

# The Ethics of Espionage and Covert Action: *The CIA's Rendition, Detention and Interrogation Program as a Case Study*

by **John G. Breen**

I have just asked a classroom filled with U.S. Army officers (with a few sister service and civilian counterparts thrown in) to name some of the ethical challenges they believe are associated with spying. They have little trouble helping me fill a large whiteboard with their concerns. By this point in the course I teach at the U.S. Army's Command and General Staff College entitled "CIA for SoF, MI, and the Warfighter," the students have read extensively and discussed relevant case studies and many of the more controversial, historical episodes associated with the Central Intelligence Agency's (CIA) espionage and covert action.

Recent headline issues have included drone strikes, the Senate Select Committee on Intelligence's (SSCI) report on the CIA's Rendition, Detention, and Interrogation (RDI) program, the prosecution and jail sentence of mid-level CIA officer Jeffrey Sterling, the fine and probation offered to former CIA Director David Petraeus, and of course, Edward Snowden's espionage, with attendant revelations of the extent of National Security Agency (NSA) surveillance programs. Most recently, waterboarding became a topic of discussion in the run up to the 2016 Presidential election.

By this point in the course, students understand that the CIA recruits and handles human assets (HUMINT), produces finished intelligence, and conducts Presidentially-directed covert action. Historically, this last activity has been, perhaps, the most problematic. Today, covert action programs require a signed Presidential Finding, with subsequent Congressional notification. This is due in no small part to disputed claims of Presidential plausible deniability, revelations in the press, and Congress reasserting itself, over time, as a co-equal branch of government. Nevertheless, the golden thread of covert action connects the President and the CIA, and it is not likely to be severed any time soon.

Unfortunately, failed or ethically questionable covert action programs have been well documented—MKUltra (human testing of behavior-modification drugs), Bay of Pigs, the Vietnam-era Phoenix Program, Iran-Contra, and most recently, the use of "enhanced interrogation techniques"

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(EITs), such as waterboarding against prisoners in CIA custody.<sup>1,2</sup> Morally dubious as it may sometimes be, Presidents rely on covert action as a vital means by which to implement identifiable foreign policy objectives in support of U.S. national security.

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Students identified, in no particular order and among others, concerns with lying, stealing, targeted assassination and drones, torture of detainees, interference with other nations, putting an asset in danger in order to accomplish mission, exploiting weakness in others, the involvement of healthcare professionals in interrogation, honey traps, misrepresentation, coercion, using money to buy influence, blackmail, treason, manipulation, ballot box stuffing, and so on. While the whiteboard now contained potentially objectionable issues, the listing also represented, perhaps uncomfortably, a menu of potentially effective techniques. In certain situations, some if not all of these techniques might be considered “appropriate.” They certainly have all been utilized (and likely continue to be) by intelligence services around the world with varying degrees of success.

The whiteboard discussion is used to set the stage for the remainder of the class session on the ethics of espionage, with a focus on covert action. The students explore whether or not a particular espionage technique or set of techniques may be permissible, forbidden, or even required. The CIA’s RDI program is discussed as a case study to explore the possible elements of a Just Espionage Theory.

**Just War and Just Espionage**

The students are already quite familiar with Just War Theory—an attempt to regulate the conduct of war, guarding against the slippery slope of narrow adherence to consequentialism (the ends justify the means), realpolitik (state-based pragmatism), or deontology (moral norms). The consequentialist, for example, can claim that almost any action, however dubious, was necessary, as it resulted in or it was anticipated to result in a “good” outcome. Realpolitik can place a state’s self-interest above all else. The deontologist may claim that an action is immoral, simply because it is deemed a norm that cannot be broken, e.g., “thou shalt not kill.” At certain times and in certain situations, one indeed will kill, and it will obviously not be immoral in any common sense of the word, e.g., self-defense.

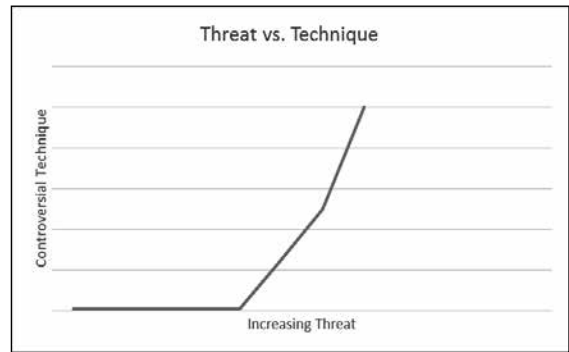
Others have addressed in great detail how a discussion of the ethics of espionage may follow logically from Just War Theory.<sup>3</sup> The main conditions of a Just Theory of Espionage might then at least include: (1) just cause, (2) proper authority, (3) proportionality, and (4) last resort. Can our intelligence services demonstrate that their efforts are for a just cause? Are they directed and monitored by a proper authority? Have they ensured that intelligence collection efforts and covert action campaigns are pursued in a manner proportional to the risks of causing undue harm? Do they employ the most contentious espionage techniques only as a last resort?

