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June 9, 2010

Dr. Jerry Menikoff
Director, Office for Human Research Protections
1101 Wootton Parkway, Suite 200
Rockville, MD 20852

June 9, 2010

Dear Dr. Menikoff,

Please find attached an official complaint to The Office for Human Research Protections, filed by the following human rights, medical, legal and religious organizations:

- Physicians for Human Rights
- Amnesty International USA
- Bill of Rights Defense Committee
- Center for Constitutional Rights
- Center for Victims of Torture
- Human Rights Watch
- National Religious Campaign Against Torture
- Psychologists for Social Responsibility

Recent reports by Physicians for Human Rights and a paper by Renée Llanusa-Cestero in *Accountability in Research* raise concerns that the CIA's Office of Medical Services (OMS) conducted research and experimentation on detainees in US custody and, in the process, likely violated federal regulations governing human subject research carried out by United States Government entities. These regulations are known as The Common Rule (45 CFR 46). The CIA is one of seventeen federal agencies required by law to adhere to The Common Rule when conducting federally funded research on human beings.

The Office for Human Research Protections (OHRP) should initiate immediately an official investigation into experimentation by the CIA on detainees in its custody. See the complaint for more information and sources of evidence, which can also be found in PHR's new report *Experiments in Torture: Human Subject Research and Evidence of Experimentation in the 'Enhanced' Interrogation Program*, which is downloadable at <http://phrtorturepapers.org/>.

Please contact our Washington Director, John Bradshaw, at 202-728-5335 x304 or jbradshaw@phrusa.org, with any questions you may have, and to update PHR on the status of this complaint.

Respectfully,



A. Frank Donaghue
Chief Executive Officer
Physicians for Human Rights



Advancing health, dignity and justice

Complaint to Office of Human Research Protections Regarding Evidence of CIA Violations of Common Rule

Recent reports by Physicians for Human Rights and a paper by Renée Llanusa-Cestero in *Accountability in Research* raise concerns that the CIA's Office of Medical Services (OMS) conducted research and experimentation on detainees in US custody and, in the process, likely violated federal regulations governing human subject research carried out by United States Government entities. These regulations are known as The Common Rule (45 CFR 46). The CIA is one of seventeen federal agencies required by law to adhere to The Common Rule when conducting federally funded research on human beings.

The Office for Human Research Protections (OHRP) should initiate immediately an official investigation into experimentation by the CIA on detainees in its custody based upon the following evidence of wrongdoing detailed in declassified government documents:

- (1) The collection by OMS health professionals of data from detainees in order to derive generalizable knowledge of the effects on detainee subjects of "enhanced interrogation" techniques. These techniques, which have serious potential to cause harm, included sleep deprivation, waterboarding, sensory deprivation and overload. It appears that data also was collected on the impact of techniques both when used individually and when applied in combination;
- (2) The collection of data from detainees subjected to the technique of the waterboard in order to develop new methods and procedures for its application, including the experimental use of potable saline in place of water to reduce the risk of hyponatremia;
- (3) The CIA's apparent failure to comply with The Common Rule's regulations (a) requiring all human research subjects to provide informed consent, (b) assuring that subjects of research have the right and ability to stop their participation in the research at any time, and (c) requiring the conduct of prior review of the proposed human subject research by an Institutional Review Board.

We request the OHRP to conduct a For-Cause Compliance Oversight Evaluation of the CIA OMS for research targeting detainee subjects.

If the OHRP concludes that OMS research on detainees subjected to "enhanced interrogation" techniques commonly viewed as torture violated The Common Rule and internationally accepted standards of health professional ethics, the CIA must be immediately sanctioned by the Department of Health and Human Services. Any personnel found to have violated the law should be referred to the Department of Justice for prosecution. Professionals determined to be in violation of their ethically mandated responsibilities should be referred to state licensing bodies and professional associations for appropriate professional sanctions.

Unethical Research and the C.I.A. Inspector General Report of 2004: Observations Implicit in Terms of the Common Rule

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Declassification of documents has given rise to the allegation that the Central Intelligence Agency may have conducted unethical research targeting detainee subjects. That allegation is examined using document analysis and the development of research goals and roles as defined in the Common Rule. This article sets aside issues as to whether enhanced interrogation techniques described in the declassified documents rise to legal definitions of torture. Instead, it presents a post hoc ethics review raising questions addressed by Institutional Review Boards recommending the filing of a for-cause non-compliance complaint with the Office for Human Research Protection against the Central Intelligence Agency.

