

ARTICLES

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Facing an Ugly Truth: The Senate's Report on CIA Torture as Truth-Telling

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Known as the “torture report,” the U.S. Senate’s December 2014 report on the CIA’s post-9/11 interrogation program described years of systematic human rights abuses born from an official policy of torture and cruel treatment. The Obama administration ended the program in 2010, marking a transition away from these state-sponsored human rights violations. In such a transitional society, it is crucial that the truth be available to the public and to victims to help them move past atrocities; the torture report may be a mechanism for such truth-telling. By considering similar truth-telling reports from other countries as well as the context of the torture report, I assess how this report contributed to transitional justice in four ways: by

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discovering and acknowledging past abuses, addressing the needs of victims, advancing accountability, and creating institutional reforms and promoting national reconciliation. While not perfect in any respect, the report has affected the way Americans view the CIA program, contributed to legislation banning torture, and created consequences for some of the program's architects.

INTRODUCTION

In December 2014, the U.S. Senate Select Committee on Intelligence (SSCI) released the executive summary, findings, and conclusions of its report on the Central Intelligence Agency's (CIA) interrogation program following the September 11, 2001 terrorist attacks. A landmark document, the executive summary (hereafter the "SSCI report," "torture report," or "report") is a 499-page documentation of abuses committed in CIA "black sites" against suspected terrorists and al Qaeda members. It documents the CIA's use of techniques such as waterboarding; sleep deprivation for up to 180 hours (often with the detainee's hands shackled above his head); the use of stress positions and confinement (including confinement in small boxes); sensory deprivation; dietary manipulation; threats of personal harm against the detainee or his family; slapping and hitting detainees; exposure to extreme cold; forced nudity; repeatedly slamming detainees against concrete walls; and "rectal rehydration," a "force feeding" technique that doctors have said is never medically necessary.¹ At least one detainee died as a result of treatment; others experienced frequent vomiting, unconsciousness, hallucinations, panic attacks, convulsions, severe depression, and near-drowning.² The report also details how the CIA, the George W. Bush administration (hereafter Bush administration), and the Department of Justice authorized these techniques, as well as the CIA's misleading statements to Congress, the administration, and the public about the program.

¹ See generally SENATE SELECT COMMITTEE ON INTELLIGENCE, 113TH CONG., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM (2014) (Executive Summary) [hereinafter SSCI REPORT]; Press Release, Physicians for Human Rights, CIA Torture Report Highlights Medically Unnecessary Procedure, (Dec. 10, 2014), <http://physiciansforhumanrights.org/press/press-releases/cia-torture-report-highlights-unnecessary-medical-procedure.html>.

² See generally SSCI REPORT, *supra* note 1.

The SSCI report's champion was Senator Dianne Feinstein of California, then the chair of the Intelligence Committee, who worked for several years to have the report released. In her floor speech on December 9, 2014, Senator Feinstein said, "history will judge us by our commitment to a just society governed by law and the willingness to face an ugly truth and say 'never again.'"³ In this statement she identified the true purpose of the report: to uncover atrocities, demonstrate responsibility for them, and ensure that they never happen again.

Truth-telling mechanisms can be central elements in transitional justice, helping a society move past a period of systematic human rights abuses. While many forms of transitional justice take place after the fall of an oppressive regime or a period of civil war, this is not always the case.⁴ Truth-telling mechanisms have also been used after the cessation of systematic and state-sanctioned human rights violations, whether or not these violations accompanied a political transition or the end of a conflict. For example, a truth commission was established in Greensboro, North Carolina in 2004 to investigate racial attacks from the year 1979 and determine the U.S. government's involvement in those attacks.⁵ Canada developed its own truth commission in 2009 to investigate the forced assimilation and abuse of Aboriginal populations in Canada.⁶

The end of the CIA torture program did not, of course, mark the end of a dictatorship or oppressive political regime, and whether the

³ Dianne Feinstein, Chairman Senate Intelligence Comm., Remarks on Committee Report on CIA Detention, Interrogation Program (Dec. 9, 2014), http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=c0710e63-f518-40f5-a90d-7e788c9c91a3.

⁴ Compare Rosemary Nagy, *Transitional Justice as Global Project: Critical Reflections*, 29 *THIRD WORLD Q.* 275, 277 (2008) ("[t]he view of justice associated with periods of political change, as reflected in the phenomenology of . . . responses that deal with the wrongdoing of repressive predecessor regimes"; "that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law"; and "restoring justice within the parameters of peacebuilding.") with Matiangai Sirleaf, *The Truth about Truth Commissions: Why They Do Not Function Optimally in Post-Conflict Societies*, 35 *CARDOZO L. REV.* 2263, 2265 (2014) (Transitions "are characterized by widespread criminality and norm breaking, which complicates efforts to resort to the criminal justice system.").

⁵ Priscilla B. Hayner, *UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS* 62 (2001).

⁶ *Id.* at 72–73.

“War on Terror” or the central conflicts in Iraq and Afghanistan had officially ended by the time the report was released is still a subject of debate. However, the end of the CIA torture program did mark the end of a systematic policy of government-supported human rights abuses in the United States. The George W. Bush administration’s legal memos demonstrate that torture was not the work of a few rogue officers, but was an official, politically-supported anti-terrorism strategy.⁷ The transition to the Obama administration marked a shift in this policy, as one of President Obama’s first acts was to outlaw torture by executive order.⁸

This transition, as well as Senator Feinstein’s description of the SSCI report as a recommitment to a “just society,” a willingness to face an “ugly truth,” and a way to say “never again,” identify the SSCI report as a form of truth-telling. This paper will examine the SSCI report through the lens of transitional justice. The first section examines the role that truth-telling can play in moving past a conflict, discusses whether a “right to truth” exists in international law, and discusses the criteria for a successful truth-seeking mechanism. The next four sections discuss how the SSCI report can contribute to four central goals of truth-telling: discovering and acknowledging past abuses, addressing the needs of victims, advancing accountability, and creating institutional reforms and promoting national reconciliation.

There are many controversial debates around the CIA’s interrogation program, and to discuss the SSCI report in depth I accept several legal arguments as true, as they have been addressed elsewhere and are outside the scope of this paper. First, I accept that the CIA’s “enhanced interrogation techniques” constitute torture. Legal scholars, international law, and President Obama’s own statements support this viewpoint, though it is still a topic of some

⁷ See, e.g., Memorandum from Stephen Bradbury, Principal Deputy Assistant Attorney General, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 10, 2005), <http://fas.org/irp/agency/doj/olc/techniques.pdf> [hereinafter May 10 CIA Memo]; Memorandum from Jay S. Baybee, Assistant Attorney General, to John A. Rizzo, Acting General Counsel, Central Intelligence Agency (Aug. 1, 2002), <http://fas.org/irp/agency/doj/olc/zubaydah.pdf> [hereinafter Aug. 2002 CIA Memo]; Memorandum from Stephen G. Bradbury, Principal Deputy Assistant Attorney General, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (May 30, 2005), <http://fas.org/irp/agency/doj/olc/article16.pdf> [hereinafter May 30 CIA Memo].

⁸ Exec. Order No. 13491, 3 C.F.R. § 199 (2010).

debate within the United States.⁹ I do not intend to delve into this debate, nor do I accept the views of the “torture memos” prepared during the Bush administration that claim otherwise.¹⁰ Second, I accept that torture is illegal under U.S. and international law, that torture was illegal in the United States even before specific anti-torture legislation was signed into law in November 2015, and that the post-9/11 interrogation program represented a systematic, official policy of employing illegal interrogation techniques.¹¹

Third, some of the Bush administration’s memos claim that there is a justification for torture under a defense of “necessity” or a “ticking time-bomb” scenario, in which the only way to prevent an attack on many innocent people is to torture one guilty individual.¹² I reject this interpretation, as do international treaties.¹³ While it is understandable that in a post-9/11 United States, the Bush administration and even the American public were willing to turn to almost any mechanism to prevent future attacks, anti-torture laws are expressly formulated to protect against governments’ yielding to this temptation. This paper accepts legal standards that explain there is never justification for torture in international or domestic law, and therefore any use of torture constitutes a war crime or a gross human rights violation, regardless of the detainee or circumstance.¹⁴

⁹ See generally Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT’L SEC. L. & POL’Y 455 (2005); Josh Gerstein, *Obama: “We Tortured Some Folks,”* POLITICO (Aug. 1, 2014), <http://www.politico.com/story/2014/08/john-brennan-torture-cia-109654.html>.

¹⁰ See May 10 CIA Memo, *supra* note 7; Aug. 2002 CIA Memo, *supra* note 7; May 30 CIA Memo, *supra* note 7.

¹¹ Numerous U.S. laws prohibit torture, including 18 U.S.C. § 2340A (2006) and the War Crimes Act, 18 U.S.C. § 2441 (2012), as well as state, local, and federal laws prohibiting assault, battery, mayhem, or other crimes. International legal statutes that prohibit torture include the Geneva Conventions, the International Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Dec. 10, 1984, 1465 U.N.T.S. 85), and the International Convention on Civil and Political Rights (Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.), among others.

¹² May 10 CIA Memo, *supra* note 7.

¹³ See, e.g., International Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, art. 2(2).

¹⁴ This is not to say that all instances of CIA torture were war crimes—there is still extensive debate about whether all or some of the “War on Terror” constitutes an armed conflict. I do not intend to delve into this issue in this paper, but it is important to note that torture is illegal both in a state of armed conflict and outside of one.

