

Torture and Institutional Design

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ABSTRACT. This Essay discusses the creation, rise, and decline of the High-Value Detainee Interrogation Group (HIG) as a case study for how institutional design affects the implementation of international commitments. The Obama Administration created the HIG to utilize noncoercive interrogation methods that comply with international-law norms against torture while demonstrating the effectiveness of such methods to the rest of the U.S. government. But the HIG's placement within the Federal Bureau of Investigation and its dependence on other agencies in the national-security space rendered it unable to effectively promote policy change without direct support from the President. Agencies with counterterrorism as their core mission rely on coercive interrogation methods because they are more likely to produce information regarding threats—even when such information is inaccurate. This strong resistance among agencies in national security to abandoning the use of coercive methods caused the HIG to lose all its influence when the Obama Administration ended.

INTRODUCTION

Institutional design—the strategic placement of a new entity within a nation's bureaucracy—plays a crucial role in establishing the entity's mission and influence.¹ But institutional design has its limits. When the goal is to substantially alter policies that are long entrenched in the existing bureaucracy, institutional design alone will rarely suffice. Direct intervention by the chief executive and the legislature are necessary for lasting, meaningful change.

1. See, e.g., Robert Knowles, *Warfare as Regulation*, 74 WASH. & LEE L. REV. 1953, 2030–32 (2017); David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. LEGAL STUD. 413, 417 (1999) (describing how Congress's “decision to place a policy choice in the hands of one agency (as against another) will affect policy outcomes in ways that members of Congress may be able to foresee”).

This Essay uses the United States's High-Value Detainee Interrogation Group (HIG) as a case study for this phenomenon. In 2010, the Obama administration created the HIG, an interagency group housed within the Federal Bureau of Investigation (FBI), to utilize noncoercive methods while demonstrating the effectiveness of such methods to the rest of the U.S. government.² The HIG's creation was part of an effort to shift interrogation policy away from traditional, coercive practices that had led to the use of torture – a profound violation of U.S. international legal obligations.³

Examining the HIG's fate is especially useful because it was established with a single purpose – to reverse longstanding policy – and its efforts to do so manifestly foundered when Congress failed to fully write the new policy into law and the President who had championed it was no longer in office.

The HIG dispatched teams to conduct interrogations of special importance to the U.S. intelligence community.⁴ The HIG also conducted research to establish best practices on effective and lawful interrogation, and disseminated those practices to the rest of the intelligence community. The HIG was created to help ensure that national-security interrogations comply with U.S. obligations under the law of armed conflict and international human rights law. In particular, it was designed to deploy noncoercive interrogation methods and encourage their use throughout the U.S. government, while supporting research that furthers their effectiveness.⁵

Since 2017, however, the HIG has been sidelined.⁶ It is no longer deployed to interrogate high-value detainees and its research component has been starved of support and resources. The HIG's attempts to establish noncoercive techniques as the standard for interrogation have encountered strong resistance from those

2. See *High-Value Detainee Interrogation Group*, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/about/leadership-and-structure/national-security-branch/high-value-detainee-interrogation-group> [<https://perma.cc/GE9G-3QYU>] (noting High-Value Detainee Interrogation Group's (HIG) research and training components); Jeffrey F. Addicott, *The Legality of Dual Interrogations for High-Value Terrorists*, GEO. J. INT'L AFF. (Jan. 25, 2018), <https://www.georgetownjournalofinternationalaffairs.org/online-edition/2018/1/25/the-legality-of-dual-interrogations-for-high-value-terrorists-1> [<https://perma.cc/7ZL4-U4EK>] (stating the National Security Council authorized the HIG charter in 2010).

3. See *infra* Part I. Other “enhanced interrogation methods” (EITs) that may not have fallen within the definition of torture would nonetheless qualify as cruel, inhuman, and degrading treatment (CIDT), which is also prohibited by the same or similar legal obligations. See *infra* note 12 and accompanying text.

4. See *infra* notes 53-56 and accompanying text.

5. See *High-Value Detainee Interrogation Group*, *supra* note 2.

6. See *infra* notes 69-71 and accompanying text.

in the intelligence community who insist that the traditional, more coercive techniques are necessary and effective.⁷

Part I of this Essay explains the importance of the U.S. international-law obligation to refrain from the use of torture, the Enhanced Interrogation Program that violated this obligation, and the persistence of coercive interrogation techniques that typically pave the road to torture's use. This part also recounts why and how the HIG was created, its brief success, and its precipitous fall at the end of the Obama administration. Part II then seeks to explain why, in the case of the HIG, bureaucratic culture revealed the limits of institutional design—limits which may also frustrate similar efforts to ensure compliance with international law.

