
Could the United States Reinstitute an Official Torture Policy?

Adam D. Jacobson
New York University, adj303@nyu.edu

Follow this and additional works at: <https://scholarcommons.usf.edu/jss>
pp. 97-118

Recommended Citation

Jacobson, Adam D.. "Could the United States Reinstitute an Official Torture Policy?." *Journal of Strategic Security* 10, no. 2 (2017) : 97-118.
DOI: <http://doi.org/10.5038/1944-0472.10.2.1568>
Available at: <https://scholarcommons.usf.edu/jss/vol10/iss2/7>

This Article is brought to you for free and open access by the Open Access Journals at Scholar Commons. It has been accepted for inclusion in *Journal of Strategic Security* by an authorized editor of Scholar Commons. For more information, please contact scholarcommons@usf.edu.

Could the United States Reinstigate an Official Torture Policy?

Abstract

In 2015, the United States passed legislation that reaffirmed its ban on using torture and abusive techniques in national security interrogations. However, the Republican president-elect Donald Trump has repeatedly promised to revive torture as official policy, and the idea of torturing suspected terrorists is popular with the American public. Given these facts, what are the vulnerabilities within the current prohibition that makes a return to an official torture policy possible? This paper examines the weaknesses within each branch of government and other factors that could contribute to making a return to official torture by the United States more likely. It shows that the prohibition against torture does face vulnerabilities that can be exploited to reinstitute a torture policy, and that while this may not be likely in the current political environment, it is possible.

Acknowledgements

The author would like to thank Mary Beth Altier for her guidance.

Introduction

Despite the current legislative ban on the use of torture and abusive techniques in national security interrogations, President Donald Trump has made promises to revive torture as official policy, and the idea of torturing suspected terrorists is significantly popular with the American public. In 2016, sixty-three percent of Americans polled said that “torture against suspected terrorists to obtain information about terrorist activities” could be justified often or sometimes.¹ Given this statistic, what are the vulnerabilities within the current prohibition that makes a return to an official torture policy possible? How likely is a return to officially sanctioned torture by the United States (U.S.)? This article shows that a return to an official torture policy is possible and even likely, at least in part. Despite the steps the government has taken to prevent future abuses, the current makeup of the government, the judicial precedents, and the country’s relative safety from terrorism, there are still gaping holes in the ban on torture.

This article provides background information on the history of American post-September 11 torture policy and practice and its eventual dismantling, as well as evidence that torture is ineffective and illegal. It then shows the avenues for a return to an official torture policy, examining the options for and likelihood of actions through each branch of American government. If a president sought to reinstate a torture regime, could he or she accomplish this goal through executive powers, the legislature, and/or the judiciary? The article also examines other factors, including the importance and malleability of public opinion on the issue, as well as the institutions a president would task with carrying out torture (the Central Intelligence Agency and U.S. military). Finally, the article addresses arguments that an official torture policy is improbable.

Though several commentators have written articles speculating whether President Trump will revive a torture policy, none have examined the issue at the level of detail in this article. The debate over the reinstatement of an official torture policy could have significant and lasting effects on U.S. national security policy and counterterrorism operations, and this article seeks to influence this debate and future policy decisions on the issue.

¹ Ipsos, “Ipsos Poll Conducted for Reuters, Brussels Topline 3.28.2016,” *Ipsos Public Affairs*, March 28, 2016, available at: <http://graphics.thomsonreuters.com/16/Ipsos-Brussels.pdf>.

Background

Post-9/11 Torture

After the 9/11 attacks, the Central Intelligence Agency (CIA) contracted psychologists James Mitchell and Bruce Jessen to design an interrogation program based on techniques used in the U.S. military's Survival, Evasion, Resistance, and Escape (SERE) program. To prepare U.S. military personnel who served in roles with a high probability of capture, SERE exposed them to harsh interrogation techniques to teach them resistance strategies. Mitchell and Jessen designed the *Enhanced Interrogation Techniques* (EITs) program to induce a state of *learned helplessness* in detainees, which the psychologists theorized would coerce detainees into divulging valuable information.² In interrogations of terrorism suspects the CIA, the U.S. military, and these agencies' contractors used Mitchell and Jessen's program, and other torture and abusive techniques not on the approved EITs list.

Bush Administration lawyers approved many of the techniques using an interpretation of the international legal definitions of *torture* well short of the common understanding to provide legal cover for their application. The administration's lawyers also argued that during times of national emergency, the president could use extraordinary measures to protect the country, including the abuse of prisoners, and that the United States was not obligated to provide captured terrorists Geneva Convention protection.³ The Bush Administration consistently touted EITs as having produced intelligence that saved lives and stopped attacks. But oversight reports from the Senate Armed Services Committee (which examined U.S. military abuses) and the Senate Select Committee on Intelligence (which examined CIA abuses), and independent reports from non-governmental groups such as The Constitution Project's Task Force on Detainee Treatment show that the administration's claims were exaggerated or entirely false.⁴ The claims also demonstrate that the techniques used went beyond the legal bounds set by U.S. domestic and

² The Constitution Project, *The Report of The Constitution Project's Task Force on Detainee Treatment, 2013* (Washington, D.C.: 2013 Constitution Project, available at: <http://detaineeataskforce.org/pdf/Full-Report.pdf>).

³ "A Guide to the Memos on Torture," *New York Times*, available at: http://www.nytimes.com/ref/international/24MEMO-GUIDE.html?_r=0.

⁴ U.S. Senate Committee on Armed Services, *Inquiry into the Treatment of Detainees in U.S. Custody* (Washington, D.C., 2008), available at: http://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf; U.S. Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (Washington, D.C., 2014), available at <http://www.humanrightsfirst.org/uploads/pdfs/torture/sscistudy1.pdf>; The Constitution Project, *The Report of The Constitution Project's Task Force on Detainee Treatment, 2013*.

international law obligations and even the permissive guidelines provided by Bush Administration legal officials and approved by the highest levels of government.

On November 25, 2015, President Barack Obama signed into law the National Defense Authorization Act for Fiscal Year 2016.⁵ The bill contained an amendment sponsored by Republican Senator John McCain of Arizona and Democratic Senator Dianne Feinstein of California, which solidified the ban on coercive interrogation techniques, originally laid out in President Obama's Executive Order 13491. Obama's order, signed on January 22, 2009, restricted interrogation techniques for U.S. military and intelligence agencies to those listed in the Army Field Manual—the military interrogation guidelines, which rely on *rapport-building* interrogation techniques, rather than coercive and abusive measures (with one important exception detailed below). The order also established the High Value Detainee Interrogation Group, made up of interrogators from across governmental agencies, tasked with conducting high-level interrogations and researching effective interrogation.⁶ A reaction to the Bush Administration's detainee abuses, the executive order was controversial, garnering criticism that making U.S. interrogation tactics public would allow terrorists to be able to elude their questioners when captured.⁷ Supporters of the order also feared that its form makes it vulnerable to easy overturning by a future president.⁸

Following the 2014 release of the Senate Select Committee on Intelligence's findings and conclusions, and executive summary of its report on CIA abuses, the McCain-Feinstein amendment addressed this latter concern, codifying Obama's restrictions into law. It also addressed another sore spot for supporters of the executive order—which the Army Field Manual includes an

⁵ Barack Obama, "Statement by the President," *The White House*, Washington D.C., November 25, 2015, available at: <https://www.whitehouse.gov/the-press-office/2015/11/25/statement-president>.