I

TRUTH-TELLING AS A FORM OF TRANSITIONAL JUSTICE

While truth-seeking has long been a central purpose of many forms of transitional justice, truth-telling as a form of transitional justice in its own right is particularly central to the emerging concept of “restorative” justice. The primary aim of many judicial mechanisms in a restorative model is to rebuild a community rather than punish offenders, hold perpetrators accountable, or deter future crimes (tenets of “retributive” justice).¹⁵ The need for truth during a transition away from human rights abuses, and the creation of different bodies to produce official records of the truth, are “becoming the norm in societies emerging from periods of violent conflict or authoritarian rule.”¹⁶ Truth-seeking initiatives aim to create a shared memory of events, thought to be important for a society that hopes to move beyond atrocities.¹⁷

A “right to truth” is also an emerging concept as a type of redress for victims. The U.N. Commission on Human Rights has recognized a “right to truth,” citing its importance in “[contributing] to ending impunity and [promoting and protecting] human rights.”¹⁸ The question of whether a right to truth exists under international law is less certain, but there is evidence to suggest a trend in that direction. Additional Protocol 1 to the Geneva Conventions discusses the right of families to learn what happened to loved ones who disappeared under oppressive regimes.¹⁹ The Inter-American Commission on Human Rights, the U.N. Working Group on Enforced or Involuntary Disappearances, and the U.N. Human Rights Committee have all also recognized a right to truth, the latter again specifically regarding families learning the fate of victims of enforced disappearances or secret executions.²⁰

¹⁵ Gearoid Millar, *Local Evaluations of Transitional Justice through Truth Telling in Sierra Leone: Postwar Needs and Transitional Justice*, 12 HUM. RTS. REV. 515, 520 (2011) (there is significant overlap in the goals of “restorative” and “retributive” justice, and in the mechanisms typically used in each one).

¹⁶ Tim Kelsall, *Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone*, 27 HUM. RTS. Q. 361, 362 (2005).

¹⁷ Millar, *supra* note 15, at 521.

¹⁸ UN Commission on Human Rights Res. 2005/66 (Apr. 20, 2005).

¹⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 32-33, 8 June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol 1].

²⁰ Yasmin Naqvi, *The Right to Truth in International Law: Fact or Fiction?*, 88 INT’L REV. RED CROSS 245, 249, 256 (2006).

While the right to know what happened to disappeared family members is the context in which the right to truth is most often considered, it is not the only one.²¹ Interpretations of the right to truth by no means limit it to cases of enforced disappearance, nor do they limit this right to victims or their families. The right to truth can be a communal right, whereby an entire society has the right to understand what happened and ensure that similar acts are not repeated in the future.²² This right is also “a safeguard against impunity,” and, more broadly, can be violated whenever “particular information relating to the initial violation is not provided by the authorities, be it by the official disclosure of information, the emergence of such information from a trial or by other truth-seeking mechanisms.”²³

The SSCI report therefore can provide some form of the right to truth, both for individuals and for the community. It publicizes accounts for victims and their families; not only for those victims who were captured by the CIA under mysterious circumstances and those who died in captivity, but also for those who seek publication and acknowledgement of the harms that were committed against them. On a communal level, it allows the American people to understand what was committed in their name.

The next question is how societies seek and publicize the truth. In many ways, truth is central to all forms of transitional justice; it is obviously crucial, for example, to a criminal trial.²⁴ However, non-judicial forms of truth-telling through mechanisms that put the truth at the center of their mandates have become prominent in recent years.

Scholars differ on how they categorize and name non-judicial forms of truth-telling. Priscilla Hayner, founder of the International Center for Transitional Justice, uses the term “truth commissions” to encompass a wide array of truth-telling institutions. A truth commission, by her definition, is a body that

- (1) is focused on past, rather than ongoing, events;
- (2) investigates a pattern of events that took place over a period of time;
- (3) engages directly and broadly with the affected population, gathering information on their experiences;
- (4) is a temporary body, with the

²¹ *Id.* at 256–57.

²² *Id.* at 259–60.

²³ *Id.* at 249.

²⁴ *Id.* at 246.

aim of concluding a final report; and (5) is officially authorized or empowered by the state under review.²⁵

Others term some of these institutions “commissions of inquiry.” Hayner acknowledges that there “are a range of other kinds of official inquiries into past human rights abuses” that are not necessarily truth commissions by her definition, but that are nonetheless important and “may be a better approach than a truth commission, in some moments and some contexts.”²⁶ Indeed, the United States has used several similar official inquiries to develop the truth in the past, such as the Commission on War-Time Relocation and Internment of Citizens in 1982 to study World War II Japanese internment camps, and the truth commission in Greensboro, North Carolina.²⁷ Additionally, many inquiries not officially deemed “truth commissions” nonetheless fit many of these criteria, and others that were called “truth commissions” did not meet all the requirements.²⁸

Therefore, the lines between the definitions of truth-seeking mechanisms blur sufficiently that it is difficult to pinpoint how a report like the SSCI report should be termed. For the purposes of this paper it is not necessary to specifically classify the report as one form of truth-seeking or another. The SSCI report meets almost all of Hayner’s criteria for a truth commission. The only point on which it fails to meet this definition is in its lack of direct engagement with the affected population.²⁹ However, as mentioned, Hayner does not believe that failing on one criterion means that an initiative cannot be considered a truth commission, or that a report not specifically called a truth commission cannot be a valuable form of truth-telling.

A more complicated question is whether the SSCI report fulfills the *goals* of truth-telling. While scholars vary on what they emphasize as goals of truth-telling, there is some consensus. Hayner says that what she terms “truth commissions” should achieve some or all of the following goals: “to discover, clarify, and formally acknowledge past abuses; to address the needs of victims; to “counter impunity” and advance individual accountability; to outline institutional

²⁵ Hayner, *supra* note 5, at 11–12.

²⁶ *Id.* at 14.

²⁷ *Id.* at 15, 62.

²⁸ *See generally id.*

²⁹ It is also true that the SSCI is not a temporary committee, being a permanent part of the U.S. Senate. However, for the purposes of this definition, it is effectively temporary, because the investigation that resulted in the report was a temporary effort with a clear end goal.

responsibility and recommend reforms; and to promote reconciliation and reduce conflict over the past.”³⁰

David Mendeloff of Carleton University, who has written extensively on transitional justice, notes eight main purposes of truth-telling as a form of transitional justice: that it “(1) encourages social healing and reconciliation, (2) promotes justice, (3) allows for the establishment of an official historical record, (4) serves a public education function, (5) aids institutional reform, (6) helps promote democracy, and (7) preempts as well as (8) deters future atrocities.”³¹ Robert Weiner, formerly of the Lawyers’ Committee for Human Rights (now Human Rights First), has said that “three steps should be considered minimal requisites after a period of long-standing abuse: an inquiry into the facts by proper authorities, an opportunity for victims to come forward and tell their stories, and an official finding of the facts.”³²

Hayner’s criteria largely encompass those of Weiner and Mendeloff, while occasionally outlining slightly broader goals. All acknowledge the importance of clarifying the past, creating a historical record, and official fact-finding to promote an accepted truth and educate the public. Weiner states that addressing the needs of victims may be accomplished by allowing them to come forward and tell their stories (though, as discussed later in this paper, this is not always the only or best way to help victims heal).³³ Both Hayner and Mendeloff stress the importance of individual responsibility and justice, as well as institutional reforms, which can include the promotion of democracy. Institutional reforms, which Hayner stresses, are intended to achieve Mendeloff’s goal of preventing future atrocities (for example, by passing new legislation).³⁴ Finally, promoting reconciliation and reducing conflict goes hand in hand with societal healing, and reducing the possibility of future atrocities.

Because Hayner’s points generally include Mendeloff and Weiner’s priorities, I will use Hayner’s requirements to demonstrate how the SSCI report meets the goals of truth-telling. Because

³⁰ Hayner, *supra* note 5, at 20.

³¹ David Mendeloff, *Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?*, 6 INT’L STUD. REV. 355, 358 (2004).

³² Thomas Antkowiak, *Truth as a Right and Remedy in International Human Rights Experience*, 23 MICH. J. INT’L L. 977, 997 (2002).

³³ See *infra* Part III.

³⁴ See *infra* Part V.

reconciliation and reforms tend to be intertwined, and because the unique context of the SSCI report may render reconciliation less crucial (as will be discussed below), I will discuss these two criteria together.

II

DISCOVERING AND ACKNOWLEDGING PAST ABUSES

Hayner states that the “first and most straightforward” goal of a truth commission is fact-finding.³⁵ This is especially important in the context of regimes that were known for forced disappearances or secrecy. Truth disseminated through society can effectively set the record straight, both for society generally and for the individual victims specifically.³⁶

However, the exact purpose of creating a record of the truth varies depending on the context in which it is made. In societies emerging from regimes characterized by secret torture and enforced disappearance, the truth can serve a purely educational role. In others, however, atrocities committed may have already been acknowledged, or may be an open secret. In this context, truth commissions are more valuable as a public acknowledgement of wrongdoing.

For example, perhaps the best-known truth commission was the one created in post-apartheid South Africa. Here, 22,000 victims came forward to the commission with statements of wrongs done to them, and 1,819 were chosen to testify publicly.³⁷ The goal of the South African truth commission was to promote national unity as well as discover the story of past events.³⁸ Many apartheid activists, however, argued that the commission was not necessary to publicize the truth because it was impossible to not know that people had been tortured and disappeared under the regime.³⁹ Rather, the commission’s “most important contribution was simply to remove the possibility of continued denial.”⁴⁰ In other words, truth-telling was valuable even if it did not “establish” a new truth; rather, it merely

³⁵ Hayner, *supra* note 5, at 20.

³⁶ Antkowiak, *supra* note 32, at 997.

³⁷ Audrey Chapman, *Truth Commissions and Intergroup Forgiveness: The Case of the South African Truth and Reconciliation Commission*, 13 PEACE AND CONFLICT: J. PEACE PSYCHOL. 51, 54 (2007).

³⁸ *Id.* at 52.

³⁹ Hayner, *supra* note 5, at 20–21.

⁴⁰ *Id.*

“[lifted] a veil of denial about generally known but unspoken events.”⁴¹

In the wake of the U.S. torture program, both goals were important. While the extent and details of the atrocities committed during the torture program may not have been widely known, most people knew that suspected terrorists were imprisoned and subjected to techniques like sleep deprivation and waterboarding. In this sense, the SSCI report's role is similar to that of the South African commission: to make it harder to deny the extent of the program's brutality, rather than to educate the public.

