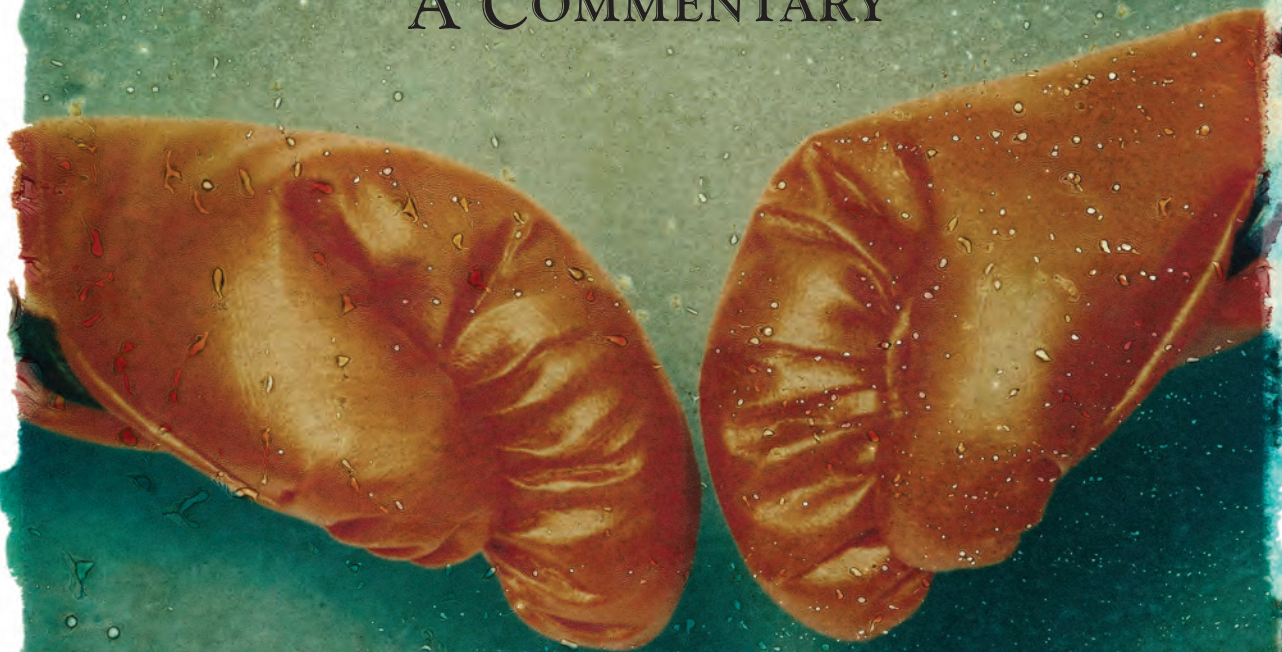


TORTURE OR TORMENT? A COMMENTARY



BY JOHN CONNORS

THE PUBLIC FUROR ABOUT THE FEDERAL GOVERNMENT'S USE OF ENHANCED INTERROGATION TECHNIQUES (EITs) ON ENEMY PRISONERS CONTINUES TO RAGE. THE QUESTIONS AROUND: WHAT WAS DONE? WHO DID IT? WHO AUTHORIZED THE USE OF THESE TECHNIQUES? SHOULD THOSE WHO AUTHORIZED THE TECHNIQUES AND THOSE WHO USED THEM BE CRIMINALLY PROSECUTED? RECENTLY, A NEW PHASE IN THE "DEBATE" HAS EMERGED, WHICH ASKS: WHAT WAS KNOWN BY SOME OF THOSE WHO LATER APPEARED TO EXPRESS SHOCK AND RIGHTEOUS ANGER AT THE "ILLEGALITY" OF THESE TECHNIQUES, AND WHEN DID THEY KNOW IT?

The intensity of the debate is not disproportionate to its importance. The United States has long been proud of its expressed commitment to the ideals of fairness and fundamental human decency—a commitment that is at the core of our nation's self-definition and its very existence. More important, we have been proud of our record of honoring these ideals in a less than ideal world. Measured in absolute terms, our record is imperfect. Measured in relative terms (relative to other nations throughout history or even to contemporaries), our record is admirable, especially in light of the extremely high standard we have set for ourselves and the fact that no human pursuit of an ideal—whether by an individual or a nation—can ultimately reach its goal. In any event, the issue of fidelity to our ideals is critical and we therefore must ask: Are we the nation we say we are?

The importance of honoring our ideals is not limited to our self-perception. In a world in which the ideals we purport to cherish are challenged by those who would destroy us, the opinions held by others are of great importance as well. As the battle of cultures—more accurately, the battle of values—proceeds, we cannot afford to be seen to betray our core beliefs. Not only would such a betrayal weaken us and encourage our enemies, but it would also disillusion those who remain uncommitted. If we cannot remain true to our ideals, we are, in an important sense, defeated, and we can hardly serve as a persuasive model for others.