I. THE UNITED STATES'S LEGAL OBLIGATIONS

The United States is bound under international law to refrain from, and to outlaw, the use of torture. This prohibition is one of America's strongest legal obligations. Many courts and scholars have concluded that the prohibition against torture enjoys *jus cogens* status: as a “peremptory” norm, it applies universally and without exception.⁸ The prohibition has long been recognized as a

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7. See *infra* notes 67–69 and accompanying text. The Intelligence Community officially consists of seventeen organizations – including the Central Intelligence Agency (CIA), the Federal Bureau of Investigation (FBI), the Office of the Director of National Intelligence, and the Defense Intelligence Agency – but they have numerous agencies nested within them, and many other departments and agencies have intelligence-collection arms. See *Members of the IC*, OFF. DIRECTOR NAT'L INTELLIGENCE, <https://www.dni.gov/index.php/what-we-do/members-of-the-ic> [<https://perma.cc/JM9X-ZPMA>] (noting that the intelligence community is composed of two independent agencies, eight Department of Defense elements, and seven elements of other federal departments and agencies).
 8. See, e.g., Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 153 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (“Because of the importance of the values it protects, [the prohibition on torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules.”); Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 368 (2009) (observing that the Restatement (Third) of Foreign Relations “has become an influential reference point when discussing well-established peremptory norms” and that among them are both torture and “cruel, inhuman, or degrading treatment or punishment”); Christopher Romero, *Praying for Torture: Why the United Kingdom Should Ban Conversion Therapy*, 51 GEO. WASH. INT'L L. REV. 201, 215 (2019) (“[T]orture is considered *jus cogens*, but CIDT [cruel, inhuman, and degrading treatment] is not.”). “The terms *jus cogens* and peremptory norms are used interchangeably.” Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 297 n.37 (2006). For discussions of the *jus cogens* concept, its origins, its justifications, and its relationship to other norms of international law, see, for example, M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga*

customary principle of the Law of Armed Conflict.⁹ It has been repeatedly codified in that body of law, most recently in the Geneva Conventions¹⁰ and Additional Protocols,¹¹ which also prohibit cruel, inhuman, and degrading treatment (CIDT) that does not rise to the level of torture.¹² The United States is a party to the Geneva Conventions and has recognized the torture and CIDT prohibitions in the Protocols to the extent they reflect customary international law.¹³ Moreover, in the realm of international human rights law, the United States has

Omnes, 59 *LAW & CONTEMP. PROBS.* 63, 67-74 (1996); and Thomas Weatherall, *Lessons from the Alien Tort Statute: Jus Cogens as the Law of Nations*, 103 *GEO. L.J.* 1359, 1362-65 (2015).

9. See Ashika Singh, *The United States, the Torture Convention, and Lex Specialis: The Quest for a Coherent Approach to the CAT in Armed Conflict*, 47 *COLUM. HUM. RTS. L. REV.* 134, 135 n.4 (2016).
10. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 12, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention] (requiring that protected persons “be treated humanely and cared for by the Party to the conflict in whose power they may be” and stating that “[a]ny attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments”); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 12, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (using identical language as the First Geneva Convention to prohibit torture); Geneva Convention Relative to the Treatment of Prisoners of War art. 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention] (“No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever.”); *id.* art. 87 (“Collective punishment [of Prisoners of War] for individual acts, corporal punishment, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden.”); Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (affirming that protected persons in occupied territory “shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity”); *id.* art. 32 (“The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands.” This prohibition applies to torture as well as to “any other measures of brutality whether applied by civilian or military agents.”).
11. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75(2)(a)(ii), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 4.2(a), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]. The United States has signed but not ratified Protocols I and II.
12. See JOHN D. BESSLER, *THE DEATH PENALTY AS TORTURE: FROM THE DARK AGES TO ABOLITION* 174 (2017) (citing international-law sources to catalog a “continuum” of conduct from degrading treatment to inhuman treatment to cruel treatment to torture).
13. David Glazier, *Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure*, 24 *B.U. INT’L L.J.* 55, 94, 111 (2011); Lindsey O. Graham & Paul R. Connolly, *Waterboarding: Issues and Lessons for Judge Advocates*, 69 *A.F. L. REV.* 65, 74 n.49 (2013).

ratified the Convention Against Torture (CAT),¹⁴ enacted statutes imposing criminal penalties for torture and CIDT, and provided a right of action for victims.¹⁵

A. U.S. Compliance with Its Obligations: Interrogation Methods

These conventions and statutes reflect the reality that torture and CIDT often manifest in the interrogation context. Coercion in various forms has been a staple – if not the guiding principle – of interrogation since Ancient Greece and Rome.¹⁶ Military and law enforcement at every level in the United States continue to rely heavily on “accusatorial” approaches, which are inherently coercive.¹⁷ Fred Inbau and John Reid formalized one still-influential version of the accusatorial approach in 1962.¹⁸ The Reid Method is “guilt-presumptive and confession-focused.” The goal is to “establish control over the suspect, use ques-

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14. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S 113 [hereinafter CAT]. Other human rights conventions also prohibit torture and CIDT. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights art. 7 (Dec. 16, 1966) (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”); G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 5 (Dec. 10, 1948) (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).
 15. Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 382, 463 (1994) (codified at 18 U.S.C. § 2340 (2018)) (implementing the CAT); Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2018)) (creating a private right of action in U.S. courts against individuals who commit acts of torture or extrajudicial killing conducted “under actual or apparent authority, or color of law, of [a] foreign nation”).
 16. See generally, e.g., DARIUS REJALI, TORTURE AND DEMOCRACY (4th prtg. 2009) (surveying the history of, and reasons for, the use of torture by democratic regimes).
 17. See Christian A. Meissner, Frances Surmon-Böhr, Simon Oleszkiewicz & Laurence J. Alison, *Developing an Evidence-Based Perspective on Interrogation: A Review of the U.S. Government’s High-Value Detainee Interrogation Group Research Program*, 23 PSYCHOL. PUB. POL’Y & L. 438, 441 (2017).
 18. See generally FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962) (describing their influential accusatorial approach).

