To Be or Not to Be: Torture, American Politics, and America’s Future

(Published in New Political Science 32 (2))

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Introduction

On 28 April 2004 viewers of the CBS television newsmagazine 60 Minutes II were surprised to be confronted with a dozen photographs documenting inhumane treatment of Iraqi detainees by U.S. military police and others at the infamous Abu Ghraib prison west of Baghdad. Subsequent investigations by both government and independent sources revealed a regime of officially sanctioned interrogation practices by military and civilian intelligence agencies that clearly contravene international standards proscribing torture and inhumane treatment of prisoners taken during wartime.¹

It would have been difficult for America’s enemies in the Middle East to have thought up a scenario that more closely fits their portrayal of the American intervention in Afghanistan and Iraq as a crusade aimed at destroying Arab economic, political, and, especially, cultural independence then the abuse of Islamic detainees at Abu Ghraib, Guantanamo Bay (hereinafter GTMO), and other prisons. When combined with the constant friction caused by the occupation of Iraq and Afghanistan, the image of tortured and abused detainees has inspired armed resistance in both occupied countries. In addition, the “soft power” of the United States has been undermined not only in the developing world, but among America’s allies in Europe and Asia. Distrust of the intentions and policies of the United States have reached new heights world-wide and, for the first time, outright fear of American power has become commonplace. The scope of

the foreign policy disaster these developments have presented the Obama administration calls for both an examination of how the torture regime became established and suggestions for how to proceed going forward.

**Why Did It Happen?**

**“Bad Apples?”**

Determining what should be done about the torture regime established by the Bush administration largely depends on what explanation one gives for why torture became established. There are two common strains. Bush era investigations found that failures in the chain of command, especially dereliction of duty by officers in charge and poor control mechanisms in the Department of Defense, were largely to blame. An alternative, pushed by many organizations opposing the abuses, focuses instead on accusing members of the Bush administration of conspiring to violate both the Geneva and Anti-Torture Conventions and the U.S. anti-torture statute (U.S. Code 18, sec. 1, chap. 113c).

Both these explanations share an underlying “bad apples” theme. The abuses were due to bad apples in command or bad apples in the White House or bad apples in America’s overseas prisons. In each case the solution is a simple one: excise the bad apples. This is the major theme of much of the popular commentary on the torture regime, particularly as it concerns former mem-

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2 Danner, op. cit., pp. 329-402.

3 At present, the most persistent efforts are calls for the Department of Justice to conduct a wide ranging criminal investigation of torture. The Center for Constitutional Rights and the ACLU have been the most vocal advocates of this course.
bers of the Bush administration. Many on the left are convinced that only prosecution of those who nurtured the torture regime will ensure that it will never be reinstated.\(^4\)

But this recommendation begs the important questions: Why did a wide ranging legal and constitutional debate leading to official approval of abusive interrogations develop in the first place? Why did elected officials make decisions that facilitated and directed the torture of detainees?\(^5\) The abuses visited on America’s enemies in the past were always unofficial, third party, and ad hoc, never the result of anything like the systematic deliberations that led to the tortures in Iraq, Afghanistan, and GTMO.\(^6\) There is something else at play here.

**Political Crisis and Political Opportunity in the United States**

When George W. Bush took office in 2000, after the most closely contested and acrimonious presidential election since 1876, he found himself the hope of an increasingly frustrated alliance of evangelical Christians, traditional business-oriented Republicans, and neo-conservative intellectuals. Bush was their best hope for an “orthodox innovator”, a president who could fulfill the tasks left over from the Reagan era and effectively sabotaged by Bill Clinton. Reagan left many commitments unfulfilled for good reason: strong public opposition, lack of resources, and, most of all, divisions in the new constituencies he mobilized. As Skowronek says, Bush took arms against these troubles by defining himself politically in ways that would quiet concerns and de-


\[^6\] Alfred W. McCoy, *A Question of Torture: CIA Interrogation, From the Cold War to the War on Terror* (New York: Metropolitan Books, 2006), Chap. 3.
fang his enemies. His pronouncements in the campaign had laid out a “stalwart” position: “com-
passionate conservatism”, “family values”, and a muscular foreign policy. Still, the road ahead
was difficult, as the stumbles of his early days in the White House showed.7

The crisis presented by al Qaeda’a attacks on 9/11 offered a way out: an overarching narrat-
ive that played to Bush’s major strengths and insulated his policy decisions. The administra-
tion’s carefully constructed global “War on Terror” described a contest between good (America
and Americans) and evil (the terrorists) based on national self-defense, the need for “new think-
ing” about executive power, and the continuous threat from a faceless, stateless enemy. The legal
foundation of these themes was a constitutional interpretation supporting unilateral presidential
authority to conduct war and to protect Americans; their political foundation was the “rally ef-
fect” produced by the attacks.8 This new narrative was soon put to use to justify a successful and
popular invasion of Afghanistan.