Keywords: Belmont Report, Central Intelligence Agency, Nuremberg Code, Office for Human Research Protection, the Common Rule

Pick some particular nomenclature, some one terministic screen . . . That you may proceed to track down the kinds of observation implicit in the terminology you have chosen, whether your choice of terms was deliberate or spontaneous (Burke, 1966; italics in the original).

INTRODUCTION

Physicians for Human Rights (PHR)¹ (2009) has identified a previously unknown category of ethics violation in the Central Intelligence Agency (CIA) *Inspector General Special Review of Counterterrorism Detention and Interrogation Activities* (the *IG Report*) (2004). Details of the development of the Detention and Interrogation Program (the Interrogation Program) including the alleged unethical research were made available to the public in August

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2009 as a result of Freedom of Information Act requests made by the American Civil Liberty Union (ACLU).² Before the release of the *IG Report*, Miles had identified as an emerging issue “the possibility that coerced and abusive interrogation experiments were conducted at Guantánamo” (Miles, 2009a). Upon the declassification of the *IG Report*, PHR (2009) concurred maintaining that the aggregate collection of data on the use of the waterboard and detainee subjects’ reaction to its application during interrogation as documented in *IG Report* may amount to unethical human experimentation.

This analysis of declassified materials examines the allegation of the conduct of unethical research by the CIA setting aside the critically important legal issue as to whether the Enhanced Interrogation Techniques³ (§43) as detailed in the *IG Report* are euphemistic for torture. (See Table 1.) An exception to the sidelining of the legal issues regarding torture is made in the Discussion, where evidence of CIA personnel expressions of concern on the matter is considered. Otherwise, the *IG Report* is examined for evidence of the conduct of

Table 1: †

Enhanced Interrogation Techniques

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

†Textbox from *IG Report* (§43).

research as defined in the Common Rule⁴ within the ethical and historical contexts of the *Belmont Report* (*Belmont*) (National Commission, 1979) and the *Nuremberg Code* (Nuremberg Military Tribunal, 1947).

CIA IG REPORT

The body of the *IG Report* consists of 266 numbered paragraphs in 105 heavily redacted pages, and four pages in ten numbered paragraphs of completely redacted recommendations, plus appendices A through F. It details the evolution of the international multisite (§2) Interrogation Program, between September 2001 and October 2003.⁵

The *IG Report* provides descriptions of the use of the waterboard (§35; Appendix F), including the following:

. . . the individual is bound securely to an inclined bench. . . feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. . . the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, the air flow is slightly restricted for 20 to 40 seconds. . . This causes an increase in carbon dioxide level in the individual's blood. This increase in the carbon dioxide level stimulates increased effort to breathe. This effort plus the cloth produces the perception of "suffocation and incipient panic," i.e., the perception of drowning. . . The sensation of drowning is immediately relieved by the removal of the cloth. The procedure may then be repeated . . . (§43).⁶

Evidence of a research plan concerning the use of the waterboard as an Enhanced Interrogation Technique is found in the *Draft OMS* [Office of Medical Services] *Guidelines on Medical and Psychological Support to Detainee Interrogations* (the *Guidelines*) (Appendix F).⁷

DOCUMENT ANALYSIS

The *IG Report* offers an assessment of the overall effectiveness of the Interrogation Program beyond the scope of this article that notes, "[m]easuring the effectiveness of EITs, however, is a more subjective process and not without some concern" (§211).⁸ This analysis of the declassified materials focuses upon the use of the waterboard as an Enhanced Interrogation Technique in evaluating the allegation of the development of a research plan to assess and refine its use and the aggregate collection of data on detainee subjects' reaction to its application "to best inform future medical judgments and recommendations" (Appendix F).

Issues fundamental to the ethical conduct of human research as codified in the Common Rule are addressed. Questions raised by Institutional Review Boards (IRBs) on a daily basis are considered. Does the Common Rule apply? Is it human research? Is the risk-to-benefit analysis socially beneficial?