The Issue

The debate about enhanced interrogation techniques has been intense and important, but it has been superficial. The discussion has persistently failed to identify clearly—

let alone come to grips with—what may fairly be described as the central issue:

Are there interrogation techniques that inflict physical or psychological pain or suffering but are nonetheless, under certain circumstances, morally and ethically justified or even required?

If the answer to this question is a categorical “no,” then there is no real debate. Any technique inflicting physical or psychological pain or suffering (presumably as defined even by a subjective standard) is impermissible. If, on the other hand, the answer to the question is “yes,” then the focus of the debate can shift to where it should have been all along: What techniques *are* permissible, and under what circumstances should they be allowed?

Admittedly, it is difficult to find a term that appropriately describes a category of permissible EITs. The starting point, for reasons discussed below, might be to categorize *impermissible* EITs as those that constitute “torture,” while *permissible* EITs (which are carefully defined and cataloged) would be described by a different, distinguishing term. One suggestion for this term is “torment.”

Whatever term is used, it is critical for legislators, executive branch officials, and administrative officers to be forthright and unapologetic in recognizing the legitimacy and necessity of permissible EITs. Moreover, these techniques and the circumstances under which they may be used must be defined in greater detail than is now provided. Finally, these definitions and details must be provided *affirmatively*. The current approach essentially defines techniques that are *impermissible*, and identifies *permissible* techniques as those practices and circumstances that do not fit the latter definitions. This approach to the definition is inadequate and unfair to those responsible for conducting interrogations.

If, as is argued in this essay, there must exist a category of affirmatively identified, permissible EITs, those practices and the circumstances in which they are justified must be described in as much detail as possible—and with full legislative review and approval—rather than as interpretations of the law set out in military field manuals. And even though the practices and the details of their use themselves should be subject to as much secrecy as is deemed appropriate, the *existence* of this category should be openly admitted to friend and foe alike. If we conclude that there are permissible EITs, we must be willing to say so and willingly make our rationale known.

The Problem of Getting to the Issue

There is an aversion even to discussing the existence of permissible enhanced interrogation techniques—that is, the permissible infliction on prisoners of physical or psychological suffering in order to obtain information. This aversion comes from three sources.

The first source is cultural and historical. The barbarities of the 20th century have given rise to numerous treaties and international policy statements defining torture and generally denouncing it as “universally abhorrent.” These

definitions generally tend to be interpreted or perceived as encompassing all coercive interrogation techniques. Often, and not surprisingly, the denunciations of “torture” are long on rhetoric but do not provide—and are not intended to provide—carefully reasoned exceptions.¹ Even in treaties, which characteristically are drawn with great attention to detail, it does not behoove one party to appear to condone or tolerate what another party may consider repugnant. As a result, the definitions of what is—and, more important, what is not—torture can be inadequate. Attempts at “universal” definitions of torture may attempt to take a careful, analytic approach, but, even then, interpretations that might be seen as providing reasoned exceptions are more likely to be regarded as loopholes. In short, there is a deep emotional aversion to *any* infliction of discomfort or pain by governments on those in their custody, and it is generally assumed that such actions must constitute torture.

The aversion to discussing the possibility of permissible EITs is particularly understandable in the United States, whose originating values include the sanctity of the individual and the fundamental need to restrict governmental authority. American popular culture is involved in this aversion as well. It should come as no surprise that a discussion of “how much pain it may be permissible to inflict” will be intolerable to that segment of the population that prohibits scorekeeping at children’s sporting events for fear of diminishing the self-esteem of the (excuse the expression) losers.

The second source of public aversion to discussing permissible EITs is ideological and political. One of the many defining differences between the left and right sides of the ideological spectrum involves what might be called sensitivity. Another way to describe this divide is to say that the left tends to focus on the way the world “should be,” while the right tends to focus more on the way the world “really is.” There are many other perceived manifestations of this division: mercy versus justice, diplomacy versus military strength, rights versus responsibilities, forgiveness versus accountability, the atomic bombings of Japan as unjustified attacks versus those bombings as justified attacks. In any event, it cannot be surprising that the traditional ideological stance of the left is not conducive to a discussion of permissible EITs, because of the belief that virtually any harsh treatment of an individual by the government is to be viewed as cruel, and cruelty by the government against prisoners must be regarded as torture.