It has been suggested that simply keeping a secret from the U.S., one that could potentially be a threat to national security (not simply national interest), is in and of itself an act of aggression sufficient to justify certain techniques of espionage.<sup>4</sup> For example, using any of the whiteboard “techniques” to commit economic espionage against a country or foreign business in order to marginally enhance the U.S. gross national product or to support the efforts of a specific U.S. company seems inappropriate. But spying on a country or nonstate actor with a

covert interest in destroying the U.S. economy seems worthwhile and ethically acceptable, if not required. Of course the U.S. is keeping secrets from other nations that they, in turn, could reasonably argue threaten their own national security. Thus we have set the stage for justifiable espionage against one another—the “Great Game.” In this context, what does “justifiable” entail? Are all of the whiteboard techniques justified?

One can develop a sharply sloped scale of perceived threat (X axis) versus “controversial” espionage technique (Y axis) from this discussion. (see Figure 1) The greater the threat, the more dubious the techniques an intelligence service might feel are warranted or acceptable. The slope of this curve might likely be flat for some time at lower levels of perceived threat, allowing for numerous, relatively uncontroversial approaches with primarily HUMINT-based espionage techniques (manipulation, coercion, etc.). The slope rises sharply thereafter as the threat approaches existential, and arguments for more drastic measures (blackmail and honey traps to torture and assassination) take hold. There are certainly a multitude of variables at play (societal, diplomatic, political) that determine exactly where along the threat-spectrum axis the slope of the curve skyrockets upward. Perhaps it is the quality of the ethical consideration that goes into planning a covert action or espionage effort that ultimately affects the slope of the curve and, thus, how quickly a service moves to the most morally suspect techniques. One might also ask, what is the ceiling for this graph? Is there a ceiling?

On whom can we use these techniques? Is everyone fair game or are certain individuals off limits? If we compare the espionage “field of play” to a football or other sporting field, appropriate targets for an opposing intelligence service may be identified—a useful metaphor for discussion with the students.<sup>5</sup> Some individuals are clearly off the field of play, while others



**Figure 1. Threat vs. Technique**



**Figure 2. Quality of Target vs. Technique**

are along the sidelines as opposed to integral members of the opposing team. Integral players (vital espionage targets) have access to secrets with the greatest potential to damage U.S. national security.

Discrimination should be as important to practitioners of espionage as it is to military officers. Much as with the threat versus technique graph, a quality of target (X axis) versus technique (Y axis) graph now emerges. (see Figure 2) The slope of this curve might also be flat for some time at a lower (or undetermined) quality of target assessment, approached by intelligence officers with the most benign of HUMINT-based espionage techniques, such as subtle manipulation like flattery or playing to other nonthreatening character motivations. As the importance or quality of the human target increases, so too does the potential number of techniques an agency or intelligence officer might employ. But unlike the perceived threat versus “controversial” espionage technique

graph, there is likely a built-in ceiling on this graph when talking about recruiting human assets. The most dubious techniques tend to be ultimately ineffective and, indeed, counterproductive, e.g., an agent only working for money or a service that holds damaging information over the agent's head (blackmail) is not likely to work out long term.

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These metaphors lead to useful discussions about what it truly means for a potential target to have direct versus indirect access and the potential for collateral damage, whether we are discussing a lethal covert action or a traditional “Great Game” asset recruitment effort. Could an intelligence organization ethically target someone with no direct access to secrets but merely a relative of someone with that sought-after access? That target with indirect access could still be able to provide at least second-hand access to potentially vital information. Where on the field of play does this person find themselves, and what techniques could an intelligence service employ?

