

Chapter 1

Coercive Interrogations

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 (UN Convention Against Torture) is far from clear. The same is true of the U.S. reservations and understandings on ratifying it, which narrow the definitions of torture and cruel, inhuman, or degrading treatment. 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 UN 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 in Iraq and elsewhere, and the resulting criminal charges against military personnel, has resulted in a dramatic swing of the pendulum that may discourage legitimate interrogation tactics. That is not a beneficial response either. Our recommendations seek to provide guidance on which standards ought, and ought not, to be utilized.

Explanation and Background

Inadequately monitored and regulated coercion against prisoners has the potential to prove a setback for U.S. foreign and military policies and goals. The Bush administration has portrayed the problem as one of failed management, in the field, of a few bad apples. An internal Army inspector general's report and an independent Department of Defense report came to the same conclusion. To prevent a repetition, however, a full U.S. governmental investigation of the management of detention and interrogation in

Afghanistan, Iraq, and elsewhere is needed, as well as a broad examination of the policies and systems that the United States needs 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 U.S. treaty and statutory obligations and in light of U.S. 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 Department of Defense or other executive agencies to assure that the rules are complied with and not ignored in the field?
5. Under 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 entities should be put in place for each of these situations?

It is revealing to consider how these questions were answered prior to the public revelations about Abu Ghraib. Department of Justice attorneys appear to have spent considerable time trying to defend maximum flexibility for interrogation tactics, but the Bush administration subsequently distanced itself from that analysis. A list of permissible and impermissible methods seems to have been promulgated, with a few exceptions, at the general officer or cabinet level, in documents kept secret from the public. We cannot tell how the list of tactics was thought to relate to judgments about either applicable treaty law or domestic constitutional law (for example, the contention of the administration that, because of its reservation, Article 16 had no application to prisoners held outside the United States).

Under which circumstances the approved coercive steps could actually be used is a decision that often seems 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 was no oversight by legislative or judicial bodies; indeed, executive secrecy was pervasive, and no audit requirements were there to ensure documentation.

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 question that the Congress must now address is how the answers to these six questions should change in the future. Nothing less is at stake

than the claim of the United States as a nation to self-respect and to a needed level of the respect of others.

Treaty and Statutory Commitments

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

• **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.

At the outset, there must be—without exception—a commitment to U.S. treaty obligations under Article 1 against torture. The Congress and the president have already resolved a number of questions by submitting and ratifying, with reservations, the UN Convention Against Torture. The president cannot legitimately violate a treaty or a statute which was passed and is in effect. No exception to the prohibition of torture in Article 1 is permitted by the treaty.

Unfortunately the language of both Article 1 (defining torture) and Article 16 (prohibiting cruel, inhuman, or degrading treatment) of the treaty is far from clear; the lack of clarity was only exacerbated by a Senate Reservation limiting the U.S. definition of torture and interpreting "cruel, inhuman, or degrading treatment" to mean the treatment prohibited by the Fifth, Eighth, and Fourteenth amendments to the U.S. Constitution—amendments which do not generally deal with efforts to prevent grave future harms). Moreover, the question of when and where the full protections of the Geneva Conventions apply has been the subject of intense debate and further muddles the extent of U.S. legal obligations toward individuals captured and detained overseas.

Regardless of these ambiguities, the United States has a firm commitment to uphold a reasonable interpretation of treaty and statutory obligations against torture and related conduct. As will be noted in the sections below, we recommend no exceptions to U.S. statutory and treaty prohibitions under Article 1 against torture. Moreover, we recommend a regulated system of interrogation that will be consistent with U.S. obligations

under Article 16 of the Convention Against Torture to “undertake to prevent” cruel, inhuman, or degrading treatment, with only one narrowly limited exception—an exception that could only be used in extreme circumstances and would require presidential authorization.