The early successes of the War on Terror and Bush’s popularity as a wartime president pre-
sented the long frustrated Republican coalition an opportunity they had long waited for. Popular
approval of the Middle Eastern opportunity seized by the administration after 9/11 could be used
as the political lever necessary to complete the Reagan revolution in domestic policy. Opposition
to Bush’s domestic initiatives was quieted or marginalized by an intense focus on the need na-
tional unity in the face of the terrorists.9 More importantly, however, the Republicans’s warring

7 Steven Skowronek, “Leadership by Definition: First Term Reflections on George W. Bush’s Po-
itical Stance.” Perspectives on Politics 3 (2005), pp. 817 - 32.

8 Marc J. Hetherington and Michael Nelson, “Anatomy of a Rally Effect: George W. Bush and
the War on Terrorism.” PS 36 (2003), pp. 37 - 42.

9 Su’s contribution to this symposium is an able case study of how this occurred in education pol-
icy. The emphasis of the reform legislation (No Child Left Behind) was shifted from additional
funding to additional testing with support from most Congressional Democrats.
factions could be distracted from their differences long enough to deliver on previous promises. Evangelicals could get the social and cultural changes they longed for, business elites could see an end to the regulatory regimes they abhorred, and “Reagan Democrats” could see further tax relief and fewer public resources aimed at America’s poor and minorities. The fragmented Republican coalition could be united and used as “the base” to create the long awaited “permanent Republican majority” needed to relegate progressive tendencies to the sidelines of America’s politics. Finally, the nation’s place as the determining–and unilateral–political power in foreign affairs could be solidified. But all these ambitions had a price: success against the terrorists at an acceptable cost. Higher taxes and national mobilization for prolonged warfare was not what Bush’s supporters bargained for.

**Torture as an Informal Institution**

The War on Terror had to fulfill two complementary purposes. The first, of course, was to defend the United States from further attacks. The war on Afghanistan drove al Qaeda underground and the capture of hundreds of its operatives presented a golden opportunity to gain information. But that also presented difficulties. Questioning detainees using usual methods required time many in intelligence agencies and the White House thought the U.S. could ill afford.

What followed is best described by Helmke and Levitsky as the establishment of an accommodating informal institution:

> “Accommodating informal institutions are often create by actors who dislike outcomes generated by the formal rules, but are unable to change or openly violate those rules. As such, they often help to reconcile these actors interests with the existing formal institutional arrangements. Hence, although accommodating informal institutions may not be efficiency enhancing, they may enhance the stability of formal institutions by dampening demands for change.” ¹⁰

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Such informal institutions can be brought into existence by relatively minor changes in the application of formal rules and formal rules can be altered later to allow the desired result. The debates in 2002 concerning torture of detainees are a paradigm case of this development. Legal opinions and operational decisions were made in secret that undermined limits of interrogation established by international conventions, U.S. statutes, and military regulations. In each case the use of abusive techniques was justified by the narrative established to support the War on Terror.

The second purpose of the War on Terror was to proactively prevent further attacks. This further focused the administration’s attention on Iraq. The Baa’th regime’s continued existence had been a sore point with many of Bush’s advisors for years. The pre-war rhetorical attack on the Baa’th regime combined all the new narrative’s themes: Iraq was a “rogue state” possessing weapons of mass destruction and Saddam Hussein an ally of al Qaeda who could provide those weapons for new attacks on the United States.\(^1\) Overthrowing the Baa’th was presented as liberating the Iraqi people and inflicting an overwhelming defeat on worldwide terrorism. Further, replacing the Baa’thists with an American-supported democratic government would drain the Middle Eastern swamp of Islamic terrorism, creating new circumstances much more favorable to American interests.\(^2\) After it was launched in 2003, the war and the administration’s ideological narrative became even more closely intertwined. Failure in Iraq became politically unacceptable for both domestic—it would undermine Bush’s popularity, thus forestalling efforts to complete the Reagan revolution and create the “permanent majority”—and foreign—defeat would undermine the threat of unilateral American intervention—policy reasons.


\(^{12}\) Suskind, *op. cit.*, p. 85
Failing to find weapons of mass destruction was an embarrassment for the Bush administration, but did not undermine the administration’s narrative or Bush’s popularity at home. The rapid decline of the security situation in Iraq did. As soon became apparent, British and American forces had not been committed in sufficient numbers, placing the entire occupation of Iraq under considerable pressure. As the security situation worsened and calls for “victory” increased, the relentless need for “operational intelligence” from a population unlikely to yield it led to immense pressure from Secretary Rumsfeld on military commanders in Iraq. The initiation of mass “prophylactic” arrests and the transfer of abusive techniques from GTMO to Abu Ghraib led to the informal proliferation of torture there and at other “hard sites” along with increasingly widespread abuses of detainees.\textsuperscript{13} The combination of public revelations concerning the torture regime and adverse judicial decisions changed the acceptability of these measure by early 2006.\textsuperscript{14} As Helmke and Levitsky would have predicted, the Bush administration then formalizing elements of the informal torture regime into new laws - the Detainee Treatment Act (2005) and the Military Commissions Act (2006) - that gave the president power to establish interrogation methods and provided partial protection for the interrogators and officials involved, while, at the same time, claiming that the tortures were, in fact, legal under existing U. S. law.\textsuperscript{15}

**The Obama Presidency and the Question of Torture**

In their contributions to this symposium, Paschek and Abboud point out that so far the Obama administration has been more a correction to the course set by the Bush White House on foreign policy then a sea change. Much the same could be said about the torture issue. The new

\textsuperscript{13} Danner, *op. cit.*, pp. 26 - 52.