⁶ Peter Aldhous, "Here's What Actually Gets Terrorists to Tell the Truth—And It's Not Torture," *Buzzfeed News*, August 16, 2015, available at: https://www.buzzfeed.com/peteraldhous/torture-doesnt-work?utm_term=.xiZa79YDV#.tdr62ZkKO.

⁷ Adam Serwer, "Ayotte's Torture Amendment is Kaput," *Mother Jones*, December 1, 2011, available at: <http://www.motherjones.com/mojo/2011/12/ayottes-torture-amendment-kaput>.

⁸ Physicians for Human Rights, "PHR Praises President Obama's Executive Orders Ending Illegal US Detention and Interrogation Program; Accountability for Perpetrators of Torture Still Needed," January 22, 2009, available at: <http://physiciansforhumanrights.org/press/press-releases/news-2009-01-22.html>; Allen Keller, "May I Have the Waterboard Please...," *Huffington Post*, February 25, 2013, available at: http://www.huffingtonpost.com/allen-keller/may-i-have-the-waterboard_b_2750744.html.

appendix (Appendix M) allowing tactics that can constitute abuse or torture (especially if used in concert or for extended periods) such as solitary confinement, sensory deprivation, and sleep deprivation.⁹ The Obama Administration stated that it did not intend for interrogators to use these tactics in a way that would constitute torture and that safeguards existed to prevent abuse.¹⁰ However, anti-torture advocates (including the United Nations Committee on Torture) raised concerns that Appendix M left the door open to torture and called for eliminating the section.¹¹ McCain's and Feinstein's amendment mandates the review of the manual (including Appendix M), intending to limit or eliminate any potential abuse it allowed.¹² The amendment's passage reinforced the illegality of U.S. torture, along with any euphemistically relabeled version.

Meanwhile, President Donald Trump repeatedly advocated torture during and after his campaign, telling audiences that he would "bring back waterboarding" and "a hell of a lot worse than waterboarding."¹³ He insisted

⁹ Beth Van Schaak, "The Torture Convention & Appendix M of the Army Field Manual on Interrogations," *Just Security*, December 5, 2014, available at: <https://www.justsecurity.org/18043/torture-convention-appendix-army-field-manual-interrogations/>.

¹⁰ Charlie Savage, "U.N. Commission Presses U.S. on Torture," *New York Times*, November 13, 2014, available at: <http://www.nytimes.com/2014/11/14/world/europe/un-commission-presses-us-on-torture.html>.

¹¹ Beth Van Schaak, "The Torture Convention & Appendix M of the Army Field Manual on Interrogations;" Amnesty International, "The Army Field Manual: Sanctioning Cruelty?" March 19, 2009, available at: <http://www.amnesty.org.au/hrs/comments/20575/>; Center for Victims of Torture, "Appendix M of the Army Field Manual Authorizes Interrogation Methods that May Amount to Cruel Treatment or Torture" November 2014, available at: <http://www.cvt.org/sites/cvt.org/files/attachments/u10/downloads/CVT-AppendixM-CAT-2014Nov.pdf>; Human Rights First, "The U.S. Army Field Manual on Interrogation: A Strong Document in Need of Careful Revision," available at: https://www.humanrightsfirst.org/wp-content/uploads/pdf/Army_Field_Manual.pdf; Human Rights First, "14 Interrogators Call on Secretary Gates to Eliminate Appendix M to the Army Field Manual," November 17, 2010, available at: <http://www.humanrightsfirst.org/2010/11/17/14-interrogators-call-on-secretary-gates-to-eliminate-appendix-m-to-the-army-field-manual>; Susan Ito, "Appendix M and the Torture Quagmire," American Civil Liberties Union, January 9, 2009, available at: <https://www.aclu.org/blog/speakeasy/appendix-m-and-torture-quagmire>.

¹² Reaffirmation of the Prohibition on Torture, amendment to the National Defense Authorization Act for Fiscal Year 2016, H.R. 1735, S. Amdt. 1889, S3910-3911, June 9, 2015, available at: <https://www.congress.gov/amendment/114th-congress/senate-amendment/1889/text>.

¹³ Nicki Rossoll, "Donald Trump Wants to Authorize 'Something Beyond Waterboarding,'" *ABC News*, February 7, 2016, available at: <http://abcnews.go.com/Politics/donald-trump-authorize-waterboarding/story?id=36760677>; "Transcript: ABC News Anchor David Muir Speaks With President Trump," *ABC News*, January 27, 2017, available at:

that “torture works,” and that to compete against the barbaric conduct of the Islamic State and other enemies, he would “strengthen the laws,” and abdicate U.S. obligations to abide by the Geneva Conventions.¹⁴ When informed that the military and intelligence agencies may refuse orders to use torture, Trump responded, “They’re not going to refuse me...If I say do it, they’re going to do it.”¹⁵

While former Bush Administration officials have ardently defended the use of abusive interrogation, they have couched their language in euphemisms such as enhanced interrogation techniques, to avoid calling their own conduct *torture*. Past presidential candidates have similarly hedged, defending individual techniques such as waterboarding, but not the concept of torture, preferring to adhere to the linguistic obfuscation of the Bush Administration. Mitt Romney, the 2012 Republican nominee, claimed that waterboarding did not constitute torture, and promised, if elected, to use “enhanced interrogation techniques which go beyond those that are in the military handbook right now.”¹⁶ Building on these half measures, Trump has gone a step further, offering a strident defense of torture outright and assurances of its effectiveness, potentially normalizing the practice in the minds of those less informed of the empirical evidence that torture is ineffective, and thus, making a return to torture more likely.

Torture is Ineffective

Outside the policy realm, while there are anecdotal examples of torture working to provide intelligence, scientific evidence, expert testimony, and the historical record show that coercive interrogation is not effective in eliciting

<http://abcnews.go.com/Politics/transcript-abc-news-anchor-david-muir-speaks-president/story?id=45096081>.

¹⁴ Jenna Johnson, “Trump Says ‘Torture Works,’ Backs Waterboarding and ‘Much Worse,’” *Washington Post*, February 17, 2016, available at:

https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html; CBS Interactive, “Donald Trump Vows to ‘Strengthen’ Laws to Allow Torture, Waterboarding,” *CBS News*, March 5, 2016, available at:

<http://www.cbsnews.com/news/donald-trump-vows-to-strengthen-laws-to-allow-torture-waterboarding-election-2016/>; Ben Schreckinger, “Trump Calls Geneva Conventions ‘The Problem,’” March 30, 2016, available at: <http://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/03/donald-trump-geneva-conventions-221394>.

