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LEGAL CONSIDERATIONS IN THE WAR ON TERROR

Seeking Common Ground in the Fight Against Terrorism: Coercive Interrogation as an Example

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Introduction

Juliette Kayyem of the Kennedy School of Government and I sought and received funding from the Oklahoma Memorial Terrorism Center to assemble a richly experienced, truly distinguished group of academic, intelligence, military, and law enforcement experts from the United States and the United Kingdom to advise us (for the two of us alone were responsible for the product) on what might be wise legislative answers to 10 of the hardest questions the United States will face in the decades ahead.[1]

The 10 questions included the use of highly coercive interrogation, detentions, targeted killings, military commissions, agent attendance at political or religious meetings, state-based profiling, and gathering and use of large amounts of commercially available information. We found we could reach very considerable agreement among a group that was purposefully chosen to range from the left to the right, from civil-liberties oriented to national-security oriented. Our recommendation on highly coercive interrogation has received by far the most attention. But it is also illustrative of our contention that honest, open discussion can bring us all far nearer to agreement on extremely challenging issues for any democracy; and that such discussion should be followed by legislation, the way a democracy resolves major questions about the conditions of freedom.

The Shared Factual Background

Assume there are between 250 and 2,500 (or even more) people scattered around the world, mostly outside the United States, whose shared politics or religion leads them to plan very serious attacks on the United States. At the very least, the probability of this fact is high enough that we have to take it seriously. We should also assume that they will do their very best to hide their plans by mixing in with a much broader population that is somewhat hostile to the United States, though not murderous; and that the threat of a successful attack will remain with us for some time in the form of new generations or new groups with new causes.

Although the director of the Federal Bureau of Investigation (FBI) has said there is no evidence of terrorist cells within the United States, he fears they may be there. But we can find dangerous people abroad. The evidence of their dangerousness may be calling for attacks on the United States or calls for jihad. It may be close association with those who are more firmly believed

[1] Philip B. Heymann and Juliette N. Kayyem, *Long-Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism* (November 2004), sponsored by the National Memorial Institute for the Prevention of Terrorism (MIPT), recently published by MIT Press as *Protecting Liberty in the Age of Terror* (2005).

to be terrorists or those one-degree of separation further removed. It may be a history of having traveled to al-Qaeda camps in Afghanistan. It may be electronically overheard conversations or simply being a number called or calling another suspect. It may also be the testimony of an informant or, our present focus, of someone interrogated after capture and detention on one of these other grounds.

The list of potentially dangerous suspects is not fanciful. There is in fact reason to suspect most of the people on it. But of course it is far from perfectly reliable. We have good reason to believe–and the various statistics seem to bear this out–that a sizable number of those identified are not, in fact, planning attacks.[2]

One needn't agree that it is useful to treat even this dangerous form of terrorism as war to agree that it is more dangerous than any more traditional criminal activity we've confronted and far more dangerous than the terrorism the United States has seen in the past. Any argument that the danger is not far, far greater than it was must rely either on a lack of capacity or a lack of desire to do us great harm on the part of Al-Qaeda or its successors.[3] The former is surely a weak reed. Suicide bombers with ordinary car bombs could, at any time, target the tunnels in New York or the Golden Gate Bridge or any of our multitudes of skyscrapers with parking facilities in the basement. They could spray a football stadium with poisonous chemicals or create panic by setting off a dirty bomb made of familiar explosives laced with radioactive waste. What would be much harder for terrorists, but even then, not clearly beyond their capacity, would be to use a small nuclear device or biological weapon.

So, if the danger is not far greater after September 11th, it is because we can somehow still rely on the traditional unwillingness of criminals or terrorists to engage in extraordinarily dangerous and harmful attacks on civilians. Yet this is hardly more plausible. How many of us would bet on that after September 11th, the Madrid bombings, the planned attacks on our airlines flying over the Pacific, or the devastation of our embassies in Tanzania and Kenya?

[2] Dan Eggenand Julie Tate, "U.S. Campaign Produces Few Convictions on Terrorism Charges, Statistics Often Count Lesser Crimes," *Washington Post*, June 12, 2005, available at *www.washingtonpost.com/wp-dyn/content/article/2005/06/11/AR2005061100381.html*; see also Tim Golden and Don Van Natta Jr., "U.S. Said to Overstate Value of Guantanamo Detainees," *New York Times*, June 21, 2004; Douglas Jehl and Neil A. Lewis, "Captured Insurgents; U.S. Said to Hold More Foreigners in Iraq Fighting," *New York Times*, January 8, 2005; *Detainee Transfer Announced*, News Release (Dept. of Defense), April 19, 2005, available at *www.defenselink.mil/releases/2005/nr20050419-2661.html* (see generally *www.defenselink.mil/news/Combatant_Tribunals.html*) (noting that 214 detainees have departed Guantanamo of which 149 were released and that 520 detainees remain in custody).

[3] Boaz Ganor, *The Counter-Terrorism Puzzle A Guide for Decision Makers 41-2* (Transaction Publishers 2005) (explaining the terrorism and counterterrorism equations: Terrorism = morivation + operational capacity).

