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## Torture Logic

David Tell (op-ed)

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THE SENATE-APPROVED VERSIONS of next year's Defense authorization and appropriations bills each contain an amendment sponsored by Arizona's John McCain that would, as the commonplace newspaper shorthand has it, "make torture illegal" at Pentagon facilities throughout the world. The House-approved versions do not contain such language, and House-Senate conferees have yet to negotiate the final, "reconciled" legislation they will eventually send to the White House. But if either measure still contains the McCain amendment when it reaches his desk, President Bush will apparently cast a veto--his first ever.

It's not entirely clear just why. The White House has been singularly uncommunicative about its objectives.

Could be the administration's objection is grounded in separation-of-powers theory: The Constitution assigns the president alone an unenumerated "executive Power," and specifically designates him the "Commander in Chief of the Army and Navy," so any congressional attempt to regulate the conduct of an ongoing war must be resisted as an encroachment by one branch of government on the prerogatives of another--that kind of thing. Media reports, at any rate, routinely attribute such thinking to Vice President Dick Cheney's office, apparently the locus delicti of West Wing opposition to the McCain anti-torture campaign. And the Office of Management and Budget, citing "the Constitution," indicates general concern among the president's "senior advisers" that the amendment in question "would restrict the president's authority to protect Americans effectively from terrorist attack and bring terrorists to justice."

But there's got to be more to it than that, doesn't there? After all, the Constitution simultaneously gives Congress, not the president, plenary authority to "make Rules for the Government and Regulation of the land and naval Forces"--rules about interrogation practices presumably among them. And a large body of uniformed-services law has been on the federal statute books since 1775, before the Constitution even existed. If the president's senior advisers are similarly concerned about the Uniform Code of Military Justice, the Washington Post has not reported it.

The Washington Post has, however, reported, among other things, that Cheney aide David Addington is the brains behind a "White House memo justifying torture of terrorism suspects." And that motive, as well, is more-or-less routinely--and matter-of-factly--advanced as an explanation for the Bush veto threat.

It's a baby-with-the-bathwater problem, we're given to understand: "Torture" per se is something the administration is happy to disavow, but what if the McCain amendment's additional prohibition against "cruel, inhuman, or degrading treatment or punishment" winds up interfering with . . . some other useful stuff the Pentagon and CIA are purportedly up to?

Or, as Sen. McCain himself has characterized the debate in a recent issue of Newsweek, there are those Americans who believe that a less rigorous application of [our] values is regrettably necessary to prevail over a uniquely abhorrent and dangerous enemy. . . . Some view more coercive interrogation tactics as something short of torture but worry that they might be subject to challenge under the "no cruel, inhuman or degrading" standard.

. . . For instance, there has been considerable press attention to a tactic called "waterboarding," where a prisoner is restrained and blindfolded while an interrogator pours water on his face and into his mouth--causing the prisoner to believe he is being drowned.

Sen. McCain calls waterboarding, too, a form of torture, mind you. But there are "those Americans" who think it should count as something less, he suggests. And, by implication, it is those same Americans who are presently resisting McCain's amendment, so as to preserve the waterboard--and God knows what else--in our government's war-on-terrorism arsenal.

If this is an accurate account of things, as practically the whole rest of the world outside of 1600 Pennsylvania Avenue seems convinced it is, then the administration's position on the McCain amendment is both politically and morally unsustainable, and the president's veto threat is an embarrassment to the entire country.

And yet, we can't help wondering: What makes everybody so sure the situation isn't just a teeny bit more complicated than that? What, for example, do we suppose the practical, nitty-gritty effect will really be once the McCain amendment has become law and terror-suspect detainees, "regardless of nationality or physical location," begin to enjoy an absolute guarantee against "the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States"? Does anybody know? Has anybody even thought about it?

Will the residents of Abu Ghraib and Guantanamo Bay be entitled to conditions of confinement meeting exactly the same standards federal judges have cumulatively imposed, under the Eighth Amendment, on San Quentin and Leavenworth? Will American intelligence officers questioning captured al Qaeda operatives be required to observe the same constitutional restrictions that would apply were they talking to a drunk-driving arrestee in a stateside suburban jail? In a stateside suburban jail, government abuses sufficient to "shock the conscience"--the Supreme Court's notoriously ambiguous, 53-year-old benchmark--are an impermissible abridgment of Fourteenth Amendment due process. And in Afghanistan, Iraq, and Guantanamo, our consciences have been shocked for quite some time now.

But by what, precisely? Is it the scale and severity of the abuse involved? The United States has detained more than 83,000 foreign citizens at one time or another since September 11, 2001. According to data submitted by the State Department to the U.N. Committee Against Torture in late October, 221 substantiated cases of American abuse or misconduct have resulted from these detentions. There's no reason to assume that all these cases involved a serious injury. But let's assume it anyway, and let's also assume that vast numbers of never-reported abuses should also be charged against our troops--so that the "real" number is 2,210, fully ten times higher. U.S. war-on-terrorism detainees would still have a violent crime victimization rate dramatically lower than that experienced last year by residents of Manhattan's Mid-Town South police precinct, home of the New York Times.

More likely, we suspect, the total numbers haven't mattered all that much; it's the sensational character of certain high-profile abuse allegations that's caused the most distress. Take "Prisoner 063," for example, who's now been detained at Guantanamo for four-plus years. In late 2002, they made him the subject of a "special interrogation plan," and they treated him pretty rough. He was menaced by dogs, deprived of sleep, segregated from the general detainee population, splashed with water bottles. And--this being the part that really seems to get to people--the victim was repeatedly subjected to "gender coercion," in a manner certain to outrage his Muslim piety. On various occasions over a period of three months, female interrogators "invaded the personal space" of this gentleman, looked at him naked, made him wear a bra on his head, and massaged his back and neck in a sexually provocative manner.

Prisoner 063, incidentally, is one Mr. Mohammed al-Qahtani, who, had immigration officials not turned him away

from Orlando International Airport on August 4, 2001, would a few weeks later have been the missing fifth hijacker on United Airlines Flight 93. Shortly before 9:30 a.m. on September 11, he'd have been barricaded in the cockpit along with four other al Qaeda operatives and 49-year-old United purser Debbie Welsh. It's said the surviving black box cockpit recorder captures her voice: "Please don't hurt me. Oh, dear God, I don't want to die!" A short while later on the tape there's a "gurgling sound, then silence," as Debbie Welsh's throat is cut and she drowns in her own blood. Mr. al-Qahtani's religious views governing "personal space" and appropriate contact with a female would appear to be a very tricky business, in other words.

Is it really so conscience-shocking that U.S. interrogators failed to respect those views?

There is a lot to be ambivalent about in the current controversy over torture. Better than a presidential veto, or incompletely considered legislation extending the equivalent of constitutional due process rights to murderous foreign enemies like Mohammed al-Qahtani, would be a serious, detailed, public debate about how, exactly, a civilized country is really supposed to deal with such men once it's caught them. We haven't figured it out yet, that much is clear.