¹⁵ Alice Ollstein and Aaron Rupar, “Trump Suddenly Backpedals on Torture,” *ThinkProgress*, March 4, 2016, available at:

<http://thinkprogress.org/politics/2016/03/04/3756857/trump-torture-reversal/>.

¹⁶ “Editorial: On Torture, Romney’s Wrong,” *Los Angeles Times*, October 3, 2012, available at: <http://articles.latimes.com/2012/oct/03/opinion/la-ed-torture-romney-obama-20121003>.

reliable information from prisoners.¹⁷ In 2014, a group of 25 former interrogators, intelligence officers, and interviewing professionals who served with U.S. military intelligence, the CIA, the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Naval Criminal Investigative Service, released a statement rejecting “torture and other forms of cruel, inhuman, or degrading treatment” as “illegal, ineffective, counterproductive, and immoral.”¹⁸ The statement continues:

“The application of psychological, emotional, and/or physical pressure can force a victim of torture to say anything just to end the painful experience....This same form of pressure will substantially impair an individual’s memory, his psychophysical ability to accurately recall critical details about people, places, plans, or events....In cases where coercive force is employed in a misguided attempt to obtain an individual’s compliance, that individual will, at best, only provide limited information that directly responds to the questions asked, and is unlikely to offer additional details or spontaneously share information outside the narrow scope of questioning. Torture only guarantees pain; it never guarantees the truth.”¹⁹

Scientific research supports these assertions. Shane O’Mara, professor of experimental brain research at Trinity College and author of the book *Why Torture Doesn’t Work: The Neuroscience of Interrogation* has shown that torture and abusive interrogation techniques damage or negatively affect sections of the brain responsible for memory. He writes, “The effect of chronic stress on the hippocampus is hypotrophy—it causes the hippocampus to shrink, along with deficits in the function it supports (namely, memory).”²⁰ Effective interrogations elicit as much information as possible from detainees, and preserving memory is essential. Other emerging research bolsters these findings, showing that non-coercive interrogation methods are more

¹⁷ James Merrill, James Hanning, Mark Leftly, and Nick Clark, “Revealed: How Torture was Used to Foil Al-Qaeda 2010 Plot to Bomb Two Airliners 17 Minutes Before Explosion,” *Independent*, February 28, 2015, available at: <http://www.independent.co.uk/news/uk/home-news/revealed-how-torture-was-used-to-foil-al-qaeda-plot-to-bomb-two-airliners-17-minutes-before-10077722.html>.

¹⁸ Human Rights First, “Statement of National Security, Intelligence, and Interrogation Professionals,” October 1, 2014, available at: <http://www.humanrightsfirst.org/resource/statement-national-security-intelligence-and-interrogation-professionals>.

¹⁹ *Ibid.*

²⁰ Vivian Giang, “Here’s the Latest Evidence Torture Doesn’t Keep Us Safe,” *Defense One*, April 25, 2016, available at: <http://www.defenseone.com/ideas/2016/04/heres-latest-evidence-torture-doesnt-keep-us-safe/127764/>.

effective.²¹ Moreover, Darius Rejali has shown that throughout modern history, using torture leads interrogators to act with decreasing professionalism and go beyond approved interrogation methods. Rejali writes that “Once the torture session starts, it necessarily devolves into an unrestrained hit-or-miss affair,” adding that through the use of torture, “Professionals become less disciplined, more brutal, and less skilled while their organizations become more fragmented and corrupt.”²²

Torture is Illegal

Torture is also illegal, under both international law and U.S. law. In addition to the Detainee Treatment Act, the McCain-Feinstein amendment, and President Obama’s executive order, the United States is a signatory and/or party to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, the International Covenant on Civil and Political Rights, and the Geneva Conventions, all of which bar torture and abuse of detainees.²³ As Human Rights Watch notes, “There is no question that torture violates rights established by the Bill of Rights,” and American courts have cited the Fourth, Fifth, Eighth, and Fourteenth amendments to the U.S. Constitution as bars against torture as part of interrogations.²⁴ The Uniform Code of Military Justice also prohibits abuse of prisoners.²⁵

²¹ Rupert Stone, “Science Shows That Torture Doesn’t Work and is Counterproductive,” *Newsweek*, May 8, 2016, available at: <http://www.newsweek.com/science-shows-torture-doesnt-work-456854?rx=us>.

²² Rejali, Darius, *Torture and Democracy* (Princeton: Princeton University Press, 2007), 451, 454.

²³ United Nations, “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” United Nations Treaty Collection, New York, December 10, 1984, available at:

https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en; United Nations, “International Covenant on Civil and Political Rights,” United Nations Treaty Collection, New York, December 16, 1966, available at:

https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en; International Committee of the Red Cross, “Convention (IV) Relative to the Protection of Civilian Persons in Time of War,” Geneva, August 12, 1949, available at:

https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=380.

²⁴ Human Rights Watch, “The Legal Prohibition Against Torture,” March 11, 2003 (updated June 1, 2004), available at <https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture>.

²⁵ Jennifer K. Elsea, “U.S. Treatment of Prisoners in Iraq: Selected Legal Issues,” (Washington, D.C.: Congressional Research Service, 2004): 7-8, available at: <http://fas.org/irp/crs/RL32395.pdf>.

Avenues for a Possible Return to a Torture Policy

Legislative

The most straightforward way to overturn the ban on torture and abusive interrogation is if Congress passed new legislation to reverse the McCain-Feinstein amendment. One reason this might prove difficult is the overwhelming support the amendment received in Congress. With powerful bipartisan and senior Congressional backing from McCain for the Republicans and Feinstein for the Democrats, seventy-eight Senators voted in favor of the amendment, with only twenty-one voting against (all Republicans).²⁶ In a time of intense partisan fissures and lack of progress on so many issues (causing at least one columnist to ask, “Is This the Worst Congress Ever?”²⁷), this vote, on such a controversial topic no less, marks a significant moment in Congressional opposition to torture.

Similarly, when McCain put forward the Detainee Treatment Act in 2005, which barred the use of “cruel, inhuman, or degrading treatment or punishment” and mandated that military interrogations abide by Army Field Manual regulations, the Senate voted ninety to nine in favor.²⁸ A signing statement from President Bush asserting the executive power to ignore the limitations if he thought it would protect national security blunted the effectiveness of that act, but the Senate vote is still noteworthy.²⁹

Additionally, Congressional attempts to legislate against President Obama’s executive order have not received widespread support. In 2011, Senator Kelly Ayotte proposed an amendment to the defense-funding bill to add a secret annex to the Army Field Manual, with the intention of keeping U.S. interrogation tactics hidden. While Ayotte told the Senate, “Our amendment in no way condones or authorizes torture,” she acknowledged that the

²⁶ Conor Friedersdorf, “These 21 Republicans Voted Against a Torture Ban,” *The Atlantic*, June 17, 2015, available at:

<http://www.theatlantic.com/politics/archive/2015/06/these-21-republicans-voted-against-a-torture-ban/396095/>.

