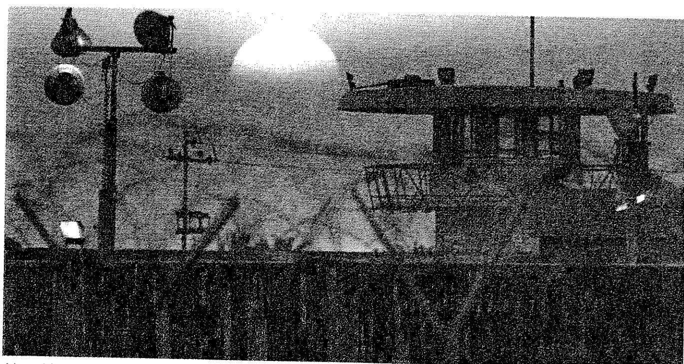
Reconciling Torture With Democracy

BY DEBORAH PEARLSTEIN



Abu Ghraib prison, located on the outskirts of Baghdad, Iraq.
(AP Photo / World Wide Photos)

The debate in this country since September 11 about the use of torture or other forms of coercive interrogation has proceeded along two oddly irreconcilable tracks. On the one hand is the national reaction following the publication of actual photos of torture and humiliation committed by U.S. troops at Abu Ghraib—a reaction that was swift, uniform, and bipartisan in its revulsion. The Secretary of Defense called the conduct "unacceptable" and "un-American." John McCain, Republican Senator and former prisoner of war, emphasized that "history shows—and I know a little bit about this—that mistreatment of prisoners and torture is not productive…You don't get information that's usable from people under torture, because they just tell you what you want to hear." And John Warner, Republican Chair of the Senate Armed Services Committee, said the abuses, if true, were "an appalling and totally unacceptable breach of military conduct that could undermine much of the courageous work and sacrifice by our forces in the war on terror."

There remains, on the other hand, a vigorous abstract debate in academic and policy circles about the need to abandon some existing laws governing detention and interrogation, and to adopt new rules permitting the use of physical or mental coercion to extract intelligence information, our best weapon, it is argued, against a new and potentially devastating terrorist threat. Human rights scholar Michael Ignatieff has insisted that "defeating terror requires violence," and that "to defeat evil, we may have to traffic in evils," including indefinite detention and coercive interrogation. Harvard lawyer Alan Dershowitz is more specific, proposing the use of physical coercion in exceptional cases if a judge authorizes its use in advance. And Judge Richard Posner goes further still, writing that "only the most doctrinaire civil libertarians (not that there aren't plenty of them) deny [that] if the stakes are high enough, torture is permissible. No one who doubts that this is the case should be in a position of responsibility."

The apparent disconnect between our attraction to coercive interrogation in theory, and our repulsion from it in practice is mediated by a few (like Mark Bowden) who have argued that coercive interrogation "should be banned but also quietly practiced." We need to do it in the interest of national security, but we need to not know about it to preserve the appearance of public morality. Whatever the merits of such a view—and there is substantial question where the rule of law fits in to such a calculus—our ability to pursue it is soon to be overtaken by events. The incoming 109th Congress will almost certainly be asked to consider authorizing new powers for detaining and interrogating terrorist suspects. There will be a range of proposed circumstances—only in a state of emergency, only if there is a ticking bomb, only for suspected "terrorists"—along with a range of proposed procedural safeguards—right to counsel, to judicial supervision, to limited duration—and a range of proposed techniques—from prolonged solitary confinement and sleep deprivation to moderate physical force.

The good news, as it were, for Congress is that the past four years have produced substantial empirical data to guide its deliberations about how the theory of coercive interrogation plays out in the real world. As official investigations, press reports, and NGO studies beyond the photos at Abu Ghraib have now made clear, U.S. authorities have practiced various forms of torture and coercive interrogation from Iraq to Afghanistan to Guantánamo Bay. Since Fall 2001, the Pentagon has reported more than 300 allegations of abuse by U.S. officials (66 substantiated as of mid-August); there are some 30 pending investigations into detainee deaths in U.S. custody by torture or abuse; and there are currently underway about two dozen criminal prosecutions of military and civilian personnel. While public information about the effects of this practice remains incomplete, it is worth identifying some of what our experience has shown.