tions that confirm what [the interrogators] believe to be true, and assess credibility based upon nonverbal indicators and the suspect's level of anxiety."¹⁹ Establishing control over the suspect is usually accomplished by isolating him and inducing his total reliance on the interrogator.²⁰

Although the Reid Method and similar approaches do not prescribe the use of torture or CIDT, the prisoner's vulnerability creates a temptation to resort to ever more coercive methods. This is especially so when the stakes are high – such as during wartime or when terrorist attacks are anticipated.²¹ The Geneva Conventions take this temptation into account by prohibiting the use of any type of coercion on detainees with prisoner-of-war status.²² Whenever the military and law enforcement rely on coercive measures to obtain information, they walk a path that has frequently led to CIDT and torture.²³

Indeed, many U.S. government officials hold the view that interrogation methods widely considered to be torture or CIDT are indispensable – even as they disavow the use of torture or CIDT *per se*.²⁴ From approximately 2002 to

19. See Meissner et al., *supra* note 13, at 441. For an example of contemporary legal criticism of the Reid Method, see Lewis R. Katz, Book Review, 19 CASE WESTERN RES. L. REV. 188, 192 (1967) (reviewing FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (2d ed. 1967)), arguing that “[w]hatever euphemism is used, the Inbau-Reid techniques are designed only to dissuade a suspect from exercising his constitutional rights and to persuade him, against his will, to confess to a crime.”

20. See Meissner et al., *supra* note 17, at 441.

21. The Army Field Manual, which prescribes the range of lawful interrogation techniques, also acknowledges this reality. See U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS 8-21, para. 8-831 (2006) [hereinafter AFM 2-22.3], <https://fas.org/irp/doddir/army/fm2-22-3.pdf> [<https://perma.cc/P2EB-8MXY>] (observing that, because “the HUMINT [human intelligence] collector is frequently under a great deal of pressure to ‘produce results’”; that he “is dealing with threat personnel who may have been attempting to kill US personnel just minutes before questioning”; and “that the source is in a vulnerable state,” this “leads to a tendency to use fear-up techniques” and that the “HUMINT collector must ensure that in doing so he neither loses control of his own emotions nor uses physical or mental coercion”).

22. See Third Geneva Convention, *supra* note 10, art. 17.

23. See David Luban & Katherine S. Newell, *Personality Disruption as Mental Torture: The CIA, Interrogational Abuse, and the U.S. Torture Act*, 108 GEO. L.J. 333, 344-47 (2019) (arguing, persuasively, that not only did the “enhanced interrogation techniques” meet the legal definition of torture, but that other forms of coercion to which the detainees were subjected also constituted either torture or cruel, inhuman, and degrading treatment); Meissner et al., *supra* note 17, at 438-39; John T. Parry, *States of Torture: Debating the Future of Coercive Interrogation*, 84 TENN. L. REV. 639, 664-65 (2017) (noting the use of torture by the United States “in the Philippines after the Spanish-American War, in the aftermath of World War II, and during the Cold War, including in Vietnam and Latin America”).

24. See Parry, *supra* note 23, at 651-52 (“Whether or not it can command the support of a clear majority of elected officials or voters, coercive interrogation nonetheless exists for the Republican Party, and for some Democrats and independents, as a legitimate option for combatting

2007, the CIA implemented this view as policy through the deployment of so-called “enhanced interrogation techniques” (EITs).²⁵ These EITs included waterboarding, walling, stress positions, dietary manipulation, and sleep deprivation, among others. The CIA’s Enhanced Interrogation Program was essentially an extreme version of the Reid Method. Because the Al Qaeda prisoners were especially resistant to interrogation, it was believed, the requisite isolation and control could only be achieved through extremely coercive methods that would break down a prisoner’s will to resist and possibly, in the process, his personality as well.²⁶

President George W. Bush and Vice President Dick Cheney, among others, both simultaneously denied that EITs constituted torture and claimed that their use was necessary to save American lives.²⁷ Ultimately, however, the U.S. government – through the findings of the Senate Select Committee on Intelligence

terrorists and related enemies.”); *see also* Luban & Newell, *supra* note 23, at 338-39 (highlighting how President Trump emphasized the need for “waterboarding . . . [and] more than that” and nominated to the government “several supporters of what are euphemistically called ‘harsh interrogations’”).