Having carefully reviewed the very limited legislative history of the Senate reservation to Article 16, we can find no substantial indication that the Senate, which plainly accepted the fact that the Article 1 prohibition of torture had worldwide application to U.S. officials, had an opposite understanding of Article 16. Indeed, if interpreted to merely repeat protections that already fully existed within the United States, the country’s agreement to Article 16 would have had no effect at all on U.S. obligations, although the act of ratifying that article with reservations would have been intended to lead other signatories to believe that the U.S. had accepted some serious obligation. We do not believe the Senate would have thus intended to mislead the other signatory nations. The far more likely, and only expressed, purpose of the reservation to Article 16 was to limit what the United States would accept as “degrading” to a type of activity like that prohibited by the Fifth, Eighth, or Fourteenth amendments of the U.S. Constitution, not to limit the territorial reach of the obligations the United States accepted solely to the area where they would be redundant.

Transfer of Individuals

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

Before addressing a regulated system of coercive interrogation, we propose a firm and all-encompassing commitment prohibiting the rendition of individuals to other countries where they will be tortured. U.S. obligations should require the secretary of state to vouch for the trustworthiness of required assurances from the receiving country that the person will not be tortured and the attorney general to find such assurances reliable before undertaking any deportation or informed rendition decision.

In addition, the United States can neither condone such torture by other countries nor promote it by another country. Thus, the United States cannot direct or request information from an interrogation or provide any assistance if there are substantial grounds for believing that torture has been, or will be, utilized by that country. In order to recognize its prohibitions against torture, the United States should also not encourage another nation to make any transfers in violation of such prohibitions.

Oversight of the Use of Any Highly Coercive Interrogation Techniques

•**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.**¹ 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.

•**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

1. 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.

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.).

Within the uncertain limits imposed by international agreements, the United States could rely on a presidential list of permissible techniques or on a statutory prohibition defined in general terms. The difficulty of making a statute precise enough in what it allows and forbids leads us to prefer a carefully defined presidential list. The result to be avoided in either case is a rule so vague that it can be secretly interpreted to permit what the American people would otherwise reject.

The substance of our recommendation is relatively clear-cut. These rules are intended to supersede any covert action authority in law, and thus we would recommend the equivalent of a national security act for coercive interrogation purposes.² Highly coercive interrogation methods are methods falling between those forbidden as torture by our statutory and treaty obligations and those that would be otherwise acceptable to obtain a confession under the due process clause of the U.S. Constitution. There is, of course, a long list of possible techniques that fall into this category, but we would require the attorney general to recommend to the president a specific listing of permitted techniques; the language of Article 16 is simply too unclear to be helpful to U.S. interrogators on the ground. In addition, the listing must address questions of duration, repetition, and the effect of combining several different techniques, for these make a certain tactic more or less objectionable.

These standards would be promulgated and distributed to relevant congressional oversight committees. Making the presidential list of permissible techniques public may provide the best form of oversight, but there are legitimate worries that knowing which interrogation techniques are available may assist terrorists. Furnishing a list of approved techniques to the relevant committees of both Houses of Congress is a near-substitute without that cost. This briefing might also include how many times HCIs were used in a given period; whether the use of HCIs yielded useful information; what acts of terrorism were prevented or limited as a result of obtaining the information; whether there was a breach of any guideline; and whether any deaths or serious injuries occurred during or as a result of the use of HCIs.

2. At the time of writing, several legislative proposals based on these recommendations were being discussed.

The standards to be applied before a highly coercive technique could be used in any individual case could be highly restrictive (requiring some reason to believe that the information sought would save lives and thus satisfying a common standard for a criminal law “necessity” defense) or more permissive (allowing the use of specifically authorized coercive techniques whenever the individual is believed to have information that would be helpful in defeating a terrorist group). Our standard, somewhat in the middle of this range, is supplemented by a requirement that alternative means of gathering information (other than highly coercive interrogation) would not be likely to accomplish the same purpose. Far too much of the present “war on terror” has come to rely on a single weapon—interrogation—from what should be an array of intelligence techniques.

