

In Response: The Ticking Bomb Contention

by Michael Traynor

The Perspectives section of the Summer 2004 issue of the *Bulletin* reported on an Academy meeting on “Contemplating Torture and Lesser Forms of Highly Coercive Interrogation.” At a November 16, 2004, press conference in Washington, D.C., Michael Traynor dissented from some of the recommendations on highly coercive interrogations discussed in the article. Following are excerpts from his remarks:

I agree with the strong statements that the United States shall abide by its statutory and treaty obligations that prohibit torture and cruel, inhuman or degrading treatment. I dissent, however, from the exception permitting cruel, inhuman or degrading treatment in some circumstances and from the recommendations that permit highly coercive interrogations that would violate the Constitution of the United States if applied to a prisoner accused of a crime.

In exceptional circumstances, the recommendations permit highly coercive interrogation techniques that are cruel, inhuman or degrading. In nonexceptional circumstances, they permit highly coercive interrogation techniques that fall into the vague and troubling zone between prohibited techniques that courts find “shock the conscience” and proposed techniques that exceed the reasonable standards set for “seeking a voluntary confession under the due process clauses of the U.S. Constitution.” The recommendations do not define the various techniques but leave them to be recommended secretly by the Attorney General, promulgated secretly by the President, and provided only to selected congressional committees. This culture of secrecy in itself should set off alarm bells. The recommendations provide for briefing by the Attorney General to congressional committees and oversight by them but only as “to which HCI’s are presently being utilized” and for making “probable cause” determinations available to congressional intelligence committees, the Attorney General, and inspectors general of pertinent departments. They do not call for briefing or oversight about such important questions as whether any lives were saved or any act of terrorism was prevented, whether any deaths or serious injuries occurred as a result of the interrogations, and whether the guidelines were

breached. They do not require monitoring or oversight by inspectors general to guard against abuse. Moreover, the guidelines are only that; they are not enforceable rules.

The so-called “ticking bomb” scenario involving interrogation of a captured terrorist is a difficult theoretical one. In the real world, the scenario posed is both artificial and unlikely – a straw man, invented to create fear and a panicked public endorsement of the shameful erosion of due process. More likely, large numbers of captured people will be swept up by troops. Such people will include individuals who are innocent and have no useful information, neighbors, relatives, or others who are innocent but might have marginally useful information, and a few terrorists. This is not the example the United States should set for its own citizens or for our allies or even for our enemies. Moreover, highly coercive interrogation techniques are not demonstrably effective to elicit truthful information . . . Techniques that by definition exceed constitutional limits on the interrogation of persons accused of crime are likely to be repugnant to people who cherish human rights as well as violate due process. They are likely to be ineffective against true terrorists and fanatics trained to withstand them and prepared to die and injurious to innocent people subjected to them. Moreover, they are likely to provoke retaliation against our own troops and civilians who are captured, foster disrespect and resentment around the world, and corrode discipline in our own forces. ■

Michael Traynor, a Fellow of the American Academy since 2002, is a partner at Cooley Godward LLP. He served as an advisor to a project on a long-term legal strategy concerning terrorism sponsored by the National Memorial Institute for the Prevention of Terrorism. For the full text of his dissenting statement, please see http://cooley.admin.hubbardone.com/files/tbl_s5SiteRepository/FileUpload21/392/Heymann_.pdf. For the final report of the Long-Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism, please see <http://www.mipt.org/Long-Term-Legal-Strategy.asp>.