Background: Current Law and Facts on Torture

In light of presidential candidates' discussion of waterboarding, torture, and "enhanced interrogation," we want to ensure that journalists are aware of some recent, underreported legal and factual developments on these issues. **We urge reporters covering these topics in the campaign to consider the following:**

- **Congress changed the law in 2015 to limit all national security interrogations to the techniques listed in Army Field Manual 2-22.3, Human Intelligence Collector Operations, which explicitly forbids waterboarding and other "enhanced interrogation." Candidates who promise to brutalize detainees would do so in violation of the law.**

- **Candidates who claim that "enhanced interrogation" is not torture, or that torture "works," are ignoring an extensive body of factual evidence to the contrary– found both in the Senate Intelligence Committee report on the CIA's torture program and in the report of The Constitution Project Task Force on Detainee Treatment. Even the CIA no longer defends the claim that torture was necessary to disrupt terrorist plots and save lives.**

Legal changes

Section 1045 of the 2016 National Defense Authorization Act, signed into law in November 2015, contains a provision designed to prevent any future President from authorizing torture or cruel treatment. The provision, a slightly modified version of an amendment introduced by Senators John McCain and Dianne Feinstein and passed by an overwhelming bipartisan majority of Senators (78-21),[1] has four main features:

- First, the law extends the 2005 Detainee Treatment Act by restricting *all* U.S. government agents – not just the military – to only those interrogation techniques listed in the Army's Field Manual on human intelligence collection.[2] The Field Manual explicitly bans torturous "enhanced interrogation techniques" such as waterboarding.
- Second, it requires that the Army's interrogation manual remain public, and that any changes to it be made public prior to taking effect.
- Third, it mandates a "thorough review" of the Army's manual – considering best practices for interrogations – to ensure that the methods the manual sets out are lawful and do not allow for the use or threat of force. This review must be completed within three years of section 1045 becoming law and recur every three years thereafter.
- Finally, it requires prompt access by the International Committee of the Red Cross to any wartime detainee held by the U.S. government.

Candidates who promise to subject detainees to waterboarding, unspecified torture techniques that are "worse than waterboarding," or other secret "enhanced interrogation techniques" cannot fulfill those promises without persuading Congress to repeal this law, or directly violating it. The former is extremely unlikely given the wide, bipartisan margin by which the McCain-Feinstein Amendment passed. Candidates should be asked whether their support for torture means that they would disobey the laws outlawing it, and about the serious separation of powers issues that doing so would raise.

Factual developments:

In December 2014, the Senate Select Committee on Intelligence released the 528 page Executive Summary of its still-classified, 6700 page report on the CIA torture program. The report, based almost entirely on CIA documents, concluded that:

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[1] The original text of the amendment (S. Amendment 1889) is available here. A record of the Senate's roll call vote on the amendment is available here. Of active Presidential candidates who serve in the Senate, Senator Ted Cruz and Senator Bernie Sanders voted for the McCain-Feinstein Amendment. Senator Marco Rubio did not vote, but said in a statement that he opposed the amendment.

[2] There is an exception for law enforcement and immigration officials, who in their day to day work can continue to use authorized, non-coercive interrogation and interview methods not specifically listed in the Army manual.

- The "enhanced interrogation techniques" and conditions of confinement at CIA black sites were far more brutal than the CIA had represented to the Justice Department, Congress, and other policymakers. At times, CIA used techniques that were not approved by the Justice Department or CIA Headquarters.
- The CIA "enhanced interrogation techniques" were designed, applied, and evaluated by contract psychologists who lacked experience in interrogation and had a financial conflict of interest. They received $81 million from the CIA before their contracts were terminated in 2009.
- The CIA provided inaccurate information about the effectiveness of "enhanced interrogation" to the Executive Branch and the media, and impeded oversight by Congress and the CIA Inspector General.
- The Office of Legal Counsel memos on the legality of "enhanced interrogation techniques" relied heavily on materially false CIA factual representations on: "(1) the conditions of confinement for detainees, (2) the application of the CIA's enhanced interrogation techniques, (3) the physical effects of the techniques on detainees, and (4) the effectiveness of the techniques."[3]

The Senate's findings closely parallel the unanimous conclusions of Constitution Project's bipartisan, independent Task Force on Detainee Treatment, released in 2013. The Task Force did not have access to classified CIA documents; rather, it based its conclusions on a thorough examination of available public records and over 100 interviews.

The CIA has criticized the Senate report, but conceded in its official response, originally submitted in June 2013, that:

- The CIA "was unprepared and lacked core competencies" to detain and interrogate suspected terrorists, which "resulted in significant lapses in the Agency's ability to develop and monitor its initial detention and interrogation activities."
- CIA officers made inaccurate statements about the program to the Office of Legal Counsel (although the CIA maintains that this did not occur "consistently or intentionally").
- It "[a]llowed a conflict of interest to exist wherein the contractors who helped design and employ the enhanced interrogation techniques also were involved in assessing the fitness of detainees to be subjected to such techniques and the effectiveness of those same techniques."
- The Agency "[f]ailed to perform a comprehensive and independent analysis on the effectiveness of enhanced interrogation techniques."
- The Agency no longer takes any "position on whether intelligence obtained from detainees who were subjected to enhanced interrogation techniques could have been obtained through other means or from other individuals," as this is "unknowable."

Moreover, the CIA's June 2013 response conceded that "we were not able to perform a comprehensive fact check" because of the Senate report's length, and that it was "difficult to address its flaws with specific technical corrections." In December 2014, the CIA issued a number of factual corrections to its June 2013 response, although it stated that "the main points in our response remain relevant." In February 2016, Mark Martins, the chief prosecutor for the Guantanamo Bay military commissions, stated in a declaration reported by the *Washington Post* that "the Prosecution will stipulate that the facts contained within the [Senate report's] Executive Summary were accurate descriptions of what occurred," although taking no position on the report's "opinions and conclusions."

Candidates who claim that "enhanced interrogation" is not torture or that torture "works" should be confronted with the extensive factual evidence showing the opposite. Even the CIA no longer claims that techniques like waterboarding "saved lives" or disrupted terrorist plots, nor does the Executive Branch deny that "enhanced interrogation" resulted in severe pain and prolonged suffering.

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[3] For further discussion of how the Senate report contradicts the factual claims in the OLC memos, and undermines their conclusion that "enhanced interrogation" was not torture, see this article.