹ *CIA Comments*, pp. 17-18.

⁸² See, for example, Department of Justice, "Department of Justice Withdraws 'Enemy Combatant' Definition for Guantanamo Detainees," press release, March 13, 2009, <http://www.usdoj.gov/opa/pr/2009/March/09-ag-232.html>.

⁸³ *Additional Views*, Remarks by Senator Susan Collins.

⁸⁴ Letter from Senator Dianne Feinstein, Chairman of the SSCI, to President Barack Obama, December 30, 2014, press release, January 5, 2015, at <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=0084e644-a5ed-46e1-8649-762df3ffc4f>.

Appendix. Enhanced Interrogation Techniques

Descriptions of Authorized Enhanced Interrogation Techniques in 2003

- The **attention grasp** consists of grasping the detainee with both hands, with one hand on each side of the collar opening, in a controlled and quick motion. In the same motion as the grasp, the detainee is drawn toward the interrogator.
- During the **walling technique**, the detainee is pulled forward and then quickly and firmly pushed into a flexible false wall so that his shoulder blades hit the wall. His head and neck are supported with a rolled towel to prevent whiplash.
- The **facial hold** is used to hold the detainee's head immobile. The interrogator places an open palm on either side of the detainee's face and the interrogator's fingertips are kept well away from the detainee's eyes.
- With the **facial or insult slap**, the fingers are slightly spread apart. The interrogator's hand makes contact with the area between the tip of the detainee's chin and the bottom of the corresponding earlobe.
- In **cramped confinement**, the detainee is placed in a confined space, typically a small or large box, which is usually dark. Confinement in the smaller space lasts no more than two hours and in the larger space it can last up to 18 hours.
- **Insects placed in a confinement box** involve placing a harmless insect in the box with the detainee.
- During **wall standing**, the detainee may stand about 4 to 5 feet from the wall with his feet spread to approximately shoulder width. His arms are stretched out in front of him and his fingers rest on the wall to support all his body weight. The detainee is not allowed to reposition his hands or feet.
- The application of **stress positions** may include having the detainee sit on the floor with his legs extended straight out in front of him with his arms raised above his head or kneeling on the floor while leaning back at a 45 degree angle.
- **Sleep deprivation** will not exceed 11 days at a time.
- The application of the **waterboard** technique involves binding the detainee to a bench with his feet elevated above his head. The detainee's head is immobilized and an interrogator places a cloth over the detainee's mouth and nose while pouring water onto the cloth in a controlled manner. Airflow is restricted for 20 to 40 seconds and the technique produces the sensation of drowning and suffocation.

Source: CIA Office of the Inspector General, "Special Review: Counterterrorism Detention and Interrogation Activities (September 2001-October 2003)," Report no. 2003-7123-IG, May 7, 2004, p. 15 Text Box, redacted version at <http://www2.gwu.edu/~nsarchiv/torturingdemocracy/documents/20040507.pdf>. (boldface added)

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