However, the American public was much less likely to know the extent of individual administration members' involvement in the program, the ineffectiveness of the techniques used, or the extent to which the CIA misled the administration and the public. The CIA's program also involved capturing suspected terrorists and taking them to secret “black sites,” so the SSCI report can serve some purpose in this case, particularly for families of detainees who were killed.⁴²

To meet both goals of a truthful account, the record created must meet two standards: first, it must be supported by fact and be a thorough analysis of the available data on the program. Second, it must not be perceived as one-sided or biased. If it fails on the first count it will fail to establish an accurate record; if it fails on the second it will not be accepted by society and cannot create a new collective understanding of what happened. The SSCI report must create a public record that is perceived as trustworthy and that permeates public consciousness to establish a complete narrative of the post-9/11 interrogation program.

To answer the first question, we must consider the process of creating the SSCI report. The Committee staff who created the report reviewed the more than six million pages of CIA materials, including operational cables, intelligence reports, internal memoranda and emails, briefing materials, interview transcripts, contracts, and other records.⁴³ However, while they “had access to and drew from the interviews of numerous CIA officials conducted by the CIA's Inspector General and the CIA Oral History program on subjects that lie at the heart of the Committee Study, as well as past testimony to

⁴¹ Antkowiak, *supra* note 32, at 998.

⁴² *See generally* SSCI REPORT, *supra* note 1.

⁴³ *See* SSCI REPORT, *supra* note 1, at 9.

the Committee,⁴⁴ they did not actually interview any CIA officials. This was largely because the Department of Justice was involved in an ongoing investigation that precluded any discussion with those involved.⁴⁵

The Committee also did not interview victims. This may be partially explained by the fact that the Department of Defense generally does not allow any access to detainees still in U.S. custody at Guantanamo Bay, and those not in U.S. custody are scattered around the world, making some interviews difficult.⁴⁶ It is also possible, though, that the Committee chose to focus on U.S. accounts of the program rather than victims' to ensure that the report was accepted as unbiased and focused on U.S. government culpability.

While the report was widely criticized for failing to interview CIA officers, the failure to interview victims is much more problematic for the report's completeness and accuracy than the failure to interview perpetrators. Victim testimony is a hallmark of truth commissions, and almost every example of a truth-telling body involves some sort of interviews or discussions with victims.⁴⁷ As Hayner points out, victim testimony "allows a detailed accounting of the patterns of violence over time and across regions, literally recording a hidden history."⁴⁸

That being said, the area in which victim testimony is most valuable when assessing the SSCI report as an accurate record is in describing the extent and the brutality of previously unknown techniques.⁴⁹ Three things are important to note here. First, as mentioned, many members of the American public generally knew what techniques the CIA used, so in this area the report may serve more as a public acknowledgement; victim testimony may be more valuable in regimes that kept their abuses more hidden. Second,

⁴⁴ *Id.*

⁴⁵ The Senate Report on CIA Torture—Frequently Asked Questions, OPEN SOCIETY POLICY CENTER 1, 4, <http://opensocietypolicycenter.org/wp-content/uploads/SSCI-CIA-Torture-Report-FAQ.pdf>.

⁴⁶ *See, e.g.*, Statement of the United Nations Special Rapporteur on Torture at the Expert Meeting on the Situation of Detainees Held at the U.S. Naval Base at Guantanamo Bay, Inter-American Commission on Human Rights, Oct. 3, 2013, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13859&LangID=E>.

⁴⁷ *See generally* Hayner, *supra* note 5.

⁴⁸ *Id.* at 20.

⁴⁹ Note that this is not the same as assessing the value of victim testimony for victim catharsis or allowing the victims to feel heard. These issues will be discussed in the next section.

because the SSCI was allowed access to the CIA's detailed records of the program and interrogation plans for many of the detainees, the drafters were able to paint a thorough picture of the brutality of the techniques. Finally, CIA records, while not containing full interviews as some truth commissions do, did contain some victim statements. For example, the report included the fact that some victims said whatever they could to make their torture stop; a piece of information that is crucial when discussing the effectiveness of the program.⁵⁰ The report, therefore, is not entirely without victim perspective.

Furthermore, interviewing victims in the absence of interviews with CIA personnel could have had a significant negative effect on the public's perception of the report. This is the second crucial issue for changing public consciousness: the report must be perceived as trustworthy. Whether they were responsible for acts of terror, many Americans viewed the detainees in the torture program as the "worst of the worst," those who did not deserve humane treatment because they were intent on attacking the United States. Victims might have added valuable information to the report, but including only victim testimony without providing the other side—accounts from American agents—could have been extremely damaging to the report's reception.

The failure to interview CIA agents has the opposite effect on the report's reception: it is not likely to have substantially affected the report's accuracy, but it may have had a negative effect on its perception. Many truth commissions do not seek perpetrator testimony at all, and find that it does not substantially add to the process.⁵¹ Testimony by the accused in such commissions is often lackluster and unhelpful to the truth-telling process.⁵² In South Africa, for example, the individuals responsible for abuses during the apartheid regime rarely participated in the truth-telling process.⁵³ In the truth commission created after the Sierra Leonean civil war, both victims and perpetrators testified in front of a commission, but perpetrators again played a lesser role. While they nominally participated, the accused often downplayed their role, apologizing

⁵⁰ See, e.g., SSCI REPORT, *supra* note 1, at 215.

⁵¹ Charles T. Call, *Is Transitional Justice Really Just?*, 11 BROWN J. WORLD AFF. 101, 104 (2004).

⁵² See Chapman, *supra* note 37, at 64–65; see also Kelsall, *supra* note 16.

⁵³ Chapman, *supra* note 37, at 64.

solely for their membership in an armed group rather than their particular crimes, or insisting that their job was a minor one.⁵⁴

Furthermore, the Committee's main sources were the CIA's own records. While it is difficult to assess the Committee's analysis of the information without seeing the full Committee study and the records in question, the fact that these records were used indicates that the lack of CIA interviews is likely not a crucial problem for the report's accuracy.

However, the failure to interview CIA agents may have had the unintended effect of weakening the report's credibility. Critics of the report used the fact that CIA agents were not interviewed to paint the report as one-sided and biased.⁵⁵ The CIA, which largely opposed the report, started preparing this negative campaign as early as the spring of 2014, when White House Chief of Staff Denis McDonough insisted that Senator Feinstein give former CIA officials the report to read. "Thus, they had time to prepare their rebuttal and create a Web site, CIA Saved Lives, before the release of the report The former CIA officials attacked the report as partisan" and therefore biased.⁵⁶ At the same time, Republicans in the Senate, who were sometimes viewed as tougher on national security and less distracted by issues of human rights than Democrats, largely abandoned the report. While six SSCI Republicans voted in favor of the initial investigation, they later recused themselves, with the result that the report was created entirely by Democrats. When the final report was completed, only one Republican voted to approve it.⁵⁷

Republican senators' statements upon the report's release further enforced the message that it was one-sided and untrustworthy. Those who opposed the report called it, among other things, "a blatant attempt to smear the Bush administration" (Richard Burr of South Carolina);⁵⁸ a Democratic attempt "to blame George W. Bush for everything" (Ted Cruz of Texas);⁵⁹ unreliable because no Republicans

⁵⁴ See Kelsall, *supra* note 16, at 372.

⁵⁵ See Connie Bruck, *The Inside War*, THE NEW YORKER, June 22, 2015, <http://www.newyorker.com/magazine/2015/06/22/the-inside-war>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Colin Campbell, *Sen. Richard Burr wants CIA Torture Report Copies Returned*, THE NEWS & OBSERVER, Jan 21, 2015, <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article10228955.html>.

⁵⁹ Josh Feldman, *Ted Cruz on CIA Report: "Torture is Wrong, Unambiguously, Period, the End," But . . .*, MEDIAITE (Dec. 10, 2014), <http://www.mediaite.com/online/ted-cruz-on-cia-report-torture-is-wrong-unambiguously-period-the-end-but/>.

had voted for it (John Hoeven of North Dakota);⁶⁰ motivated by Democrats angry because they lost the majority in the Senate (Mark Kirk of Illinois);⁶¹ “politically motivated” and “one-sided” (Johnny Isakson of Georgia, James Risch of Indiana, and Marco Rubio of Florida);⁶² incomplete due to lack of interviews with CIA agents (Thom Tillis of North Carolina);⁶³ “misleading and inaccurate” (Tim Scott of South Carolina);⁶⁴ and “a pure political piece of crap” (Orrin Hatch of Utah).⁶⁵

It is more important, however, to consider the report's impact on the American public. This is harder to measure. Several polls attempted to do so by examining U.S. attitudes toward torture before and after the report was released. A *Washington Post* poll conducted shortly after the release, for example, stated that the report's impact was fairly low because 59% of Americans thought that the CIA's techniques obtained important information that could not be obtained any other way.⁶⁶ Furthermore, 58% thought that, in the future, these techniques could sometimes or occasionally be justified.⁶⁷ Perhaps

⁶⁰ *Senator Hoeven on CIA Interrogation Practices and Government Funding*, C-SPAN, Dec. 10, 2014, <http://www.c-span.org/video/?323174-5/washington-journal-senator-john-hoeven-rnd>.

⁶¹ *Mark Kirk Calls Democrats “Little Zombies” After CIA Torture Revelations*, NBC CHICAGO (Dec. 11, 2014), <http://www.nbcchicago.com/news/local/Mark-Kirk-Calls-Democrats-Little-Zombies-for-CIA-Torture-Report-285500381.html/>.