25. *See* SENATE SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY’S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288, at xxv (2014) [hereinafter SSCI REPORT]. Some refer to the CIA’s program as the “Rendition, Detention and Interrogation Program” (or “RDI Program”). *See, e.g.*, Steven M. Kleinman, *Reflecting on Torture After “The Report,”* LAWFARE (Dec. 16, 2019, 9:00 AM), <https://www.lawfareblog.com/reflecting-torture-after-report> [<https://perma.cc/D3P7-U24N>] (utilizing that name).
26. This was a key feature of CIA interrogation practices well before 2002. *See* Luban & Newell, *supra* note 23, at 334-35 (“[There are] decades of prior CIA research and doctrine about forcing interrogation subjects into a state of extreme psychological debilitation, and about how to do so – by making them physically weak, intensely fearful and anxious, and helplessly dependent.”).
27. *See Cheney: Enhanced Interrogations ‘Essential’ in Saving American Lives*, FOX NEWS (Aug. 30, 2009), <https://www.foxnews.com/politics/cheney-enhanced-interrogations-essential-in-saving-american-lives> [<https://perma.cc/2H4J-Y8TJ>] (quoting Vice President Dick Cheney as stating, in 2009, that “enhanced interrogation techniques were absolutely essential in saving thousands of American lives and preventing further attacks against the United States, and giving us the intelligence we needed to go find Al Qaeda, to find their camps, to find out how they were being financed”); *CIA Tactics: What Is ‘Enhanced Interrogation’?*, BBC (Dec. 10, 2014), <https://www.bbc.com/news/world-us-canada-11723189> [<https://perma.cc/7RZL-EN37>]; Scott Shane, *Backing C.I.A., Cheney Revisits Torture Debate from Bush Era*, N.Y. TIMES (Dec. 14, 2014), <https://www.nytimes.com/2014/12/15/us/politics/cheney-senate-report-on-torture.html> [<https://perma.cc/55CZ-7TFH>] (quoting an interview with Vice President Dick Cheney in which he rejected the notion that the CIA’s program constituted torture, and said he “would do it again in a minute . . . Torture is what the Al Qaeda terrorists did to 3,000 Americans on 9/11 . . . There is no comparison between that and what we did with respect to enhanced interrogation”). In fact, in 2018, Vice President Cheney proposed that the United States resume using the EITs. *See* Eli Okun, *Dick Cheney: Restart Enhanced Interrogation*

and in remarks by President Obama – seemed to have reached a general consensus that some of the EITs at least – waterboarding in particular – are torture.²⁸

By 2005, when it became clear that EITs and related coercive treatment were deployed well beyond the context of the CIA program, Congress moved to limit their use. The Detainee Treatment Act (DTA) provided that “[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”²⁹ The DTA also provided that Army Field Manual 2-22.3 (AFM) delimits the complete range of lawful coercive techniques to be used on any person detained by the Department of Defense (DoD).³⁰

Nonetheless, the DTA left considerable uncertainty about the scope of these restrictions – at least as a matter of statutory command. The boundaries of what constitutes CIDT are porous.³¹ And Congress, by referencing the AFM, appeared to delegate to the Department of Defense the discretion to determine which interrogation methods were lawful: after all, the Army Field Manual could be revised.³² Moreover, the AFM reference did not apply to the CIA at all.

Programs, POLITICO (May 10, 2018, 11:20 AM EDT), <https://www.politico.com/story/2018/05/10/dick-chenev-enhanced-interrogation-579910> [<https://perma.cc/3SXX-2ZWT>].

28. See SSCI REPORT, *supra* note 25, at vii (noting that Chairman Dianne Feinstein concludes in the Foreword that “CIA detainees were tortured”); Josh Gerstein, *Obama: ‘We Tortured Some Folks,’* POLITICO (Aug. 1, 2014, 3:38 PM EDT), <https://www.politico.com/story/2014/08/john-brennan-torture-cia-109654> [<https://perma.cc/4Z84-5GAK>] (quoting President Obama at a 2014 press conference as stating, “We tortured some folks When we engaged in some of these enhanced interrogation techniques, techniques that I believe and I think any fair-minded person would believe were torture, we crossed a line. And that needs to be understood and accepted”); Press Release, White House, News Conference by the President, 4/29/2009 (Apr. 30, 2009), <https://obamawhitehouse.archives.gov/the-press-office/news-conference-president-4292009> [<https://perma.cc/G5UW-F7D3>] (“I believe that waterboarding was torture. And, I think that – whatever legal rationales were used, it was a mistake.”).
29. See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003(a), 119 Stat. 2739, 2739 (codified at 42 U.S.C. § 2000dd (2018)).
30. *Id.* § 1002(a) (codified at 10 U.S.C. § 801 note (2018)). See generally AFM 2-22.3, *supra* note 21 (listing authorized treatments and techniques of interrogation).
31. See, e.g., MANFRED NOWAK & ELIZABETH MCARTHUR, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY* 31-32 (2d ed. 2008) (describing preliminary deliberations in the Human Rights Commission’s various Working Groups regarding the boundaries of CIDT).
32. See Robert Chesney, *Annals of the Trump Administration #1: The Law of Interrogation*, LAWFARE (Nov. 9, 2016, 9:39 AM) <https://www.lawfareblog.com/annals-trump-administration-1-law-interrogation> [<https://perma.cc/UTZ4-ZBMA>] (“[T]he inherent weakness of the Field Manual compliance rule always has been that it depends entirely on what happens to be the content of the Field Manual itself; if it were altered to include some or all of the EITs, the compliance rule obviously would cease to be an obstacle to using such methods.”).

President Obama eliminated much of this uncertainty by repudiating the Bush interrogation policy and, among other things, applying the AFM limits to the CIA and all other U.S. government agencies.³³ Congress enacted most of these changes into law in 2015.³⁴ It also imposed significant constraints on DoD discretion by requiring the Secretary of Defense, “in consultation with the Attorney General, FBI Director, and Director of National Intelligence,” to ensure that future amendments to the Army Field Manual “compl[y] with the legal obligations of the United States” and therefore “do not involve the use or threat of use of force.”³⁵ Depending on how one defines the “use or threat of use of force” in the interrogation context, this language seems to foreclose the revival of EITs and many other highly coercive methods as well.³⁶