U.S. Strategy

The administration's approach to the problem this fact situation presents is to treat the list of suspects generated as described above, as illegal enemy combatants and war criminals in a war where the normal rules do not apply to either side. The notion of war can relate to the allocation of powers within the United States and among nations or to a menu of strategies. The administration claims that it operates in both realms. As to the latter realm, our mission is described as being to kill or capture the enemy forces.[4] More precisely, the strategy is to hunt enemy combatants down, with the help of other intelligence agencies and security forces, with the object of either killing them or trying them before special military commissions or simply detaining them indefinitely or interrogating them under more or less coercive conditions to learn who else is planning what. This is the heart of the National Defense Strategy released by Secretary Donald Rumsfeld on March 1, 2005: "taking the war to the enemy," rather than waiting, as President Bush has warned us is too dangerous, for the enemy to come to us.[5] Reassuring as legality is to other nations whose help we would like, international law itself is seen by the administration as a danger. In the startling words of the National Defense Strategy: "Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism."[6]

The advantage of the administration's approach is that it is very likely to be highly disruptive of the activities of those on the list including, of course, those who are really planning attacks. It may also tend to discourage some others who might assist or become terrorists. The disadvantage, besides losing the support of needed allies, is that it will inevitably treat very harshly as illegal combatants many who are not and that in doing so it will increase the support that those planning terrorist attacks enjoy. That was certainly the experience in Northern Ireland and the Palestinian territories. It will also tend to spawn new and unidentified groups who see the U.S. strategy as a war on Islam, not terrorism. Most experts believe this has happened in many places.

Whatever its effects on actually reducing terrorism, there is also relatively widespread agreement on the huge political effects of any strategy. Calling our danger "war" increases the political risks Congress and the courts would face

[4] *The White House, National Strategy for Combating Terrorism* (February 2003), available at *www.whitehouse.gov/news/releases/2003/02/20030214-7.html*; James Risen and David Johnston, "Bush Has Widened Authority of C.I.A. to Kill Terrorists," *New York Times*, December 15, 2002.

[5] Department of Defense, "The National Defense Strategy of the United States of America" 6 (March 2005), available at *www.defenselink.mil/releases/2005/nr20050318-2245.html*.

[6] *Id.* at 6.

if either seeks to impose constraints on executive action. Within the United States, the administration, its Democratic opponents, and the human rights community are also all very well aware that the political effect of another, even moderate-sized, terrorist attack within the United States would be a public demand for increased executive powers, reduced civil liberties, less role for the legislature, and less concern for claims by our allies of infringements on their sovereignty. Every month without a terrorist attack produces the opposite political effect.

Even without a new attack, one unlikely scenario has a special place in the imagination of the American public as a justification for relatively unconstrained powers of interrogation, whether simply assumed by the president or delegated by the Congress. As of yet, no evidence exists of a "ticking bomb" case where a danger to many lives will materialize within a relatively short period of time and might be prevented by learning the location of the bomb with brutal interrogation methods. There is much to be said about the merits and demerits of that answer to this scenario. For my purposes it is enough to note that it has a special role in our politics.

The political effects among Islamic opponents of adopting the imagery and strategies of "war" are undoubtedly to increase the number of those who hate or distrust the United States, at the same time as it discourages active participation in terrorism by reducing the hope of success and by increasing the fear of American response. The very steps that discourage active participation are likely to increase hatred and active or tacit support for terrorists. In Israel, for example, success in thwarting suicide attacks by military measures since 2002 has been accompanied by a sharp increase in total attempted bombings.[7]

More specifically, the political response to efforts to discourage participation in terrorist groups by making that appear an ineffective and dangerous path may be to increase the motivation of old or new leaders of the terrorists to accomplish a spectacular attack; for that could encourage demoralized supporters and give hope to that angry and defeated part of the Muslim world. To the extent we have in the last four years increased anger and resentment but discouraged its mobilization as useless, a new spectacular attack, rather than something less, might seem the most promising way to mobilize terrorists.

The Overall Impact on Civil Liberties and Human Rights

Assessing the overall impact on civil liberties and human rights of the steps the administration has taken since September 11th, 2001 requires making at least three distinctions.

[7] See Ganor, supra note 3, at 71.

The first goes to the legal source of the actions having the most significant effects. Surprisingly to most Americans and Europeans, the president has looked far less to the USA PATRIOT Act for powers, than to a claim of presidential war powers, either under the authority of the very general resolution passed by Congress soon after September 11th or under the inherent Article II powers of the president as commander-in-chief. The impact of the PATRIOT Act was first overstated by the Bush administration to show action and then the statute was treated as far more radical and dangerous than it is by a civil liberties community that needed a public focus for its concerns. Thus the Act became a symbol both in the United States and Europe of the most dramatic new steps brought about by the war on terrorism. But it does not fit that role. One can agree or disagree with a half-dozen of its provisions, but none are nearly as important as the steps taken under a claim of war powers. The 10 questions that Juliette Kayyem and I addressed involve matters far more important than anything in the PATRIOT Act.

The second distinction is between the dangers posed by assertions of new powers and authority and the dangers posed by actions taken. In the United States the danger is far more from the former than the latter, although there is some danger from each. Foremost in the realm of dangerous powers at home is the president's claim to authority to detain American citizens, as well as others, on his sole determination that they are involved in planning or executing terrorism–without any judicial review, without an attorney, and in secret locations without access to anyone outside the government. That power has only been used two or three times, but its mere existence creates vast possibilities of abuse.