My spontaneous choice, in terms of Kenneth Burke's (1966) prompt in the epigraph, was to respond to these questions using language as definition: the Common Rule as terministic screen. This approach places primary stress upon a proposition such as "It *is* or it *is not*" (Burke, 1966). In this case, *does* or *does not* the Common Rule apply? *Is* it or *is it not* human research? *Is* the risk-to-benefit analysis socially beneficial or *is it not*?⁹ Alternatively, these fundamental questions are considered using *Belmont* and the *Nuremberg Code* as terministic screens informing and guiding ethical behavior, or language as act. Both approaches are used in this analysis for evaluating evidence of the allegation of the conduct of unethical research in the Interrogation Program targeting detainee subjects.

DOES THE COMMON RULE APPLY?

Pursuant to Executive Order 12333 and its amendments, the CIA is one of 17 federal departments and agencies that have adopted the Common Rule.¹⁰ Executive Order 12333 authorizes the Intelligence Community to conduct research, development, and procurement of technical systems and devices. The allegation of unethical human experimentation focuses on research and development on the use of the waterboard as a low-tech device used in interrogation, aggregate data collection, and analysis on its implementation and detainee subjects' reaction to its application. The Common Rule stipulates that department or agency heads retain final judgment as to whether a particular activity is covered.¹¹ The *IG Report* reveals neither documentation nor mention of an exemption from the Common Rule for the Interrogation Program and the development of Enhanced Interrogation Techniques. It reveals neither documentation nor mention of submission of a prospective research plan to an IRB concerning interrogation research on the use of the waterboard targeting detainee subjects.

In the absence of evidence of the issuance of an exemption from the Common Rule by the Director of Central Intelligence (DCI), the answer is an implicit yes as to the applicability of the Common Rule to any research conducted by the CIA involving human subjects.

IS IT HUMAN RESEARCH?

Did the development of the Interrogation Program include human experimentation? Was it research? That is, did it systematically seek to develop generalizable knowledge? The Common Rule definitions of "research," "human subject," and "intervention" apply.¹²

The OMS *Guidelines* provide a chilling, clinical description of Standard and Enhanced Interrogation Techniques in "approximately ascending degree

of intensity” (Appendix F) culminating with the waterboard, “by far the most traumatic of the enhanced interrogation techniques” (Appendix F). The *Guidelines* define three contexts in which they may be applied: “(1) during the period of initial interrogation, (2) during the more sustained period of debriefing at an interrogation site, and (3) [redacted]” (Appendix F). The first and second contexts are detailed under the major heading “*INTERROGATION SUPPORT*” (Appendix F). It is the third context and the corresponding concluding major heading both completely redacted that attracts attention.

RESEARCH GOALS

Critically important in documenting the establishment of interrogation research on the use of the waterboard is the concluding “*NOTE*” to the OMS *Guidelines*. The concluding “*NOTE*” is preceded by a paragraph that defines an aggressive program for the use of the waterboard as 15 or more applications of the waterboard within a 24-hour period. “By days 3–5 of an aggressive program,” warns the *Guidelines*, “cumulative effects become a potential concern” (Appendix F). Moreover, the acknowledgment of the lack of “any hard data to quantify this [cumulative] risk or the [putative] advantage of this technique” provides the rationale for research on the use of the waterboard (Appendix F).

NOTE: In order to best inform future medical judgments and recommendations, it is important that every application of the waterboard be thoroughly documented: how long each application (and the entire procedure) lasted, how much water was used in the process (realizing that much splashes off), how exactly the water was applied, if a seal was achieved, if the naso- or oropharynx was filled, what sort of volume was expelled, how long was the break between applications, and how the subject looked between each treatment (Appendix F; italics in the original).

The perverse use of the terms “treatment” and “subject” is breathtaking to anyone concerned with human research ethics.

PRIMARY EVIDENCE OF INTERROGATION RESEARCH

Evidence of interrogation research is found in documents submitted by the government in response to a court order issued in a contempt lawsuit filed by the ACLU (Leopold, 2009) related to the destruction of 92 interrogation videotapes by the CIA (Mazzetti, 2009). The documents consist of two sets of indexes¹³ of communications sent to CIA headquarters describing the August 2002 videotaped use of the waterboard during the interrogation of Abu Zubaydah.¹⁴ The communications include information concerning strategies for interrogation sessions; the use of interrogation techniques;

reactions to the interrogation techniques; medical information, and raw intelligence, if any. The detainee subject's reactions to the use of the waterboard are also included in a 59-page notebook containing handwritten notes.¹⁵

