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Don't Be Cruel

Congress must rein in Bush's recklessly harsh treatment of enemy detainees

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Points Of View

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"We do not torture," President George W. Bush declared on Nov. 7. But hardly anybody outside the United States believes him. And fewer and fewer Americans believe that he has given much more than lip service to his ostensible policy of treating suspected enemy combatants humanely.

These are among the reasons that Congress and the Supreme Court are moving toward reining in the Bush administration's gratuitously harsh and arbitrary treatment of suspected enemy combatants. Better late than never.

Bush and his people -- especially Vice President Dick Cheney and David Addington, who is Cheney's powerful legal counsel and (now) chief of staff -- have insisted on wielding dictatorial powers, without due process, over possibly innocent detainees around the world. They have sought to prosecute some before "military commissions" that have, so far, made a mockery of fairness. They have helped cause the unwarranted abuse of thousands, and the torture of many, by belittling the Geneva Conventions and other long-standing legal limits on interrogation; by resisting proposals for preventing abuse made by military lawyers and members of Congress; by sowing confusion among our troops about how to treat detainees; and by suggesting that all detainees are terrorists despite ample evidence that many are not.

Bush and Cheney have thereby done vast damage to our nation's ideals and also to our national security. By driving countless new recruits into the arms of the jihadists, their policies on "enemy combatants" have, in my view, increased the likelihood that one or more major American cities will be obliterated by a nuclear truck bomb or boat bomb.

It's past time to put these White House loose cannons under adult supervision. This should be supplied mainly by Congress, not the courts. And Congress should proceed with care, because broad executive power over detainees -- perhaps including the recently publicized imprisonment of al Qaeda leaders in secret locations abroad -- is sometimes essential to defend against the grave threats that we face.

JUST SHORT OF TORTURE

But Bush, Cheney, and company have shown that they cannot be trusted to make responsible use of the vast war powers that they claim. One result is that "America is the only country in the world that asserts a legal right to engage in cruel and inhumane treatment," in the devastating words of Sen. John McCain (R-Ariz.), who was tortured as a prisoner in North Vietnam.

To be sure, the administration does acknowledge (contrary to many news reports) that it is bound by the flat ban on "torture" in the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which defines torture as intentional infliction of "severe" pain or suffering.

But Addington and then-White House Counsel Alberto Gonzales helped inspire an August 2002 Justice Department memo redefining "torture" so narrowly, and presidential power so broadly, as to legalize all forms of brutal interrogation. The leaking of that memo last year shamed Gonzales into backing away from it.

The administration has not backed away from its claim that it has the legal right to use interrogation techniques just short of torture -- including what the Convention Against Torture calls "cruel, inhuman, or degrading treatment" -- on any and all foreign prisoners held overseas.

This widely disputed interpretation may be technically defensible. But past presidents have taken care to honor the spirit as well as the letter of treaty obligations regarding treatment of prisoners. This president has insisted on the narrowest possible interpretations.

One result of all this has been to spawn "so many differing legal standards and loopholes that our lawyers and generals are confused," in McCain's words. Another has been to invite -- or, at least, create the appearance of inviting -- the seemingly endless stream of prisoner abuse scandals since the repugnant Abu Ghraib photos hit the front pages 18 months ago.

Thus has Bush thrown gasoline onto the flames of anti-Americanism worldwide and alienated many who want to be America's friends.

PUSHING BACK

It was welcome news, therefore, when the Supreme Court on Nov. 7 announced (over strenuous Bush administration objections) that it will review a challenge to the legality of Bush's military commissions. This review is arguably premature, since the commissions have not yet convicted, or acquitted, anyone. And the case does not involve interrogation practices. But the justices seem to have figured out that Bush and Cheney need to be whacked with a two-by-four at every opportunity to remind them that they are not above the law.

This is not necessarily to suggest that the Court should strike down the military commissions. Independent experts disagree about that. But the Court should at least require fair procedures.

Still more welcome has been the drive by McCain and his allies -- including Sens. Lindsey Graham (R-S.C.) and John Warner (R-Va.), who is chairman of the Armed Services Committee -- to set congressionally imposed rules against mistreating detainees. One provision would limit the military, but not the Central Intelligence Agency, to the interrogation techniques spelled out in the Army Field Manual. The other would bar "cruel, inhuman, or degrading treatment," by either the CIA or the military, of detainees anywhere in the world.

The Senate attached these provisions to a Pentagon spending bill by a resounding 90-9 vote, over a rare Bush veto threat and over the impassioned opposition of Cheney, who is now lobbying to exempt the CIA. These provisions -- which are endorsed by retired military leaders, including Colin Powell and John Shalikashvili, and by some widely respected former CIA officials -- would not and should not ban all aggressive interrogation.

The Army Field Manual, for example, allows techniques such as "fear up harsh," which can involve "a loud and threatening voice" and "throw[ing] objects across the room to heighten the source's implanted feelings of fear."

The CIA's carefully trained interrogators would retain still greater latitude, but with firmer guidance than they appear to have received so far from the White House or the Justice Department.

While "torture" would remain illegal even by CIA interrogators, a reservation specified by the Senate when it ratified the Convention Against Torture in 1994 defines "cruel, inhuman, or degrading treatment" as barring only interrogation techniques so brutal as to violate the Supreme Court's constitutional rulings against doing things to prisoners that "shock the conscience." This standard, though vague, would be codified for the first time (say experts) under the McCain proposal, establishing as law the common-sense principle that the toughness of interrogation techniques should be calibrated to the importance and urgency of the information likely to be obtained.

Some very aggressive techniques would not shock the conscience if used on that small percentage of detainees who seem especially likely to have potentially life-saving information. But those same techniques would shock the conscience if used to squeeze less-valuable information out of less-important detainees, such as all or most of those in the Abu Ghraib photos.

OUR NATIONAL HONOR

Even if, as some claim, the McCain proposal would not ban any interrogation techniques currently in use, it would send a much-needed symbolic message to our troops, our CIA interrogators, our citizens, our allies, and our enemies: Congress will no longer allow this president to stain our national honor with morally bankrupt leadership on the treatment of detainees.

It is Congress, after all -- not the president -- that the Constitution empowers "to define and punish . . . offenses against the law of nations [and] make rules concerning captures on land and water [and] for the government and regulation of the land and naval forces."

Yes, the president as commander in chief should not be unduly hobbled by legal rules. But does Bush really want to stand before the world and insist that he needs a license to do things to detainees that "shock the conscience"†

If he does, then let Bush seek an emergency exception to the McCain proposal, authorizing the president to approve, in writing, specified techniques for interrogating any individual whom he certifies to be highly likely to have information that could be used to prevent a planned attack. And let him stop passing the buck to low-level interrogators and guards.

In McCain's words, "We placed extraordinary pressure on them to extract intelligence from detainees, but then we threw out the rules that our soldiers had trained on and replaced them with a confusing and constantly changing array of standards. . . . And when things went wrong, we blamed them, and we punished them. I believe we have to do better than that."

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