Slate

JURISPRUDENCE

The Torture Two-Step

Bush's new torture order and its loopholes.

By Phillip Carter

Posted Monday, July 23, 2007, at 5:13 PM ET

In an executive order signed and published Friday afternoon, President Bush purported to end the reign of torture. The order clearly forbids "torture" and "cruel, inhuman or degrading" treatment." Except that it all depends on what the definition of *torture* is. The order does nothing to repudiate earlier interpretations of the Bush administration, which narrowed "torture's" scope to allow coercive interrogation techniques including sleep deprivation, water boarding, and extraordinary rendition, among others. Instead of proscribing torture, it adds yet another layer to the legal regime supporting those earlier policies. And it further opens up new loopholes for creative lawyers in the CIA and Pentagon. The end result is a policy that misses a historic opportunity to correct the excesses of the last six years.

Setting the tone for what's to come, President Bush starts by citing two of the most infamous legal documents of the past seven years—the January 2002 memo by then-White House Counsel Alberto Gonzales describing the Geneva Conventions as "quaint" and "obsolete," and the February 2002 directive declaring that Geneva didn't apply to terror detainees. These memos caricatured the Geneva Conventions as the product of old wars between old states on old-style battlefields, irrelevant in the 21st century. (Funny how so many people in uniform disagreed, including retired Gen. Colin Powell, the Navy general counsel, and *all* the military's top JAG officers.) Once it was decided that the entire class of detainees at Guantanamo didn't qualify for Geneva's protections, it became far easier for intelligence officials and their lawyers to up the ante with increasingly sadistic interrogation practices. In 2002, Bush lawyers went so far as to argue that interrogators only cross the line if they specifically intend to cause severe pain or suffering, such as organ failure or death. Friday's order rests atop this deeply flawed legal foundation.

The order also reaffirms the administration's broad view of the war against al-Qaida, the Taliban, and "associated forces" as a war that is unlimited with respect to time or geography. Al-Qaida fighters captured in Afghanistan may be subject to this order, and so, too, might suspects detained in Chicago or New York. It's not clear what limits apply. The order seems to restrict itself to the famous "ticking bomb" hypothetical, but there's nothing restricting its application to high-ranking al-Qaida operatives. The order does restrict itself to detainees who might know about terrorist attacks against the United States and its armed forces abroad, or about "locating the senior leadership of al Qaeda, the Taliban, or associated forces." But that, too, is an incredibly broad category, and an interrogator can't know whether or not a suspect falls into it *before* the interrogation begins. And so this document represents Justice Robert Jackson's proverbial loaded legal weapon, lying ready for use on *any* detainee connected to America's global war on terror.

The order does its damage by cleverly incorporating reasoning of the 2002 and 2003 torture memoranda. It defines "cruel, inhuman or degrading" treatment as treatment that violates the 5th, 8th, and 14th Amendments to the Constitution, mirroring the language of the United States diplomatic reservation to the Convention Against Torture. This sounds reasonable on its face. But it eviscerates Geneva's prohibitions by equating them with a permissive line of Supreme Court jurisprudence. In the context of domestic cases

about police and prison guard misconduct, the court has ruled that only behavior that "shocks the conscience" is out of bounds. This frees field agents to implement techniques that sound innocuous, but aren't—like "fear up" and "futility"—in ways that stop just short of violating the law. And because it doesn't repudiate the administration's stance that interrogators torture only when they cause severe pain or suffering, the order will fuel suspicion around the world about our practices. Most of Europe and Asia think we use torture in our detention facilities, and they still will.

The policy also *adds* a few new ways for misconduct to occur. Take, for instance, the provisions on cruel treatment. Detainees aren't entitled to all the "necessities of life" or all medical care, but only the "basic" necessities and "essential" care. That means, for example, that interrogators remain free to deprive detainees of palliative care to relieve the pain of a combat injury. And as a Pentagon spokesman told the *Washington Post*, "basic" means only the rudiments most necessary to sustain life. Stress positions and other forms of maltreatment do not run afoul of this rule.

The order does require the director of Central Intelligence to obtain professional advice to certify that interrogation practices are "safe for use." This should be reassuring. But given the extensive involvement at Guantanamo of Defense Department psychologists on "Behavioral Science Consultation Teams," and the complicity of medical personnel in the care given to detainees, it's not altogether clear that the rule will mean much. One of the greatest system failures since Sept. 11 has been the failure of the military professionals—including lawyers, chaplains, and physicians—to successfully oppose or moderate interrogation practices.

In a brilliant essay on torture, philosopher Michael Walzer convincingly argues that it must not be legitimated through a system of warrants and executive authorization. In the extreme circumstances where torture is necessary nonetheless, Walzer writes, the head of state must personally authorize it, and then come before the public with "dirty hands," making the case for his decision. President Bush deserves some small credit for finally affixing his name to the CIA's coercive detention and interrogation policies. But not much. The larger strategic picture shows the folly of this move. In a generation, when historians write about America's first steps in the war on terrorism, they will likely conclude that we lost the early skirmishes because we adopted coercive practices that gave us little valuable intelligence and came at incalculable strategic cost. If the president's first duty is to secure the country, and to make decisions in accordance with its long-term strategic interest, then he has failed. If his main duty is to support and defend the Constitution, then he has betrayed its values for a pittance.

Phillip Carter, an Iraq veteran, is an attorney with McKenna Long & Aldridge LLP and a principal of the Truman National Security Project.

Article URL: http://www.slate.com/id/2170983/