²⁷ Norm Orstein, “Is This the Worst Congress Ever?” *The Atlantic*, May 17, 2016, available at: <http://www.theatlantic.com/politics/archive/2016/05/is-this-the-worst-congress-ever/483075/>.

²⁸ “U.S. Senate Roll Call Votes 109th Congress—1st Session: On the Amendment (McCain Amdt. No. 1977), U.S. Senate, October 5, 2005, available at: http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00249.

²⁹ Charlie Savage, “Bush Could Bypass New Torture Ban,” *Boston Globe*, January 4, 2006, available at: http://archive.boston.com/news/nation/washington/articles/2006/01/04/bush_could_bypass_new_torture_ban.

amendment was an effort to bring back some Bush-era interrogation techniques.³⁰ The Congressional Parliamentarian rejected the amendment and it was not included in the final bill. There have not been any other significant legislative attempts since the executive order to overturn or undermine it.

However, since the 2016 election, there have been signs that a Congressional fight over interrogation policy is looming, especially given the Republican majority in both houses of Congress. Senator Tom Cotton (R-AR), a prominent member of the Senate Armed Services Committee, pushed the idea of a return to torture, telling Wolf Blitzer on *CNN* in November 2016, that waterboarding is not torture and that the United States should use the tactic on terrorism suspects. Echoing the Bush Administration legal logic used to authorize torture, Cotton claimed:

“If experienced intelligence officials come to the President of the United States and say we think this terrorist has critical information and we need to obtain it and this is the only way we can obtain it—it's a tough call...Donald Trump's a pretty tough guy, and he's ready to make those tough calls.”³¹

Senator McCain pushed back on calls to revisit torture as official policy. The same month as Cotton's *CNN* interview, McCain informed an audience at the Halifax International Security Forum, “I don't give a damn what the president of the United States wants to do. We will not waterboard. We will not torture people...it doesn't work.” McCain threatened that if the any official tried to reinstitute a torture policy, the decision would face legal action.³² Additionally, after a draft executive order leaked that suggested the Trump Administration was exploring the idea of reviving torture, Republican congressional leadership resoundingly voiced its opposition.³³

Of the seventy-eight Senators who voted in favor of the McCain-Feinstein amendment, all but five will remain in Congress in 2017 (depending on

³⁰ Adam Serwer, “Ayotte's Torture Amendment is Kaput.”

³¹ Christina Manduley, “Sen. Tom Cotton: Waterboarding Isn't Torture,” *CNN*, November 9, 2016, available at: <http://www.cnn.com/2016/11/09/politics/tom-cotton-waterboarding-torture>.

³² Michael Crowley, “McCain Warns Trump on Torture, Waterboarding,” *Politico*, November 19, 2016, <http://www.politico.com/story/2016/11/john-mccain-trump-torture-waterboarding-231668>.

³³ Alan He, “GOP Leaders Speak Out Against Torture After Trump Comments,” *CBS News*, January 26, 2017, available at: <http://www.cbsnews.com/news/gop-leaders-come-out-against-torture-after-trump-comments/>.

President Trump's appointments), and those five (three Democrats and two Republicans) departing will all be replaced by Democrats, who would likely vote against any attempts to overturn the amendment.³⁴ Even if some Senators went against their earlier vote, these numbers would probably defeat any pro-torture bill proposed. This, plus the Congressional presence of senior and stalwart anti-torture voices such as McCain and Feinstein makes a legislative action to overturn the ban unlikely for the time being. But given the precarious nature of reliance on individual Senators and the sensitivity of Congress to significant shifts in electorate opinion and priorities (discussed in more depth below), as well as the Republican majorities in both the House and Senate who are more likely to agree to a policy preference of a Republican president, there may be a danger to the prohibition of torture in Congress.

Executive

While the current bars on torture block several avenues for Executive Branch actions to revive a torture policy, significant vulnerabilities still exist about possible executive action. A future president's executive order overriding a ban is one possible avenue for a return to official U.S. torture, and would likely be safe from Congressional reversal. Congress could pass an additional bill to reinstate the ban (Congress has in the past passed bills to overturn executive orders), but if the president vetoed that new bill, it would require a two-thirds majority of Congress to override the veto, which might be difficult to muster.³⁵ However, the courts could overturn an executive order that contradicted an act of Congress. In 1952, the Supreme Court reversed Harry Truman's order that nationalized the U.S. steel industry, and in 1995, a U.S. appeals court reversed Bill Clinton's order preventing government contracts with companies that replaced striking employees.³⁶ According to the Government Affairs Institute at Georgetown University, "Courts have recognized Executive Orders as having the force of law until superseded by legislation or unless they are clearly in conflict with existing law."³⁷ In

³⁴ "U.S. Senate Roll Call Votes 114th Congress-1st Session," United States Senate, available at: http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=114&session=1&vote=00209.

³⁵ Vivian S. Chu and Todd Garvey, "Executive Orders: Issuance, Modification, and Revocation" (Washington, D.C.: Congressional Research Service, 2014): 9, available at: <http://fas.org/sgp/crs/misc/RS20846.pdf>.

³⁶ Mark Koba, "Executive Orders Coming? Here's How They Work," *CNBC*, January 28, 2014, available at: <http://www.cnbc.com/2014/01/28/executive-orders-what-they-are-and-how-they-work.html>.

³⁷ Susan Sullivan Lagon, "Executive Order V. Executive Actions," The Government Affairs Institute at Georgetown University, February 27, 2015, available at: <http://gai.georgetown.edu/executive-orders-v-executive-actions/>.

Truman's case, "the Supreme Court struck down an Executive Order as directly conflicting with procedures outlined in the Taft-Hartley Act."³⁸ With such strong precedent, any executive order that attempted to reverse the clear provisions of the McCain-Feinstein amendment could face the same fate in court.

Believing torture was necessary, the Bush Administration sought to evade legal bars on torture and abuse that existed by citing the ambiguity in international legal definitions and redefining those terms.³⁹ The administration's legal interpretation would not consider enhanced interrogation techniques torture or abuse. A future president might attempt to repeat this, seeking to exploit any ambiguity in the law to out-define the ban on torture. However, the McCain-Feinstein amendment is not vague in its requirements—while it states the law does not allow torture and abusive interrogation, it also limits all interrogation methods for military and intelligence agencies to the Army Field Manual.⁴⁰ This limitation prevents the type of legal wrangling done by the Bush Administration team over the definition of torture.

