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Can Torture Ever Be Justified?

Torture is unequivocally prohibited in some of the most basic documents of current international law, yet it continues to be practiced, even by democratic societies, as was graphically demonstrated in the photographs of abuse at Iraq's Abu Ghraib prison. A few days after those photographs appeared in the media, the Academy held an Understated Meeting on May 3, 2004, at its House in Cambridge on "Contemplating Torture and Lesser Forms of Highly Coercive Interrogation." Planned months earlier, the discussion of legal and legislative perspectives on torture was all too timely.

Judge Michael Boudin, of the U.S. Court of Appeals for the First Circuit, introduced the evening's speakers: Sanford Levinson, the W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law and professor of government at the University of Texas at Austin and the editor of *Torture: A Collection*, published in 2004; and Philip B. Heymann, James Barr Ames Professor of Law at Harvard Law School and the author of *Terrorism, Freedom and Security*, published in 2003.

Levinson opened the forum by drawing the audience's attention to Article 2 of the United Nations Convention Against Torture, which states that no "exceptional circumstances whatsoever" may be invoked to justify the practice. Yet, Levinson added, "many if not most [of the 130] countries that have signed the Convention in fact engage in torture."

In our own country, Levinson said, suggestions that we use or would consider using forms of highly

coercive interrogation began to emerge well before the Abu Ghraib photographs. Within weeks of September 11, 2001, there were newspaper reports of plans to extradite suspects in the terrorist attack to countries known to practice torture, a practice explicitly forbidden by the Convention. These reports were followed by accounts of such extraditions actually taking place. By the end of December 2002, the *Washington Post* reported that prisoners in Afghanistan were being forced to stand or kneel for hours in black hoods or spray-painted goggles, were being held in awkward and painful positions, and were being deprived of sleep with bombardments of light for extended periods.

In view of these reports, and in light of the photographs from Abu Ghraib, Levinson said "it has become necessary for us, in the sense that we recognize our own respon-

sibility for the actions of our government, to contemplate torture." When states define torture, Levinson added, they tend to place the bar very high, to use ambiguous terms such as severe, prolonged, and imminent, and to leave the door open for some forms of coercive interrogation if there is a "compelling interest."

If we are willing to torture under certain circumstances, how do we give form to this decision within our laws and society? Levinson laid out three possible approaches. One is to create a legal mechanism that would permit torture but simultaneously minimize its use. He described Alan Dershowitz's controversial proposal to require government officials to obtain judicial warrants before conducting interrogations employing torture. Critics of this approach, Levinson said, argue that it gives legitimacy to torture opening a legal door that other nations may open far wider. An alternative approach is for the legal system to set no conditions for the use of torture. Adherents of this view point to the importance of maintaining the position that torture is never acceptable, but urge a "don't ask, don't tell" policy that would permit torture without sanctioning it. Public officials would decide when to use torture, and indeed it would be used, but it would not be given legitimacy. The responsibility for using torture, then, would be relegated to the political realm, with its potential for public accountability.

The third alternative is for the legal system to permit torturers to plead the "law of necessity," which means torturers would be excused under certain conditions. This approach would open a loophole in the UN Convention's absolutist position, but those who torture would be placed at serious risk of being punished if their appeal to

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necessity fails. Even so, said Levinson, the difficulty with this approach is that only people at the lower levels of the system that tortures would likely be punished, and there would be little hope of challenging the policy decision they were following in good faith.

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Whereas Sanford Levinson considered the question of torture from a legal perspective, Philip Heymann outlined a legislative approach, laying out a specific proposal for consideration by Congress and the public. He noted that, with funding from the Justice Department, he and his colleague Juliette Kayyam of the Kennedy School of Government conducted a series of meetings that examined “the ten hardest questions” surrounding terrorism. Participants included representatives of British and American intelligence, law enforcement, and the academic world, with political orientations ranging from very liberal to very conservative. The discussions led to a set of recommendations for dealing legislatively with the subject of torture and lesser forms of highly coercive interrogation.

To begin with, Heymann said, the United States should abide by both its treaty and statutory obligations prohibiting torture. Further, it must take seriously the UN Convention’s restrictions on turning prisoners over to countries where they might be tortured or encouraging other nations to do likewise.

Heymann’s recommendation would prohibit what the UN Convention defines as torture, taking it off the table completely, and closing all loopholes that make it exportable to other countries. To

permit torture while the prohibition is in place, he said, was to pay too high a price in terms of lawlessness and disaffection within our own country as well as hostility from abroad. This blanket condemnation of torture would preclude the Dershowitz proposal of exceptions with judicial assent, which Heymann sees as likely to be ineffectual in any case.

Heymann nevertheless defined a category of lesser forms of highly coercive interrogation that would be permissible in certain situations, including sexual humiliation, sleep deprivation, and hooding, along with other measures. This category of interrogation methods would be regulated in a way that would specify clear conditions for its use.

The attorney general of the United States, in Heymann’s proposal, would present the president with a document outlining the forms of interrogation that would be permissible. The president would explicitly authorize the interrogation methods contained in the document, which would either be made public or shared with relevant committees in the House and Senate.

The presidential guidelines would restrict the use of highly coercive measures to cases in which “interrogators have probable cause to believe that an individual possesses significant information about one of two things: either a specific plan that threatens American lives and which cannot be prevented by any other reasonable alternative, or a group or organization making such plans whose capacity could be significantly reduced by exploiting the information.” Heymann explained that the determination of probable cause “would be made in writing, on the basis of sworn affidavits and would be available to congressional intelligence committees, the Attorney General, and the Inspectors General of the pertinent departments,” including Justice and Defense, thus ensuring high-level oversight of the process.