Nonetheless, the version of the AFM still in effect authorizes a set of coercive interrogation methods for use “to meet unique and critical operational requirements.”³⁷ When utilized in combination and to the fullest extent permitted, these methods could easily fall within the definition of CIDT,³⁸ and possibly torture as well.³⁹ One AFM technique is called “separation” – the isolation of the detainee

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33. Exec. Order No. 13,491, 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009). The order also required that treatment of detainees be “consistent with” the CAT and “other laws regulating the treatment and interrogation of individuals detained in any armed conflict.” *Id.*
 34. National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1045, 129 Stat. 726, 977 (2015) (codified at 42 U.S.C. § 2000dd-2 (2018)) [hereinafter 2016 NDAA]; see also Press Release, Diane Feinstein, Senator, Feinstein Hails Congressional Passage of Anti-Torture Legislation (Oct. 7, 2015), <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=A8BA0596-244E-468A-A5EE-77BE19AF3940> [https://perma.cc/UM7C-SMKS] (describing the new limitations imposed on government actors as “anti-torture legislation”).
 35. See 2016 NDAA § 1045(a)(6)(A)(i), 129 Stat. at 978 (codified at 42 U.S.C. § 2000dd-2(a)(6)(A)(i) (2018)); Jennifer Daskal, *Draft EO on Detention and Interrogation: Update and Additional Concerns*, JUST SECURITY (Jan. 26, 2017), <https://www.justsecurity.org/36816/draft-eo-detention-interrogation-update-remaining-concerns> [https://perma.cc/E933-87KN].
 36. See Daskal, *supra* note 35.
 37. AFM 2-22.3, *supra* note 21, para. M-1.
 38. See Beth Van Schaack, *The Torture Convention & Appendix M of the Army Field Manual on Interrogations*, JUST SECURITY (Dec. 5, 2014), <https://www.justsecurity.org/18043/torture-convention-appendix-army-field-manual-interrogations> [https://perma.cc/JCX4-ZX9Y]; see also Scott Roehm, *The HIG Speaks on Effective Interrogation*, LAWFARE BLOG, (Apr. 11, 2017, 4:42 PM), <https://www.lawfareblog.com/hig-speaks-effective-interrogation> [https://perma.cc/2LSS-NSTT] (questioning the evidentiary basis of certain currently approved techniques).
 39. See *The U.S. Army Field Manual on Interrogation: A Strong Document in Need of Careful Revision*, HUM. RTS. FIRST 1 (June 16, 2015) [hereinafter *U.S. Army Field Manual*], <http://files.courthousenews.com/2015/06/16/hrfmanual.pdf> [https://perma.cc/5RD4-DBWZ]; The Constitution Project, *The Report of the Constitution Project’s Task Force on Detainee Treatment*, PROJECT ON GOV’T OVERSIGHT 326-28 (2013), <https://docs.pogo.org/report/2013/TCP>

from others, which, with periodic approval from the combatant commander, could go on for months.⁴⁰ In shorter increments when physical separation is not feasible, the detainee can be further isolated through the use of “goggles or blindfolds and earmuffs” to “generate a perception of separation.”⁴¹ A detainee may also be deprived of sleep for up to forty hours at a time.⁴² Like isolation, there is no apparent limit to the amount of time sleep deprivation may be used, so long as there is periodic re-approval.

The rationales for authorizing many of these techniques mirror the Reid Method’s and follow the accusatory tradition that ultimately led to the creation of the Enhanced Interrogation Program.⁴³ One stated objective of using separation is to “foster a feeling of futility.”⁴⁴ The initial “field-expedient separation” also serves to “[p]rolong the shock of capture.”⁴⁵ The AFM prescribes combining separation with forms of emotional manipulation, including “Futility” (to “engender a feeling of hopelessness and helplessness,” so that cooperation is a “way out”), and “Fear Up and Down,” in which the interrogator induces fear and offers to assuage it if the detainee cooperates.⁴⁶ At one point the AFM indicates that the goal of using these “emotional approaches” is to “hasten the source’s reaching the breaking point.”⁴⁷

The AFM’s approval of these coercive techniques presaged just how difficult it would be for the military and the intelligence community to abandon the well-entrenched accusatory tradition. Plenty of evidence already existed that coercive

-Detainee-Task-Force-Report.pdf [<https://perma.cc/G5JS-8YPX>]; see also generally John D. Bessler, *Taking Psychological Torture Seriously: The Torturous Nature of Credible Death Threats and the Collateral Consequences for Capital Punishment*, 11 NE. U.L. REV. 1 (2019) (defining and cataloguing prohibitions against psychological torture).

40. AFM 2-22.3, *supra* note 21, paras. M-2, M-29 to -30; see also *U.S. Army Field Manual*, *supra* note 39, at 2-3 (describing “separation”).

41. AFM 2-22.3, *supra* note 21, para. M-27.

42. See *id.*, para. M-30 (requiring that detainees be provided with at least four hours of sleep per twenty-four hour period); *U.S. Army Field Manual*, *supra* note 39, at 3 (“This [twenty-four hour] limit . . . could be interpreted to permit interrogators to bookend the detainee’s rest around a 40-hour interrogation period.”).

43. See Jeff Stein, *Obama Banned Torture Years Ago but Its Replacement Is Still Brutal*, NEWSWEEK MAG. (Nov. 29, 2018, 6:40 AM ET), <https://www.newsweek.com/2018/12/07/obama-banned-torture-interrogators-still-cant-agree-replacement-1233717.html> [<https://perma.cc/2B6D-BGF3>].