Two named independent sources with first-hand knowledge of the Interrogation Program refer to the establishment and functioning of interrogation research. One was reported by the International Committee of the Red Cross (ICRC) (2007). A second was revealed in the testimony of a former FBI agent to the Senate Committee on the Judiciary (Soufan, 2009). The ICRC records "high value detainee" subject, Abu Zubaydeh, reporting, "[i]t felt like they were experimenting and trying out techniques to be used later on other people" (ICRC, 2007). In his testimony before the Senate Committee on the Judiciary, former FBI agent Ali Soufan (2009) relates his encounter with a CIA contractor/interrogator using "harsh" interrogation techniques on Zubaydah who Soufan had previously interrogated using another approach. Soufan (2009) reports:

Once again the contractor insisted on stepping up the notches of his experiment, and this time he requested the authorization to place Abu Zubaydah in a confinement box, as the next stage in the force continuum.

See Table 1. The *IG Report* documents that Zubaydah moved along the "force continuum" ultimately undergoing no less the 83 applications of the waterboard (§223).

Zubaydeh's grievance to the ICRC is self-serving. It is noteworthy, however, that he explicitly mentions an experimental aspect of the abuse. Moreover, his allegation that one of his interrogators told him that he was one of the first to be subject to these interrogation techniques, "*so no rules applied*" (ICRC, 2007; italics in the original) conforms with President Bush's public acknowledgement of the Interrogation Program, "operating along rules of its making" (Mayer, 2009). The context of the testimony of the former FBI agent (Soufan, 2009) is the dispute between the FBI and the CIA regarding Enhanced Interrogation Techniques.

SECONDARY EVIDENCE OF INTERROGATION RESEARCH

Mayer has provided a narrative of that dispute characterizing the entire Interrogation Program as, "The Experiment" (2009). Mayer's (2009) account describes the transfer of the Zubaydah interrogation from agents of the FBI using rapport building techniques to the contractor interrogators using Enhanced Interrogation Techniques. Mayer's account cites FBI sources and their reaction to the apparent leader of the CIA interrogators James Mitchell,¹⁶ a retired military psychologist hired by the CIA as a consultant on interrogation, and one of two reported architects of the Interrogation Program (Goetz and Sandberg, 2009).

Mayer (2009) cites the following exchange:

Mitchell announced that the suspect had to be treated “like a dog in a cage,” informed sources said. “He said it was like an experiment, when you apply electric shocks to a caged dog, after a while, he’s so diminished, he can’t resist.”

The FBI agents, with their traditions of working within the U.S. criminal legal framework, were appalled. They argued that Zubayda was not a dog, he was a human being.

Mitchell, according to the informed sources, retorted, “Science is science.”

In his analysis of the “interrogation log” of a Guantánamo detainee Miles (2009a) raises the question:

What is the point of meticulously recording the prisoner’s tears and bathroom privileges, digressions on dinosaurs, and reactions to the interrogators’ [sic] playing checkers if the primary interest is intelligence acquisition? The peculiar content and structure of this document makes sense if it is the log of research on coercive interrogation. . . . From the nature of prior CIA interrogation research and the log, it is possible to infer a design of the research project.

A similar question could be raised and the same inference made about the first “NOTE” in the *Guidelines*:

NOTE: Examinations performed during periods of sleep deprivation should include the current number of hours without sleep; and, if only a brief rest preceded this period, the specifics of the previous deprivation also should be recorded (Appendix F).

Both *Guideline* notes are highlighted by italicized text and direct the attention of medical and psychological staff to the documentation of the application of Enhanced Interrogation Techniques, rather than focusing upon the acquisition of intelligence.

RESEARCH ROLES

The *IG Report* (§32) recounts the development of the Enhanced Interrogation Techniques by two unnamed contractor psychologists¹⁷ and the evolution of roles in the Interrogation Program after September 11, 2001.

. . . A debriefer engages a detainee solely through question and answer. An interrogator is a person who completes a two-week interrogations training program, which is designed to train, qualify, and certify a person to administer EITs . . . An interrogator transitions the detainee from a non-cooperative to a cooperative phase in order that a debriefer can elicit actionable intelligence through non-aggressive techniques . . . (§15fn6).

Furthermore, analysts “do not participate in the application of interrogation techniques” (§204). Apparently, the application of the Enhanced Interrogation

Techniques, specifically the waterboard, was delegated to contractor psychologist/interrogators (§43; §76; §79; §224). A one-page certification form, “*Enhanced Pressures—Waterboard*,” released with the *IG Report* (CIA) is attached as Figure 1.