On a traditional field of play, like a sporting event, there are rules and referees, so too in “Great Game”-type espionage. There are mutually-accepted rules that allow countries to conduct espionage with minimal risk of conflagration. The U.S. and Soviet Union certainly appreciated this field of play and associated rules and regulations during the Cold War. Writing about nuclear nonproliferation

negotiations between Nikita Khrushchev and President Eisenhower, E. Drexel Godfrey, a former CIA Deputy Director, pointed out that “both leaders recognized that inspections in each other's countries would probably be out of the question for many years to come; each knew that in order to make any progress on arms limitation he would have to rely on the safety of his own intelligence monitoring system and avert his eyes to monitoring by the other.... The tensions of the nation-state system are, in other words, held in bounds not only by diplomacy and by mutual common sense, but also by carefully calibrated monitoring systems.”<sup>6</sup>

Thus, in many of the countries in which CIA officers operate (certainly not all), the worst thing the host country would do if traditional HUMINT spying activity was identified would be to kick the officer out of the country and name the individual *persona non grata*—unable to travel to that country ever again. There would be inevitable challenges diplomatically, perhaps some negative press articles, but eventually and certainly in private, both sides would move on and continue looking for opportunities to steal the other's secrets.

But how does this mesh with the case of Sabrina De Sousa, who was reportedly one of 26 Americans sentenced in absentia by the Italian judiciary for her alleged role in the February 2003 rendition of a terrorism suspect off the streets of Milan.<sup>7</sup> In the spring of 2015, De Sousa traveled to visit relatives in Portugal and, as of May 2016, was not allowed to leave the country and was in the midst of a legal battle to avoid extradition back to Italy to face charges. Perhaps her actions and those of her 26 colleagues, rightly or wrongly, went beyond those mutually (and informally) accepted techniques one finds on the playing field of the “Great Game.”

In contrast to traditional espionage, the students inevitably point out that al-Qaida or the Islamic State of Iraq and Syria (ISIS) clearly do not recognize any aspect of this “Great Game”

field of play. As a nonstate actor, ISIS is, of course, playing by its own set of rules. So it is fair to ask if there is a role for classical espionage against terrorist targets. Does the terrorist's disregard for accepted rules and regulations relinquish our responsibility and allow us greater ethical/moral flexibility with the range of techniques we can deploy? The answer we arrive at in the classroom discussion seems to be that there are multiple fields at play, each with its own set of rules.

The military, for example, engages in activities that are not appropriately (or at least commonly) found on the classic intelligence field of play. It would seem inappropriate, for example, to suggest that the mere act of keeping a secret would on its own allow a country to engage in lethal military activity, though it might. Historically, paramilitary and other more violent covert action has included techniques perhaps more appropriate on the military's field of play—targeted killing and EITs, among others.

When details of clandestine operations wind up in the press, they can have a negative impact on the other fields—future “Great Game”-type agent recruitment operations, for example. Much like the superstring theory in physics that postulates underlying connectivity, there appears to be a resonance between the more traditional intelligence field of play and the military or paramilitary fields. Nothing is more damaging when trying to convince a potential agent about the U.S. government's commitment to his/her safety and confidentiality, as when the agent then asks about the latest headline account of an arrested spy, a blown intelligence operation, or an ethically questionable paramilitary activity. A *Studies in Intelligence* article on “Ethics and Espionage” says it well:

Deception is inherent in agent operations, but rare is the agent who will risk his well-being unless there is a positive ethical

content in the relationship between him and the service for which he works. If the relationship is to endure, he must have confidence in the organization on whose instructions he is risking so much.<sup>8</sup>

### **Case Study: The CIA's Rendition, Detention, and Interrogation Program**

The most recent, publicly-acknowledged example of a covert action program with dubious moral footing is the RDI program, authorized by President George W. Bush in the days following the terrorist attacks of 9/11. In 2009 and by Executive Order, President Obama ended the CIA program and prohibited the use of EITs, including waterboarding. Obama also prohibited the CIA from operating detention facilities and directed that only interrogation techniques detailed in the Army Field Manual would be authorized. According to the CIA's official account of the RDI program, three detainees were waterboarded. The technique was last used in March 2003.<sup>9</sup>

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According to the SSCI, the CIA oversold the efficacy of the RDI program and resisted oversight.<sup>10</sup> In response, CIA Director John Brennan defended the work of the Agency. The official CIA response pushed back on certain SSCI findings, but also identified failures and highlighted areas in which there was agreement: “While we made mistakes, the record does not support the Study's inference that the Agency systematically and intentionally misled each of these audiences on the effectiveness of the program.”<sup>11</sup> Retired CIA officials involved with the program, including former Directors

George Tenet and Porter Goss and former Deputy Director for Operations Jose Rodriguez, among others, published memoirs and wrote numerous articles and essays in support of the RDI program.