As to actions taken at home, we have been unusually aggressive bringing prosecutions in the United States, often against minor figures, and in conducting far more court-authorized electronic surveillance than in the past.[8] We have pursued innovations in discovering and processing information about citizens and others in areas where privacy law has not yet limited federal actions. We have been very vigorous, and sometimes discriminatory, in enforcing immigration laws and in monitoring aliens. But none of these actions, nor all together, begins to approximate the importance of the presidential claims of new powers.

Third, the claim to war powers abroad has supported detentions of thousands, coercive interrogation of hundreds, renditions of one hundred and fifty, and targeted killing. Here action has plainly matched the claims of power and the claims too are far broader than at home or those involving Americans. The legal authorization is found in a gap between the coverage of the Geneva

[8] Dan Eggen and Julie Tate, supra note 2; Devlin Barrett, "Wiretaps in U.S. Jumped 19 Percent in 2004," Associated Press, April 29, 2005.

Conventions and the coverage of the U.S. Constitution, statutes, and treaties–a gap creating a status of illegal combatants. That in itself is part of a broader self-empowerment with regard to human rights and sovereignty abroad based upon the power of administration lawyers to "helpfully" interpret our treaty obligations, as in the case of the meaning of "torture" and the limitation to our shores of "cruel, inhumane, and degrading treatment" –both terms defining our obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which protects against these activities. Unilateral interpretation is a great power. Recognizing this, in his 2005 defense strategy Secretary Donald Rumsfeld described the risk of replacing American interpretation with that of international institutions as one of the great dangers facing the United States.

Empowerment with regard to both Americans and aliens, both at home and abroad, has also come from a series of efforts to limit the jurisdiction of U.S. courts to review actions taken under war powers. Finally, unprecedented claims of secrecy are themselves a form of empowerment.

The U.S. approach to civil liberties, human rights, and the sovereignty of other nations is likely to change in the years ahead. The scandals of Abu Ghraib and Guantanamo have plainly had an effect. So has the passage of time without another attack. Beginning with a famous question by Secretary Donald Rumsfeld to his staff, we may come to believe far less in the efficacy of killing and capturing al-Qaeda leaders if the means (and their mistakes and collateral damage) create lasting hostility in a vast population. The administration has come to see more clearly the need for cooperation from a broader range of allies.

Coercive Interrogation

Against this background, our recommendations took the middle of three possible alternatives. The first is that the president must have discretion to use any form of highly coercive interrogation, including torture, openly or secretly, and even without specific statutory authorization for use of that type of interrogation. The second, our alternative, was that the president should use highly coercive forms of interrogation only with statutory authority and even that should be limited to using only such forms of interrogation as he could lawfully use in the United States under similar circumstances. The third alternative, embraced by most of the human rights groups, is that the president and the United States should comply with even the somewhat aspirational provisions of international treaties, which, besides forbidding all torture, also forbid whatever is meant by the lesser category of "cruel, inhuman, or degrading treatment". In ratifying those treaties the United States has limited its commitment, at most, to not engaging in any form of interrogation that would violate the 5th, 8th, or 14th Amendments of the U.S. Constitution.

Our "middle-ground" recommendation has been greeted with opposition ranging from administration disinterest to active hostility by much of the human rights community. The administration has seen no benefit in allowing itself to be bound, when it is presently free of almost any constraints in conducting a secret war on terrorists. It has vigorously opposed a bill introduced by Senator McCain that is very similar in effect to our proposal. It passed overwhelmingly in the Senate. The human rights community has thought it inconsistent, or at least unrealistic, of us to suggest that certain highly coercive forms of interrogation could be used on rare occasions where the immediate necessity to save lives is found and certified by the president, even if that form of interrogation was something that the United States would be ashamed to adopt or see a dictator use as a general practice. The passion of the debate, at least on the side of human rights groups, is surprising, because our views on most of the background facts probably differ very little. It is handling five additional areas, where no one can be certain of the facts, which separate us.

The Uncertainties

Five factors highly relevant to choosing between the three alternatives for using coercive interrogation are unknown. Being unknown and not the subject of broad-based agreement, arguments by partisans based on confident assertions about these matters deserve a good measure of skepticism. Wise decision must recognize and deal with these uncertainties, not simply hide them to support preferred policies. We should turn now to these uncertainties, leaving to a last section why we handled them as we did.

The Effectiveness of Coercive Interrogation

The advantages of authorizing highly coercive interrogation in any situation depend upon how much this technique can add to a variety of other ways of getting information or even to the narrower set of ways of getting information from an unwilling individual. In rejecting the use of coercive forms of interrogation for confessions, the United States Supreme Court has often emphasized that it is likely to turn out to be a lazy way of getting evidence that could as readily be obtained by searches, interviews of willing witnesses, or any of a number of other ways. Even if the information is only in the hands of a particular individual, probably a rare occasion, there are a number of alternatives to coercive interrogation.

Federal law enforcement relies on recruiting informants, electronic surveillance, and placing law enforcement agents undercover within an organization to obtain information from individuals who would not willingly disclose it without being deceived in one of these ways. Physical surveillance

could be added to that list. Even when U.S. law enforcement wants to extract information from an individual disinclined to talk, it relies on relatively non-coercive interrogation (after Miranda rights have been waived) or the threat of far longer sentences for an individual who does not cooperate in furnishing information. We have no useful way of assessing how much a power to engage in coercive interrogation would add in light of the available alternatives. It is even hard to assess whether its effect is counterproductive: to offer the benefits of having to use less imagination and energy at the expense of obtaining information that is far more likely to be false.