In interrogation sessions where the waterboard is applied, the *Guidelines* stipulate, in case of a serious adverse event, “[a]n unresponsive subject should be righted immediately and the *interrogator* should deliver a subxyphoid thrust to expel the water” (Appendix F; emphases added). Despite the mandated presence of a physician for use of the waterboard, it is the interrogator administering the waterboard who is tasked with the application of first aid to an unresponsive detainee subject. Only if the interrogator’s intervention fails to restore normal breathing is “aggressive medical intervention required” administered, presumably, by the physician observing and documenting the application of the waterboard (Appendix F). Although the *Guidelines* state that it is important that adequate medical care be provided to detainees, the physician’s primary role during waterboard interrogation is observation and documentation for research purposes and medical intervention only in extremis.¹⁸

The *Guidelines* adopt the clinical research use of the term “subject,” as in, “the subject is immobilized” (Appendix F). The *Guidelines* instruct medical staff on systematic observation and data collection on the use of waterboard in each and every session where it is applied by an interrogator to a bound and gagged detainee subject. Engaging in such coercive and abusive behavior, and following such operating procedures serves as the basis for calls by PHR (2009), Miles (2009b), and Psychologists for Social Responsibility (2009) for professional association sanctions against named individual physicians and psychologists for unethical conduct regardless of the research context. The ICRC report concluded with respect to the role of health personnel, “their primary purpose appears to have been to serve the interrogation process, and not the patient” (2007). As Benjamin (2007) has noted:

Theoretically, a psychologist could lose his state-issued license for violating an APA [American Psychological Association] resolution, regardless of APA membership, which might plant a seed of doubt in a psychologist’s mind when he steps into a CIA interrogation booth. Military psychologists, for example, are required to maintain a state license.

The Web site of Psychologist for Social Responsibility (2009) has posted a chronology of their challenge to the American Psychological Association to ban psychologist from any direct role in the interrogation and to act quickly on ethics complaints against psychologists reported to have contributed to U.S. torture and detention abuses.

Enhanced Pressures

00103

NAME:

Waterboard

Date:
Trainer:
Academics:
Practice:
Configuration:
Subjected: Y N
Comments
Operational Training
Test
Certification

Signature:	Date:
Trainer Signature:	Date:

Refresher/ Requal Date:

0000143

Figure 1: †

†Single-page document declassified and released on August 24, 2009 in response to ACLU Freedom of Information Act requests (CIA, No Date).

RESEARCH RESULTS

Adherence to the *Guidelines* would have produced a database of aggregate data on the use of the waterboard on, at least, three detainee subjects (§222) including the documentation of observations on 183 applications of the waterboard to one detainee subject (§100), at least 83 applications to a second detainee subject (§223), and two applications to a third detainee subject (§224). Government documents filed in response to a court order reveal scores of communications recording detainee subjects' reactions to interrogation techniques, including a 59-page notebook (Leopold, 2009). Moreover, the authors of the *IG Report* viewed 92 videotapes of interrogations (Appendix A), "12 of which include EIT applications" (§77), all of which were subsequently destroyed by the CIA.¹⁹

Was it research involving human subjects? The retrospective response is an implicit yes.

IS THE RISK-TO-BENEFIT ANALYSIS SOCIALLY BENEFICIAL?

The *IG Report* documents that the OMS did not conduct a prospective risk-to-benefit analysis. According to the Chief, Office of Medical Services:

OMS was neither consulted nor involved in the initial analysis of the risk and benefits of EITs . . . In retrospect . . . OMS contends that the reported sophistication of the preliminary EIT review was exaggerated, at least as it related to the waterboard, and that the power of this EIT was appreciably overstated . . . Consequently . . . there was no *a priori* reason to believe that applying the waterboard with the frequency and intensity with which it was used by the psychologist/interrogators was either efficacious or medically safe (§43fn26).²⁰

The OMS *Guidelines* neither reflect nor mention this assessment made by its Chief. This retrospective negative risk-to-benefit assessment by the Chief of the office implementing the interrogation research provides further evidence of flagrant disregard of the Common Rule²¹ and, more importantly, a depraved indifference to the principles guiding the ethical conduct of research as articulated in *Belmont* and the *Nuremberg Code*.

