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The Return of Torture?

By Kelley Beaucar Vlahos
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After the June 28 attack that killed 45 people at Turkey’s Ataturk airport in Istanbul, Republican presidential candidate Donald Trump, never afraid to take his rhetoric up a notch, reiterated his call for torturing suspected terrorists. “We’re going to have to do things that are unthinkable almost,” he told a New Hampshire television reporter.

This came after he had suggested in March—before reversing himself—that families of terrorists might be tortured, too. Following a backlash in the press, Trump assured voters during the contentious Republican primaries that he would not ask anyone to break the law in order to torture. But he also said he would “strengthen the laws so that we can better compete” with the tactics of the Islamic State.

Then, just after the attack in Turkey, Trump said in an Ohio campaign appearance that eliminating practices like waterboarding—which President Obama did when he strengthened the ban on torture in 2009, and which Congress reinforced in the National Defense Authorization Act of 2016—was a sign of weakness: “Can you imagine [ISIS fighters] sitting around the table or wherever they’re eating their dinner, talking about the Americans don’t do waterboarding and yet we chop off heads? They probably think we’re weak, we’re stupid, we don’t know what we’re doing, we have no leadership. You know, you have to fight fire with fire.”

He told CNN around the same time that he intended to “change our law on, you know, the waterboarding thing,” in order to “be able to fight at least on an almost equal basis.”

On this front, the American people appear to be with Trump. In March, amid terrorism attacks in Europe, and with the San Bernardino massacre still fresh on everyone’s minds, two-thirds of respondents in a Reuters/Ipsos poll said that torturing suspects could be justified “to obtain information about terrorism.” Some 82 percent of Republicans agreed; 53 percent of Democrats, too. Only 15 percent of respondents said torture was never justified.

This follows years of similar polling in which Americans have signaled their approval of “enhanced interrogation techniques,” including methods such as waterboarding. But it wasn’t always that way. In polling conducted in 2005, Americans had reservations about specific practices—including waterboarding—and disapproved in much greater numbers, according to Gallup.

“The public polling depends very heavily on the way the question is phrased,” says Katherine Hawkins, senior counsel at the Constitution Project, which has been on the forefront of the legal fight against detainee torture and abuse. Yet lately “there have been some polls that show pretty disturbingly high levels of support for torture.”

So the stage is set as the country prepares to turn the White House over to a new commander in chief in January. Trump clearly thinks that current events bolster his tough talk on the campaign trail. “I am the law-and-order candidate,” he insisted at one press event. He toggles easily between threats: ISIS terrorists, undocumented Hispanic criminals, lone gunmen picking off police in the streets. Trump will deal with them all with a swift blow of force. Strength, he has said numerous times, is the only language the enemy knows. And for ISIS, waterboarding is “not nearly tough enough, okay?”



If this is more than red meat for the base—if Trump is serious about turning back time to the days after 9/11, when White House lawyers wrote the infamous “torture memos” to help ensure government officials could not be charged with war crimes for the way they were interrogating detainees—then he better prepare for some real bureaucratic resistance, Beltway-style. He’ll find a much more complicated landscape in official Washington today, one filled with lawsuits, never-ending investigations, a number of high-level military and CIA officials wary of scrutiny, and political winds in the nation’s capital that appear—at least for now—to favor keeping things the way they are.

“You have serious players like [CIA Director] John Brennan saying that if they got orders to reinstitute torture policies then they would refuse to follow them,” notes John Kiriakou, a former CIA officer who turned against waterboarding and paid the price. Kiriakou went to prison for two years for confirming to a journalist the name of an agent who was involved with torture. Today he is an outspoken critic of the CIA’s role in employing enhanced interrogation techniques during the War on Terror.

Brennan has said publicly that there will be no more waterboarding under his watch. Former CIA Director Michael Hayden has taken the same line, telling the media: “If any future president wants CIA to waterboard anybody, he better bring his own bucket, because CIA officers aren’t going to do it. Multiple investigations, grand juries, presidential condemnations, and congressional star chambers have a way of doing that to you.”

Also opposing a return to torture is former CIA Director David Petraeus, who ironically was a commander of the multinational forces in Iraq during the period in which Joint Special Operations Command was operating its own secret interrogation sites, including the infamous Camp Nama. Petraeus has pointed to blowback against the interrogation techniques used in Abu Ghraib and elsewhere, techniques that went beyond what is sanctioned in the Army Field Manual, which bans “use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind.” (These restrictions were extended to the rest of the government, including the CIA, under President Obama’s 2009 Executive Order 13491, which requires that all U.S. policy and practice be consistent with these standards, as well as those outlined in other federal laws and under the Geneva Convention.)

“It is nonbiodegradable. It took place there. It is never going away,” Petraeus said of Abu Ghraib in 2014. “It’s always on the Internet and it causes problems to this day.” He has also stood squarely with Sen. John McCain (R-Ariz.), a former POW, against waterboarding.

So has retired Marine Gen. James Jones, a former Marine Corps commandant, who came out against the practice for the first time after Trump repeated his desire to see it reinstated. “There is such a thing as an illegal order, and I deeply believe in the Geneva Conventions,” he said at the Bipartisan Policy Center in late June.

Though he doesn’t trust the system, Kiriakou guesses that the security establishment is as wary of Trump’s exhortations on the campaign trail as he is himself. “Maybe they would refuse to [torture] for altruistic reasons, but more likely they would refuse to do it because they are students of history. They won’t want to have to take the fall.”

“Within the CIA, there are still many people who participated in and continue to defend the torture program—but there may at least be a sense that the risks of disclosure and investigation outweigh the benefits,” added the Constitution Project’s Hawkins.