Among those experienced in counter-terrorism or related operations there is a sharp division about the usefulness of sustained coercion. Every one agrees such coercion can and is likely to produce statements designed to satisfy the interrogator. Interrogators from Israel and Northern Ireland say that the likelihood such statements will not be true is very high, compared, for example, to a statement obtained using rapport as an interrogation device. My Harvard colleague Michael Ignatieff argues that torture would not be used so widely if it were not considered effective. But confusion about the likelihood of getting some statement (very high) or a confession (also quite high, whether true or false) as opposed to getting useful information about an ongoing operation or organization seems ample to account for the frequent use of torture.

As to the "ticking bomb," we have no adequate sense of how often coercive interrogation would be helpful. We will frequently have the wrong person. Even if we have the right person, he is likely to hold out until the information he has is no longer useful. He is likely to lie and in a clever way developed by his organization. Even if a particular plan is stopped, his colleagues may change the plan and substitute another. If all of this adds up to a one in ten chance that he will tell the truth, law enforcement would need the time to check out a number of false stories, not just the time to go directly to where the bomb is located.

Costs of Interrogation

We can identify the types of costs, but we do not have the information to weigh them. Stories about Abu Ghraib and Guantanamo have plainly made us new enemies, strengthened the support among Islamic publics for terrorism, and emboldened new terrorists. That has been the history of the Palestinian intifada against Israel.

Highly coercive interrogation also undermines support we need for U.S. objectives. Within the U.S. population we have been watching a contest between support for the United States generated by democratic elections in Iraq and opposition to the United States generated not only by the cost in dollars

and lives, but also by the cost in national self-respect accompanying tales of sadistic or depraved interrogation in Iraq, Afghanistan, or Guantanamo. A similar array of moral embarrassments cost President Lyndon Johnson dearly in terms of support for a continued war in Vietnam.

Highly coercive interrogation alienates allies in Western democracies making it, at a minimum, far harder to find coalition partners. The practice also gives away our capacity to criticize brutality by others in the world. We can hardly lecture Egypt or Saudi Arabia.

Such interrogation may endanger our soldiers. It may cause grave harm to the interrogators too. These types of harm are plainly real. But no one can measure them with exactness.

The Slippery Slope and its Relatives

Without being able to weigh these costs, we may be able to reduce them by carefully specifying the circumstances in which highly coercive interrogation could be used, but that creates another cost which is the most difficult of all to measure: the risk that highly coercive interrogation will spread from the limited area in which it is permitted to broader and broader areas; from foreigners to resident aliens to American citizens; and from use against terrorism to criminal drug trafficking and then to ordinary crimes. We know how to write standards and how to allocate responsibility for decisions and even how to monitor those decisions with devices of legislative or judicial oversight. Still we do not know how these efforts to control and direct discretion would apply when an administration believes we are at war and is not restrained by the desire for reciprocity that lies behind willing compliance with the Geneva Conventions.

Some would argue, plausibly, that even if no "slippery slope" develops, any exception may cause disrespect for crucial principles. The argument here is that a deeply held principle ceases to be deeply held once any exceptions are admitted, especially because then every country can define its own exceptions. Those taking this view contend that it would even be better for the President to engage in civil disobedience when he thought that necessary to save lives and take the admittedly small risks of punishment than to authorize any exception to the prohibition of torture.[9] Alternatively, they would urge that the president or the secretary of defense should act and defend his conduct as falling within a justification of "necessity" –a position taken by Israel's Supreme Court. Perhaps even secret exceptions (although it is difficult to keep mistreatment secret) are better than openly approving exceptions in some circumstances. Opponents of these views find something profoundly dishonest about expecting and wanting officials to act in a way that we have previously defined as unlawful. But until we can weigh the cost of institutionalized hypocrisy against the cost of each country creating its own exceptions to even the most sacred of principles, still another measure of uncertainty is built into the question.

[9] Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. Rev. 1481 (2004).

Moreover, some of the costs would be incurred whenever an exception is made, however rarely–i.e. even if the there is no slippery slope. They flow from violating a treaty obligation or publicly stated principles; for one category of cost involves a loss of trust. A minister or judge who lies or cheats once will never be trusted again. A judge who makes a single blatantly racist remark at a cocktail party cannot benefit from the fact that it was a rare occasion. A company that once knowingly sells a harmful drug cannot effectively point to the percentage of useful drugs it sells. An accounting firm that juggles the books in even one audit is likely to have no credibility left. A stockbroker who has been shown to boost stocks he secretly considers worthless will have no customers. In each of these situations others may have little basis for judging whether an action is a rare exception or a revelation of frequent deception about a general practice. In each, the alternative to not trusting again someone who has fooled us once may be so cheap and effective that trusting that someone again seems foolish.

Looking for "weights" for such imponderables may be a utilitarian way of expressing the choice between a utilitarian philosophy and a Kantian morality. It is in fact very difficult to answer the question put, at least implicitly, by those insisting that morality requires an exception to any universal prohibition, even of torture. The brutally simple argument asks, "Would you torture to save two lives? If not, what about two hundred or twenty thousand or two million?" The Kantian answer is that no action more clearly treats a person as a means rather than an end than imposing pain until he reveals what his self-respect and social identity are making him withhold. It is only after reaching and resolving this impasse that one can confidently announce a preferred policy.