There is no particular reason to call on the same decisionmaker for deciding 1) which techniques are permissible, and 2) when those techniques may be used. The decision as to which techniques are authorized and found to be legal under U.S. statutory and treaty obligations is one that will have to be made only occasionally. In light of its extreme sensitivity, we have analogized it to decisions about covert action that require a presidential, if not a legislative, decision.

The application of duly promulgated standards for when authorized techniques may be used in individual cases could be made in a far more decentralized way. The alternatives are either relatively senior officials in the field or judges. Since the decision would be made in many cases abroad and often under urgent conditions of combat or military occupation, judicial decisionmaking will often be impracticable. An additional weakness of that option is that it makes it difficult to determine who is really accountable. A judge may well believe that he should give very broad discretion to intelligence agents who provide the judge with the necessary information, while the intelligence agents may believe that they need not exercise real judgment because the decision is being made by the judge. Thus, we recommend that senior officials in the field must find probable cause that a specific plan threatens U.S. lives or that the capacity of a group or organization making such plans could be significantly reduced by exploiting the information, that there is no reasonable alternative to obtain the information, and that the person being interrogated under HCI tactics is in possession of the significant information. The determination must be in writing on the basis of sworn affidavits.

The management of the process to be sure that highly coercive interrogation techniques are not used contrary to the standards required by Congress and the president has to fall to the Department of Defense, the Central Intelligence Agency (CIA) and, to whatever extent it is involved, the Federal Bureau of Investigation (FBI). Congressional hearings should fully explore the failings and remedies in this area. The fact that there have

already been major failings suggests the need for oversight to be systematic, not just occasioned by scandal. Oversight in any event is essential to ensure that there is a more public check on the president's determination as to what is legal and permissible in the way of coercive interrogation and, on lower level decisions applying statutory standards, as to when coercive techniques can be used on prisoners. There is a requirement to disclose both the general authorizations, as well the more specific factual determinations, to Congress.

Emergency Exception

•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 Fifth, Eighth, or Fourteenth Amendments of the U.S. Constitution if applied to a U.S. citizen in similar circumstances within the United States.

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

The establishment of a quite rigorous set of processes and standards for the use of highly coercive techniques that themselves fall short of torture has its own cost. Much of the public will worry—and any administration will argue—that the system will interfere with handling a highly unusual case of extraordinary danger. An example would be the capture of a terrorist who knew where a nuclear weapon or other weapon of mass destruction had been placed. To deal with this remote but still worrisome possibility, the president would be authorized to waive the proposed rules except for the prohibition of “torture” as defined by statute and treaty, in a finding of extraordinary danger in highly unusual circumstances—a finding which he or she would be required to submit promptly to the appropriate committees of the Congress. But this power must not be an excuse for devaluing the lives of non-Americans. Thus, it can only be used when

its exercise would be consistent with the U.S. Constitution if applied to U.S. citizens in the United States under similar circumstances.

In addition, the president would be required to disclose publicly to Congress, on a biannual basis, the number of uses of his power. Like the required disclosure of the quantity of foreign intelligence wiretaps, this disclosure provides an oversight mechanism without disclosing specific cases.

Individual Remedies and Applicability

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

An additional and perhaps essential form of oversight extends the provisions of Article 14 of the UN Convention Against Torture (which requires states to provide legal remedies to victims of torture) by adding a judicial damage action against the United States if any highly coercive interrogation techniques have been used illegally. This would set aside any special defenses the government may enjoy in other settings but would not affect present law with regard to criminal or civil liability of individual perpetrators. This form of oversight has the immense advantage of not only compensating people wrongfully subjected to severe coercion but also of providing judicial review, after the fact, of the legality of the techniques under our international and domestic legal obligations and of the procedures used before applying them.

In addition, in recognition of the demands of the Fifth Amendment and given the differences between the uncertain product of interrogation tactics and information that is sufficiently credible to be allowed in criminal proceedings, no information obtained by HCI techniques may be used at a U.S. trial (including military trials) against the individual detained.