⁶² News Release, U.S. Senator Johnny Isakson, Isakson on Senate Democrats' CIA Detention and Interrogation Report, Dec. 9, 2014, <http://www.isakson.senate.gov/public/index.cfm/news-releases?ID=1ff330c0-b277-4e06-8827-dbd8ecef3368>; Press Release, James E. Risch, U.S. Senator for Idaho, Risch, Rubio Statement on Senate Intelligence Committee Release of Interrogation Study, Dec. 8, 2014, http://www.risch.senate.gov/public/index.cfm/pressreleases?ContentRecord_id=2b5de0c9-ee1e-4c33-8c5e-d14f7a079e2d.

⁶³ Renee Schoof, *Tillis Echoes Burr on Torture Report*, THE NEWS & OBSERVER (Dec. 10, 2014), <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article10189583.html>.

⁶⁴ Schuyler Kropf, *CIA tactics, report's timing draw fire*, THE POST AND COURIER (Dec. 9, 2014), <http://www.postandcourier.com/article/20141209/PC16/141209457>.

⁶⁵ Stephen Collinson, *Bush Era Haunts Obama*, CNN POLITICS.COM (Dec. 10, 2014), <http://www.cnn.com/2014/12/09/politics/senate-torture-analysis/>.

⁶⁶ Adam Goldman & Peyton Craighill, *New Poll Finds Majority of Americans Think Torture was Justified After the 9/11 Attacks*, WASH. POST (Dec. 16, 2014), https://www.washingtonpost.com/world/national-security/new-poll-finds-majority-of-americans-believe-torture-justified-after-911-attacks/2014/12/16/f6ee1208-847c-11e4-9534-f79a23c40e6c_story.html.

⁶⁷ *Id.*

most concerning for the report's impact: 47% thought that the SSCI report was unfair, opposed to just 36% who found it fair.⁶⁸

On the other hand, 54% of respondents felt that the CIA misled the White House, Congress, and the public.⁶⁹ This perception could demonstrate that the report was more widely trusted than otherwise indicated. While the specific details were not public information, the fact that the CIA used "enhanced interrogation techniques" was fairly well known before the report was published. Fewer people knew the extent of the CIA's deception, so a shift in public perception regarding the CIA's role could be a better indication of the report's impact. A *Huffington Post* poll found that 49% of those polled think the CIA has been not very or not at all truthful about its use of torture (and an additional 23% say it's only been "mostly truthful"). Forty-eight percent think the civilian government does not have control over the CIA, with high (29%) numbers saying they don't know. Fifty-six percent believe the CIA's torture program was illegal (although 24% think it was illegal but necessary).⁷⁰

The *Washington Post* poll was also criticized for not accurately measuring the public's feelings toward torture; its numbers were similar to earlier polls demonstrating that people might support the occasional use of torture in theory, but this perception changes when they are presented with the individual techniques used.⁷¹ For example, a 2001–2009 poll showed that the vast majority of American people oppose the use of electric shock (81%–82%), waterboarding (58%–81%), sexual humiliation (84%–89%), forced nudity (74%–75%), exposure to extreme heat or cold (58%–65%), and punching or kicking (69%–81%).⁷² A ReThink Media poll compiled the results of five polls conducted after the report's release (and one in anticipation of its release) and found similar results: a majority of the public "consider[s] waterboarding (69%), sleep deprivation (70%), forced

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *How Americans Think About Torture*, RETHINK MEDIA 3 (2014), https://rethinkmedia.org/sites/default/files/Torture.ReThink%20Public%20Opinion%20Analysis.Dec2014_0.pdf.

⁷¹ Paul Gronke et al., *No, Americans Aren't "Fine with Torture." They Strongly Reject It.*, WASH. POST (Dec. 11, 2014), <http://www.washingtonpost.com/posteverything/wp/2014/12/11/no-americans-arent-fine-with-torture-they-strongly-reject-it/?hpid=z3>; see generally Paul Gronke et al., *U.S. Public Opinion on Torture, 2001–2009*, 43 POL. SCI. & POLITICS 437 (2010).

⁷² Gronke, *supra* note 71, at 439.

ice baths (57%), and threatening to sexually abuse a prisoner's mother (73%) forms of torture."⁷³

Furthermore, a Constitution Project poll in January 2015, conducted after the public had more time to digest the contents of the report, found even stronger opposition. When questioned about the techniques individually, more than 70% of respondents disapproved of "shoving a person into a wall and hitting him in the face and stomach;" keeping someone awake for up to seven days, shackled and diapered; locking a person for hours in a box the size of a dog crate; and waterboarding.⁷⁴ This poll also found that 67% of respondents supported stronger prohibitions on torture, 69% said that torture was immoral, and 63% said that torture weakened America's standing in the world.⁷⁵

While it is still unclear how the SSCI report changed the public consciousness, these numbers are, on the whole, encouraging for the report's status as a mechanism for truth-telling. While some members of the public seem to feel that torture can sometimes be justified, they are generally uncomfortable with many of the techniques used and are skeptical of the CIA's honesty.

Furthermore, it is important to remember that negative attitudes toward torture do not necessarily imply that the report was unsuccessful in spreading the truth about the program. The truth-telling function of the report aims only to educate the public about what was done, not about the morality of these actions. It is possible that a fully successful form of truth-telling could educate the public on the CIA's program and the majority of Americans could still feel that the CIA's techniques were necessary and appropriate.

While it is difficult to tell exactly what impact the reporting methods had on the public's perception of the report and the torture program, it is clear that the failure to speak to both CIA agents and victims hindered the report's acceptance. Interviews with CIA agents may have lent it credibility, which is crucial for truth-telling as a mechanism. The report's failure to interview victims weakened its ability to tell an accurate and complete story. That said, the fact that

⁷³ RETHINK MEDIA, *supra* note 70, at 2–3.

⁷⁴ Results of National Survey: Views of the American Public about the Use of Torture, Benden Russonello Strategists (Jan. 2015), http://detaineeataskforce.org/wp-content/uploads/2015/01/TCP-Poll-for-release-Jan-2015.pdf?utm_source=PR%3A+Torture+Poll+Release&utm_campaign=PR+-+Torture+Poll+&utm_medium=email.

⁷⁵ *Id.*

torture techniques and policies were publicized using information from the CIA's own records means that the report can still contribute to spreading the truth. These problems, therefore, are notable but not fatal.

III ADDRESSING THE NEEDS OF VICTIMS

A primary purpose of truth-telling in this context, historically, is to provide information for victims and their families. The promotion of truth is often viewed as a non-judicial way to help victims move past atrocities through testimony, acknowledgement of crimes, apologies, or the promise of change.⁷⁶ Many believe that victim involvement and a “bottom-up” approach is central to the healing process.⁷⁷

As discussed, the SSCI report does not include direct victim testimony. It does include CIA reports of victim's responses to questioning—for example, describing how victims would give false information when faced with torture—and some accounts of the effects of torture on the victims.⁷⁸ However, the committee did not interview victims of the torture program, and none were given the chance to directly speak, publicly or privately, about their treatment.

At first glance, this appears to be a major failing in the report. Truth-telling is largely focused on helping victims move past atrocities, feel heard, and have their past be publicly acknowledged. Historically, some victims have been eager to speak; for example, in a Haitian truth commission created after three years of military rule, victims formed long lines outside of commission offices to provide testimony.⁷⁹ In Guatemala, commissioners reported thousands of individuals coming forward for public meetings.⁸⁰ The Chilean National Commission for Truth and Reconciliation after the Pinochet regime, also known as the Rettig Commission, held no public hearings, but those who worked with victims reported that victims felt authorities finally heard them. This process was important to catharsis

⁷⁶ Hayner, *supra* note 5, at 22.

⁷⁷ See generally Patricia Lundy & Mark McGovern, *Community-Based Approaches to Post-Conflict “Truth-Telling”*: Strengths and Limitations, 1 SHARED SPACE: A RES. J. PEACE, CONFLICT, COMMUNITY RELATIONS IN N. IRELAND 35 (2010).

⁷⁸ See generally SSCI REPORT, *supra* note 1.

⁷⁹ Hayner, *supra* note 5, at 147.

⁸⁰ *Id.* at 147–48.

and healing.⁸¹ Some South African victims in the post-Apartheid truth and reconciliation commission also said that testifying brought profound relief.⁸²

The CIA report's situation, however, was more complicated than many of these foreign examples. In most other truth commissions and transitional situations, the victims were members of a society who would remain in their country after a truth commission operated. The United States' torture program was different in that its victims were suspected terrorists who were not members of American society. They did not need to re-join the public in the aftermath of the program. Thus, the U.S. government did not specifically seek to help victims move on and heal, and re-integration was not a central goal of the SSCI report.⁸³

The question is, then, whether the SSCI report can address victims' needs without including their testimony. There are several factors to consider. First, speaking out is not universally accepted as a positive step for victims. There is no consensus on whether telling the truth helps victims move past atrocities. Though the symbolic gesture of the state accepting a victim's account is important, speaking out can also re-traumatize victims. Some who testify in front of truth commissions or provide testimony to commissioners report that they feel worse than before.⁸⁴ In El Salvador, for example,

[m]any victims and their relatives were not yet ready to speak out. The trauma of the war was too recent, and the practice of holding pain inside and not talking about what had happened too ingrained. Many people did not even make the effort to go before the Truth Commission, because they were not ready, because they did not believe the Truth Commission would do anything, or

⁸¹ *Truth Commission: Chile 90*, UNITED STATES INSTITUTE OF PEACE: PUBLICATIONS (May 1, 1990), <http://www.usip.org/publications/truth-commission-chile-90>; Hayner, *supra* note 5, at 148.

⁸² Hayner, *supra* note 5, at 149–50.

⁸³ It is important to note that the fact that victims are suspected terrorists who may have committed crimes is irrelevant to their status as victims. International humanitarian law and other laws prohibiting torture do not have exceptions for criminals. *See, e.g.*, UNITED NATIONS, *supra* note 13, at art. 2(2). (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”).