National Understandings about the Relative Value of Non-U.S. Lives

Our normal criminal procedure has to address the risks, inconveniences, and embarrassment we may impose on an individual who is suspected of crime but may well be innocent. In general, he is promptly furnished a lawyer and, unless there is a risk that an American suspect will flee or endanger others before trial, very little harm can be done to an American citizen until he has been convicted of a crime. We may question these understandings in the area

of suspicion of terrorism, for the risks of harm pending trial may be far greater and the needs for information about associates to prevent another attack may be far greater. Moreover, if the suspect has no substantial ties to the United States, the political dangers to American democracy of unchecked executive power over its own citizens will generally not be involved; and, even more significantly, the government's activities are not likely to threaten us, our neighbors, and our friends, whose welfare many consider more important than the welfare of strangers abroad.

But even these difficulties are vastly compounded by the fact that we have no national agreement on how to put weights on the trade-off between dangers to Americans from the activities of others and dangers to others from the efforts of our government to protect Americans from terrorism. Americans do not agree on what weight to give to the interests of alien suspects compared to the interests of innocent Americans who may be victimized.[10]

Our recommendation insists that American citizens be subject to the same risks that would apply to foreigners abroad–no more and no less. The administration has in fact applied very different practices for suspects from abroad and suspects within the United States. Except for two or three Americans, no American has been detained except for trial and, almost without exception, no American has been subjected to torture or, perhaps, any treatment that would be considered cruel, inhuman, and degrading. That is manifestly untrue of our past practices with regard to non-U.S. persons abroad whether the subject is detention (of thousands) or interrogation (with one hundred deaths)

The Costs of Lost Respect for Legality

Our Senate Reservation to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines our understanding of the prohibition against "cruel, inhuman, and degrading" treatment that is not torture, as only including conduct prohibited by three Amendments to our Constitution and not lesser forms of interrogation. Arguing that these Constitutional provisions do not apply to aliens abroad, the administration claims that our treaty obligation is therefore applicable only in the one place where it is wholly and utterly superfluous--the United States. Here, as the administration notes, the 5th, 8th, and 14th amendments of the Constitution obviously already ban whatever conduct violates them. Our obligations would be far greater, the administration acknowledges, if this were a war against a signator to the Geneva Conventions whose troops wore uniforms and were

[10] See Michael Walzer, *Arguing About War* 23 (Yale University Press, 2004) (discussing the related problem of how much responsibility the U.S. military should have toward civilians whose lives are put at risk by military operations).

under firm command.[11] But we have few, if any, obligations to foreigners in a war against terrorism although it is likely to continue indefinitely. For decades to come, refraining from "cruel, inhuman, and degrading" treatment of those aliens abroad whom we suspect of terrorism is, according to the administration, not required or promised.

We don't know the effects of adopting such an implausibly narrow interpretation of our treaty obligations. We know that it is of great value to us as a nation that we can make promises that can be taken as reliable in the form they are likely to be understood by the recipient states. This is not because otherwise the United States will be sanctioned for violating a treaty obligation; there may be such a sanction but that would be rare and its use and practice would be even rarer. International agreements are far more frequently supported by the mutual benefits of compliance with promises. We enter into them because we care about other nations complying. If we ignore, or interpret unreasonably narrowly, our commitments, we can expect to receive less from the commitments that were made in exchange for our promise.

More broadly, nations develop reputational value from being law-abiding and promise-keeping. That this is an area of potential cost from ignoring either the Geneva Conventions or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is clear, but what weight it should be given is far less clear. In the area of these particular treaties, and perhaps more generally of human rights agreements, the subject matter may be sufficiently distinct and isolated as not to bear on our other commitments in, for example, the fields of trade or national security. If so, then we would have to know how much we had to gain from others' compliance with treaties in the area of human rights, and we would have to assess whether there was some reason to think that the extent of compliance by others would be affected by our actions.

Our early interpretations of the Geneva Convention and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment were stretched beyond what others would believe were good faith interpretations of our promises. That applied to the severity the Administration said was required for torture. It applied to the administration's interpretation of cruel, inhuman, and degrading punishment, the effect of which was to make our promise applicable only within the United States (where the Constitution already forbade what we agreed to forbid) and not outside

[11] *Cf.* arguments by the administration that the Geneva Conventions do not apply to non-signators, al-Qaeda, and the Taliban. Memorandum from John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, on Application of Treaties and Laws to al-Qaeda and Taliban Detainees, to William J. Haynes II, General Counsel DOD (January 9, 2002), available at *www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf*.

the United States. This interpretation would have seemed implausible to any state entering into the treaty in partial reliance on the benefits to be realized from U.S. promises, affecting its future behavior. But we cannot easily weigh the costs of this loss of credibility.

Choosing Among the Alternatives

I began this essay by suggesting we must choose as a country between: (1) allowing the president to assert that he has discretion under Article II of the U.S. Constitution to authorize any form of interrogation, including torture (which he deplores as a matter of policy) secretly when he regards that as appropriate; (2) insisting that in this area the president's discretion should be constrained by a statute such as the McCain bill and subject to legislative and judicial systems of accountability; and (3) insisting that the national decision on these troublesome questions has already been made–that the president is bound by international treaties, including the vague and somewhat aspirational prohibition of cruel, inhuman, and degrading treatment, and therefore the president has neither unlimited discretion nor should be given bounded discretion by U.S. legislation. The choice among these three broad systems will depend upon answers to the uncertainties described above.