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The Senate, led in part by Sen. Dianne Feinstein (D-Calif.), ranking member of the Intelligence Committee, has engaged the CIA in a rigorous, years-long inquiry into the agency’s practices after the 9/11 attacks, culminating in a 6,700-page report completed in 2014. The 525-page executive summary—the only part of the report that has been released publicly—reveals a shocking degree of what could only be described as torture by the CIA. Furthermore, it concludes that such practices did not elicit any actionable intelligence that could not have been gleaned through other, less coercive means.

The summary describes beatings, sexual threats, intense waterboarding, black sites, and, yes, “rectal feeding.” The committee concluded that this was going on under the noses of Congress, the Justice Department, the White House, and cabinet heads. According to the report, the CIA lied to each of these authorities about what it was doing and about how ineffective enhanced interrogation techniques were overall.

The full report has yet to be made public, despite Freedom of Information Act requests. It was sent to all pertinent agency heads, including the White House and the CIA, but no one knows who, if anyone, has actually read the entire thing. This spring, it was reported that the CIA inspector general’s copy had been “mistakenly” destroyed. This came on the heels of a year-long fight between Feinstein and Brennan over the CIA’s spying on Senate computers, and counterattacks by the CIA that the committee had grabbed material out of the agency’s own files.

The back-and-forth may have sucked the life out of the real issue—torture—but Hawkins says the committee is still working on the fight, and groups like her own and the American Civil Liberties Union keep pushing for more of the report to be released.

“It was definitely helpful,” says Marcy Wheeler, an independent national-security journalist who runs the popular blog Emptywheel, in an email interview. “Even just the details, like introducing ‘rectal feeding,’ revealed new details about how sadistic and wanton the program was.” Yet so much more has been held back, including documents that might have implicated the presidency. “Without more transparency on that, we won’t really be able to prevent the return of torture,” she charges.

Still, the release of the summary emboldened bipartisan critics and sparked legislative action in the typically gridlocked Congress. Senator McCain said at the time of its release that the report confirmed much of what he always believed was American “torture” policy, but he was particularly enraged that the CIA was holding back on the plain truth, that enhanced interrogation techniques were never that effective.

“What might come as a surprise, not just to our enemies, but to many Americans, is how little these practices did to aid our efforts to bring 9/11 culprits to justice and to find and prevent terrorist attacks today and tomorrow,” he said in a Senate floor statement in December 2014. “That could be a real surprise, since it contradicts the many assurances provided by intelligence officials on the record and in private that enhanced interrogation techniques were indispensable in the war against terrorism.”

He and Senator Feinstein proposed, and easily passed, an amendment to the NDAA that limits all interrogation techniques by anyone in the U.S. government to what is already outlined in the Army Field Manual. It was signed by the president last year.

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Without perpetrators actually being punished for torture, there is always a danger of it sneaking back into policy, warns Kiriakou. “I think everybody got a pass and I think we’re past the Bush torture program, I don’t think anyone is going to take the fall,” he says.

There have been incremental steps toward justice. Beyond the Senate's torture report, more recently a federal court has allowed a landmark lawsuit to proceed against two psychologists who were contracted by the CIA to implement its torture program. The ACLU has brought the suit on behalf of two survivors of the program and the family of another man who died at a CIA black site.

The two former military psychologists, James Mitchell and Bruce Jessen, recently admitted in court filings that they administered techniques such as "walling"—grabbing someone by the collar and slamming him into a wall—facial and abdominal slaps, facial holds, sleep deprivation, and waterboarding to the CIA's first high-profile detainee, Abu Zubaydah, whom we know from the Senate's report was waterboarded a total of 83 times in one month. The men also admitted to confining him to a box the size of a coffin. This was the first time that individuals connected to the CIA program were forced to reveal their actions in court. They admit they were paid a total of \$81 million by the agency for the work.

But those who follow the torture issue aren't so naïve as to think the government has fully learned its lessons. Abuses continue. As Hawkins points out, Obama's 2009 directive ended the CIA's secret prisons overseas, otherwise known as black sites, but it did not legally address the practice of handing over prisoners to other countries for interrogation, which is known as rendition. "Under the Obama administration, transfers of detainees to countries with poor human-rights records have continued, largely under the radar," she says. "There have been some attempts to obtain meaningful assurances of humane treatment and monitor compliance, but these have been uneven, and a future administration seeking torture loopholes could easily abandon them."

Which brings us back to Trump's vow to "strengthen the laws so that we can better compete" with ISIS's brutal tactics. Right now, the letter of the law is against torture, and Congress does not seem inclined to loosen restrictions explicitly. But as we saw with the parsing of language during the Bush administration—i.e., the John Yoo memos—eager officials often see the law as pliable.

"Consider how few people realize that near-drowning was also used by CIA, dubbed 'dousing,' and achieved roughly the same effect" as waterboarding, says Wheeler. "They could do it pretty easily. Just name it something different."

When asked about Hillary Clinton, who is known as a hawk in the realm of war and counterterrorism, Wheeler says the Democratic nominee would "be every bit as fond of covert operations—if not more so, because she knows more about past ones—as Trump. And those tend to lead to dark places and proxy horrors."

"Will that include stuff called torture?" Wheeler asks. "Probably, though remotely distanced from U.S. actions."

Kiriakou says he fails to see hope for much change on the horizon for counterterrorism policy overall: "I've always believed that the Obama military and national-security policy was just an extension of the Bush policy, and either Clinton or Trump will simply be a continuation of

Obama.” But the CIA interrogation program the way he knew it in the early days following 9/11? That, he believes, might be a bridge too far for even the loudest chest-thumpers.

“I can’t help think that Trump is smarter than [his torture rhetoric], that he is just doing it to appeal to his base,” Kiriakou says. “He’s just too smart to reinstitute a failed and illegal policy.”

Only time, and the outcome of the election, will tell.