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The inside, untold story of CIA's efforts to mislead Congress -- and the people -- about torture will horrify you

Matt Damon as Jason Bourne (Credit: Universal Studios) *Excerpted from "Lords of Secrecy: The National Security Elite and America's Stealth Warfare"*

On March 11, 2014, California Sen. Dianne Feinstein stepped to the well of the Senate to deliver a speech exposing in stark terms a struggle between congressional investigators and their oversight subject: the Central Intelligence Agency. Feinstein was an unlikely critic of the practices of the intelligence community. The wife of investment banker Richard C. Blum, who managed enormous capital investments in corporations serving the American defense and intelligence communities, Feinstein had distinguished herself among Senate Democrats as a staunch CIA defender. In her long service on the Senate Intelligence Committee, which she had chaired since 2009, Feinstein established close personal ties with key senior agency figures—championing the candidacy of former deputy director Stephen Kappes to head the

agency after Barack Obama was elected.

Patiently and meticulously, Feinstein unfolded the string of events that led her committee to launch the most exhaustive congressional probe of a single CIA program in the nation's history. "On December 6, 2007, a *New York Times* article revealed the troubling fact that the CIA had destroyed video tapes of some of the CIA's first interrogations using so-called enhanced techniques," she stated.

CIA director Michael Hayden had assured congressional overseers that they had no reason to be concerned: routine written field reports, what Hayden called CIA operational cables, had been retained. These documents, Hayden said, described "the detention conditions" of prisoners held by the CIA before it decided to shut down the program as well as the "day-to-day CIA interrogations." Hayden offered the senators access to these cables to prove to them that the destruction of the tapes was not a serious issue. Moreover, he reminded them that the CIA program was a historical relic: in the fall of 2006 the Bush administration ended the CIA's role as a jailer and sharply curtailed its program of "enhanced interrogation techniques" (EITs)—specifically eliminating techniques that most of the international community, including the United States in the period before and after the Bush presidency, had viewed as torture, such as waterboarding.

Nevertheless, the Senate committee had never looked deeply into this program, and Hayden's decision to offer access to the cables opened the door to a careful study, which was accepted by then-chair Jay Rockefeller. Early in 2007, two Senate staffers spent many months reading the cables. By the time they had finished in early 2009, Feinstein had replaced Rockefeller as committee chair, and Barack Obama had replaced George W. Bush as president. Feinstein received the first staff report. It was "chilling," she said. "The interrogations and the conditions of confinement at the CIA detention sites were far different and far more harsh than the way the CIA had described them to us."

This first exploration of the dark side of CIA prisons and torture led committee members to recognize a serious failure in its oversight responsibilities. The committee resolved with near-unanimity (on a 14–1 vote) to launch a comprehensive investigation of the CIA program involving black sites and torture.

But the CIA was not simply going to acquiesce to a congressional probe into the single darkest and most controversial program in the organization's history. Since it could not openly do

battle with its congressional overseers, the agency turned to a series of tactics that it had honed over the difficult decades following the Church Committee inquiries of the mid-1970s. Throughout the subsequent decades, the CIA complained loudly about the burdens of oversight and accountability—while almost always getting its way.

Indeed, the dynamics had changed dramatically after the coordinated terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001. In the ensuing years, the CIA's budget ballooned to more than double its pre-2001 numbers. Moreover, it got the go-ahead to launch programs previously denied or sidetracked, and clearance to encroach on the Pentagon's turf through extensive operations using armed predator drones. Washington, it seemed, had forgotten how to say no to Langley. Still, the operation of the black site and EIT program involves a strikingly different dynamic—because the spring that fed it came not out of Langley but from the office of Vice President Dick Cheney, inside the White House.

Senior figures in the CIA, including the agency's senior career lawyer, John Rizzo, fully appreciated that the black sites and the EITs presented particularly dangerous territory. Exposure of these programs could damage some of the agency's tightest points of collaboration with foreign intelligence services—authoritarian regimes such as Egypt, Jordan, Morocco, Pakistan, Thailand, and Yemen, as well as among new democracies of Eastern Europe, like Lithuania, Poland, and Romania. British intelligence had been deeply involved and feared exposure, considering the domestic political opposition and the rigorous attitude of British courts.