Why Not Torture at the Discretion of the President?

Only very broad assessments of likelihood about a number of these uncertainties seemed necessary to us to decide against the first alternative. We would not give the president unbounded discretion to approve, secretly and without oversight in any form, any form of interrogation he regards as necessary, because: (1) as we have described above, the benefits of coercion even in the "ticking bomb" case depend on a quite unlikely set of conditions; (2) an inadequate level of care has been used so far in resorting to highly coercive or degrading interrogation whenever the power to choose this path was delegated to subordinates, creating real evidence of a "slippery slope"; and (3) a number of the costs of even personal presidential decision to use highly coercive interrogation, much less power delegated by the president, are likely to be great, and, if these concerns leave grave doubt about the wisdom of this alternative, as they do, we should not abandon either treaty commitments we have solemnly signed or a federal statute forbidding torture we have very deliberately enacted.[12] Moreover, the possible effects on American loyalty and morale of such a sharp abandonment of the claim that the United States is a

[12] 18 U.S.C. §§ 2340-2340(A) (2004).

world leader in fairness and decency make authorizing torture a gamble not to be taken without far more evidence of usefulness than is now available. Nor would we accept as such evidence anecdotal statements from officials involved in highly coercive interrogation when the only evidence as to how often and how well it has worked compared to far less costly ways of gathering information is systematically withheld by the Administration. Neither international embarrassment at what we do nor any plausible need for secrecy even years later warrants preventing a fact-based evaluation of such a highly controversial abandonment of U.S. tradition. In short, that some resolution of admitted uncertainties are much more likely than others and that critical continued uncertainty is often the result of executive secrecy together led us to reject any form of authorization of torture.

Why Allow Limited Forms of Cruel, Inhuman, and Degrading Treatment?

Most of what has been a costly experiment with interrogation during the "war on terrorism" involves activities that fall short of torture, but fall into whatever the meaning might be of the somewhat vague label "cruel, inhuman, and degrading treatment." The considerations here are somewhat different. The forms of coercion that fall within this prohibition may not bear all the costs of the powerful and historic social condemnation that is plainly associated with torture. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for example, specifically precludes any exception to the prohibition of torture; it does not include a similar provision forbidding departures from the commitment not to engage in cruel, inhuman, and degrading treatment.

The great price we have already paid in alienating the communities and nations whose support we will need in the "war on terrorism" is a strong argument for not continuing to delegate authority to use degrading treatment, let alone cruel and inhuman treatment short of torture. How different would the consequences be if such practices were generally prohibited, but the president remained free to personally make very rare exceptions to save human lives? I have discussed above the difficulties of assessing the political costs of occasional exceptions, even assuming, as I do, that a properly drafted executive power could prevent slipping down a slope of abuse. Moreover, the benefits of this lesser form of coercion might well not include a substantially increased chance of obtaining a quick and truthful answer in the case of the "ticking bomb".

Still for three reasons we would permit the president personally to approve any form of interrogation short of torture in an emergency where multiple lives could be saved in no other way and where that form of interrogation would be Constitutionally permitted even if the subject was an American citizen and the interrogation took place in the United States.

1. We would be fully honoring the commitments we made by treaty. At the time the Senate ratified The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, they made clear that "cruel, inhuman, and degrading treatment" was to be understood as any form of interrogation that would violate the 5th, 8th, or 14th Amendments of the Constitution. That means that as a nation we agreed to prohibit only what was forbidden in a line of Constitutional decisions about government conduct that "shocks the conscience." In each of the cases, the necessity for what the government did is treated as entirely relevant to assessing the Constitutionality of its actions. We believe that the use by the president of a form of coercive interrogation that was not torture in an emergency where it was necessary to save multiple lives might well not "shock the conscience" of a court reviewing that action in a suit for damages months later. There is much to be said for sticking with what was carefully decided a decade ago in a situation where arguments could still be made on either side of the issue.

   Under our recommendation, judicial review will create accountability in the form of damage actions and will allow a careful review of the facts. That eliminates, as the Senate desired, much of the great vagueness of the phrase "cruel, inhuman, and degrading." Finally, there is a real guarantee of fairness and a significant reduction in resentment that flows from the Senate's decision to use the standard applicable to interrogation of Americans as the standard for interrogation of "illegal combatants." We will not treat anybody anywhere in the world one touch worse than we would treat an American citizen at home. But we are not obligated to treat suspects abroad more carefully than we would treat U.S. citizens.

2. Giving the president a very limited, procedurally guarded, discretion to create an exception to the prohibition of "cruel, inhuman, and degrading" treatment is only responsible and prudent in a world where a small nuclear bomb is a distinct possibility. While we do not think that power will help the president much, we were not prepared to have our judgment replace that of the president's if he is willing to decide personally and accountably that using an interrogation technique short of torture is necessary.

   That exception brings the handling of captured terrorists into line with the criminal law of most Western countries and with other steps that are accepted to prevent a terrorist attack. Under the criminal law of almost every Western nation, even the killing of innocent people is permitted to save more innocent lives under a doctrine called the "lesser of evils" or "necessity" defense. This part of the U.S. criminal law would apply to the president in acting to diffuse a "ticking bomb." It should apply to interrogation techniques short of torture if it would authorize, in closely related circumstances, lethal force to prevent the same attack.