Take, for example, the argument that the use of coercive techniques could be limited to only the most exceptional circumstances – only where there was a real "ticking bomb" to be diffused – and real "torture" would not be authorized, but only lesser techniques like sleep deprivation, sensory deprivation, or uncomfortable "stress" positions – only "torture lite." The past few years have demonstrated our failure to

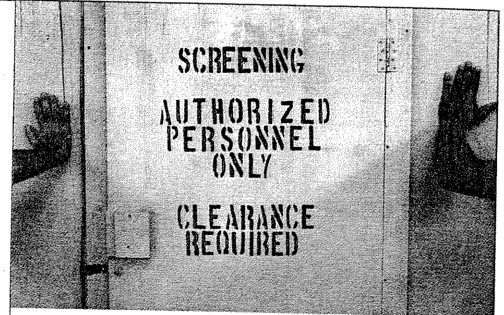
in the foreign press

FROM GERMANY

"European self-righteousness and German arrogance towards the U.S. are inappropriate. In Germany, awareness for civilization and humanity is beginning to erode…When the Vice President of the Police Office in Frankfurt thinks that torture is appropriate in special cases … apparently there are two kinds of torture—the one that is practiced elsewhere, like in Iraq or Israel or whenever Americans practice it, and the good one practiced in Germany."

Heribert Prantl, Suddeutsche Zeitung Newspaper, *May 20, 2004*
—Translated by Chia Lenhardt

“ THE PAST FEW YEARS HAVE SEEN MIXED REPORTS ABOUT THE VALUE OF INTELLIGENCE GLEANED AS A RESULT OF COERCIVE PRACTICES. SOME INSIST THAT GUANTÁNAMO, FOR INSTANCE, HAS PRODUCED VALUABLE INFORMATION, WHILE OTHER MILITARY AND INTELLIGENCE OFFICIALS CONTEND THAT THOSE HELD THERE HAVE YIELDED LITTLE OR NO INTELLIGENCE VALUE. ”



Iraqi prisoners are frisked next to a door leading to an interrogation room at Abu Ghraib prison. (AP Photo / John Moore)

limit the use of coercion by circumstances or technique. A U.S. Army interrogator deployed to Afghanistan in 2001 wrote of one example, explaining that the stress positions that had been prohibited early in the war in Afghanistan were soon adopted by soldiers there as a means of prison discipline. By the time of the Iraq war (where, unlike in Afghanistan, the Administration had announced its intention to apply the Geneva Conventions), the use of stress positions, practiced in Afghanistan, had become an accepted interrogation technique. While the specific behavior at Abu Ghraib may not have been part of the rules of engagement, the former interrogator argues, they "represented the gravitational laws that govern human behavior when one group of people is given complete control over another in a prison. Every impulse tugs downward."

What of the argument that the use of coercive interrogation in some form may be the only way to secure intelligence critical to saving lives? The past few years have seen mixed reports about the value of intelligence gleaned as a result of coercive practices. Some insist that Guantánamo, for instance, has produced valuable information, while other military and intelligence officials contend that those held there have yielded little or no intelligence value. But Senator McCain's view that abusive tactics have long been understood as counterproductive has been echoed by many, including a group of retired admirals and generals, who wrote in a letter to the President that information gathered through coercion is "notoriously unreliable," and has "a demoralizing, dehumanizing effect not only on those subject to violations, but also on our own troops." The Army Field Manual itself reinforces this view, instructing that coercive techniques are not to be practiced not only because they are against the law, but because they are ineffective. Meanwhile, the negative consequences of such tactics for U.S. security interests are apparent. Polling in Iraq suggests that evidence of coercive practices by the United States helped galvanize public opinion in Iraq against U.S. efforts there. And the Pakistani Sunni extremist group Lashkar-e-Tayba has used the Internet to call for sending holy warriors to Iraq to take revenge for the torture at Abu Ghraib.

The opportunity to evaluate these and other lessons of the past few years in a semi-public forum in Congress is, to be sure, far closer to how a democracy should operate than the unilateral, unreviewable use of such techniques behind closed doors. But getting to the right result in the coming debate is tricky. And it depends critically on our willingness to hold our theory of coercion up against the reality of what makes us secure.

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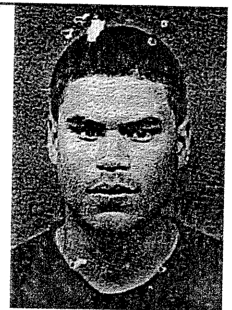
Opinion: Protecting National Security without Classifying Jose Padilla an "Enemy Combatant": His Lawyer Speaks

BY ANDREW G. PATEL

On June 9, 2002, President George W. Bush signed an order as Commander-in-Chief declaring Jose Padilla, an American citizen, to be an enemy combatant. The President ordered the Secretary of Defense to take custody of Padilla. Pursuant to the President's order, agents of the Department of Defense removed Padilla from his maximum security jail cell in New York where he had been detained as a grand jury material witness by order of a United States District Court Judge. Padilla was transferred to the Consolidated Naval Brig near Charleston, South Carolina. To this day, Padilla remains in solitary confinement in that brig. In ordering the military detention of Padilla without charging him with a crime or any form of judicial process, the President exercised a degree of executive power that had rarely been seen since King John reluctantly signed the Magna Carta in 1215.


Jose Padilla

At the time Padilla was transferred to military custody, James B. Comey was the