Political factors also have been effective in preventing an open discussion of whether there are permissible EITs. Arising as a public issue during the Bush administration, the use of EITs has been consistently described by major media outlets as the “authorization of torture.” The following example is representative of such coverage. One of the documents at the heart of the uproar is a memorandum issued by the Department of Justice in 2002—the so-called Bybee memorandum.² That document sought to provide an analysis of interrogation practices that are prohibited by a particular federal statute and those that are not. Although the Bybee memorandum’s conclusions may be debated

fairly, one must acknowledge that, by any reasonable standard, the document was carefully researched and written. One of its conclusions is that, under the circumstances discussed, certain techniques do not satisfy the statutory definition of “torture” and therefore are not prohibited by that law. In other words, the techniques at issue that are performed in the manner described do not constitute “torture.”

Here is how a *Washington Post* headline referred to the Bybee memorandum: “Justice Dept. Memo Says ‘Torture May Be Justified.’”³ It is unlikely that this depiction is a semantic slipup. The memorandum concluded that the techniques were permissible because they *did not constitute torture*, whereas the headline proclaimed that the techniques were found permissible *despite the fact that they constitute torture*. A review of any random sample of opinion columns or news stories on the subject of the so-called Bush administration torture memos supports the conclusion that, at least for the population at large, the “left” has gained the moral and definitional high ground.

The third source of aversion to an open discussion of permissible EITs is the need for secrecy. There is great irony in the fact that the sensitivity of the subject demands both secrecy in order to maintain effectiveness and, simultaneously, a robust public debate. The issue is problematic in this regard, but not unique. A balance between these competing demands could be struck by, on the one hand, focusing the public debate on the compelling need to acknowledge a category of permissible EITs, the requirements that must define them, and the circumstances that must justify their use, and, on the other hand, maintaining secrecy regarding the specific details of the permissible techniques, details that will provide a reliable guide for those charged with the critical responsibility of employing them.

Common Sense

Despite the aversion—be it based on cultural, political, or practical factors—to a discussion of permissible EITs, the justification for their existence cannot be reasonably doubted. A simple and by now familiar hypothetical example makes the point by means of the oft-cited “ticking time bomb” scenario: A high-value Al Qaeda prisoner—a self-proclaimed insider—is known to have information about a planned mass attack on an American city, an attack that may be imminent. Upon being questioned, he acknowledges that he has such information but declines to provide it, expressing his hatred for America and his devout commitment to the mandates of the Koran.

Those who believe that this circumstance cannot justify the use of *any form of coercive interrogation technique* may stop reading here. All others may begin the difficult task of considering what should be permissible. There can be no doubt that reasonable minds can—and must—meet on the question of what reasonably and permissibly could be done to obtain information to avert the murder of hundreds or thousands of innocents. In other words, in this circumstance, what would constitute a permissible enhanced interrogation technique and therefore, by definition, would not constitute torture.

The Basis for Legal Analysis

Once one looks past the aversions, there is nothing inherently unique about the effort to identify, at least categorically, permissible EITs. In fact, that was the primary purpose of the Bybee memorandum. Like any legal analysis, the memorandum begins with a provision to be analyzed: the definition of “torture” as provided in a criminal statute, 18 U.S.C. § 2340(1): “... an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”

This commentary is not intended to critique the Bybee memorandum or to explore the complexities of its comprehensive analysis. Certainly, no attempt is made to examine the concept of torture.⁴ The modest goal of this essay is simply to eliminate the simplistic and emotion-laden notion that any infliction of pain on prisoners *must* constitute torture. In this regard, the Bybee memorandum identifies several factors that are critical to any attempt to define permissible EITs—that is, interrogation techniques that involve the infliction of physical or mental pain or suffering but do not constitute torture. Two such factors are critical: intent and severity of the pain or suffering.

Intent

The infliction of pain and suffering on another person cannot alone constitute torture; otherwise, a completely inadvertent act would be implicated. More to the point, every dentist would be subject to indictment. It follows that intent is a necessary element of torture. The statute at issue requires “specific intent”—that is, an intent not just to perform the prohibited act but an intent to perform that act for the purpose of disobeying the precise requirements of the law in question. Accordingly, an interrogation technique does not constitute torture unless the interrogator specifically intends to inflict “severe physical or mental pain or suffering.” Thus, the requisite intent turns on the interrogator’s understanding of the type and level of pain and suffering that is prohibited.

Severity of the Pain or Suffering

No reasonable person, at least upon reflection, can conclude that *any* level of pain or suffering inflicted on a prisoner must constitute torture. We are familiar with the examples of frightening a prisoner with an insect or grasping his face. The Bybee memorandum provides a review of the many and varied precedents that are relevant to the question of when suffering—either physical or mental—is considered “severe.” The irreducible fact is that whether the infliction of pain or suffering can be said to constitute torture is a matter of the degree of that pain or suffering. The level is inevitably a matter of severity. Accordingly, a category of permissible EITs must be said to exist.