   Similarly the exception makes sense in terms of the president's admitted capacity and certain plans to take far more drastic steps when a serious terrorist event is imminent. He will shoot down an airliner with 240 of us aboard if it has been hijacked and is heading for the Capitol or Empire State Building. He should be able, in similar circumstances, to order an interrogation under coercive conditions less than torture. Our presidents have and would send cruise missiles or bomber attacks to prevent such an attack.

3. Realistically, giving the president some power to act exceptionally in highly exceptional circumstances is a minimum condition of legislation and would be even if we had a Democratic Congress and a Democratic president. If the legislature is to act with executive agreement, there ultimately has to be a trade of legitimacy for one set of presidential actions (which he is presently taking without clear authority) in exchange for the president accepting both a prohibition of some others and a set of procedures, standards, and oversight for a broader range of interrogation techniques.

   All this would be unimportant if having legislation made no difference–if judicial review were a promising and full substitute for legislation. But judicial review ignores one-third of the separation of powers and, even more serious, will be extremely deferential to presidential authority unless and until the Congress acts. The courts will not stand in the way of a president who is asserting national security interests unless the Congress provides its support. In that circumstance, made famous by a concurring opinion of Justice Jackson in the Steel Seizure case, the courts will step in. But they will not step in alone. So if we want to reestablish separation of powers in the United States, we have to get the Congress to act. Only this will empower the legislature and the courts to share in deciding the future of the United States.

This resolution of uncertainties led us to leave a narrow exception for highly coercive interrogation, short of torture, in life-threatening emergencies.

Conclusion

For few truly hard questions of policy or morality are there conclusive answers. That there is not a single certain answer to the question of what the position of the United States should be on coercive interrogation of a suspected terrorist–and on who should make that decision and with what procedures, standards, and oversight–is hardly surprising. Indeed, it is almost mandated by the fact that while there is agreement on some critical facts, there is no agreement on others that are both of great moment and deeply contested.

What we can ask for the nation is that we debate a matter as relevant to our national identity as coercive interrogation and that the arguments seek as much transparency as possible and not hide behind either feelings of pride in hard-headedness or of satisfaction in being holier than others and not be hidden behind conclusive assumptions about unknown facts.

Juliette Kayyem and I have tried to take that unusual path by assembling a group of law enforcement, intelligence, and academic experts from the United States and the United Kingdom to consider 10 very difficult questions, none harder than what our position should be on highly coercive interrogation. Not all of our experts agreed with all of our conclusions. The results are solely the responsibility of Juliette Kayyem and I.

Our conclusions, with reasoning as transparent as possible, went like this: if you believe that laws and practices of war between states had to change after the development of atomic weapons because suddenly there were risks orders of magnitude greater than those before, then it is reasonable to believe that the danger of devastating forms of terrorism also require some changes in domestic law and international law. We believe that the world has not changed enough to have the executive operate without legal constraints or accountability to other branches of government, but it has changed enough to require some new laws and international understandings. Our assumption has been that the administration's picture of a relatively ruthless "war," where the goal of survival justifies almost every means, is no better than an exclusive preoccupation with general rules of righteous behavior–that what is needed is an intelligent effort to maximize both humaneness and national security.

Our specific handling of one of the ten hardest issues–highly coercive interrogation–is attached as Appendix A. We thought that the extremely questionable benefits of adding torture to an array of already available and widely accepted methods of gathering intelligence were very likely to be outweighed by the types of costs that I have described. A balance that was close at best could hardly justify a case for violating a treaty obligation we had solemnly adopted. We also thought the use of renditions and near-renditions to bring about torture at the hands of other nations, should be flatly prohibited and not tolerated with an executive wink at hypocritical assurances.

The United States should freely use any interrogation technique that can be used in a police station within the United States without making a resulting confession excludable as "coerced" under the due process clause of the U.S. Constitution. But any technique forbidden in this context but to be used on terrorists should be proposed by the attorney general and approved by the president. For accountability we require that list of approved coercive techniques to be sent to appropriate committees of Congress.

Nothing on that list should violate either the torture provisions or the provisions forbidding "cruel, inhuman, and degrading" treatment. Particular findings must be made in the field before an individual can be subjected to any technique on the list–any technique which would not be consistent with due process in a U.S. police situation. For a violation of any of these rules a party could bring suit for damages against the United States in federal district court. The effect would be to develop, after the fact, law as to whether or not a technique violates the prohibitions we formally accepted and ratified, with particular reservations.

To all these protections we added one exception: that the president could personally decide to use techniques that would, as general practices, be forbidden by the "cruel, inhuman, and degrading" clause if he or she made written findings that in a particular emergency this was necessary to save lives imminently threatened and if the technique he approved would be Constitutional if applied to an American citizen in the United States in a similar circumstance. This does not, in any circumstance, authorize torture. It is substantially the same as the provision that would allow a necessity defense to a killing of innocent people by an ordinary person in most Western countries. The situation is also one in which the president would feel authorized to use military and lethal force. When exercising that exception the president's findings would have to be formally sent to Congress. He would have to announce the number of occasions in any year in which the exception was invoked.

The benefit of these provisions is that they honor our commitments, protect our national security in the one situation where more than normal police interrogation may be necessary, and provide a variety of forms of accountability to replace the secrecy that now hides our interrogation practices. The effect would also be to remove any doubt that the prohibition on cruel, inhuman, and degrading treatment applies abroad.