Was the risk-to-benefit analysis socially beneficial? According to the retrospective assessment of the Chief, Medical Services, the answer is an explicit no.

DISCUSSION

In February 2008, the Bush administration publically acknowledged that it had used the waterboard in the interrogation of detainees (Mayer, 2009). Former Vice President Cheney has acknowledged since leaving office that he signed-off on the use of Enhanced Interrogation Techniques on dozens of

detainees and the use of the waterboard on three (Mayer, 2009). That the Bush administration committed to a policy of coercive, abusive, and inhuman practices in the Interrogation Program is no longer disputed. Implicit in the declassified materials is that in the Interrogation Program the Bush administration reordered the developmental sequence from research-to-policy-to-program to policy-to-program-to-research.

This analysis of the *Guidelines* text juxtaposed to redacted blocks infers that the only component of the document remaining classified concerns interrogation research and suggests that the integrity and organization of the document is restored if we recognize both notes as research-related. This analysis posits *INTERROGATION RESEARCH* as the redacted major heading following the concluding “NOTE” (Appendix F). That is, the concluding “NOTE” states research goals requiring the systematic observation and documentation of every waterboard application and serves as a link between the two major headings of the *Guidelines*: “*INTERROGATION SUPPORT*” (Appendix F) and the posited *INTERROGATION RESEARCH* corresponding to the third redacted context under which the *Guidelines* apply.

Unlike the U.S. military training model, where volunteers are subjected to a single waterboard application (§32), detainee subjects did not volunteer and underwent the waterboard during scores of interrogation sessions. One of the interrogators acknowledged that the use of the waterboard differed from the military training model and “explained that the Agency’s technique is different because it is ‘for real’” (§79). The *IG Report* cites the OMS opinion that the waterboard training experience “is so different from the subsequent Agency usage as to make it almost irrelevant” (§43fn26).²²

The use of physical coercion contravenes the first principle of the ethical conduct of human research as established in the *Nuremberg Code*: voluntary informed consent (Nuremberg Military Tribunal, 1947). The voluntary aspect of consent to participation in research has been incorporated into every human research ethics code and convention since the *Nuremberg Code* (Emanuel et al., 2000). Before *Belmont*, the *Nuremberg Code* had an impact on research involving prisoners in the United States. In 1953, the Secretary of the Department of Defense issued a memorandum establishing policy for research that incorporated the principles of the *Nuremberg Code* including a prohibition on research involving prisoners of war (National Bioethics Advisory Commission, 2001). The first paragraph in *Belmont* counterbalances the assertion in its opening sentence, “Scientific research has produced substantial social benefits,” with the Nuremberg War Crimes Trials and biomedical experimentation on concentration camp prisoners (National Commission, 1979).

Belmont and the Common Rule can be viewed as the terministic screens guiding and defining the ethical conduct of human research in the United States. *Belmont* considered that respect for persons would dictate that

prisoners be protected noting the “exploitation of unwilling prisoners as research subjects in Nazi concentration camps was condemned as a particularly flagrant injustice” (National Commission, 1979). While the Interrogation Program contrasts sharply with criminal human experimentation condemned at Nuremberg in terms of magnitude, there remains a basis for comparison in terms of justice. The detainees are alleged terrorists. The legality of their indefinite detention is beyond the scope of this article, yet issues of justice obtain in terms of abusive and inhuman treatment and their unwilling participation in research (ICRC, 2007). Declassified documents reveal the rationale for the conduct of interrogation research that functioned outside of the guidelines for the ethical conduct of human research as they have evolved over the past half century. This article intends to persuade the research ethics community to reconsider the applicability *Nuremberg Code* in the contemporary United States. It aims at demonstrating that the Enhanced Interrogation Techniques are “so egregious, so outrageous, that they fairly may be said to shock the contemporary conscience” and that interrogation research on the techniques targeting detainee subjects violates “the whole community sense of decency and fairness that has been woven by common experience into the fabric of acceptable conduct.”²³

It is possible that the DCI issued an exemption for interrogation research that remains classified. It is also possible that a formal research protocol for interrogation research remains classified or that, like the Tuskegee Syphilis Study, no formal protocol ever existed (National Bioethics Advisory Commission, 2001). In any case, the Interrogation Program raises vexing issues concerning the ethical conduct of classified human research,²⁴ including: prospective review, accountability, and prisoner subjects, among other issues and illustrates basic flaws in U.S. human research protection (Shapiro and Speers, 2002).