CIA leadership was also focused on the high likelihood that the program, once exposed, would lead to a press for criminal prosecutions under various statutes, including the anti-torture act. It therefore moved preemptively, seeking assurances and an opinion from the Justice Department that would serve as a "get out of jail free" card for agents involved in the program. But when those opinions were disclosed, starting hard on the heels of photographic evidence of abuse at the Abu Ghraib prison in Iraq—much of it eerily similar to techniques discussed in the Justice Department opinions—a political firestorm erupted around the world. The Justice Department was forced to withdraw most of the opinions even before George W. Bush left Washington.

Leon Panetta, arriving at the CIA in 2009, found top management preoccupied with concerns about fallout from this program.

The CIA chose to react to plans for a congressional probe cautiously, with a series of tactical maneuvers and skirmishes. Its strategy was apparent from the beginning: slow the review down while hoping for a change in the political winds that might end it. And from the outset it made use of one essential weapon against its congressional overseers—secrecy. For the agency, secrecy was not just a way of life; it was also a path to power. It wielded secrecy as a shield against embarrassing disclosures and as a sword to silence and threaten adversaries. It was an all-purpose tool.

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The agency's first line of defense was to insist on what at first blush were minor inconveniences: congressional staff could not sit in their offices on Capitol Hill—not even if secured and cleared for the examination of classified materials. Instead, they had to travel to a CIA-leased facility in suburban Virginia to do so. Moreover, the investigators could not use congressional staff computers for these purposes. Materials were to be installed on "a stand-alone computer system" furnished by the CIA but with its own "network drive segregated from CIA networks" and under the control of the Senate. These requests seemed innocuous, and consequently Feinstein and her vice chair, Missouri Sen. Kit Bond, agreed to them. Later these measures would provide cover for more devious antics.

Before any materials could be turned over, the CIA insisted on its own review to be certain that the documents were relevant to the committee's request and were not subject to a claim of executive privilege. As it turns out, more than 6 million pages of documents were covered by the Senate request. It would take many months to review them all—and that of course meant a delay of many months before the Senate researchers could do so. The CIA, guided by its lawyers, thus assumed a posture that was common for American corporate lawyers engaged in high-stakes commercial litigation—"discovery warfare."

The adversary's requests for documents could not be denied but could be slowed down, complicated, and subjected to privilege claims. But this was not a billion-dollar battle between corporate giants with comparable legal rights. It was an exercise of democratic process in which the Senate was discharging its constitutional duty of oversight over an organ of the executive branch, the CIA. The agency's right to assert claims of privilege was at best legally doubtful, and its insistence on the need to test the materials for relevance was still thinner gruel. Even if irrelevant, the CIA would have no right to withhold the documents from the investigators. Moreover, the Senate, and not the CIA, was the ultimate judge of relevance for these purposes.

Even more absurd, in order to avoid wasting valuable man-hours of CIA agents on this review process, the CIA proposed bringing in outside contractors—not government employees—to complete it. In order to filter submissions to its congressional overseers, the CIA decided to let another team of persons, who otherwise would not have reviewed these documents, read and evaluate all of them. As they did so, the review team simply dumped the documents (which ultimately would amount to 6.2 million pages) on the committee, without offering them any index, organization, or structure. Delay was clearly the principal operating motivation for the CIA.

Furthermore, the CIA soon turned its skills of spycraft against its congressional overseers. “In May of 2010, the committee staff noted that documents that had been provided for the committee’s review were no longer accessible,” Feinstein noted in her speech. When confronted about this, the committee’s CIA interlocutors responded with a series of lies. First they denied that the documents had been removed, then that it was a problem for personnel servicing the computers. Finally they asserted that the “removal of the documents was ordered by the White House.” But the White House denied this and provided further assurance that the CIA would stop accessing the committee’s computers and removing documents.