⁸⁴ Hayner, *supra* note 5, at 152–55.

because wartime leaders failed to inform them about the commission's work.⁸⁵

Furthermore, even where truth-telling is helpful to victims, it does not always provide all the relief they need. Victims also seek social change and reforms to improve their lives and prevent future atrocities (though these adjustments may be less important for foreign actors who are not part of society).⁸⁶ Other criteria for successful truth telling can also indicate ways to help victims. Acknowledging crimes committed in a truthful report can be important, as can institutional reforms or consequences for perpetrators.⁸⁷ While these points are addressed more thoroughly in other sections of this paper, it is worth acknowledging that the SSCI report succeeded, at least partially, on several of them. In short, while allowing victims to speak out can be important, it is not always necessary or sufficient for healing.

Finally, in cases of systematic human rights violations, there is not necessarily just one class of victim or perpetrator. While individuals who were tortured are certainly victims, in a post-conflict context "it is necessary to expand the definition of infringement to include collective infringements on rights to social and collective needs, and, by extension, to see society itself as an actor, both a victim and a perpetrator."⁸⁸ The category of "victim" in the case of the CIA torture report also includes the American public, which was, in many ways, betrayed by the operation of this program and the adoption of an official policy of human rights violations. For this victim class, direct testimony is less important than factors such as creating a public acknowledgement of the truth, creating consequences for those responsible, and reforming society.

The lack of victim testimony is a serious problem for the SSCI report, and, from a transitional justice perspective, it is relevant that the report did not specifically aim to address victims' needs. However, given the report's context, it is not necessarily a fatal fault: the torture program's victims were mostly individuals who were not part of American society and did not seek to integrate after their detention, making at least some of the societal reconciliation purposes

⁸⁵ Margaret Popkin & Nehal Bhuta, *Latin American Amnesties in Comparative Perspective: Can the Past Be Buried?*, 13 ETHICS & INT'L AFF. 99, 107 (1999).

⁸⁶ Millar, *supra* note 15, at 524.

⁸⁷ Hayner, *supra* note 5, at 21, 92.

⁸⁸ Millar, *supra* note 15, at 530.

of testimony unnecessary. Victims' needs may also be served by other means, such as providing official acknowledgement of wrongdoing.

We must also remember that, as discussed in the previous section, interviews with victims could have significantly undermined the report's credibility in the eyes of the public. While it is difficult to weigh the costs to victims against the benefits of not including victim testimony, there is a tradeoff to be made here. The SSCI report's context may demonstrate the need for a revised model that places less of an emphasis on victims' needs when the victims are not part of the society. In such a model, this failing may not be as detrimental as transitional justice theory suggests.

IV

ADVANCING ACCOUNTABILITY

Many believe that successful truth-telling should lead to some consequence for perpetrators. This is a challenging goal, as it can overlap with other distinct forms of transitional justice (such as prosecutions). However, available consequences are not limited to a criminal justice system response. As Hayner points out, some commissions pass their files on to prosecutors, but others recommend sanctions or other non-criminal consequences.⁸⁹ Consequences may also take the form of a public apology, reparations to victims, the loss of a job, loss of reputation, or mere "naming and shaming." It is important, however, to have some form of consequence: "[m]any victims feel that just truth-telling without any other monetary response or form of payment by the perpetrators is not useful; apologies are also more helpful than just truth-telling."⁹⁰ The same goes for the American public; some acknowledgement of wrongdoing should be provided to move the country beyond this program of abuse.

Many truth commissions have led to these forms of "soft" justice—requiring perpetrators to retire, or simply naming them publicly.⁹¹ For example, a Brazilian report released on December 10, 2014—

⁸⁹ Hayner, *supra* note 5, at 22–23.

⁹⁰ Antkowiak, *supra* note 32, at 1000.

⁹¹ For example, El Salvador, Argentina, and Brazil; Popkin & Bhuta, *supra* note 85, at 105, 108–09; Dom Phillips, *Brazil Confronts Horrors of the Past with Torture Report's Release*, TIME (Dec. 10, 2014), <http://time.com/3629031/brazil-torture-report-truth-commission/>; *Brazil Truth Commission: Abuse "Rife" under Military Rule*, BBC NEWS (Dec. 10, 2014), <http://www.bbc.com/news/world-latin-america-30410741>.

coincidentally one day after the SSCI report, and also termed a “torture report”—specifically identifies 377 people by name.⁹² Individuals involved in past Chilean regimes have suffered a loss of reputation or, in some cases, more concrete measures such as the loss of a job.⁹³ The Salvadoran Commission on the Truth, which was created as a formal part of the 1992 peace accords following the Salvadoran Civil War, eventually recommended that 103 people in the government be removed and suggested the creation of a more formal Truth Commission to produce a report.⁹⁴ While results were mixed, eventually some of these 103 individuals were forced to retire.

There are many possible consequences available for punishing perpetrators, and therein lies the SSCI report’s greatest failure. There have been very few consequences for the CIA perpetrators of the torture program, and almost none that the government initiated. There are many people who were in positions of power who contributed to this program and now have left, but they largely did so because of the end of the Bush administration or their retirement, not due to the report or the CIA’s program. No one was forced from a job due solely to the SSCI report and no one was forced to pay reparations.

One of the SSCI report’s claims was that the CIA did not hold individuals accountable during the program, and the CIA largely agreed with this statement.⁹⁵ However, the CIA was also quick to point out accountability measures it did take. The CIA convened six accountability procedures from 2003–2012, assessing 30 individuals and finding 16 accountable; it sanctioned these people with “administrative actions.”⁹⁶ The CIA response to the report also states that the Office of the Inspector General (OIG) conducted two major and 29 minor reviews, and the CIA referred individuals to the OIG and corrected harmful practices. This, the report mentions, did “lead

⁹² Dom Phillips, *Brazil Confronts Horrors of the Past with Torture Report’s Release*, TIME (Dec. 10, 2014), <http://time.com/3629031/brazil-torture-report-truth-commission/>; *Brazil Truth Commission: Abuse “Rife” under Military Rule*, BBC NEWS (Dec. 10, 2014), <http://www.bbc.com/news/world-latin-america-30410741>.

⁹³ Mark Ensalaco, *Truth Commissions for Chile and El Salvador: A Report and Assessment*, 16:4 HUM. RTS. Q. 656, 664–65 (1994).

⁹⁴ Popkin & Bhuta, *supra* note 85, at 104.

⁹⁵ See generally SSCI REPORT, *supra* note 1, at 277; THE DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, Memorandum on CIA Comments on the Senate Select Committee Intelligence Report on the Rendition, Detention, and Interrogation Program 14 (June 27, 2013).

⁹⁶ THE DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, *supra* note 95, at 9.

to tensions” between the CIA and OIG, but nothing that prevented the OIG from continuing its work.⁹⁷

While the OIG found most of the cases it examined to be without merit, the CIA response mentions three in which action was taken. In one, an individual beat an Afghan prisoner to death; this person was referred to the Department of Justice and found guilty of a felony.⁹⁸ In another, a contractor who had “slapped, kicked, and struck” detainees was terminated, had his clearances revoked, and was put on a contractor watch list.⁹⁹ Finally, after Abd al-Rahim al-Nashiri was threatened with an electric drill and a pistol (an account described in detail in the SSCI report), the junior officer involved was prevented from receiving a raise or a promotion for two years, suspended without pay for a week, and removed from the program (the senior officer involved had retired).¹⁰⁰

Despite outlining these consequences, the CIA’s response to the SSCI report also admits “significant shortcomings in [the] CIA’s handling of accountability for problems in the conduct and management of [the] CIA’s RDI [rendition, detention, and interrogation] activities.”¹⁰¹ The CIA’s response takes the SSCI report’s conclusions a step further by adding that the “[a]gency did not sufficiently broaden and elevate the focus of its accountability efforts to include more senior officers who were responsible for organizing, guiding, staffing, and supervising RDI activities.”¹⁰²

The CIA’s response specifically highlighted that individuals should have been held accountable for the death of Gul Rahman, a detainee who died in CIA custody.¹⁰³ In this case, CIA management decided to overturn an accountability board recommendation on grounds that it was inappropriate to punish a junior officer for following orders (indeed, one officer in charge received a \$2,500 “cash award” for “consistently superior work”).¹⁰⁴ In its response to the SSCI report, the CIA acknowledged that this distinction had merit; however, the organization stated that even the most junior officer must have been

⁹⁷ *Id.* at 10.

⁹⁸ *Id.* at 44.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 46.

¹⁰¹ *Id.* at 8.

¹⁰² *Id.*

¹⁰³ *Id.* at 9.

¹⁰⁴ *Id.* at 9; SSCI REPORT, *supra* note 1, at 55.

in some way accountable in this case, and the CIA “had an affirmative obligation to look more deeply into the leadership decisions that helped shape the environment in which the junior officer was required to operate . . . and to determine what responsibility, if any, should be fixed at a more senior level.”¹⁰⁵ Furthermore, the response said that individuals with broader accountability for the program should have been held responsible.¹⁰⁶

The gaps pointed to in the CIA’s response do not indicate a failure of the SSCI report—there was a lack of accountability before the report was released. They do suggest, however, that the SSCI report and the CIA’s response could have provided post-report accountability or a reform of accountability measures in the CIA. However, the CIA stated that it would now not be “practical or productive to revisit any RDI-related case so long after the events unfolded.”¹⁰⁷

The Department of Justice conducted an investigation into the torture program from 2008–2012. The prosecutor, John Durham, found that there were no grounds under which to file charges.¹⁰⁸ After the SSCI report was released, there were calls to reopen the Durham investigation. Instead, the Department of Justice said in a statement that after seeing the report, they “did not find any new information that they had not previously considered in reaching their determination.”¹⁰⁹

There have been some non-criminal consequences for those involved in the torture program. Many Bush administration officials were named in the report; for example, the report describes the memos, emails, and statements of key players such as President Bush, Vice President Cheney, Condoleezza Rice, and former CIA directors Porter Goss and Michael Hayden. It also names lawyers in the CIA, White House, and Department of Justice, including John Rizzo, Stephen Bradbury, and John Yoo, the author of the infamous “torture memos” that argued that the techniques used did not constitute torture. Most people were already aware of the involvement of these

¹⁰⁵ THE DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, *supra* note 95, at 9.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 8.