44. AFM 2-22.3, *supra* note 21, para. M-28.

45. *Id.*

46. Roehm, *supra* note 38; see AFM 2-22.3, *supra* note 21, paras. 8-37 to -41.

47. AFM 2-22.3, *supra* note 21, para. 8-30.

methods frequently produced false confessions.⁴⁸ Internal CIA reports determined that its own use of coercive techniques had been ineffective,⁴⁹ a view shared by many interrogation officials in the military.⁵⁰ And in 2006, the same year the coercive techniques were detailed in the AFM for the first time, the now-defunct U.S. Intelligence Science Board produced a “landmark” report concluding that accusatorial methods were “devoid of any scientific evaluation or validity,” and “recommended that the U.S. government initiate a program of research to develop effective, evidence-based approaches that meet both ethical and legal standards.”⁵¹

President Obama – or President Trump, for that matter – could have ordered the removal of all coercive interrogation techniques from the AFM and, in doing so, prohibited their use.⁵² But President Obama chose instead to use institutional design to steer the military and the intelligence community away from the use of coercive techniques. He created the HIG.

B. The Creation and Decline of the HIG

The Obama administration apparently took notice of the evidence that coercive interrogation techniques were ineffective. In the same Executive Order banning the use of EITs, President Obama created the Special Task Force on Interrogations and Transfer Policies to “establish a specialized interrogation group to bring together officials from law enforcement, the U.S. Intelligence Community and the Department of Defense to conduct interrogations in a manner that will

48. See Meissner et al., *supra* note 17, at 438-39.

49. SSCI REPORT, *supra* note 25, at 17-19.

50. Stein, *supra* note 43.

51. Meissner et al., *supra* note 17, at 439 (summarizing INTELLIGENCE SCI. BD., EDUCING INFORMATION: INTERROGATION: SCIENCE AND ART, FOUNDATIONS FOR THE FUTURE (2006)). The Office of the Director of National Intelligence (DNI) created the Intelligence Science Board in 2002. It was disbanded in 2010 as part of then-DNI Director James Clapper’s efforts to reorganize the DNI and improve organizational efficiency. Steven Aftergood, *DNI Disbands the Intelligence Science Board*, FED’N AM. SCIENTISTS (Oct. 14, 2010), https://fas.org/blogs/secretcy/2010/10/isb_disband [<https://perma.cc/S3Z2-HLXL>].

52. Cf. Chesney, *supra* note 32 (noting that while the 2016 NDAA requires compliance with the Army Field Manual (AFM), the 2016 NDAA does not prohibit the AFM being amended to include enhanced interrogation techniques).

strengthen national security consistent with the rule of law.”⁵³ The Task Force recommended the creation of the HIG, which was set up in early 2010.⁵⁴

The HIG is an interagency group whose charter established an interrogation arm and a research arm, with the two intended to operate in a positive feedback loop.⁵⁵ The HIG’s charter described its mission as bringing to bear “the nation’s best available interrogation resources against terrorism detainees identified as having access to information with the greatest potential to prevent terrorist attacks against the United States and its allies.”⁵⁶ The interrogation arm would deploy mobile interrogation teams to serve the intelligence community, law enforcement, and the military in the most delicate cases. And on the research side, the HIG would “serve as the locus for interrogation best practices, lessons learned, and research for the federal government.”⁵⁷ The interrogation arm would operate mostly in secret, but the research arm would operate in public, engaging with the scientific community and commissioning research with the general goal of establishing the effectiveness of noncoercive methods.⁵⁸

Although the internal deliberations concerning the HIG’s creation remain shrouded in secrecy, one can infer from the HIG’s structure what Obama administration officials evidently believed would be most effective in furthering this goal. The HIG was housed within the FBI, a nonmilitary agency with a traditional focus on, and reputation for effectiveness in, interviewing suspects and

53. Press Release, U.S. Dep’t of Justice, Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President (Aug. 24, 2009), <https://www.justice.gov/opa/pr/special-task-force-interrogations-and-transfer-policies-issues-its-recommendations-president> [<https://perma.cc/7HKC-UCUF>]; see also HIGH-VALUE DETAINEE INTERROGATION GROUP, INTERROGATION BEST PRACTICES 1 (Aug. 26, 2016) [hereinafter HIG REPORT], <https://www.fbi.gov/file-repository/hig-report-august-2016.pdf/view> [<https://perma.cc/WZ2j-DTBA>] (describing the formation of the HIG).

54. See HIGH-VALUE DETAINEE INTERROGATION GROUP, INTERROGATION: A REVIEW OF THE SCIENCE (2016) [hereinafter HIG SCIENCE REVIEW], <https://www.fbi.gov/file-repository/hig-report-interrogation-a-review-of-the-science-september-2016.pdf> [<https://perma.cc/6FXJ-ZRSJ>].

55. See Ali Watkins, *Elite Terrorist Interrogation Team Withers Under Trump*, POLITICO (Dec. 5, 2017, 5:04 AM EST), <https://www.politico.com/story/2017/12/05/elite-terrorist-interrogation-trump-279930> [<https://perma.cc/8XLZ-RVAH>]. As far as I have been able to discern, the HIG’s charter has never been made public, although it was quoted in an FBI report. See HIG REPORT, *supra* note 53, at 1.