That same year, committee investigators made another curious discovery. As the Senate committee was reviewing the documents, some CIA staffers were doing the same and were preparing an internal memorandum that summarized them, apparently intended as a document to brief Director Panetta. This document was also delivered to the committee and reviewed by its investigators. It would play a critical role after December 2012, when the committee delivered a 6,300-page study with a 480-page executive summary from its report to the White House and CIA for review and comment.

True to its slow-walking strategy, the CIA took more than six months—until June 27, 2013—to respond. When it did so, the earlier confidential response was backed by the curiously coordinated crossfire of an assortment of actors—former CIA directors and senior officials, disgraced former CIA agents whose involvement in the torture program was documented in the report, and media figures, often with close ties to the Bush administration authors of the program.

Their message was simple: waterboarding has produced major breakthroughs and disrupted actual terrorist plots, ultimately putting American Special Forces in a position to kill Osama bin Laden in the Abbottabad raid of May 2, 2011. However, the CIA’s own records furnished no

support for these claims.

This unofficial CIA response was driven heavily by apparent leaks from within the agency, and the hand of Director John O. Brennan was later revealed in the process. While the agency's defenders concentrated their fire on specific facts found and conclusions drawn by the report, it would turn out that the CIA's own internal review had come to most of the same conclusions. This was hardly surprising, since both the committee and the CIA were summarizing the same documents.

Both the internal Panetta report and the Senate committee report scrutinized the documents and evidence and found nothing to support claims that torture, particularly waterboarding, produced anything that materially advanced the search for terrorist leaders or planned strikes; both apparently concluded that these claims were unfounded. That produced intense embarrassment for the CIA and exposed the CIA's criticism of the Senate report as disingenuous—as Feinstein noted, it stood "factually in conflict with its own internal review."

Even more worryingly, while the Senate report was for the moment holding back from policy recommendations and other action, it set the stage for a high-stakes game on accountability for torture, including unexplained homicides involving prisoners.

The CIA had thus far escaped meaningful accountability through a combination of internal reviews and an independent examination of these questions through a special prosecutor appointed by the Bush administration Justice Department. In the end, the special prosecutor,

John Durham, focused on a handful of cases involving homicide. He did not exonerate those involved but opted not to file charges on the basis of prosecutorial discretion. Durham had apparently concluded that the prosecution would inevitably involve the disclosure of highly classified information—including the Justice Department's authorization of torture and the CIA's use of it—that would harm the interests of the United States (or, more particularly, the Justice Department and CIA). He therefore dropped the investigation, even though the evidence collected had already proven sufficient in some instances for successful prosecutions in the military justice system.

In the second half of 2013 and the early months of 2014, the feud between the CIA and the

Senate oversight committee continued to percolate. The roles played by the White House and President Obama himself were consistently ambiguous. On one hand, Obama assured Feinstein, other key members of Congress, and significant supporters who felt strongly about the issue that he was "absolutely committed to declassifying that report." On the other hand, aides quickly clarified that it meant *only the 480-page executive summary,* and only after the CIA and other agencies had reached a consensus with the White House on redactions from the report.

Obama's key spokesman on the issue continued to be his former counterterrorism adviser, John O. Brennan, a career CIA man whose own involvement with the program was never fully clarified, and whose hostility to the Senate investigation and report could hardly be contained. By March 2013, Brennan had succeeded Panetta as head of the CIA.

As this controversy developed, it became clear that Senate investigators had read the agency's own internal review and therefore knew that the agency's criticisms of the report were specious. This had stung figures at the CIA who were trying to manage the fallout from its torture and black site programs. The CIA never actually contacted the Senate committee and asked how it had come by the Panetta review. Instead, perhaps convinced that the information had been gained improperly (though that is a strange word to apply to an oversight committee's examination of documents prepared by the agency it is overseeing), someone at the agency decided to break into the Senate computers and run searches.