Nonetheless, adding additional techniques to the Army Field Manual is also a risk. The McCain-Feinstein amendment, which restricts all national security interrogations to the tactics listed in the Manual, mandates review of the Manual every three years. This is done "to ensure [it]...complies with the legal obligations of the United States and reflects current evidence-based, best practices for interrogation that are designed to elicit reliable and voluntary statements and do not involve the use or threat of force."⁴¹ However, some would likely argue that several enhanced interrogation techniques did not use or threaten force (sleep/sensory deprivation or temperature manipulation, for example). Since there is a process in place for changing the Manual, it seems conceivable that tactics could be added to the Manual that would contravene the intention of, but stay within the requirements of the McCain-Feinstein amendment. The mandated review, conducted by "the Secretary of Defense, in coordination with the Attorney General, the Director of the Federal Bureau of Investigation, and the Director of National Intelligence" might prevent these additions, especially since all of these positions require Congressional confirmation (if Congress maintains its anti-torture bent).⁴² However, if

³⁸ *Ibid.*

³⁹ U.S. Senate Committee on Armed Services, *Inquiry into the Treatment of Detainees*.

⁴⁰ Reaffirmation of the Prohibition on Torture, amendment to the National Defense Authorization Act for Fiscal Year 2016.

⁴¹ *Ibid.*

⁴² *Ibid.*

tactics are added to the Manual in a way to evade review, or if Congress confirms pro-torture officials, adding abusive tactics to the Army Field Manual could be an avenue for an official (albeit limited) torture policy. The Trump Administration's draft executive order explored this option, as did CIA Director Mike Pompeo during his confirmation process.⁴³

There is also the possibility of exploiting the questionable tactics already listed in Appendix M of the Manual. As noted above, Appendix M currently allows the use of interrogation tactics that can constitute abuse or torture (especially if used in concert or for extended periods) such as solitary confinement, sensory deprivation, and sleep deprivation. While the Obama Administration has forsworn misusing the tactics allowed, with the appointment of a pro-torture Secretary of Defense and/or CIA Director, officials may exploit these ambiguities.

Additionally, if a president nominates and Congress approves individuals for top positions who advocate the use of torture, or are ambivalent to its prohibition the debate could shift, both in the populous and in Congress, potentially creating enough of an impact to overturn the bars that currently exist. Trump's nominees for leadership positions at the Department of Defense, the Department of State, the Justice Department, the Department of Homeland Security, and the CIA have all rejected torture and/or pledged to uphold the McCain-Feinstein amendment.⁴⁴ Trump has also pledged to follow Secretary of Defense James Mattis' recommendation to not use torture.⁴⁵ However, a future president's nominees could certainly differ in their opinions on the issue.

⁴³ Spencer Ackerman, "Trump's Impending Executive Order Heralds 'Dangerous' Return to Torture, Officials Warn," *The Guardian*, January 26, 2017, available at: <https://www.theguardian.com/us-news/2017/jan/25/trump-executive-order-torture-black-sites-guantanamo-bay>.

⁴⁴ Caroline Kenny, "CIA Nominee Says He Would Disregard Trump on Torture," *CNN*, January 12, 2017, available at: <http://www.cnn.com/2017/01/12/politics/trump-cabinet-picks-oppose-torture/>; Editorial Board, "Trump's Nominees" Are Right: The United States Can't Go Backward on Torture," *Washington Post*, January 13, 2017, available at: https://www.washingtonpost.com/opinions/global-opinions/trumps-nominees-are-right-the-united-states-cant-go-backward-on-torture/2017/01/13/72c47cfc-d9ab-11e6-9a36-1d296534b31e_story.html;

⁴⁵ Cameron Joseph, "President Trump Says James Mattis Will 'Override' His Own Views on Torture," *Daily News*, January 27, 2017, available at: <http://www.nydailynews.com/news/politics/trump-mattis-override-views-torture-article-1.2957473>.

Judicial

A future president could also bring a challenge in the courts, asserting executive privilege over detention and interrogation issues in an attempt to reverse the ban. The Bush Administration asserted this privilege repeatedly, such as in Bush's signing statement to the Detainee Treatment Act, referenced above. The Obama Administration claimed executive privilege on detention issues, although not nearly as expansively as the Bush Administration, and not to advocate coercive interrogation techniques.⁴⁶

Even so, the Supreme Court has established judicial precedent rejecting executive claims that the Geneva Conventions do not protect imprisoned terrorism suspects or individuals captured in armed conflicts against terrorist or insurgent groups. In doing so, the court rejected unbounded executive privilege over the treatment of those prisoners during war. In *Hamdan v. Rumsfeld*, the court decided that Common Article 3, which regulates military conduct toward prisoners in non-international armed conflict, covered U.S. prisoners in the war on terror (even if not part of a regulated armed force).⁴⁷ This includes a prohibition on "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment."⁴⁸ President Bush subsequently issued an executive order interpreting U.S. obligations under Common Article 3 to exclude the CIA's interrogation program, and a future president may follow his lead.⁴⁹ Nevertheless, courts may still refer back to *Hamdan* to decide future cases, asserting that a policy reinstating torture and abuse would violate those obligations and choosing to reject claims of executive privilege over interrogation issues.

More recently, the U.S. Court of Appeals for the Fourth District decided that a lawsuit brought by victims of torture could proceed against contractors responsible for their torture at Abu Ghraib. In his concurring opinion to the

⁴⁶ Jenna McLaughlin, "Obama Has Threatened Vetoes Over Guantanamo Before, and Caved In Every Time," *The Intercept*, October 19, 2015, available at: <https://theintercept.com/2015/10/19/obama-has-threatened-vetoes-over-guantanamo-before-and-caved-in-every-time/>.

⁴⁷ *Hamdan v. Rumsfeld, Secretary of Defense, et al.*, (2006), available at: <http://www.supremecourt.gov/opinions/05pdf/05-184.pdf>.

⁴⁸ "Convention (III) Relative to the Treatment of Prisoners of War," International Committee of the Red Cross, Geneva, August 12, 1949, available at: <https://www.icrc.org/ihl/WebART/375-590006>.

⁴⁹ Executive Order 13440 of July 20, 2007, Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, *Code of Federal Regulations*, Title 3 (2007), available at: <http://fas.org/irp/offdocs/eo/eo-13440.htm>.

court's unanimous decision, Judge Henry Floyd wrote, "While executive officers can declare the military reasonableness of conduct amounting to torture, it is beyond the power of even the President to declare such conduct lawful," adding:

"The fact that the President—let alone a significantly inferior executive officer [likely a reference to White House lawyers]—opines that certain conduct is lawful does not determine the actual lawfulness of that conduct."⁵⁰

Therefore, in addition to *Hamdan*, this decision provides further ammunition to forestall any return to a torture policy or to challenge a policy if it implemented. Whether any executive challenges are accepted by the courts, lawsuits against individual perpetrators of torture and abuse may deter future abuses. American courts have ruled that torture victims' suits can proceed against Mitchell and Jessen, the psychologists who devised and applied the CIA's EIT program, and CACI Premier Technology, Inc., the government contractor whose employees were partially responsible for the abuses at Abu Ghraib.⁵¹ Even if these cases do not result in judgments for the plaintiffs, they open a path for victims to sue their torturers in U.S. courts, and therefore the threat of civil liability may deter future torture and abuse. While judicial decisions may not prevent a return to an official torture policy, it is unlikely that once enacted, such a policy would survive judicial review.