¹⁰⁸ Charlie Savage, *U.S. Tells Court that Documents from Torture Investigation Should Remain Secret*, N.Y. TIMES: POLITICS (Dec. 10, 2014), <http://www.nytimes.com/2014/12/11/us/politics/us-tells-court-that-documents-from-torture-investigation-should-remain-secret.html>.

¹⁰⁹ *Id.*

individuals before the report (the “torture memos” were public, for example), and each now enjoys retirement or continued work outside the federal government. The only possible detriment to these individuals’ legacies is the public’s view that the CIA lied about the program.¹¹⁰ It is worth noting that this is only a potential consequence for those in the CIA, not in the White House or Justice Department.

The issue of naming other involved individuals in the report was a contentious one, and demonstrates another shortcoming of the report. Senator Feinstein fought the administration for months over the issue of pseudonyms. Though she did not urge the administration to use CIA officers’ names, she did encourage the use of consistent pseudonyms so that readers could construct a narrative of what happened.¹¹¹ This failed: the issue proved such a sticking point that it became a barrier to the report’s being published at all.¹¹² Aside from the high-level Bush administration officials mentioned, and a few select other individuals, all names and locations in the report are blacked out.

The SSCI report had one success in creating consequences, though, and that is due to its discussion of two contract psychologists who designed the interrogation program, whom media identified as John “Bruce” Jessen and James E. Mitchell.¹¹³ The report publicized the extraordinarily high fee for their work and their lack of experience in interrogation, points that the news media seized upon.¹¹⁴ Even the CIA’s response to the report acknowledged that there was a lack of oversight in the work of independent contractors.¹¹⁵ If there is an example of successful “naming and shaming” by the CIA report, it is

¹¹⁰ Cf. Goldman & Craighill, *supra* note 66.

¹¹¹ Bruck, *supra* note 55, at 19.

¹¹² *Id.* at 22.

¹¹³ See, e.g., Robert Windrem, *CIA Paid Torture Teachers More Than \$80 Million*, NBC NEWS, Dec. 9, 2014, <http://www.nbcnews.com/storyline/cia-torture-report/cia-paid-torture-teachers-more-80-million-n264756>; Mark Mazzetti, *Panel Faults C.I.A. Over Brutality and Deceit in Terrorism Interrogations*, N.Y. TIMES: WORLD (Dec. 9, 2014), <http://www.nytimes.com/2014/12/10/world/senate-intelligence-committee-cia-torture-report.html>.

¹¹⁴ See, e.g., Joseph Tanfani & W.J. Hennigan, *Two Psychologists’ Role in CIA Torture Program Comes into Focus*, L.A. TIMES: WORLD (Dec. 14, 2014), <http://www.latimes.com/world/afghanistan-pakistan/la-fg-torture-psychologists-20141214-story.html#page=1>; James Risen & Matt Apuzzo, *C.I.A., on Path to Torture, Chose Haste over Analysis*, N.Y. TIMES: POLITICS (Dec. 15, 2014), http://www.nytimes.com/2014/12/16/us/politics/cia-on-path-to-torture-chose-haste-over-analysis-.html?_r=0.

¹¹⁵ THE DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, *supra* note 95, at 24.

that of Jessen and Mitchell. It is worth noting, however, that at the time the report was released both were retired and the firm they created together had already been disbanded.¹¹⁶

In October 2015, the American Civil Liberties Union (ACLU) filed a suit against Mitchell and Jessen (*Salim v. Mitchell*) on behalf of three victims of the CIA torture program. The suit, filed under the Alien Tort Statute, accuses Mitchell and Jessen of torture; cruel, inhuman, and degrading treatment; non-consensual human experimentation; and war crimes.¹¹⁷ The complaint describes the SSCI report in detail and cites it 38 times.¹¹⁸ In April 2016, the U.S. government said it would allow the case to go forward, choosing not to invoke the “state secrets privilege” to block the case. In every previous torture-related case, the Bush and Obama administrations had claimed that considering the case would involve divulging state secrets, so this was an unprecedented development. The ACLU stated its belief that the SSCI report was to thank for this change.¹¹⁹ Should the suit proceed, and Mitchell and Jessen be forced to pay reparations, this would be a significant and groundbreaking consequence that could lead to other civil cases against the contractors involved in the torture program.

The government’s failure to invoke state secrets was significant, and demonstrated an important win for the impact of the SSCI report on accountability. Unfortunately, the civil suit and public disdain for Jessen and Mitchell are possibly the SSCI report’s only tangible consequences for perpetrators. This greatly lessens the report’s potential impact.

V

CREATING INSTITUTIONAL REFORMS AND PROMOTING NATIONAL RECONCILIATION

Another crucial aspect of truth-telling is the promotion of institutional reforms. This is a hallmark of many of the Latin American truth-telling mechanisms, though “[s]uccessful

¹¹⁶ Tanfani & Hennigan, *supra* note 114.

¹¹⁷ *Salim v. Mitchell—Lawsuit Against Psychologists Behind CIA Torture Program*, ACLU: CASES (Oct. 13, 2015), <https://www.aclu.org/cases/salim-v-mitchell-lawsuit-against-psychologists-behind-cia-torture-program>.

¹¹⁸ Compl. *Salim v. Mitchell*, 2:15-CV-286-JLQ (E.D. Wash. Oct. 13, 2015).

¹¹⁹ Dror Ladin, *The Government’s Unprecedented Position in CIA Torture Lawsuit is Very Good News*, ACLU (Apr. 15, 2016), <https://www.aclu.org/blog/speak-freely/governments-unprecedented-position-cia-torture-lawsuit-very-good-news>.

implementation of truth commission recommendations . . . continues to be weak.”¹²⁰ For example, the Chilean National Commission for Truth and Reconciliation was intended to gather evidence and then make recommendations for institutional reform (despite an included mandate that prevented naming those responsible).¹²¹ It succeeded by leading to eventual reforms and the creation of a reparations program for victims.¹²²

In other cases, recommendations have had a lesser impact. In Argentina, for example, the Alfonsín government created a national commission to investigate disappearances and ultimately convicted five junta leaders. Several years later, all investigations were terminated and those who had been convicted were released.¹²³

Peru also established a Truth Commission to investigate atrocities committed by the government, the Shining Path Maoist movement, and the Túpac Amaru Revolutionary Movement between May 1980 and November 2000. The Commission recommended reparations and reconciliation, noting that most of the affected were those who tended to be marginalized in society.¹²⁴ Significantly, the Peruvian Government pursued many of these recommendations, prosecuting several of those involved, issuing a public apology, and setting up a register for reparations (though the latter is proceeding slowly).¹²⁵ However, while Peru’s commission is recognized as one of the more successful examples of truth-telling, some “traditional political sectors and some local elites” still oppose its findings.¹²⁶

Despite including descriptions of many internal CIA problems, and the CIA’s acknowledgment of the need for institutional reforms, there

¹²⁰ Hayner, *supra* note 5, at 23.

¹²¹ UNITED STATES INSTITUTE OF PEACE, TRUTH COMMISSION: CHILE 90, *supra* note 81; Margaret Popkin & Nehal Bhuta, *Latin American Amnesties in Comparative Perspective: Can the Past Be Buried?*, 13 ETHICS & INT’L AFF. 99, 112 (1999); Mark Ensalaco, *Truth Commissions for Chile and El Salvador: A Report and Assessment*, 16 HUM. RTS. Q. 656, 658 (1994).

¹²² UNITED STATES INSTITUTE OF PEACE, TRUTH COMMISSION: CHILE 90, *supra* note 81.

¹²³ Popkin & Bhuta, *supra* note 121, at 108–09.

¹²⁴ UNITED STATES INSTITUTE OF PEACE, TRUTH COMMISSION: CHILE 90, *supra* note 81.

¹²⁵ *Truth Commission: Peru 01*, TRUTH AND RECONCILIATION COMMISSION, UNITED STATES INSTITUTE OF PEACE, TRUTH COMMISSION: PERU 01, <http://www.usip.org/publications/truth-commission-peru-01> (last visited Apr. 26, 2016).

¹²⁶ *Ten Years after Peru’s Truth Commission*, ICTJ (Aug. 19, 2014), <https://www.ictj.org/news/ten-years-after-peru-truth-commission>.

is no evidence that the SSCI report has led to notable changes inside the CIA.¹²⁷ CIA Director John Brennan has made some changes within the agency, primarily reducing the separation between CIA analysts and operations. However, it is unclear if this change is at all related to the torture program, and some feel that it might work to facilitate the program's repetition: "Had there been a separation between analysts and operations officers [at the time of the torture program], it would have been easier for analysts to assess whether the interrogation program really was saving thousands of innocent lives."¹²⁸

Outside of the CIA, institutional reform is arguably the SSCI report's greatest result. In June 2015, the Senate voted on Amendment 1889, an Amendment to the National Defense Authorization Act (NDAA) for Fiscal Year 2016.¹²⁹ The amendment, which Senator John McCain introduced and Senator Feinstein (among several others) cosponsored, codified President Obama's Executive Order 13491 by making the Army Field Manual the standard for interrogation practices for all branches of the government, including the CIA.¹³⁰ The amendment also required International Committee of the Red Cross (ICRC) access to all detainees.¹³¹ In a landslide vote, the amendment passed with the support of 78 Senators (all 44 Democrats, both Independents, and 32 Republicans). Twenty-one Senators, all Republican, voted against the amendment.¹³² In November, President Obama signed the act into law.