56. See HIG REPORT, *supra* note 53, at 1.

57. *Id.*

58. See *id.*; Watkins, *supra* note 55.

witnesses.⁵⁹ FBI agents' traditional investigative tasks, moreover, typically allowed them to avoid relying on "displays of personal dominance, physical strength, or identification with the victims."⁶⁰ The HIG Director is an FBI official appointed by, and reporting directly to, the FBI Director.⁶¹

At the same time, the White House anticipated the need for buy-in from other federal agencies involved in interrogations. Accordingly, the HIG's leadership would also include experts drawn from the CIA, law enforcement, and the Defense Intelligence Agency, a DoD component.⁶²

Nonetheless, it appears that what the HIG lacked in formal authority over sister agencies it made up for with clout, at least for a time. High-level White House officials, including the Homeland Security Advisor and President Obama himself, touted the HIG's importance.⁶³ In any event, for about six years, from 2010 to 2016, the HIG seems to have functioned more or less as intended. It had a staff of about fifty. Its interrogation teams were reportedly deployed about thirty-four times.⁶⁴ And according to the HIG's own 2016 report, the research it commissioned "led to over 100 publications in peer-reviewed journals" and was "incorporated into HIG best practices via a continuous cycle of research advising training, training informing operations, and operational experience identifying

59. See JAMES Q. WILSON, *THE INVESTIGATORS: MANAGING FBI AND NARCOTICS AGENTS* 36 (1978) (quoting an FBI agent as telling an interviewer that "[t]alking to people is the name of the game; everything else is just overhead").

60. *Id.* at 26.

61. See *Oversight of the Federal Bureau of Investigation: Hearing Before the Comm. on the Judiciary*, 111th Cong. 72 (2009).

62. *Commerce, Justice, Science, and Related Agencies Appropriations for 2011: Hearings Before a Subcomm. of the Comm. on Appropriations*, 111th Cong. 263 (2010) (Ranking Member Frank R. Wolf, Questions for the Record).

63. See Press Release, White House, Remarks by Assistant to the President for Homeland Security and Counterterrorism John Brennan at CSIS (May 26, 2010), <https://obamawhitehouse.archives.gov/the-press-office/remarks-assistant-president-homeland-security-and-counterterrorism-john-brennan-csi> [<https://perma.cc/B6JF-6RG5>] (citing the HIG as an example of the Administration "strengthen[ing] existing tools" and "further empower[ing] our counterterrorism professionals"); Press Release, White House, Press Briefing by the Press Secretary Josh Earnest (Dec. 10, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/12/10/press-briefing-press-secretary-josh-earnest-121014> ("[President Obama] also suggested the creation of [the HIG] that we have used to great effect on a number of occasions . . .").

64. Carrie Johnson, *Detainee Interrogation Chief: Waterboarding Doesn't Work*, NAT'L PUB. RADIO (Feb. 12, 2016, 5:00 AM ET), <https://www.npr.org/2016/02/12/466411509/detainee-interrogation-chief-waterboarding-doesnt-work> [<https://perma.cc/V85B-HRUA>] (providing an overview of the HIG's operations and including quotes from the head of the HIG regarding the importance of rapport-based interrogation techniques).

research gaps and updating training models.”⁶⁵ One of its directors, Frazier Thompson, pointedly declared in early 2016 that coercive methods do not work.⁶⁶

But even by 2016, there were signs that the HIG was encountering resistance to its efforts to displace traditional accusatory interrogation methods—both from within the FBI and without. One red flag was that the HIG, in its statutorily-mandated report, declined to evaluate the effectiveness of the AFM-authorized coercive methods and failed to propose changes to the AFM, “despite explicit statutory authorization to do so.”⁶⁷ The resistance to HIG’s mission had become strong even—perhaps especially—within its parent agency, the FBI. HIG Director Thompson was “quietly pushed out” early in 2016 after clashing with FBI leadership over the HIG’s mission; and unlike for his predecessors, Thompson’s HIG role did not give him a career boost.⁶⁸ In 2017, the HIG’s supporters described “an increasingly dismissive attitude at the FBI,” which failed “to advocate for” the HIG’s deployment for interrogations or its role in revising the AFM. The FBI was also seen as “disregarding” and “actively undermining” the HIG’s research, and it refused to adopt the non-coercive approach in its own interrogation groups or at its academy, instead clinging to the Reid Method.⁶⁹

In the Trump administration, the HIG’s decline into obscurity accelerated. It seems not to have been deployed for interrogations at all.⁷⁰ And the research arm has been neglected: its funding has been cut, new research projects have not been approved, and the original director resigned in protest in 2017 without immediate replacement.⁷¹

II. THE LIMITS OF INSTITUTIONAL DESIGN

What went wrong? Scholars of the administrative state and regulation will recognize design flaws that sowed the seeds of the HIG’s decline and ultimately prevented it from fulfilling its mission to encourage the use of non-coercive interrogation methods.

65. HIG SCIENCE REVIEW, *supra* note 54, at 1; *see* Roehm, *supra* note 38; *see also* Meissner et al., *supra* note 17, at 441 (describing the range and influence of the HIG research program’s commissioned studies and training programs).

66. Johnson, *supra* note 64.

67. Roehm, *supra* note 38.

68. *See* Watkins, *supra* note 55.