The public commentary and press reporting that followed the release of the SSCI report highlighted the more graphically disturbing details of EITs but largely focused on effectiveness: Did use of EITs lead us to Usama Bin Laden? What seemed lost in the debate and left largely unaddressed in the CIA's response was not if the RDI program and EITs worked or not, but if it was right that they were utilized in the first place. Was it ethical to use these techniques? Mike Morrel, former acting CIA Director, addressed the question in his memoir:

When it comes to EITs, there are two key aspects to the morality question. Is it moral to subject human beings, no matter how evil they are, to harsh interrogation techniques, particularly when done by the country that stands for human dignity and human rights in the world? At the same time, what is the morality of not doing so? What is the morality of believing that, if you do not use the harsh techniques, you may well be making a decision that leads to the death of Americans in a terrorist attack that you could have otherwise prevented? These are complicated and extremely tough difficult questions. Some people make them sound easy. They are wrong. The Senate report did not, in any way, address this most difficult of issues.<sup>12</sup>

Perhaps a Just Theory of Espionage could have been used during CIA's RDI campaign program planning to address these important questions:

### ***Just cause***

Did the President have national security concerns sufficient to order the CIA to initiate an RDI program and employ EITs? In a 2015 essay,

former CIA Director George Tenet suggests intelligence existed confirming meetings between Pakistani nuclear scientists and Usama Bin Laden. Tenet then reveals that "we briefed the President of reporting that indicated a nuclear weapon had been smuggled into the United States destined for New York City."<sup>13</sup> Regardless of the ultimate veracity of this intelligence, faced with this dire threat warning from the Director of the CIA, it seems the President would have had just cause sufficient to take immediate steps to protect the Nation from another attack. One could argue then that, in isolation, this just cause condition appears to have been met.

### ***Proper authority***

Did executive and legislative bodies oversee the activities of the CIA appropriately, and did the CIA keep its executive and legislative overseers fully informed? As oversight of a clandestine organization is by definition an act involving the directed transparency of an otherwise opaque organization, it requires a relationship built on trust and a certain level of voluntary openness. The SSCI report makes a detailed case that the CIA misrepresented the effectiveness of EITs and the value of the information obtained from their use and argues that the CIA purposely mislead and failed to fully brief executive and congressional oversight. While defending itself, the CIA admitted shortcomings: "Despite some flaws in CIA's representations of effectiveness, the overall nature and value of the program, including the manner in which interrogations were carried out and the IG's findings about the program's shortcomings, were accurately portrayed to CIA's Executive and Legislative Branch overseers, as well as the Justice Department."<sup>14</sup> Critics might ask how many "flaws in representation" it takes to make a pattern. According to former CIA acting General Counsel John Rizzo, for example, Goss failed to inform Congress that videotape records of waterboarding had been destroyed on the orders

of Jose Rodriguez:

“So please tell me,” I [Rizzo] asked, “that you briefed the intelligence committee leaders about the destruction and that there’s a record somewhere of that briefing.”

There was a pause, and then Porter said, “Gee, I don’t remember ever telling them. I don’t think there was ever the right opportunity to do it.”

My heart sank. It was the ultimate nightmare scenario.<sup>15</sup> As for the Executive, Rizzo stated that he was unaware of President Bush ever having been briefed on the specifics of EITs. Rizzo reported that he asked former Director Tenet about this directly, who confirmed that he, Tenet, was not aware of Bush having been briefed, despite Bush’s own published memories to the contrary.<sup>16</sup> Furthermore, Rizzo points out that “the Bush MON [Memorandum of Notification] issued days after 9/11 authorized the capture, detention and questioning of Al Qaeda leaders, but was silent about the means by which any of it could be carried out.”<sup>17</sup> And referring to the specific location of CIA’s RDI “black site” facilities overseas, Rodriguez asserted that senior White House officials did not have a need to know.<sup>18</sup>

At a minimum, these statements suggest a lack of clarity in how much oversight took place or was allowed to take place. Despite these exceptions, if the CIA did indeed brief oversight to the extent it claims, then the proper authority obligation appears to have been, in large part, met; more detailed and accessible recordkeeping on the part of both the intelligence community, the executive, and legislative bodies may help clarify levels of oversight for future covert action programs. Of course, if the legislative branch was not fully briefed, they certainly had and have recourse to pass new laws and to put

marks on CIA budgets, all effective tools to ensure transparency.

