

# [Getting away with torture](https://assignbuster.com/getting-away-with-torture/)

Global Governance 11 (2005), 389–406 REVIEW ESSAY Getting Away with Torture Kenneth Roth The Bush administration’s use of torture and inhumane treatment has undermined one of the most basic global standards governing how governments can treat people under their control. Contrary to the efforts of the administration to pass this abuse off as the spontaneous misconduct of a few low-level soldiers, ample evidence demonstrates that it reflects policy decisions taken at the highest levels of the U. S. government.

Repairing the damage done to global standards will require acknowledging this policy role and launching a genuinely independent investigation to identify those responsible and hold them accountable. The creation of regulated exceptions to the absolute prohibition of torture and mistreatment, as suggested by several academics, will not redeem the tarnished reputation of the United States or restore the global standards that the Bush administration has so severely damaged. KEYWORDS: torture, Abu Ghraib, Guatanamo, interrogation, cruel treatment.

B’Tselem, “ Legislation Allowing the Use of Physical Force and Mental Coercion in Interrogations by the General Security Service,” B’Tselem Position Paper, January 2000, 80 pp. Mark Danner, Torture and Truth: America, Abu Ghraib, and the War on Terror (New York: New York Review of Books, 2004), 592 pp. Alan M. Dershowitz, WhyTerrorismWorks: Understanding the Threat, Responding to the Challenge (New Haven: Yale University Press, 2002), 288 pp. Karen J. Greenberg and Joshua L. Dratel, eds. , The Torture Papers: The Road to Abu Ghraib (New York: Cambridge University Press, 2005), 1, 284 pp. Philip B. Heymann and Juliette N.

Kayyem, Preserving Security and Democratic Freedoms in the War on Terrorism (Cambridge: Belfer Center forScienceand International Affairs, 2004), 195 pp. Human RightsWatch, The Road to Abu Ghraib (New York: Human Rights Watch, 2004), 37 pp. Sanford Levinson, ed. , Torture: A Collection (Oxford: Oxford University Press, 2004), 328 pp. 389 390 Getting Away with Torture ho would have thought it still necessary to debate the merits of torture? Sure, there are always some governments that torture, but they do it clandestinely. Torture is inherently shameful—something that, if practiced, is done in the shadows.

In the system of international human rights law and institutions that has been constructed since World War II, there is no more basic prohibition than the ban on torture. Even the right to life admits exceptions, such as the killing of combatants allowed in wartime. But torture is forbidden unconditionally, whether in time of peace or war, whether at the local police precinct or in the face of a major security threat. Yet, suddenly, following the terrorist attacks of September 11, 2001, torture and related mistreatment have become serious policy options for the United States.

Academics are proposing ways to regulate the pain that can be inflicted on suspects in detention. Overly clever U. S. government lawyers have tried to define away laws against torture. The Bush administration claims latitude to abuse detainees that its predecessors would never have dared to contemplate. Washington’s new willingness to contemplate torture is not just theoretical. The abuse of prisoners has flourished in the gulag of offshore detention centers that the Bush administration now maintains in Guantanamo, Iraq, Afghanistan, and the secret dungeons where the U. S. government’s “ disappeared” prisoners are held.

Hidden from public scrutiny, shielded from legalaccountability, the interrogators in these facilities have been allowed to flout the most basic rules for the decent and humane treatment of detainees. Yet torture remains the despicable practice it has always been. It dehumanizes people by treating them as pawns to be manipulated through their pain. It harnesses the awesome power of the state and applies it to human beings at their most vulnerable. Breaching any restraint of reciprocity, it subjects the victim to abuse that the perpetrator would never himself want to suffer.

Before looking at why Americans are suddenly confronting the torture option, it is useful to clarify what, exactly, torture is. The word torture has entered the vernacular to describe a host of irritants, but its formal meaning in international law is quite specific: the intentional infliction of severe pain or suffering, whether physical or mental, for whatever reason. Torture as defined in international law is not done by private actors but by government officials or those operating with their consent or acquiescence. 1 Torture exists on a continuum of mistreatment.

Abuse just short of torture is known in international law as cruel, inhuman, or degrading treatment. The lines between these different degrees of mistreatment are W Kenneth Roth 391 not crystal clear—lesser forms are often gateways to torture—which is one reason why international law prohibits all such forms of coercion. 2 Torture as well as cruel, inhuman, or degrading treatment is flatly prohibited by such treaties as the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Geneva Conventions.

All of these treaties are widely ratified, including by the United States. None permits any exception to these prohibitions, even in time of war or a serious security threat. Indeed, these prohibitions are so fundamental that the Restatement of the Foreign Relations Law of the United States, the most authoritative U. S. treatise on the matter, lists them as peremptory jus cogens norms, meaning they bind governments as a matter of customary international law, even in the absence of a treaty.

Breach of these prohibitions gives rise to a crime of universal jurisdiction, allowing the perpetrator to be prosecuted in any competent tribunal anywhere. Yet it is precisely because of the fundamental character of the prohibition of torture and cruel, inhuman, or degrading treatment that the Bush administration’s deliberate disregard for it is so damaging. If this basic human rights protection can be cast aside, no right is secure. Moreover, the Bush administration is not just any government. When most governments breach international human rights law, they commit a violation—the breach is condemned or prosecuted, but the rule remains firm.

Yet when a government as dominant and influential as the United States openly defies that law and seeks to justify its defiance, it also undermines the law itself, and invites others to do the same. That shakes the very foundations of the international system for the protection of human rights that has been carefully constructed over the past sixty years. This unlawful conduct has also damaged Washington’s credibility as a proponent of human rights and a leader of the campaign against terrorism. The U. S. government’s record of promoting human rights has always been mixed.