On January 15, 2014, Brennan met with Feinstein and had to acknowledge that the CIA had run searches on the Senate computers. Far from apologizing for this intrusion, Brennan stated that he intended to pursue further forensic investigations "to learn more about activities of the committee's oversight staff."

The Senate committee responded by reminding Brennan that as a matter of constitutional separation of powers, the committee was not subject to investigation by the CIA. It also pressed to know who had authorized the search and what legal basis the CIA believed it had for its actions. The CIA refused to answer the questions.

By January 2014, before Feinstein gave her speech, the controversy had reached a fever pitch. Reports that the CIA had been snooping on the Senate committee and had gained unauthorized access to its computers began to circulate in the Beltway media. Through its surrogates, the CIA struck back. Unidentified agency sources asserted that Senate staffers had

"hacked into" CIA computers to gain access to the Panetta report and other documents. The staffers had then illegally transported classified information to their Capitol Hill offices, removing it from the secure site furnished by the agency.

In addition, the Justice Department had become involved. The CIA inspector general, David Buckley, had reviewed the CIA searches conducted on Senate computers and had found enough evidence of wrongdoing to warrant passing the file to the Justice Department for possible prosecution. Perhaps in a tit-for-tat response and certainly with the aim of intimidating his adversaries, the acting CIA general counsel, Robert Eatinger, had made a referral of his own, this time targeting Senate staffers and apparently accusing them of gaining improper access to classified materials and handling them improperly. Secrecy was unsheathed as a sword against an institution suddenly seen as a bitter foe: the U.S. Congress.

Eatinger's appearance as a principal actor in this drama was revealing. He was hardly an objective figure. A key point for the committee investigators was the relationship between CIA operations and the Department of Justice, and particularly the process the CIA had used to secure opinions from Justice authorizing specific interrogation techniques, including waterboarding, that amounted to torture.

As the senior staff attorney in the operations directorate, Eatinger would certainly have played a pivotal role throughout the process leading to the introduction of torture techniques. The Senate investigators concluded that the CIA had seriously misled the Justice Department about the techniques being applied in an effort to secure approvals that would cover even harsher methods than those described, and Eatinger was right at the center of those dealings. Indeed, Eatinger's name appears *1,600 times* in the report.

Like many agency figures closely connected with the black sites and torture program, Eatinger had skyrocketed through the agency, ultimately becoming senior career lawyer and acting general counsel. No figure in the agency would have had a stronger interest in frustrating the issuance of the report. All those involved with the torture and black sites program risked being tarnished by the report, but few more seriously than the CIA figures who dealt with the Justice Department. Moreover, other risks were looming on the horizon outside the Beltway. As Eatinger struggled to block the Senate report, courts in Europe were readying opinions concluding that the CIA interrogation program made use of criminal acts of torture and that the black site operations amounted to illegal disappearings. The United States was not subject to the jurisdiction of these courts, but its key NATO allies were, and the courts would soon be pressing them to pursue criminal investigations and bring prosecutions relating to the CIA program.

Those involved in the program, including Eatinger, thus risked becoming international pariahs, at risk of arrest and prosecution the instant they departed the shelter of the United States.

Feinstein had refused press comment throughout this period, but other sources from the committee or its staff had pushed back with blanket denials of these accusations.

U.S. media relished the controversy and presented it in typical “he said/she said” style. But rarely is each view of a controversy equally valid or correct. Indeed, within the agency suppressing media coverage of the highly classified detention and interrogation program was considered a legitimate objective, which helps to account for the numerous distortions, evasions, and falsehoods generated in Langley with respect to it. But the CIA’s campaign against the Senate report was approaching a high-water mark of dishonesty.

As Feinstein ominously noted, these developments had a clear constitutional dimension: “I have grave concerns that the CIA’s search may well have violated the separation of powers principle embodied in the United States Constitution, including the speech and debate clause. It may have undermined the constitutional framework essential to effective oversight of intelligence activities or any other government function.”