Declassified documents reveal the rationale for the conduct and the products of interrogation research that challenge the entire human research ethics community. Executive Order 13491 (2009) *Ensuring Lawful Interrogations* issued by President Obama has restored the observance of the prohibition of torture or inhuman treatment, including biological experiments.²⁵ Yet, while the Obama administration has declassified documentation of torture policy, the establishment and conduct of interrogation research remains redacted in those same documents. Moreover, the Department of Justice has argued that data documenting detainee subjects’ reactions to interrogation techniques repudiated by President Obama are exempt under the Freedom of Information Act (Leopold, 2009).

The *IG Report* anticipated the appointment of a special prosecutor to investigate abuse and torture (ACLU, 2009; Horton, 2010).²⁶

During the course of this Review, a number of Agency officers expressed unsolicited concern about the possibility of recrimination or legal action resulting

from their participation in the CTC [Interrogation] Program. . . . [and] expressed concern that a human rights group might pursue them for activities [redacted] Additionally, they feared that the Agency would not stand behind them if this occurred (§231).

The concluding paragraph of *IG Report* is prescient:

The Agency faces potentially serious long-term political and legal challenges as a result of the CTC Detention and Interrogation Program, particularly its use of EITs and the inability of the U.S. Government to decide what it will ultimately do with [alleged] terrorist detained by the Agency (§266).

President Obama's reluctance to hold anyone accountable for the Interrogation Program and his administration's lack of transparency with respect to interrogation research confounds and undermines his executive order *Ensuring Lawful Interrogations* and his position on the matter has been emulated. In his evaluation of the *IG Report*, Miles (2009b) indicates the scope of accountability issues:

The Institute of Medicine and the American Medical Association tacitly supported the devolution of the medical ethics of torture to these new lower U.S. standards. Both organizations repeatedly declined to support:

- a. an independent investigation of the role of U.S. personnel in organizing and implementing these abuses;
- b. calling for the accountability of identified participants, by means of licensing boards or censure by medical associations;
- c. implementation of the U.S. War Crimes Act's sanctions against medical personnel.

Given such formidable institutional resistance to any investigation of or accountability for coercion, abuse, and torture, this article recommends an additional route for redress of abuses of the Interrogation Program concerning interrogation research.

CONCLUSION

This analysis of declassified documents and historical evidence (Miles, 2009a) support the inference that the CIA conducted interrogation research on detainee subjects. The heavily redacted documents define roles for physicians and psychologists revealing the rationale, goals, operating procedures, and products of interrogation research targeting detainee subjects. Research documenting the reactions of detainee subjects to Enhanced Interrogation Techniques violates the principles guiding the ethical conduct of human research and the Common Rule. Consistent with a focus on the conduct of unethical

research as revealed in the *IG Report* and other sources, this article proposes the submission of a noncompliance complaint to the Office for Human Research Protection (OHRP) requesting a for-cause evaluation of interrogation research conducted by the CIA (OHRP, 2009).

The research ethics community is included among the sponsors, the funding source, of the Interrogation Program. The submission of a noncompliance complaint to OHRP against the CIA for interrogation research says this is neither what we do nor how we work within the human research community. The fact that an agency of the federal government has engaged in interrogation research on the use of the waterboard is an appalling and terrible thing to contemplate meriting, at the very least, the repudiation of the entire human research ethics community. Whatever the outcome of a for-cause OHRP evaluation of the CIA for unethical interrogation research a segment of the research ethics community will have initiated procedures seeking ethical accountability in research.²⁷

This post hoc exercise in research ethics and the use of the waterboard setting aside the legal and moral issues is dizzying and, as the Spanish say, like trying to block out the sky with your hand.

ACKNOWLEDGMENTS

As an undergraduate at The City College of New York, I was introduced to Kenneth Burke and his work by his daughter, anthropologist Eleanor Leacock. My debt to them has been inestimable. I have also benefitted from generous support offered by Donna Keren, Gerald Markowitz, M. Teresa Rabassa, Kim Greene, and Steven H. Miles. I am also indebted to anonymous reviewers for their insightful commentary. Despite the kindness of the aforementioned, I am solely responsible for errors and shortcomings in this article.

