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A Tortured Debate

The media-fed hysteria over the treatment of terrorist prisoners

By Byron York

On Sunday, June 20, at the U.S. detention facility in Guantánamo Bay, Cuba, the lunch menu for suspected al-Qaeda, Taliban, and other prisoners in the War on Terror was as follows: whole-wheat pita bread, stewed tomatoes, long-grain brown rice, chickpeas, dates, yogurt, and tea. For dinner, the suspected terrorists were served green beans, carrots, chicken and noodles, whole-wheat bread, fresh fruit, and tea. For both meals, as for all others served at what is known as Camp Delta, U.S. forces took care to make sure the food served to Muslim prisoners was prepared in accordance with halal dietary requirements. Detainees "receive three culturally appropriate meals each day," one official told National Review, and another officer e-mailed from Guantánamo to say, "I can reassure you that we are definitely attuned to the cultural dietary needs of the detainees. Nothing that is not appropriate is ever given to them to eat or drink."

Such measures, along with many others concerning the prisoners' daily lives, suggest that the American military is going to great lengths to ensure that detainees, a number of them jihadists captured on the battlefield in Afghanistan, are treated humanely. Yet in recent days the Bush administration has found itself facing accusations that it permits the "torture" of prisoners in the War on Terror. Critics in Congress and the press have suggested that the administration has not only condoned torture, but has used illegal methods of interrogation on detainees.

It started, of course, with the abuses at Iraq's Abu Ghraib prison, which were condemned (and prosecuted) by U.S. officials. But now, with the publication of formerly secret administration legal memos analyzing the torture question, the president's opponents have suggested that the Abu Ghraib scandal is just part of a larger Bush policy of criminally abusing prisoners. The *New York Times* wrote that the existence of the memos suggested that "the inhumanity at Abu Ghraib grew out of a morally dubious culture of legal expediency and a disregard for normal behavior fostered at the top of this administration." The *Washington Post* wrote that the Bush administration had "redefined" torture in a way that brought "shame on American democracy" by adopting the reasoning of "dictatorships," "military juntas," and Islamic "autocracies." Other critics suggested the White House had ripped the Constitution to shreds.

Amid all the condemnations, a few questions remained largely unasked. What did those legal memos actually say about torture? How does the U.S. military treat its prisoners? Have any been tortured? A look at the administration's legal thinking, and interviews with those involved in making its policies, suggest the answers come out in the administration's favor. Although such answers are less sexy than headlines about torture, it appears the administration is simply not guilty of the misconduct of which it has been accused.

WRESTLING WITH DEFINITIONS

The Bush administration has conducted two major reviews of the law on the issue of torture: one by the Justice Department, completed in the summer of 2002, and another by the Defense Department, completed in the spring of 2003. The two studies are similar in many ways, but the Justice Department's — written after the CIA asked for legal guidance on the issue of prisoner treatment — is the more wide-ranging.

To answer the CIA's inquiries, the Justice Department assembled a sizable team of lawyers. They began by examining the major international treaty on the issue, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was written in the 1980s and ratified by the U.S. Senate in 1994. They also studied the act of Congress, usually referred to as Section 2340, which implemented the treaty in U.S. law.

"We looked at the treaty, the implementing statute, the negotiating history of the treaty, the U.S. ratification record, the discussions between the Senate and the president about the treaty, the cases from the U.S. and abroad involving torture, other statutes involving torture, commentary, law-review articles, and books," says one former administration official involved in terrorism issues. "This was probably the most comprehensive examination of this question there has ever been in American law."

The key question for the Justice Department lawyers was: What is torture? Although some critics have suggested the administration came up with a new definition to allow for abusive interrogations, in fact the legal team decided to adopt the definition contained in both the Convention Against Torture and Congress's Section 2340. The treaty, which was approved by more than 70 nations around the world, defined torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Section 2340 contained similar language, defining torture as an "act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control."

Both the treaty and the law used the word "severe." The Justice Department study noted that the treaty carefully "distinguishes between torture and other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture . . ." In addition, the lawyers found, the treaty required criminal penalties only for acts of torture, not for anything else. Likewise, Section 2340, according to the administration analysis, "makes plain that the infliction of pain or suffering per se, whether it is physical or mental, is insufficient to amount to torture."

As administration lawyers studied the congressional debate over the act, they discovered that such language was chosen after lengthy consideration. "One thing that both senators and administration witnesses made clear was that . . . torture was defined in a very specific way," says the former administration official. "[The act] defines torture, and then it defines cruel, inhuman, and degrading acts." The two, though both undesirable, were different things.

Everything in the Justice Department's 50-page memo — and the controversy it created — flowed from that distinction. Administration lawyers concluded that some types of treatment of prisoners, while perhaps not acceptable either to the administration or to the American public, might nonetheless be legally defensible under both international and American law. The memo did not condone torture. Nor, for that matter, did it condone cruel, inhuman, or degrading treatment. It just examined the law.

"The job was, here's a statute, and you have to find out what it means. What conduct is allowed by law, and what is not?" says the former official. "If you're in a war, and you have to interrogate people, wouldn't you want the government to ask, what is torture, and what are the lines established by Congress? The critics almost make it as if you are not allowed to ask."

Indeed, Democrats pounded attorney general John Ashcroft when he appeared before the Senate Judiciary Committee on June 8, shortly after the memo was reported. California senator Dianne Feinstein said the administration appeared to be trying "to redefine torture and narrow prohibitions against it." Vermont's Patrick Leahy said the memo "may well have set in motion a process that led to [the] abuses" at Abu Ghraib. And Ted Kennedy said the memo *did* lead to those abuses.