One might want to change these provisions. They were not handed down on Mt. Sinai. They are simply our effort to deal realistically, but under a rule-of-law regime, with the increased dangers posed by the risk of massive terrorist attacks. The very idea of addressing these issues thoughtfully and publicly has not so far been embraced by either the basic rights community or the administration. But the process is necessary for a self-governing, proud nation.

Appendix A

Long-Term Legal Strategy Project
Preserving Security and Democratic Freedoms in the War on Terrorism
Recommendation on Coercive Interrogation

Rules proscribing the use of torture and other cruel and inhuman treatment by the United States provide little guidance as to the legitimacy of specific interrogation techniques and when they can be used. The exact coverage of the international torture prohibition is far from clear. The same is true of the U.S. reservations and understandings on ratifying it. Whether it binds the president is disputed, as are the conditions, if any, on which the lesser prohibition (Article 16) of cruel and inhuman treatment can be waived. No other set of specific rules and procedures regarding highly coercive interrogation, not forbidden by the U.N. Convention Against Torture or the Geneva Conventions, exists. In this context of uncertainty, the use of particular coercive techniques remains and has been subject to serious abuse. On the other hand, the controversy surrounding interrogation tactics, and the resulting criminal charges against military personnel, has resulted in a dramatic swing of the pendulum that may discourage lawful interrogation tactics. That, too, is not a beneficial response. Our recommendations seek to provide guidance on which standards ought, and ought not, to be utilized.

I. Treaty and Statutory Commitments

A. Without exception, the United States shall abide by its statutory and treaty obligations that prohibit torture.

B. Consistent with the provisions under "Emergency Exception," the United States shall abide by its statutory and treaty obligations that prohibit cruel, inhuman, or degrading treatment. Lawfulness under the U.S. reservation to Article 16 of the Convention Against Torture ("cruel, inhuman, or degrading treatment") requires at least compliance with the due process prohibition against actions that U.S. courts find "shock the conscience." Nothing in the following effort to define compliance with these obligations is intended to supplant our additional obligations when particular circumstances make applicable the Third and Fourth Geneva Conventions.

II. Transfer of Individuals

A. The United States shall abide by its treaty obligations not to transfer an individual to a country if it has probable cause to believe that the individual will be tortured there. If past conduct suggests that a country has engaged in torture of suspects, the United States shall not transfer a person to that country unless (1) the secretary of state has received assurances from that country that he or she determines to be trustworthy that the individual will not be tortured and has forwarded such assurances and determination to the attorney general; and (2) the attorney general determines that such assurances are "sufficiently reliable" to allow deportation or other forms of rendition.

B. The United States shall not direct or request information from an interrogation or provide assistance to foreign governments in obtaining such information if it has substantial grounds for believing that torture will be utilized to obtain the information.

C. The United States shall not encourage another nation to make transfers in violation of the prohibitions of the Convention Against Torture.

III. Oversight of the Use of any Highly Coercive Interrogation (HCI) Techniques[13]

A. The attorney general shall recommend and the president shall promulgate and provide to the Senate and House Intelligence, Judiciary, and Armed Services Committees, guidelines stating which specific HCI techniques are authorized. To be authorized, a technique must be consistent with U.S. law and U.S. obligations under international treaties including Article 16 of the Convention against Torture, which under "Treaty and Statutory Commitments" above, prohibits actions that the courts find "shock the conscience." These guidelines shall address the duration and repetition of use of a particular technique and the effect of combining several different techniques together. The attorney general shall brief appropriate committees of both houses of Congress upon request, and no less frequently than every six months, as to which HCIs are presently being utilized by federal officials or those acting on their behalf.

[13] Highly coercive interrogation methods are all those techniques that fall in the category between those forbidden as torture by treaty or statute and those traditionally allowed in seeking a voluntary confession under the due process clauses of the U.S. Constitution.

B. No person shall be subject even to authorized HCI techniques unless (1) authorized interrogators have probable cause to believe that he is in possession of significant information, and there is no reasonable alternative to obtain that information, about either a specific plan that threatens U.S. lives or a group or organization making such plans whose capacity could be significantly reduced by exploiting the information; (2) the determination of whether probable cause is met has been made by senior government officials in writing and on the basis of sworn affidavits; or (3) the determination and its factual basis will be made available to congressional intelligence committees, the attorney general and the inspectors general of the pertinent departments (i.e., Department of Justice, Department of Defense, etc.).

IV. Emergency Exception

A. No U.S. official or employee, and no other individual acting on behalf of the United States, may use an interrogation technique not specifically authorized in this way except with the express written approval of the president on the basis of a finding of an urgent and extraordinary need. The finding, which must be submitted within a reasonable period to appropriate committees from both houses of Congress, must state the reason to believe that the information sought to be obtained concerns a specific plan that threatens U.S. lives, the information is in possession of the individual to be interrogated, and there are no other reasonable alternatives to save the lives in question. No presidential approval may authorize any form of interrogation that would be prohibited by the 5th, 8th, or 14th Amendments of the U.S. Constitution if applied to a U.S. citizen in similar circumstances within the United States.

B. The president shall publicly report the number of uses of his special necessity power biannually to Congress.

V. Individual Remedies and Applicability

A. An individual subjected to HCI in circumstances where the conditions prescribed above have not been met shall be entitled to damages in a civil action against the United States.

B. No information obtained by highly coercive interrogation techniques may be used at a U.S. trial, including military trials, against the individual detained.