¹²⁷ See generally The Director of the Central Intelligence Agency, Memorandum for: The Honorable Dianne Feinstein, The Honorable Saxby Chambliss, Subject: The CIA on the Senate Select Committee Intelligence Report on the Rendition, Detention, and Interrogation Program (June 27, 2013), https://www.cia.gov/library/reports/CIAAs_June_2013_Response_to_the_SSCI_Study_on_the_Former_Detention_and_Interrogation_Program.pdf [hereinafter CIA Response to SSCI Report].

¹²⁸ Matteo Faini, *John Brennan's Reforms Would Turn the CIA into a Paramilitary Organization*, THE WEEK (Mar. 30, 2015), <http://theweek.com/articles/546728/john-brennans-reforms-turn-cia-into-paramilitary-organization>.

¹²⁹ S. Amdt.1889 to S. Amdt.1463, 114th Cong. (2015).

¹³⁰ S. Amdt.1889 to S. Amdt.1463, 114th Cong. (2015), Order No. 13491, 3 C.F.R. § 199 (2010).

¹³¹ S. Amdt.1889 to S. Amdt.1463, 114th Cong. (2015).

¹³² United States Senate, U.S. Senate: Roll Call Votes 114th Congress—1st Session, Vote Summary, Question: On the Amendment (McCain Amdt. No. 1887), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=114&session=1&vote=00209 [hereinafter Roll Call] (Marco Rubio, Republican of Florida, did not vote, though he later said he would have opposed the Amendment).

This is a positive change, but the question remains as to whether it is a direct result of the release of the SSCI report. On one level, the link between the two is clear. Shortly after the release of the SSCI report, on December 30, 2014, Senator Feinstein introduced proposed reforms that would address the issue of torture.¹³³ She presented the reforms in a letter to President Obama, which stated, “I write today to describe and transmit the recommendations derived from the Committee’s report.”¹³⁴ The reforms proposed would have made the Army Field Manual the standard for interrogation, closed purported loopholes that allowed the Bush administration to authorize the use of torture, demanded ICRC access to all detainees, and prohibited the CIA from detaining any individuals.¹³⁵ Of these, only the prohibition on CIA detention was not included in the amendment introduced in June.¹³⁶ It is clear, therefore, that the release of the SSCI report ensured that the issue of torture was in the public consciousness and influenced a push for strengthening its prohibition.

A more complicated question, however, is how much the SSCI report influenced the process of passing of the Amendment, beyond its mere introduction. As discussed, the report was by no means widely accepted and trusted, especially by Republicans. It is possible that while the report created a stage onto which legislation could be introduced, the manner of its release and its methods may have actually harmed the amendment’s passing. To examine this idea, I will consider statements by Republican senators, either on the report’s release or on the McCain-Feinstein Amendment.¹³⁷ Of course, it is impossible to tell how many of these votes were influenced by the report or a genuine desire to ban torture, and how many were otherwise motivated. For example, some senators may not have wanted to defy Senator McCain—a leading anti-torture Republican and Chair of the Senate Armed Services Committee—or may have sought to vote in a way that would give them more political capital.

¹³³ Dianne Feinstein, United States Senator for California, Press Release: Feinstein Proposes Reforms to Prevent Future Use of Torture (Jan. 5, 2015), <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=0084e644-a5ed-46e1-8649-762df3ffc4f>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ S. Amdt.1889 to S. Amdt.1463, 114th Cong. (2015).

¹³⁷ Democrats were largely in support of both the report and the Amendment; in fact, no Democrats voted against the Amendment’s passing, so their statements are less relevant to this consideration.

Among Republican senators who supported the McCain-Feinstein Amendment, only two made statements that suggested they supported the CIA program and use of torture after the report was released. Chuck Grassley of Iowa said that he supported “anything that is legal for American citizens under the Constitution or for combatants under the Geneva Conventions,” including techniques authorized by the Bush administration’s torture memos,¹³⁸ and Johnny Isakson of Georgia stated that the program, “despite what this report alleges, helped develop intelligence that led to action against threats to our national security.”¹³⁹ These statements seem contradictory given the senators’ support for the amendment, but they may indicate a more general support for the CIA (and an acknowledgement that there were a few successes in the program) without necessarily supporting the techniques used.

The majority of Republican senators who both voted in favor of this amendment and also criticized the SSCI report pointed to the report’s methods and described it as partisan without actually commenting on the use of torture. At least three senators, John Hoeven of North Dakota, Mark Kirk of Illinois, and Thom Tillis of North Carolina, stated they thought the report was biased, but they did not discuss torture as a strategy.¹⁴⁰ Others criticized the report itself while saying simultaneously that they did not support torture. For example, Ted Cruz of Texas said that the report was biased but that torture was “unambiguously wrong”¹⁴¹ and Kelly Ayotte of New Hampshire criticized the timing of the report’s release but also said, “I support taking off the table the things that were used like torture, and I don’t think we should use those types of methods.”¹⁴² These votes

¹³⁸ Joseph Morton, *Grassley, King Back CIA Methods; Fischer Blasts Torture Report as “One-Sided,” But Harkin Praises its Release*, OMAHA.COM (Dec. 10, 2014), http://www.omaha.com/news/iowa/grassley-king-back-cia-methods-fischer-blasts-torture-report-as/article_0c492294-7fe8-11e4-b1db-e7e594b6e423.html; Roll Call, *supra* note 132.

¹³⁹ Isakson, *supra* note 62; Roll Call, *supra* note 132.

¹⁴⁰ *Senator Hoeven on CIA Interrogation Practices*, *supra* note 60; *Mark Kirk Calls Democrats “Little Zombies,” supra* note 61; Schoof, *supra* note 63; Roll Call, *supra* note 132.

¹⁴¹ Feldman, *supra* note 59; Roll Call, *supra* note 132.

¹⁴² Roll Call, *supra* note 132; Michael Brindley, *Shaheen Calls CIA Torture Report “Disturbing,” Ayotte Concerned about Timing*, NEW HAMPSHIRE PUBLIC RADIO (Dec. 10, 2014), <http://nhpr.org/post/shaheen-calls-cia-torture-report-disturbing-ayotte-concerned-about-timing>; *Ayotte Pushes for Strong Foreign Policy in Speech to the Ripon Society*, THE RIPON SOCIETY (June 25, 2014), <http://www.riponsociety.org/2014/06/ayotte-pushes-for-a-strong-foreign-policy-in-speech-to-the-ripon-society/>.

suggest that while some opposed the way the report was created and its release, they were still opposed to the tactics described.

Interestingly, two senators who voted in favor of the amendment made comments suggesting that they supported torture before the report came out: Richard Burr of North Carolina said in 2011 that he believed that torture directly led to the capture of Osama bin Laden,¹⁴³ and Pat Toomey of Pennsylvania said in 2009 that he thought waterboarding led to valuable information.¹⁴⁴ The shift from their support of torture to voting in favor of its abolition suggests that the SSCI report may have been instrumental in changing some minds, though, of course, it is impossible to know their motivation.

Not surprisingly, many of the Republicans who voted against the amendment made comments supporting the CIA's interrogation program and indicated an inclination to repeat it. Tom Cotton of Arkansas said on the subject, "We shouldn't celebrate having to use such harsh interrogation techniques, but they're not torture, and if they save an American life, then an American president should use them to protect America and keep our citizens safe."¹⁴⁵ Mitch McConnell of Kentucky said, "The fact that the CIA's Detention and Interrogation program developed significant intelligence that helped us identify and capture important al Qaeda terrorists, disrupt their ongoing plotting, and take down Osama Bin Laden is incontrovertible. Claims included in this report that assert the contrary are simply wrong."¹⁴⁶ Marco Rubio of Florida, who did not vote, commented that he would have opposed the amendment because he did not want to deny future interrogators any tools.¹⁴⁷ He later added

¹⁴³ Patrick Allen, *Enhanced Interrogations Led to Bin Laden Kill: Senator*, CNBC (May 3, 2011), <http://www.cnn.com/id/42871400>; Roll Call, *supra* note 130; Campbell, *supra* note 58.

¹⁴⁴ John L. Micek & Lauren Boyer, *Toomey: Waterboarding Got the Job Done*, THE MORNING CALL (May 19, 2009), http://articles.mcall.com/2009-05-19/news/4375837_1_waterboarding-prosecute-specter.

¹⁴⁵ Roll Call, *supra* note 132; *Tom Cotton Talks CIA Torture Report*, NEXSTAR BROADCASTING (Dec. 14, 2014), http://www.nwahomepage.com/fulltext-news/d/story/tom-cotton-talks-cia-torture-report/38973/7MeDac8SrU6gmZP_-Wet0w.

¹⁴⁶ Chambliss, McConnell React to Public Release of Senate Democrats' CIA Detention and Interrogation Report (Dec. 9, 2014), <http://justsecurity.org/wp-content/uploads/2014/12/Statement-by-Sens-Mitch-McConnell-and-Saxby-Chambliss-on-the-SSCI-report.pdf>; Roll Call, *supra* note 132.

¹⁴⁷ Chris Adams, *Although He Missed Vote, Rubio Would Have Said No on Anti-Torture Measure*, MIAMI HERALD (June 16, 2015), <http://miamiherald.typepad.com>

that if elected president he would use “enhanced interrogation” techniques.¹⁴⁸ John Cornyn of Texas and Deb Fischer of Nebraska also said that they felt the interrogation techniques gained valuable information, and James Inhofe of Oklahoma claimed that he was “very supportive of enhanced interrogation.”¹⁴⁹ However, Inhofe later commented that he opposed the McCain-Feinstein Amendment not because he supported torture, but because he did not want techniques in the Army Field Manual to be made public. This suggests that some of those who supported the CIA’s program did not necessarily think these techniques should be used again.¹⁵⁰

Roy Blunt of Montana, Orrin Hatch of Utah, and James Risch of Indiana all voted against the amendment and made statements criticizing the report’s methods as partisan.¹⁵¹ Risch, however, also made a statement vehemently opposing the use of torture.¹⁵²

Furthermore, several senators who opposed the amendment stated that they specifically did not intend to support torture, but disagreed with other aspects of the legislation, rather than the report itself. Lindsey Graham of South Carolina said that he did not agree with using the Army Field Manual as a standard for interrogation; David Vitter of Louisiana said he did not want to broadcast techniques by allowing the manual to remain public; and James Lankford of

/nakedpolitics/2015/06/although-he-missed-vote-rubio-would-have-voted-against-anti-torture-measure.html.