One key concept is that a technique can be cruel but not constitute “torture.” Thus, under the statutory definition, a technique could meet any reasonable definition of “cruelty” but would constitute torture only if it resulted in suffering that was severe. The importance of this point can

be illustrated by a determination by the United Nations that many of the interrogation techniques—including “using cold air to chill”—used by Israel constituted torture.⁵ Logic would appear to require that, in order to constitute torture, the concepts of intent and severity of suffering would have to be applied. Only at the point where that suffering were determined to be severe could an act of torture be alleged. Prior to that point, the use of cold air, though possibly cruel, is permissible, because it is seen as torment rather than torture, discomfort rather than severe suffering or pain. Especially when used as a means of obtaining information to prevent murder, it would seem inconceivable that discomfort could be confused with torture.

The Hot-Button Issue: Waterboarding

In letters home from Groton in 1896, a young Franklin D. Roosevelt described to his parents, with no hint of alarm or concern for the “victims,” the fact that one sanction that students applied to others who had cheated was “pumping.” This practice consisted of being “taken to a lavatory, where one’s face was held under an open spigot for a long enough period to induce the sensations of drowning.”⁶

In the last year, the subject of waterboarding has become the subject of countless reviews, analyses, opinions, and descriptions, many of which luridly depict procedures that, because of the process that was used and the interrogator’s intent and purpose, clearly fall within any definition of torture. However, the point to be made here is that there is no single definition of waterboarding that irrevocably relegates this technique to the status of torture. Moreover, there is a sound body of opinion and evidence that this technique can be uniquely effective. Its singular virtues are that waterboarding requires neither the infliction of lasting physical or mental injury nor any other form of severe suffering (as that term can be reasonably defined), yet the reflex it induces is so powerful that even murderous jihadists committed to martyrdom have yielded to the effect of this technique. In addition, there are specific requirements that can attenuate the severity of waterboarding: the amount of water can be limited; the manner in which it is introduced can be restricted; the time during which the water is applied can be shortened; the presence of a doctor can be required; and the prisoner can be told in advance that the technique will not, in fact, be fatal or cause permanent injury.

Finally, as with any discussion of whether a particular technique may be regarded as permissible (that is, torment) or prohibited (that is, torture), the acceptability of waterboarding, properly restricted and regulated, must be judged in relation to its purpose. Although the technique is perhaps no longer acceptable as punishment for cheating in school, waterboarding simply cannot be categorically dismissed as a morally and legally impermissible means of obtaining information in order to prevent murder.

Conclusion

The intentional taking of a human life—homicide—is reflexively regarded as inherently wrong. Yet we know that homicide can be justified, even morally required, depend-

ing on the circumstances. Clearly, killing another who is about to murder an innocent person or killing a person in self-defense constitutes justifiable homicide.

Similarly, many Americans recoil at the very notion of inflicting pain on prisoners. But techniques, if reasonably defined and restricted, and if employed for the purpose of obtaining information critical to the prevention of an imminent atrocity, are not inconsistent with our fundamental values. The philosophical absolutism expressed by those who oppose the use of any coercive technique under any circumstance must be regarded as unreasonable at best and dangerously irresponsible at worst. Let those who oppose such interrogation techniques express that view with full acknowledgment of their responsibility for the possible consequences.

In fact, depending on the details of their application and the purposes for which they are used, there *are* interrogation techniques that involve the infliction of pain but do not constitute torture. We owe our best efforts to those who must be protected, to those charged with providing that protection, and to the values that define us to discuss, describe, and define such techniques openly and to knowingly take responsibility for authorizing their use. **TFL**

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Endnotes

¹For example, “Torture is an atrocious violation of human dignity. It dehumanizes both the victim and the perpetrator. The pain and terror deliberately inflicted by one human being upon another leave permanent scars. ... Freedom from torture is a fundamental human right that must be protected under all circumstances. Growing awareness of international legal instruments and protection mechanisms gives hope that the wall of silence around this terrible practice is gradually being eroded.” U.N. Secretary-General Kofi Annan, Remarks from “Freedom from Torture ‘Fundamental Right,’ Says Secretary General,” SG/SM/7855 (June 26, 2001).

²U.S. Department of Justice, Office of Legal Counsel, Memorandum to Alberto R. Gonzalez, Counsel to the President, “Re Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A” (Aug. 1, 2002).

³Dana Priest, *Justice Dept. Memo Says Torture ‘May Be Justified,’* WASH. POST (June 13, 2004).

⁴For a detailed review of the subject of torture, see Gail H. Miller, *Defining Torture*, Cardozo Law School, Floer-sheimer Center for Constitutional Democracy, Occasional Paper no. 3 (Dec. 2005).

⁵Concluding Observations of the Committee Against Torture: Israel, U.N. Doc. A/52/44, ¶¶ 253–260 (1997).

⁶Kenneth S. Davis, *FDR: THE BECKONING OF DESTINY, 1882–1928* (New York: G.P. Putnam’s Sons, 1972).