Some of the accusations left other committee members shaking their heads. Arizona Republican Jon Kyl told National Review, "I think the real stretch is to take a memo like the one that was written by the attorney general's office and suggest that somehow or other that legal memo found its way through to some troop on the ground in Afghanistan or Iraq, and he's reading this memo and saying, 'Aha, I've got a defense if I torture this guy.'"

For his part, Ashcroft tried to explain that Congress, and not the attorney general or the Justice Department, had crafted the legal definition of torture that was the basis of the memo.

In fact, some of the senators on the committee had voted for the law containing that definition. But the attorney general made little progress.

A DIRTY LITTLE SECRET

One thing the senators did not much discuss was how accused terrorist prisoners are actually being treated and questioned in American detention facilities. It was only after the torture uproar that the administration decided to release its rules concerning those interrogations. What they revealed was a military that had engaged in a long and careful process of determining what is permissible and what is not — staying well within the bounds of acceptable treatment outlined in both the Convention Against Torture and Congress's Section 2340.

When the U.S. began shipping detainees to Guantánamo, the only rules that applied to interrogations were those found in Field Manual 34-52, an old publication that had guided American military interrogations for years. The manual listed 17 techniques that interrogators could use, such as incentives, removal of incentives, rapid-fire questions, and silence. Those guidelines governed all interrogations until December 2002.

By then, the military had been having problems with what one Pentagon source calls a "high-value detainee" who had al-Qaeda connections and who "we thought had some very specific information about future planned attacks on America." Officials will not name him publicly, but he has been identified in the press as Mohamed al-Kahtani, thought to be the intended "20th hijacker." "He was resisting these kinds of techniques," says the source. "We know that they [al-Qaeda] train to resist these things."

Al-Kahtani's resistance led to an extensive review of interrogation procedures. The reviewers went up and down the chain of command, and in the end came up with a new list of procedures. That list was divided into three tiers. The first tier involved most of the techniques that had been in the old field manual, plus a few new ones, "like yelling at a detainee, but not in his ear, and not to cause pain," says the Pentagon source.

The second tier involved strategies such as removing "comfort items," including toothpaste and other sundries. The third tier comprised just one technique: Officials will not give all the details, but it appears to have involved "non-injurious contact" — what the source calls "light pushing."

The new three-tier system had been in place for just a month when some military officials at Guantánamo raised concerns about its appropriateness and effectiveness. At that point, defense secretary Donald Rumsfeld convened a large working group to come up with yet another set of interrogation guidelines. The group included people from all disciplines in the military, including lawyers who opposed virtually all interrogation techniques.

An extensive debate took place, and the work went on for more than a year. Finally, in April 2003, the Pentagon approved a new set of interrogation methods that are still in effect today. The new set included 24 techniques — the 17 from the old field manual, plus seven new ones.

The new methods included "dietary manipulation," which means a change in the detainee's daily rations. "It's not a reduction in caloric intake, and it's intended to provide the same level of nutrition, but perhaps just not as palatable," says the source. In practice, it has meant taking away a prisoner's hot meals and giving him instead a military MRE, the standard field ration for American troops. Other techniques included shaving off a detainee's beard (something the September 11 hijackers did for themselves, in order not to attract attention) and "change of scenery," such as taking a detainee to a smaller interrogation room than the one to which he had become accustomed.

Four of the 24 techniques required the approval of the secretary of defense himself. They were "attacking or insulting the ego of a detainee"; using a "team consisting of a friendly and harsh interrogator"; the reward or removal of significant incentives; and "isolation." Officials are quick to point out that "isolation" does not mean "solitary confinement." "It's removing him from his peer group, not removing him from all human contact," says the Pentagon source. Officials also stress that every interrogation is conducted only after an interrogation plan is written and approved in advance.

In total, what seems remarkable about the interrogation guidelines is, for the most part, how mild they are. In many ways, even the most recalcitrant detainee receives better treatment (and food) than many U.S. troops in the field (or in training). "The dirty little secret here is not how bad these guys are being treated," says the source. "The dirty little secret is we're not really doing very much to them."

'OUR VALUES AS A NATION'

On June 17, Rumsfeld faced the Pentagon press corps to answer a long series of questions about torture. At times the usually eloquent defense secretary was reduced to stream-of-consciousness rambling. "I have read this — editorials — 'torture' — and one after another," he said. "*Washington Post* the other day — I forget when it was — just a great, bold 'torture' . . . " Gathering his thoughts, Rumsfeld continued, "I have not seen anything that suggests that a senior civilian or military official of the United States of America . . . could be characterized as ordering or authorizing or permitting torture or acts that are inconsistent with our international treaty obligations or our laws or our values as a country."

What Rumsfeld did not mention — because it was classified at the time — was that for more than two years he and the entire American government have operated under a February 7, 2002, directive from President Bush that declared, "Our values as a nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those

who are not legally entitled to such treatment. As a matter of policy, the U.S. armed forces shall continue to treat detainees humanely, and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."

America's military men and women seem to have taken that directive quite seriously. For example, while the prosecutions of soldiers involved in the Abu Ghraib abuses are well known, it is not as well known that the Pentagon has been quite tough — some would say too tough — on Americans who have run into trouble with terrorist detainees at Guantánamo. In one instance, according to military officials, a prisoner threw a cup of urine at a guard, who retaliated by throwing some Pine-Sol cleaner at the prisoner. In another case, a detainee spit on a guard, who then turned a water hose on him. In both cases, sources say, it was the guards, and not the detainees, who were disciplined.

That kind of story doesn't receive much notice in the ongoing uproar about torture. But in the end, such instances seem to show an administration determined to treat prisoners humanely — no matter what its critics say.