¹⁴⁸ Jeremy W. Peters, *Republicans Turn Up Heat in Iowa, Setting Aside Good for Bad and Ugly*, N.Y. TIMES (Jan. 4, 2016), <http://www.nytimes.com/2016/01/05/us/politics/republicans-turn-up-heat-in-iowa-setting-aside-good-for-bad-and-ugly.html?ref=politics&mtref=www.nytimes.com>.

¹⁴⁹ News Release, John Cornyn, United States Senator for Texas, Cornyn: Democrats Should Thank, Not Vilify, Intelligence Community (Dec. 9, 2014), http://www.cornyn.senate.gov/public/index.cfm?p=NewsReleases&ContentRecord_id=e6d959f2-ada4-4c0e-b56b-ee02b03689c3; Morton, Burgess Everett, *Torture Report Divides Republicans*, POLITICO (Dec. 9, 2014, 1:55 PM), <http://www.politico.com/story/2014/12/cia-torture-report-republicans-react-113432.html>; Roll Call, *supra* note 132.

¹⁵⁰ Press Release, James M. Inhofe, U.S. Senator, Oklahoma, Inhofe’s Statement on Anti-Torture Amendment (June 16, 2015), <http://www.inhofe.senate.gov/newsroom/press-releases/inhofes-statement-on-anti-torture-amendment>.

¹⁵¹ Jo Mannies, *Blunt, McCaskill Split Sharply over CIA Torture Report*, ST. LOUIS PUBLIC RADIO (Dec. 10, 2014), <http://news.stlpublicradio.org/post/blunt-mccaskill-split-sharply-over-cia-torture-report>; Collinson, *supra* note 65; Adams, *supra* note 147; Roll Call, *supra* note 132.

¹⁵² George Prentice, *Jim Risch Has Plenty to Say About Torture, Not So Much About Gun Control*, BOISE WKLY. (Dec. 21, 2014), <http://www.boiseweekly.com/CityDesk/archives/2012/12/21/jim-risch-has-plenty-to-say-about-torture-not-so-much-about-gun-control>.

Oklahoma stated that he “vehemently opposed torture” but thought the amendment could have “unintended consequences.”¹⁵³

It seems, therefore, that the report’s perceived partisanship and bias did not hugely influence the way senators voted. Senators who criticized the SSCI report were relatively split in their votes on the amendment. Several other “no” votes were due to issues unrelated to the report, such as the publication of the Army Field Manual. The biggest split between supporters and non-supporters was a stated belief in the value of torture. Even so, support for torture was not necessarily indicative of a “no” vote: while at least five Republicans who stated that they supported the CIA’s program voted against the amendment, two stated their support for torture and voted for it, and several others mentioned that they felt the CIA saved lives but did comment on their support of the techniques used.

Thus, even if the report did not directly help the passage of the amendment, it does not seem to have greatly hurt it either. Finding the report partisan or biased was, in general, not a persuasive reason for an individual to vote against the amendment. While it is difficult to know the true motives of the involved politicians, it seems that the report may have had a positive effect in making some people, even those who opposed the amendment, believe that torture was wrong and should not be repeated.

Furthermore, it is clear that the report led to the introduction of the amendment, so even if its effect on the vote was neutral, its ultimate influence on institutional reforms was positive. This seems to be the area where the SSCI report was most successful as a truth-telling measure, despite not being as influential as hoped in changing the public’s views. Though a better methodological approach would have also certainly helped it gain more support in the senate, it nonetheless helped achieve a concrete measure to ban an official torture policy.

Reconciliation goes hand with reforms. As Hayner discusses, “breaking the cycle of revenge and hatred between former enemies” through reconciliation is one way to deter future violence and prevent

¹⁵³ Alex Rogers, *Another 2016 GOP Fault Line: Torture*, NATIONAL JOURNAL (June 16, 2015), <http://www.nationaljournal.com/2016-elections/another-2016-gop-fault-line-torture-20150616>; Chris Casteel, *Inhofe, Lankford Oppose Anti-Torture Amendment*, TIMES RECORD (June 7, 2015), <http://swtimes.com/news/politics/inhofe-lankford-oppose-anti-torture-amendment>; Bruce Alpert, *Senate Votes to Ban Torture: Cassidy Votes Yes, Vitter, No*, NOLA.COM (June 16, 2015), http://www.nola.com/politics/index.ssf/2015/06/senate_votes_to_ban_torture_ca.html.

future human rights abuses, but “[m]ore concretely, most commissions recommend reforms in the military police, judiciary, and political systems in the hope of preventing former abuses.”¹⁵⁴ Reconciliation and reforms, therefore, are two methods of breaking the cycle of abuse and “[n]ot all commissions have been built around an assumption or priority of advancing reconciliation.”¹⁵⁵

Hayner also distinguishes between individual and national or political reconciliation.¹⁵⁶ The SSCI report presents an interesting challenge in the former. The detainees who were tortured under the CIA’s program were suspected terrorists or alleged international criminals who, the CIA believed, sought to harm the United States.¹⁵⁷ This does not change the detainee’s status as victims, but it does mean that traditional reconciliation is not as prominent a goal. In the case of most truth commissions, the victims analyzed were citizens of the countries that oppressed them, and reconciling with the government and creating a unified society was crucial. The CIA’s foreign detainees did not necessarily need to make peace with their captors the U.S. government, and they and the United States do not seek to become a societal whole.

The discussion of the SSCI report should, therefore, focus on political or societal reconciliation, a return to respect for human rights, and closure for the American people who unknowingly sponsored the use of torture. As Hayner points out, reconciliation on a political level rests in the creation of a truthful and acknowledged report: “An official accounting and conclusion about the facts can allow opposing parties to debate and govern together without latent conflicts and bitterness over past lies.”¹⁵⁸

While the statements by the report’s opposition are not necessarily free of bitterness, the conversations about the SSCI report were centered almost entirely around its initial release and the vote on the McCain-Feinstein Amendment. It did not remain a point of argument in the Senate. When the NDAA was sent to President Obama for his signature, the amendment was not a point of contention. Of course, the torture program itself did not greatly affect American political structures, (as some other campaigns of massive human rights

¹⁵⁴ Hayner, *supra* note 5, at 182.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 183.

¹⁵⁷ Note, of course, that some were innocent.

¹⁵⁸ Hayner, *supra* note 5, at 183.

violations have) and the fact that the victims of the program are not part of American society may contribute to this peacefulness. However, the fact that the amendment passed with such a wide margin and with bipartisan support suggests that either the report has created some political reconciliation, or that such reconciliation was not necessary in the first place.

As Hayner mentions, not all truth-seeking bodies automatically include reconciliation as a goal. The fact that the torture program's victims are not part of American society largely negates the need for such reconciliation on an individual basis, and the torture program does not continue (and perhaps never began) to cause substantial animosity on a political basis to the extent that it prevents moving on to other issues. Reconciliation, therefore, is not an issue that substantially affects the SSCI report's effectiveness; in moving past abuses and towards peace, the political reforms that it led to are much more relevant.

CONCLUSION

All forms of truth-telling are imperfect in some way. The SSCI report's flaws should not be seen as a failure of transitional justice. After all, it did achieve some significant success, and its triumphs are important to learning how truth-telling as a post-conflict mechanism should evolve. The report contributed significantly to anti-torture legislation, and it was crucial in bringing the CIA's torture program into the public consciousness. There have been some consequences for the program's architects (albeit only a few of them). This demonstrates that even if some perceive it as partisan or biased, it has some tangible impact.

However, the report's shortcomings must be acknowledged, even if only to consider the best course for future truth-telling. The failure to interview victims meant that they had no outlet to explain what happened to them, and weakened the report's ability to help victims move on. The report did not name the majority of the perpetrators, and there have been very few consequences for them. Its victory in contributing to legislation may be somewhat marred by the fact that many senators, even those who supported the McCain-Feinstein Amendment, were quick to point out that they did so more or less in spite of the SSCI report. Its impact on public opinion is also uncertain, and many perceive it as partisan and untrustworthy.

That being said, the SSCI report provides important lessons for future truth-telling mechanisms. First, it is crucial for a report's integrity and credibility, as well as its impact on victims, that it collect information from both victims and perpetrators. While collecting information from victims may be more important in gaining a complete picture of what happened, since perpetrators are less likely to be cooperative, interviewing perpetrators aids in a report's credibility and the public's perceptions of its impartiality. There is little point to a truth-telling report if no one believes it.

Second, if at all possible, individuals involved in the program must be named. This in itself may lead to sufficient consequences for perpetrators and catharsis for victims. Unfortunately, a document like the SSCI report is significantly less helpful in achieving the goals of truth-telling when all but the most obvious individuals involved are anonymous. That being said, SSCI staff cannot be faulted in being denied the chance to interview those involved or being forced to use pseudonyms.

Truth-telling is an area where the perfect should not be the enemy of the good; the report's release was important and its achievements should not be downplayed. In many ways, there is no "right" or "only" way to achieve post-conflict truth-telling, and some of the SSCI report's shortcomings, had they been corrected in according with transitional justice norms, could have prevented its very existence. The report's role in propelling anti-torture legislation was pivotal, and it has shed light on the CIA's interrogation program, the extent of the CIA's misrepresentations to the administration and Congress, and the ineffectiveness of torture. Future truth-telling mechanisms should bear both the report's shortcomings, its successes, and its necessary compromises in mind if the world is to keep striving toward peace for victims and abolishing human rights violations and torture.