69. *See id.*

70. *See id.*

71. *Id.*

There is evidence that interagency groups can perform crucial coordination functions that enable the government to carry out policies more efficiently—including the implementation of international-law obligations.⁷² But there is little evidence that interagency groups are capable of implementing significant policy shifts without the direct and persistent involvement of high-level White House officials.⁷³

Bureaucrats in national security possess the same motivations as other bureaucrats—they seek increased budgets, autonomy, and prestige.⁷⁴ They can rarely obtain those goals by reporting that all is well in the world; if they fail to identify a catastrophic threat, their agency will suffer serious reputational damage, as the CIA did after 9/11.⁷⁵ Instead, these bureaucrats are *rationally* motivated to obtain as much information as possible from as many sources as possible, and to identify national security threats in the information they obtain. Aggressive intelligence-gathering and threat inflation are therefore most likely to be rewarded.⁷⁶ Changing course is typically regarded as an admission of failure.⁷⁷ And pervasive secrecy allows agencies in the national security space to hide inaccurate results, so long as those results do not lead to a public scandal.

These incentives help explain why the HIG was bound to encounter resistance and why it cannot succeed without strong support from the White

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72. See, e.g., Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT'L L. 359, 395 (2013) (“U.S. engagement and interagency coordination in the [human rights] treaty body reporting process has been considerable.”).
73. Cf. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1197 (2012) (“[A]gencies themselves must be motivated to pursue coordination, by either internal or external incentives. In cases of high conflict, recalcitrance, or incapacity, a central coordinator will be necessary.”).
74. See, e.g., JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 106, 182 (1989) (observing that bureaucrats prioritize autonomy and prestige); Nathan Alexander Sales, *Share and Share Alike: Intelligence Agencies and Information Sharing*, 78 GEO. WASH. L. REV. 279, 282 (2010) (“Intelligence agencies seek to maximize their influence over senior policymakers . . . [and their] autonomy—i.e., the ability to pursue agency priorities without outside interference.”). Wilson’s book remains perhaps the most comprehensive study of bureaucrats’ incentives.
75. See TIM WEINER, LEGACY OF ASHES: THE HISTORY OF THE CIA 4-6 (2008).
76. See, e.g., MICHAEL J. GLENNON, NATIONAL SECURITY AND DOUBLE GOVERNMENT 17 (2014). Threat inflation is “the attempt by elites to create concern for a threat that goes beyond the scope and urgency that a disinterested analysis would justify.” Jane K. Cramer & A. Trevor Thrall, *Understanding Threat Inflation*, in AMERICAN FOREIGN POLICY AND THE POLITICS OF FEAR: THREAT INFLATION SINCE 9/11 (A. Trevor Thrall & Jane K. Cramer eds., 2009).
77. See Anjali S. Dalal, *Shadow Administrative Constitutionalism and the Creation of Surveillance Culture*, 2014 MICH. ST. L. REV. 59, 105 (“[C]hanging course implies that the existing course is incorrect—an admission of failure that might expose the agency to unwanted scrutiny and negatively implicate the agency’s top brass.”).

House. An interagency group inevitably risks creating resentment among the agencies it interacts with when it performs functions once carried out exclusively or independently by those agencies. Deploying the HIG meant “sidelining each respective agencies’ own internal interrogation personnel.”⁷⁸ And these personnel were heavily invested in using traditional coercive interrogation methods. After 9/11, counterterrorism became central to the mission of nearly every major federal government entity in the national security realm, including the FBI.⁷⁹ Even with the best intentions, interrogators in these federal agencies are looking for information about serious threats – that is their core mission. Coercive methods are more likely to produce that type of result, even if the information is often inaccurate. Agencies whose agendas conflict with their parent agency’s will typically find themselves without much influence.⁸⁰ The HIG’s fate is not an unusual one in this respect.

What can be done? The HIG’s story suggests that only direct presidential intervention can force agencies in the national security space to alter long-entrenched practices. Yet altering such practices will often be necessary to honor commitments to other nations and comply with international law. The clear mandate from President Obama gave the HIG the clout it needed to get buy-in from the other agencies, at least for a time. But the President cannot personally oversee every aspect of the national security state’s operations and provide the constant pressure necessary to keep reforms in place. Congressional oversight, which is usually scant when it comes to the operational side of national security functions, would help. And so would less secrecy and more public accountability.⁸¹ These are the traditional means by which the administrative state has been

78. Watkins, *supra* note 55.

79. See GLENNON, *supra* note 76, at 16-17; Anjali S. Dalal, *Shadow Administrative Constitutionalism and the Creation of Surveillance Culture*, 2014 MICH. ST. L. REV. 61, 63-64, 87 (2014) (describing the FBI’s greater concentration on counterterrorism after 9/11). The Department of Homeland Security itself absorbed twenty-two agencies into a Department with counterterrorism as its primary mission. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

80. See Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 104 (2014) (concluding from a study of the DHS’s Office of Civil Rights and Civil Liberties that it is inherently difficult to induce agencies to execute both a primary mission and constraints on that mission).

81. See, e.g., Robert Knowles, *National Security Rulemaking*, 41 FLA. ST. U. L. REV. 883, 904-05 (2014) (noting that exempting national security entities from notice-and-comment rulemaking requirements threatens “democratic accountability, transparency, and legitimacy”); Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1657 (2006) (noting accountability issues in the post-9/11 reorganized national security apparatus); Sudha Setty, *Surveillance, Secrecy, and the Search for Meaningful Accountability*, 51 STAN. J. INT’L L. 69, 69 (2015) (same).

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kept in check, and they should be applied to national security interrogation as well.

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