Judge Michael Boudin (U.S. Court of Appeals), Sanford Levinson (University of Texas at Austin), and Philip B. Heymann (Harvard Law School)

In addition, Heymann’s recommendation would entitle individuals interrogated in violation of these restrictions to damages in a civil action against the government. A further restriction would prohibit information gleaned through highly coercive methods from being used against the individual in an American court.

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The general discussion that followed ranged over a number of issues but focused in particular on the question of distinguishing between forms of interrogation. Levinson observed that the Heymann proposal “follow[s] a general strategy of defining torture as that which we hope we don’t do and in fact which we shouldn’t do, not only because it’s immoral, but for all the other more consequential reasons we’ve cited. The real debate turns out to be about the acceptability of ‘highly coercive interrogation.’ We must decide what we think about sleep deprivation or hooding or extended uncomfortable positions, because it may be that the distinction

between highly coercive interrogation methods and torture is the kind only lawyers could really take seriously, while most lay people would run them together.”

Heymann responded that formulating distinctions was indeed possible and would be encouraged by the public accountability at the heart of his proposal. “I don’t think the president of the United States would publicly condone standing a prisoner on a box and threatening him with severe electrical shocks,” he said. “But I believe that our worst problem is that our government will do things that we don’t want to know about, and they don’t want us to know about. I’m satisfied with a political test that requires the president to say ‘Yes, this is included on the list of things we will do.’”

In concluding the meeting, Judge Boudin praised the speakers for their forthrightness, observing that “the arguments you’ve heard here this evening are ones that are carried on partly in the light and partly in the shadows – but perhaps mostly in the shadows.” What is needed more than anything else on this extraordinarily difficult issue is “broader public discussion such as we have had here tonight.” ■

“Torture and Lesser Forms of Highly Coercive Interrogation?”

Excerpts from Academy Meeting

Sanford Levinson

It has become necessary for us, at least in the sense that we recognize our own responsibility for the actions of our government, to contemplate torture. Yet any discussion of torture must recognize that it is really a placeholder, an abstract work that is made concrete by the knowledge and imagination of the reader. What this means is that we must ask ourselves precisely what constitutes torture, as distinguished not only from inhuman and degrading acts, which are also prohibited, though perhaps not so absolutely, by the United Nations Convention, but also and more significantly from what might be termed merely unattractive methods of interrogation that are nonetheless distinguishable from those that are forbidden

For the UN Convention, “torture means any act by which *severe* pain or suffering, whether physical or mental, is intentionally inflicted on persons for such purposes as obtaining from him or a third person information or a confession” The U.S. Senate’s ratification of the Convention carried a reservation that “in order to constitute torture, an act must be specifically intended to inflict *severe* physical or mental pain or suffering and that mental pain and suffering refers to *prolonged* mental harm caused by or resulting from 1) the intentional infliction or threatened infliction of *severe* physical pain or suffering; 2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; 3) the threat of *imminent* death; or 4) the threat that another person will *imminently* be subjected to death, severe physical pain or suffering, or the adminis-

tration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.”

One does not need to be a well-trained lawyer to know that the marked words are all significant: severe, prolonged, imminent. This raises the grim possibility that the recent events in Iraq might not constitute torture. They almost certainly would constitute inhuman and degrading acts, but the way the rhetoric of the argument often works is to say, “Well, torture is absolutely forbidden” and then set a definition so high that you can assure yourself that we’re not doing that. Nobody is using the thumbscrew today, but, according to a report in *The New York Times*, the United States did place an Egyptian national in solitary confinement in Tulsa for 71 days before being released because, after that period, he was so broken that if he had anything useful to say, he would have said it, and, in fact, he didn’t have anything useful to say. Torture or not?

Philip B. Heymann

Inadequately monitored and regulated coercion against prisoners has now caused a truly major setback in terms of our foreign and military policies and in particular for the goals that have claimed over 700 lives in Iraq and more in Afghanistan. The administration hopes to portray the problem as one of failed management, in the field, of a few bad apples. But to prevent a repetition we need not only a full investigation of the management of detention and interrogation but also to examine more broadly the policies and systems we need for the future.

There are six major questions that have to be addressed in setting up any system dealing with interrogation for intelligence purposes. They are:

1. What coercive steps are permissible under our treaty and statutory obligations and in light of our moral and policy concerns?
2. Under what circumstances may highly coercive but legal and duly authorized steps of interrogation be used?
3. Who should decide each of the first two questions?
4. How should the process be managed by the Defense Department or other executive agencies to assure that the rules are complied with and not ignored in the field?
5. In what, if any, circumstances should the president have the power to waive either of the first two determinations?
6. What form of oversight by non-executive agencies should be put in place as to each of these issues?

It is revealing to consider how these questions were answered prior to the public revelations about Abu Ghraib. The list of permissible and impermissible methods seems to have been largely promulgated at the general officer level, somewhere well short of the cabinet or presidential level, in documents kept secret from the public. We cannot tell the relationship of the list to judgments about either applicable treaty law or domestic constitutional law. Under what circumstances these steps should actually be used is a decision that seems often to have been made, without any statement of standards, by intelligence or prison personnel at a

quite junior level in the military. A startling absence of management controls also allowed the rules to be ignored at operating levels. There has been no oversight by legislative or judicial bodies; indeed executive secrecy has been pervasive and no audit requirements have left a trail. With no public rules or accounting, the president’s discretion has been absolute and wholly delegable to any level. This means, of course, that the president is not formally accountable for the decisions actually made.

The recommendations are designed to answer these six questions. They outline the steps involved in creating a transparent and legitimate system of interrogation of suspects in terrorism matters. Congress must also consider how the answers to these questions should change in the future. Nothing less is at stake than our claim as a nation to self-respect and to a needed level of respect of others. ■

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