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A fundamental concept underlying the American Constitution is the delicate rapport established between Congress and the various agencies of the executive. The massive government apparatus, including the ballooning intelligence community, is controlled by the executive. Yet the individual agencies, including the CIA—called into existence and defined by acts of Congress—operate using money that Congress gives them, subject to any limitations Congress may apply. The legislative branch exercises specific powers of oversight and inquiry into the work of agencies of the executive, including the right to conduct investigations, to require documents to be produced and employees of the government to appear and testify before it, and to issue reports with its findings and conclusions.

Throughout history executives have used the administration of justice as a tool to intimidate

and pressure legislators. To protect legislators against this sort of abuse, the Constitution's speech and debate clause provides a limited form of immunity for members of Congress. The Supreme Court has confirmed that this immunity extends to congressional staffers, such as Senate committee staffers, when they are supporting the work of their employers, and protects them against charges of mishandling classified information.

Feinstein's suggestion that CIA activities had violated the Constitution and several federal statutes was on point. Eatinger's decision to refer allegations against committee staffers to the Justice Department also reflected an amazing lack of understanding of the Constitution and the respective roles of the two institutions. And so did Brennan's public statements. Brennan first pushed back against Feinstein's account, strongly suggesting it would be proven inaccurate: "As far as the allegations of CIA hacking into, you know, Senate computers, nothing could be further from the truth. We wouldn't do that. That's just beyond the scope of reason in terms of what we would do." He also suggested that the Justice Department would be the arbiter of the dispute between the CIA and the Senate: "There are appropriate authorities right now both inside of CIA, as well as outside of CIA, who are looking at what CIA officers, as well as SSCI staff members did. And I defer to them to determine whether or not there was any violation of law."

This formulation was of course nonsense—the CIA had turned to the Justice Department as a dependable ally, not as an independent fact finder. The department was the second government agency likely to be excoriated by the report. Its national security division, to which Eatinger had turned, was little more than the CIA's outside law firm.

But when an internal probe by the CIA's inspector general vindicated Feinstein and found that CIA employees had likely misled the Justice Department, Brennan was compelled to issue an apology to the Senate committee; when he again appeared before the committee, Brennan refused to identify the responsible CIA agents or provide other details. The incident prompted bipartisan calls for Brennan to be fired, but President Obama went before the cameras to express his ongoing confidence in his CIA director.

The CIA, in its frenzied maneuvering to suppress an essential Senate report, had made predictable use of secrecy as its chief weapon—against its own congressional overseers. The agency cast itself as an intrepid force protecting American democracy from its enemies. But in this case, the agency had unambiguously emerged as the enemy of democracy.

One century ago, the brilliant German sociologist Max Weber, looking at the calamity of World War I and the wide-ranging struggle it had spawned between intelligence services and parliament, drew a series of far-reaching conclusions about the effects that secrecy would have on democratic government. Tenacious parliamentary oversight of the operations of intelligence agencies was essential, he concluded, if democracy was to survive. The experiences recounted by Sen. Feinstein provided a rare glimpse into precisely the struggle that Weber predicted.

One commentator quipped, “This is death of the republic stuff.” Hyperbole? Maybe not. More precisely it is what Hannah Arendt labeled a “crisis of the republic.” At the peak of popular discontent over the Vietnam War, as the *Pentagon Papers* were published and highly classified news about the war effort was regularly splashed across the pages of American newspapers, Arendt focused on the use of secrecy and its close ally, the political lie, to impede public discussion of vital national security issues. However, Arendt had high confidence that the crisis would pass—America’s democratic institutions were sound, its press was resilient, and politicians who made bad mistakes regularly saw accountability at the polls.

Forty years later, America faces another crisis of democracy. But now the dynamics have shifted considerably in favor of national security elites. They have carefully calculated the points likely to alarm the public and stir it to action. More effectively than before, they use secrecy not only to cover up their past mistakes but also to wrest from the public decisions about the future that properly belong to the people. Increasingly, Congress seems no match for them.

The Senate committee had emerged from a long period of somnolence to finally ask meaningful questions about a hideous CIA project involving torture and secret prisons. And the lords of secrecy were striking back.

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