Other Factors

Public Opinion

One sign that torture could make a return is the significant support for it amongst the American public, which has remained at high levels for over a decade. A Pew poll in 2004 showed that when given the scenario "Torture to gain important information from terrorists can be justified" fifteen percent responded Often and twenty-eight percent responded "Sometimes," and in 2011, 19 percent responded "Often" and thirty-four percent responded

⁵⁰ "No. 15-1831," *United States Court of Appeals for the Fourth Circuit* (2016): 34, available at: https://ccrjustice.org/sites/default/files/attach/2016/10/98_10-21-16_Opinion-Vacating-Remanding_o.pdf.

⁵¹ David Cole, "Will These 2 Court Cases Finally Hold Our Torturers Accountable?" *The Nation*, May 10, 2016, available at: <http://www.thenation.com/article/will-these-two-court-cases-finally-hold-our-torturers-accountable/>.

“Sometimes.”⁵² In 2014, a *Washington Post/ABC News* poll asked “Looking ahead, do you feel that torture of suspected terrorists can often be justified, sometimes justified, rarely justified, or never justified?” and seventeen percent of respondents answered “Often justified” while forty percent answering “Sometimes justified.”⁵³ This year, respondents to a similar question of “How do you feel about the use of torture against suspected terrorists to obtain information about terrorism activities?” answered twenty-five percent “Often justified,” and thirty-eight percent “Sometimes justified.”⁵⁴

These polls show that respondents who identify as Republicans favor the use of torture much more than those who identify as Democrats, a dynamic we saw evidence of in the 2016 election as well (both Bernie Sanders and Hillary Clinton vehemently rejected the use of torture).⁵⁵ Experts have pointed out that “public opinion on torture follows the same pattern of partisan ‘sorting’...where partisan adherents readjust their beliefs on issues to correspond with signals they hear from party elites.”⁵⁶ As the president and many within the Republican majority seek to advocate and normalize the practice of torture, these trends may continue. There is some evidence to show that Americans’ endorsement of torture declines when asked about specific techniques (such as “punching/kicking” or waterboarding),⁵⁷ or when presented with other options to elicit intelligence (when asked if the government “should not use torture if we think there may be other ways to obtain information about terrorists,” for example).⁵⁸ However, the level of overall support of torture of suspected terrorists does indicate that the

⁵² “United in Remembrance, Divided over Policies,” Pew Research Center, September 1, 2011, available at: <http://www.people-press.org/2011/09/01/united-in-remembrance-divided-over-policies/#torture-chart>.

⁵³ “Washington Post-ABC News Poll December 11-14, 2014,” *Washington Post*, January 4, 2015, available at: https://www.washingtonpost.com/politics/polling/washington-postabc-news-poll-december-1114/2015/01/04/b6f831be-8518-11e4-abc5a3d7b3b20b8_page.html.

⁵⁴ Ipsos, “Ipsos Poll Conducted for Reuters.”

⁵⁵ Dan Merica, “Torture Report Splits 2016 Democrats,” *CNN*, available at: <http://www.cnn.com/2014/12/11/politics/2016-democrats-torture/>; Shushannah Walshe, “Hillary Clinton Speaks Out Against U.S. Use of Torture,” available at: <http://abcnews.go.com/US/hillary-clinton-speaks-us-torture/story?id=27654296>.

⁵⁶ Paul Gronke, Darius Rejali, and Peter Miller, “No, Americans Aren’t ‘Fine with Torture.’ They Strongly Reject It,” *Washington Post*, December 11, 2014, available at: <https://www.washingtonpost.com/posteverything/wp/2014/12/11/no-americans-arent-fine-with-torture-they-strongly-reject-it/>.

⁵⁷ *Ibid.*

⁵⁸ “Results of a National Survey: Views of the American Public about the Use of Torture,” Belden Russonello Strategists LLC, January 2015, available at: <http://detaineetaskforce.org/wp-content/uploads/2015/01/TCP-Poll-for-release-Jan-2015.pdf>.

majority of the American public could be supportive of a reversal of policy on torture.

The threat or occurrence of a future terrorist attack would also likely tip public opinion toward approving torture. As retired U.S. Air Force general and law professor Charles Dunlap Jr. notes, “Don’t be surprised if the next poll shows that a sizable percentage of the American public would still support harsh interrogation techniques...in an extreme situation or especially in the aftermath of a serious terrorist attack by ISIL or al-Qaida.”⁵⁹ There is also evidence that media portrayals of torture being effective can make people more willing to support its use. Researchers at American University have shown that after viewing media in which torture is portrayed as effective, “participants...had a higher level of stated support for torture post-test.” The study showed that not only did participants express more support for torture, but also that they were also willing to act to express that support. The researchers go on to note that “dramatic depictions of torture where it is shown to be effective can change both stated attitudes about the practice and willingness to behaviorally support torture via signing a petition in support of it.”⁶⁰ An increased approval of torture among the electorate, whether because of political influence from party elites, a terrorist attack on the United States, or media portrayals of torture being effective, would likely influence U.S. government action on this issue and make maintaining the prohibition more difficult.

Intelligence Leaders and U.S. Military

Statements from current and former CIA leadership and military leadership are also important to examine. Michael Hayden, CIA Director from 2006 to 2009, received media attention for his sharp response to Trump’s comments advocating torture. Hayden stated, “If any future president wants CIA to waterboard anybody, he better bring his own bucket, because CIA officers aren’t going to do it.”⁶¹ John Rizzo, the acting CIA counsel who gave legal approval for the implementation of enhanced interrogation techniques, has

⁵⁹ Brittany Lyte, “Americans Have Grown More Supportive of Torture,” *Five Thirty Eight*, December 9, 2014, available at: <http://fivethirtyeight.com/datalab/senate-torture-report-public-opinion/>.

⁶⁰ Erin M. Kearns and Joseph K. Young, “If Torture is Wrong, What About 24?: Torture and the Hollywood Effect” (Research Paper No. 2014-0001: American University, 2014), 12, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2483131.