\textsuperscript{14} The most important of these cases was *Hamdan v. Rumsfeld* 548 US 557 (2006).

\textsuperscript{15} Helmke and Levitsky, *op. cit.*, pp. 731 - 33
The president has already issued executive orders forbidding use of “alternative procedures” by the armed forces and U.S. intelligence agencies. Promising to close GTMO prison by the end of 2010 also signaled a willingness to break with the recent past. Finally, while the Military Commissions Act has not been repealed, its worse features have been eliminated by further executive orders and by passage of amendments to commission procedures in the Military Commissions Act of 2009. Finally, the Attorney General has decided that most GTMO detainees will be tried for their crimes in federal court.

However, while laws have been amended, orders have been issued, promises made, and memoranda of law repudiated, the informal institutions the torture regime was based on could be reinstated easily. The Obama Administration has not foresworn the use of “renditions” (i.e. kidnapping suspects on foreign territory) nor has it abandoned the assertions of executive privilege that have hindered public monitoring of the agencies involved in torture. Further, while Attorney General Holder has launched investigations into the possibility of limited war crimes prosecutions, President Obama appears to have little relish for prosecuting former Bush administration officials, despite official rulings that at least one detainee was tortured in violation of U.S. law. Congress appears similarly unenthusiastic; even as mundane an initiative as a “truth commission” appears dead in the water. It would, of course, only take one more fatal attack in the United States to change this situation overnight. Were such an attack to occur, Obama would face overwhelming pressure to reinstate “harsh interrogation”. His administration is well aware of this

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16 The practice of “extraordinary” rendition, i.e. sending detainees to prisons in countries known for torturing to be interrogated, has been stopped, however.

possibility and has shown little inclination to fully relinquish the statutory and executive authority it might need going forward.

This is where the danger lies. The use of torture by the Bush administration depended on an alternative interpretation of the Constitution, the so-called “unitary executive” theory. Many in the Bush administration, particularly Vice President Cheney, believed that the power the Constitution grants the President to conduct war gives him virtually unlimited discretion both abroad and at home. This view was justified using secret Office of Legal Counsel (OLC) opinions and used to loosen institutional limits on interrogation. In turn, that led to the torture regime metastasizing. As Griffin points out, that no legal proceedings against the instigators have emerged and no new laws have addressed the situation allows these precedents to act as presumptively constitutional placeholders for future presidents to use.\(^{18}\) Should torture become constitutionally established, the potential for assaults on civil liberties and for government intimidation of dissent would increase exponentially.

What, then, can be done? First, successful prosecutions against either the instigators or the operatives of the torture regime are unlikely. The OLC “torture memos” ratified the President’s power to imprison detainees and to order the use of abusive interrogation methods. The OLC interprets the Constitution and laws for the executive branch of the government. What it says is legal is legal for operational purposes.\(^{19}\) Further, there is no love lost in the American public for


\(^{19}\) The rumored imminent appointment of a special prosecutor to investigate torture illustrates the problems. Apparently, the investigation will be limited to whether interrogators followed the guidelines in the OLC torture memos. Greg Miller and Josh Meyer, “Criminal Investigation into CIA Treatment of Detainees Expected,” Los Angeles Times, August 9, 2009.
the terrorists and, were Bush administration officials tried by a jury, they would claim that their fear of renewed attacks justified their actions. It would be surprising if this defense did not work.

The alternative to prosecution is a full scale bipartisan Congressional investigation on the lines of Watergate Committee or the 9/11 Commission.\textsuperscript{20} The decision to delegitimized torture in the future must be a political decision. The constitutional innovations of the Bush administration have the potential to severely undermine the control mechanisms built into the separation of powers and, especially, the process of congressional oversight. When similar problems with intelligence agencies and the armed forces arose in the past, Congress intervened through the Church committee, creating a new political and legal consensus about limits on presidential power and the uses of intelligence. Only by creating such a consensus on torture can the necessary statutory changes–repeal of the MCA, amendment of the anti-torture statute to bring it in line with the UN Anti-Torture Convention, making the Torture Victims Protection Act effective for detainees, new restrictions on intelligence agencies–be made. The Obama administration is not going to create a New Jerusalem in the United States; this will still be a capitalist democracy and a world power set against many progressive policies when he departs. But it does appear possible to delegitimize the official use of torture. Using criticism by academic and legal opinion makers, continuing pressure on the press, and the mobilization of mass publics through both virtual communities and popular organizations to pressure the administration and Congress to establish a bipartisan commission on torture seems the most promising strategy for doing so.