NOTES

1. PHR shared the 1997 Nobel Peace Prize. It is a non-profit, non-sectarian organization funded through private foundations and by individual donors with membership open to all and not restricted to health professionals.
2. See <http://www.aclu.org/accountability>.
3. The *IG Report* abbreviates Enhanced Interrogation Techniques with the acronym "EIT." In keeping with Burke's (1966) notion of language as act, I demure from that practice.
4. Title 45 *Code of Federal Regulations*, Part 46, (45 CFR 46) Subpart A.
5. "It [the *IG Report*] is notably deficient in not describing the interrogation of prisoners by our proxy interrogating allies, such as Uzbekistan," notes Miles (2009b).
6. See also International Committee of the Red Cross for detainee subjects' accounts of "suffocation by water" (2007).

7. In April 2003, the OMS disseminated draft guidelines that were updated in September 2003 (Appendix B). OMS retained the term “draft” in the updated guidelines on advice of legal counsel (§262). A version of the OMS *Guidelines*, dated May 2004, “Draft” deleted and expanded to include rendition, was declassified on 10/30/09. See Document #80 available at <http://www.aclu.org/accountability/released.html>.
8. See also Swarns (2009) on former Vice President Cheney’s defense of the Interrogation Program.
9. This was the choice reflected in blog discussions upon the release of the *IG Report* and the PHR allegation of unethical human experimentation. See <http://www.researchethics.ca/blog/2009/09/cia-physicians-and-research-on-torture.html> and the October 6 and 7, 2009 contributions to <http://primr.blogspot.com>.
10. The Department of Health and Human Services (HHS) Office for Human Research Protection cites Executive Order 12333 in the Federalwide Assurance authorizing CIA adoption of the Common Rule (HHS, 2005).
11. See 45 CFR 46.101(c).
12. See 45 CFR 46.102(e) and (f), respectively.
13. The ACLU has posted the indexes at http://www.aclu.org/torturefoia/legaldocuments/torturefoia_vaughn1_20090501.pdf and http://www.aclu.org/torturefoia/legaldocuments/torturefoia_vaughn2_20090501.pdf.
14. The *IG Report* (2004) spells the name “Zubaydah,” the ICRC (2007) “Zubaydeh,” and Mayer (2009) “Zubayda.”
15. See Document Number 1494 at http://www.aclu.org/torturefoia/legaldocuments/torturefoia_vaughn1_20090501.pdf.
16. Mitchell who had no experience in the Middle East, with Islamic religion or culture, interrogation or terrorism and does not speak Arabic was, nonetheless, hired by the CIA as a consultant on detainee interrogation (Mayer, 2009).
17. See Goetz and Sandberg (2009) for biographical information on the contractor psychologists and the CIA outsourcing of the Interrogation Program.
18. The *Guidelines* mention medical dimensions that need to be monitored to “ensure the safety of the subject” but redact the following paragraph that presumably detail the role of physicians and psychologists in that task fundamental to the ethical conduct of clinical research (Appendix F).
19. Since the Department of Justice announced a criminal inquiry into the destruction of videotapes in 2008, (Mazzetti and Johnston, 2008) the grand jury inquiry into the destruction of videotapes is ongoing (Mazzetti, 2009).
20. The *IG Report* does not provide a date for the OMS Chief’s assessment cited in ¶43fn26.
21. See 45 CFR 46 §111.
22. The footnote to ¶43 is particularly relevant to legal issues sidelined in this article because then-Assistant Attorney General Bybee leaned heavily on the military training model for the use of the waterboard in the Department of Justice memorandum (Appendix C) clearing the way for the use of the waterboard in the Interrogation Program.
23. This language is lifted from a declassified one-page document, #151 CIA/OLC interrogation questionnaire, released on 10/30/09, posted by the ACLU at <http://www.aclu.org/accountability/released/html>.

24. See Network of Concerned Anthropologists (2008) who promoted the principle that clandestine research is “a clear violation of research ethics” into the American Anthropological Association Code of Ethics (2009).
25. See Article 130 Third 1949 Geneva Convention relative to the Treatment of Prisoners of War available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>.
26. See Johnston and Mazzetti (2009).
27. “If OHRP receives an allegation or indication of noncompliance related to human subjects research that is covered by an OHRP-approved FWA and is conducted or supported solely by a Federal department or agency other than HHS, OHRP will refer the matter to the other department or agency for review and action as appropriate” (2009).

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