⁶¹ Christopher Woolf, “Ex-CIA Director to Trump: ‘Bring Your Own Bucket’ If You Want to Waterboard,” *PRI*, February 29, 2016, available at: <http://www.pri.org/stories/2016-02-29/ex-cia-director-trump-bring-your-own-bucket-if-you-want-waterboard>.

made similar statements, focusing on the political blowback faced by CIA officers “vilified as ‘torturers’ and ‘war criminals.’”⁶² Rizzo told *NBC News*:

“Many of these same CIA career officers would be ordered to go down—perhaps double down—on that perilous path again? Who could blame them for refusing to expose themselves and their families to a reprisal someday of the ordeal they have had to endure? I hope and trust no CIA director—or its lawyer—would countenance such an order.”⁶³

Hayden, who is also a retired Air Force General, noted that if given the order to kill the family members of terrorists (as Trump promised on the campaign trail), “the American armed forces would refuse to act,” adding, “You are required not to follow an unlawful order. That would be in violation of all the international laws of armed conflict.”⁶⁴ However, reviewing Hayden’s memoir, Charlie Savage of the *New York Times* notes that since Hayden was a proponent of “enhanced interrogation techniques,” his protectiveness of the CIA and its employees are the likely root of his concerns, rather than opposition to the application of the techniques the agency used.⁶⁵

Obama Administration CIA Director John Brennan told *NBC News*, “I will not agree to carry out some of these tactics and techniques I’ve heard bandied about because this institution needs to endure...I would not agree to having any CIA officer carrying out waterboarding again.”⁶⁶ A CIA spokesperson also told *Newsweek*, “It is CIA Director Brennan’s resolute intention to ensure that Agency officers scrupulously adhere to these [McCain-Feinstein amendment] directives, which the Director fully supports.”⁶⁷ However, these statements are not as comforting as the CIA would hope. As legal analyst Marcy Wheeler observed, these guarantees specifically concern CIA officers,

⁶² Ken Dinalian, “Trump Needs His ‘Own Damn Bucket’ to Waterboard: Ex-CIA Chief,” *NBC News*, February 22, 2016, available at: <http://www.nbcnews.com/news/us-news/trump-needs-his-own-damn-bucket-waterboard-ex-cia-chief-n523576>.

⁶³ *Ibid.*

⁶⁴ Peter Holley, “Former CIA Director: Military May Refuse to Follow Trump’s Orders If He Becomes President,” *Washington Post*, February 28, 2016, available at: <https://www.washingtonpost.com/news/morning-mix/wp/2016/02/28/former-cia-director-military-may-refuse-to-follow-trumps-orders-if-he-becomes-president/>.

⁶⁵ Charlie Savage, “General Hayden’s Offensive,” review of *Playing to the Edge: American Intelligence in the Age of Terror* by Michael V. Hayden *New York Review of Books*, May 26, 2016, available at: <http://www.nybooks.com/articles/2016/05/26/general-haydens-offensive/>.

⁶⁶ Richard Engel and Robert Windrem, “Director Brennan: CIA Won’t Waterboard Again—Even if Ordered by Future President,” *NBC News*, April 11, 2016, available at: <http://www.nbcnews.com/news/us-news/director-brennan-cia-won-t-waterboard-again-even-if-ordered-n553756>.

⁶⁷ CBS Interactive, “Donald Trump Vows.”

not contractors, who after 9/11 were intimately involved with the application of torture and abuse, especially waterboarding.⁶⁸ Moreover, Brennan has been more equivocal in the past, stating in 2014 that on these issues, he would “defer to the policymakers in future times when there is going to be the need to ensure that this country stays safe if we face a similar kind of crisis.”⁶⁹

U.S. military leadership has been a bit more resolute. Former Secretary of Defense Ash Carter told *CNN*, “[T]he Department of Defense follow the Army Field Manual. It does not allow torture, and America conducts itself in accordance with its values...[F]or both effectiveness reasons and for reasons of reflecting our own values that we’re not going to do that sort of thing.”⁷⁰ In addition, General Joseph Dunford, Chairman of the Joint Chiefs of Staff under Obama, responded to questions about using torture by saying, “When our young men and women go to war, they go with our values,” noting that the military punishes those personnel who act outside those values.⁷¹ As noted above, Secretary of Defense James Mattis has also been a stalwart opponent of using torture.⁷²

Whether the CIA and U.S. military refuse to use torture because of a self-preservation instinct (fearing eventual prosecution or political blowback) or the knowledge that torture is ineffective and immoral, the result would likely be the same: The United States not officially employing torture or abusive interrogation practices. However, if the major reason these institutions oppose the use of torture is self-preservation, this does make the risk of a lapse back into torture more likely, especially if Congress legalizes the practice. Given the likelihood that a pro-torture president would appoint officials who are pro-torture or ambivalent about its prevention, this poses serious challenges to maintaining prohibition.

⁶⁸ Marcy Wheeler, “CIA Officers Didn’t Carry Out Waterboarding,” *Emptywheel*, April 11, 2016, available at: <https://www.emptywheel.net/2016/04/11/cia-officers-didnt-carry-out-waterboarding/>.

⁶⁹ Zack Beauchamp, “Obama’s CIA Chief Won’t Rule Out Torture in the Future,” *Vox*, December 11, 2014, available at: <http://www.vox.com/2014/12/11/7377977/brennan-torture-obama>.

⁷⁰ “Defense Secretary Ash Carter Says Torture is ‘Not the American Practice or Policy,’” *CNN*, March 24, 2016, available at: <https://www.facebook.com/cnnpolitics/videos/1106354836073015/>.

⁷¹ Richard Sisk, “Joint Chiefs Chairman Rejects Trump’s Claim that ‘Torture Works,’” *Military.com*, February 25, 2016, available at: <http://www.military.com/daily-news/2016/02/25/joint-chiefs-chairman-rejects-trumps-claims-that-torture-works.html>.

⁷² Kristina Wong, “Pentagon: Mattis Still Opposes Torture Despite Trump Comment,” *The Hill*, January 26, 2017, available at: <http://thehill.com/policy/defense/316356-mattis-remains-opposed-to-torture-pentagon-says>.

Other Views

Some lawyers have argued that there are enough restrictions in place to prevent the return to an official torture policy.⁷³ These arguments largely focus on the possible actions of President Trump, but are useful to examine as applicable to any future administration.

A good distillation of these arguments comes from Jack Goldsmith, former Bush Administration Assistant Attorney General and current Harvard Law School professor. Goldsmith cautions against prematurely panicking about the revitalization of a torture policy under President Trump. He writes that because of the bureaucracy's commitment to the law and the fact that most officials are not political appointments, "I do not believe that the armed services under Trump will carry out orders to...unwind the interrogation constraints in the Army Field Manual, because doing so would be clearly unlawful."⁷⁴ He also argues that internal constraints exist in the CIA and U.S. military in the form of inspectors general. The person in this position Goldsmith notes, "sees himself or herself as beholden to Congress as the Executive, and has authority to conduct basically any investigation and report those findings to Congress," adding that "The CIA Inspector General effectively ended waterboarding long before the practice became public."⁷⁵

After the election, Goldsmith also revisited an argument he made in his 2012 book *Power and Constraint* arguing that a torture policy was unlikely. He noted that the law governing interrogation policy was significantly constrained during the Bush Administration, and that the law is "even stricter now."⁷⁶ He also argued that the Bush Administration lawyers who created that administration's torture policy, Jay Bybee, John Yoo and others, faced "brutal recriminations," and that government lawyers are now more circumspect.⁷⁷ Furthermore, he stated that the CIA experienced enough political blowback and abandonment over its use of torture from the rest of

⁷³ Adam Serwer, "Can Trump Bring Back Torture?" *The Atlantic*, January 26, 2017, available at: <https://www.theatlantic.com/politics/archive/2017/01/trump-torture/514463/>.