### ***Proportionality***

Given concerns over terrorist acquisition of WMD and fear of a second-wave, al-Qaida attack and assuming graduated increases in the intensity levels of enhanced interrogation (moving from traditional techniques to EITs, including waterboarding), one could argue that this requirement was met, at least at the programmatic level. Rizzo states in his memoirs that “...the EITs would be judiciously applied, beginning with the ones least coercive, for a limited period of time, and would end as soon as [Abu] Zubaydah demonstrated that he was no longer resisting and ready to cooperate.”<sup>19</sup> Of course, this presumes that these detainees actually have access to threat intelligence of such a quality as to merit such extreme measures. Before the most morally dangerous techniques are applied, the CIA needs to be able to say definitively that a potential target is on the field of play and confirm (not just assess) beforehand the target’s knowledge of threat details.

### ***Last resort***

Despite early, tragic lapses in CIA leadership, this requirement was arguably met. The Agency employed traditional interrogation techniques against detainees assessed to have vital threat intelligence prior to the graduated initiation of EITs, using them only when traditional interrogation techniques failed or, at least were assessed to have failed. The element of last resort may be one of the more readily challenged of the Just Espionage conditions for RDI. After all, Abu Zubaydah was in CIA custody in March 2002. The CIA then spent four months seeking a legal judgment about EITs from the Department of Justice Office of Legal Counsel. Zubaydah was only then subjected to waterboarding in August 2002.<sup>20</sup> One could reasonably ask how the threat information he may have possessed could have been truly imminent or constituted an “extreme

emergency” if waterboarding was withheld for four months while legal cover was sought. Perhaps the most relevant challenge to the last resort requirement comes from Brennan himself when he acknowledges “the Agency takes no position on whether intelligence obtained from detainees who were subjected to enhanced interrogation techniques could have been obtained through other means or from other individuals. The answer to this question is and will forever remain unknowable.”<sup>21</sup>

## Conclusion

Brennan has commented that problems within the RDI program were the result of “failure of management at multiple levels.”<sup>22</sup>

As a CIA employee, the best presentation I ever heard on ethics and leadership was given by Kyle “Dusty” Foggo. At the time, he was one of the most powerful officers in the Agency; his discussion of ethics was motivational, clear, and compelling. He shortly thereafter pleaded guilty to charges of felony corruption.<sup>23</sup>

A close runner-up in quality to Dusty was a presentation delivered by Rodriguez at a CIA leadership seminar. In his book, *Hard Measures*, Rodriguez, who ordered the destruction of videotapes of CIA officers waterboarding detainees, complains that critics of waterboarding have shown “fanciful simulations” with large volumes of water used during the 183 times Khalid Sheikh Muhammad was waterboarded. Without a conscious hint of irony, Rodriguez suggests these were more like “splashes of water.”<sup>24</sup> Perhaps if he had not ordered the tapes destroyed, he could demonstrate his point more effectively.

Rizzo, writing in his memoir about his own role in the RDI program, describes how he heard music in the hallways of a black site and “pondered the question of whether being involuntarily subjected to Anne Murray’s musical offerings could be construed as cruel or inhumane treatment.”<sup>25</sup> He also relates a story in which a detainee refused to take medicine, and another senior officer responsible for the prisons asked, “What do you recommend we do to make him take his pills? Wash it down with a waterboard?” Rizzo notes that he “resisted the temptation” to report this exchange to Harriet Miers, the newly appointed White House counsel.<sup>26</sup> One must ask how the Acting General Counsel of the CIA could not have reacted more forcefully to this inane comment from another senior leader responsible for the well-being of detainees.

These former senior leaders were forced to consider ethical challenges foisted on them by terrorists seeking to repeat the horrors of 9/11. Hind-sight criticism can certainly be unfair. But their writings after retirement and some of their actions during their tenures suggest they may not have fully explored the moral and ethical character of the RDI program, nor their roles and responsibilities for executing it. Would the use of a Just Theory of Espionage framework have changed anything at all about the conduct of this covert action campaign? To steal a line from Brennan—this is unknowable. This may be, nevertheless, an important question to consider, as the 2016 Presidential campaign has been filled with questionable rhetoric, to include calling for the return of waterboarding. Brennan has said: “I personally remain firm in my belief that enhanced interrogation techniques are not an appropriate method to obtain intelligence and that their use impairs our ability to continue to play a leadership role in the world.”<sup>27</sup> In the absence of clear-cut legislation prohibiting (or alternatively, sanctioning) EITs, what will the next Director say when faced with a crisis and asked to use EITs, or worse? **IAJ**



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