⁷⁴ Jack Goldsmith, "Libertarian Panic, Unlawful Action, and the Trump Presidency," *Lawfare*, November 22, 2016, available at: <https://www.lawfareblog.com/libertarian-panic-unlawful-action-and-trump-presidency>.

⁷⁵ *Ibid.*

⁷⁶ Jack Goldsmith, Twitter post, November 17, 2016, 3:32 p.m., available at: <https://twitter.com/jackgoldsmith/status/799349483704303617>.

⁷⁷ Goldsmith, Jack, *Power and Constraint: The Accountable Presidency after 9/11* (New York: W.W. Norton & Company, 2012), 238.

the U.S. government that the Agency would be reluctant to use torture and court controversy again.⁷⁸

Goldsmith may be right that the reaction to the CIA's use of torture has made it more adverse when approaching interrogation. However, the illegality of torture is what is driving this turn. As noted above, the CIA's and military's reluctance to engage in torture based on a fear of legal reprisal is not so encouraging, and even increases the likelihood that those entities would revert if U.S. law re-legalized the practice. The major concern of the CIA and Department of Justice after 9/11, for example, was making sure that the CIA had legal cover for its use of torture and abuse.⁷⁹ If the U.S. government makes torture official policy again, the hesitations that Goldsmith assumes the CIA would show may not materialize. Additionally, Goldsmith's claim that the power of inspectors general would prevent a return to torture is flawed. Inspectors general investigate past conduct, examining if/where that conduct violated guidelines or laws. For example, a CIA Inspector General report on post-9/11 interrogation from October 2003 examined if interrogators exceeded legal guidelines in interrogating detainee Abd al-Rahman Al-Nashiri, not the legality or efficacy of the approved techniques used on him.⁸⁰ In addition, even if an oversight report did indeed end the CIA's use of waterboarding, it happened after interrogators had already used that tactic.

Similarly, Goldsmith's assertion that future officials would be less likely to approve torture because of the harsh consequences faced by torture-approving lawyers, is suspect. While it is true that the lawyers Goldsmith mentions by name, Bybee and Yoo, earned public scorn for their legal decisions, both have continued to enjoy fruitful careers. Bybee is a U.S. Circuit Court of Appeals judge, while Yoo is the Emanuel S. Heller Professor of Law at the University of California's Berkeley Law School and a regular contributor to *The National Review*.⁸¹ Both The Federalist Society and the American Enterprise Institute list these judges as experts.⁸² These hardly

⁷⁸ Ibid, 239.

⁷⁹ U.S. Senate Committee on Armed Services, *Inquiry into the Treatment of Detainees*.

⁸⁰ John L. Helgerson, "Report of Investigation: Unauthorized Interrogation Techniques at [Redacted]," Office of the Inspector General, Central Intelligence Agency, October 29, 2003, available at: <https://www.cia.gov/library/readingroom/docs/0006541525.pdf>.

⁸¹ Andrew Cohen, "Torture Memo Author, Now a Federal Judge, Still Justifying Torture," *The Atlantic*, February 9, 2013, available at: <http://www.theatlantic.com/national/archive/2013/02/torture-memo-author-now-a-federal-judge-still-justifying-torture/272998/>; "John Yoo," University of California Berkeley Law, available at: <https://www.law.berkeley.edu/our-faculty/faculty-profiles/john-yoo/>.

⁸² "John Yoo," *National Review*, available at: <http://www.nationalreview.com/author/john-yoo/>; "Professor John C. Yoo," The

seem like dire consequences that would scare others in the future. In fact, virtually no one in the CIA or Bush Administration faced legal consequences for the use of torture, even those who exceeded the lax guidelines in place (the CIA even promoted some).⁸³ If Goldsmith sees threats of accountability as a bulwark against future torture policies, he is likely mistaken.

Conclusion

While an American torture policy revival may not become reality under a President Trump, the country has not fully closed the door for future U.S. presidents. Reliance on an anti-torture majority in Congress may prevent this eventuality in the short term, but even so, there are gaps that may allow an erosion of the ban. Even today, the susceptibility of the Army Field Manual to changes or the exploitation of its ambiguities is a major weakness. More long-term, the public's favorable view of torture and its possible influence is another danger to the prohibition. Without credible, powerful anti-torture voices in the government, Congress could reverse course and/or not move to prevent executive action to revive a torture policy. Executive action taken today, such as the appointment of government officials who are either pro-torture or ambivalent about a ban, would likely push the government closer to overturning it.

The effects of an official torture policy, especially the likelihood of a return to torture, deserve more analysis and debate than this article allows.

Constitutional scholars and lawyers would likely have much more to add on the separation of powers issues referenced. Also, U.S. policies of sending suspects to other countries for coercive interrogation or transferring prisoners to foreign custody knowing they will be abused are also possibilities that deserves more examination, especially given accusations that they are already happening.⁸⁴

Federalist Society, available at: <http://www.fed-soc.org/experts/detail/john-c-yoo>;

"John Yoo," American Enterprise Institute, available at:

<https://www.aei.org/scholar/john-yoo/>.

⁸³ Adam Goldman and Matt Apuzzo, "CIA Officers Make Grave Mistakes, Get Promoted," *NBC News*, February 9, 2011, available at:

http://www.nbcnews.com/id/41484983/ns/us_news-security/t/cia-officers-make-grave-mistakes-get-promoted/#.WDXzIPorKM8.

⁸⁴ Shane Harris and Nancy A. Youssef, "'They're Being Tortured': U.S. Ally Accused of Abusing ISIS Prisoners," *The Daily Beast*, November 29, 2015, available at:

<http://www.thedailybeast.com/articles/2015/11/29/i-m-sure-they-re-being-tortured-u-s-ally-accused-of-abusing-isis-prisoners.html>; Jeremy Scahill, "The CIA's Secret Sites in Somalia," *The Nation*, December 10, 2014, available at:

<http://www.thenation.com/article/cias-secret-sites-somalia/>.

This article focused on potential weak points in the ban on torture. Its aim was not to expose weak points for exploitation by proponents of coercive interrogation methods, but rather to illuminate aspects of torture, so that its opponents can solidify its prohibition. The empirical evidence presented demonstrates there are serious gaps in the ban on torture that could facilitate torture's re-emergence as official policy and facilitate a reversal of progress on this issue.