For every offender it berated for human rights transgressions, there was another whose abuses it ignored, excused, or even supported. Yet despite this inconsistency, the United States historically has played a key role in defending human rights. Its embrace of coercive interrogation—part of a broader betrayal of human rights principles in the name of combating terrorism—has significantly impaired its ability to mount that defense. As a result, governments facing human rights pressure from the United States now find it increasingly easy to turn the tables, to challenge Washington’s standing to uphold principles that it violates itself. 92 Getting Away with Torture Whether it is Egypt justifying torture by reference to U. S. practice, Malaysia defending administrative detention by invoking Guantanamo, Russia citing Abu Ghraib to blame abuses in Chechnya solely on lowlevel soldiers, Nepal explaining a coup by reference to America’s postSeptember 11 excesses, or Cuba claiming the Bush administration had “ no moral authority to accuse” it of human rights violations, repressive governments find it easier to deflect U. S. pressure because of Washington’s own sorry counterterrorism record on human rights.

Indeed, when Human Rights Watch asked State Department officials to protest administrative detention in Malaysia and prolonged incommunicado detention in Uganda, they demurred, explaining, in the words of one, “ With what we are doing in Guantanamo, we’re on thin ice to push this. ” 3 Washington’s loss of credibility has not been for lack of rhetorical support for concepts that are closely related to human rights, but the embrace of explicit human rights language seems to have been calculatedly rare.

In his January 2005 inauguration speech, President Bush spoke extensively of his devotion to “ freedom” and “ liberty,” his opposition to “ tyranny” and “ terrorism,” but hardly at all about his commitment to human rights. 4 The distinction has enormous significance. It is one thing to pronounce oneself on the side of the “ free,” quite another to be bound by the full array of human rights standards that are the foundation of freedom. It is one thing to declare oneself opposed to terrorism, quite another to embrace the body of international human rights and humanitarian law that enshrines the values rejecting terrorism.

This linguistic sleight of hand—this refusal to accept the legal obligations embraced by rights-respecting states—has both reduced Washington’s credibility and facilitated its use of coercive interrogation. Because of this hypocrisy, many human rights defenders, particularly in the Middle East and North Africa, now cringe when the United States comes to their defense. Reformers in the Middle East speak of “ the hug of death”—the ill effects of Washington’s hypocritical embrace.

They may crave a powerful ally, but identifying too closely with a government that so brazenly ignores international law, whether in its own abuses or its alliance with other abusers, has become a sure route to disrepute. At a time when the Bush administration is extolling itself as a champion of reform in the Middle East, as the catalyst behind recent democratic developments, however modest, in Iraq, Lebanon, Egypt, Saudi Arabia, and the Palestinian territories, it is a sad irony that so few reformers welcome its support.

That weakening of Washington’s moral authority in the Middle East is particularly tragic, because that region is where effective counterterrorism efforts are most needed. Open and responsive political systems Kenneth Roth 393 are the best way to encourage people to pursue their grievances peacefully. But when the most vocal governmental advocate of democracy deliberately violates human rights, it undermines democratically inclined reformers and strengthens the appeal of those who preach more radical visions. Instead, U. S. buses have provided a new rallying cry for terrorist recruiters, and the pictures from Abu Ghraib have become the recruiting posters for Terrorism, Inc. Many militants need no additional incentive to attack civilians, but if a weakened human rightscultureeases even a few fence-sitters toward the path ofviolence, the consequences can be dire. Why is the United States taking this approach? To vent frustration, to exact revenge—possibly—but certainly not because torture and mistreatment are required for national security or protection.

Respectfor the Geneva Conventions does not preclude vigorously interrogating detainees about a limitless range of topics. The U. S. Army’s field manual on intelligence interrogation makes clear that coercion undermines the quest for reliable information. 5 The U. S. military command in Iraq says that Iraqi detainees are providing more useful intelligence when they are not subjected to abuse. In the words of Craig Murray, the United Kingdom’s former ambassador to Uzbekistan, who was speaking of the UK’s reliance on torture-extracted testimony, “ We are selling our souls for dross. 6 Moreover, coercive interrogation is making us less safe by effectively precluding criminal prosecution of its victims. Once a confession is coerced, it becomes extremely difficult to prove, as due process requires, that a subsequent prosecution of the suspect is free of the fruits of that coercion. As a result, the Bush administration finds itself holding some suspects who clearly have joined terrorist conspiracies and might have been criminally convicted and subjected to long prison terms, but against whom prosecution has become impossible. In February 2005, the Central Intelligence Agency (CIA) began openly fretting about the problem.

What happens, it worried, when continuing to detain suspects without trial becomes politically untenable, but prosecuting them is legally impossible because of taint from coercive interrogation? 7 None of this is to say that the United States is the worst human rights abuser. There are many more serious contenders for that notorious title, including governments that torture more frequently and more ruthlessly. But the United States is certainly the most influential abuser, making its contribution to the degradation of human rights standards unique and the costs to global institutions for upholding human rights incalculable.

It is not enough to argue, as its defenders do, that the Bush administration is well intentioned—that they are the “ good guys,” in the 394 Getting Away with Torture words of the Wall Street Journal. 8 A society ordered on intentions rather than law is a lawless society. Nor does it excuse the administration’s human rights record, as its defenders have tried to do, to note that it removed two tyrannical governments—the Taliban in Afghanistan and the Ba’ath Party in Iraq. Attacks on repressive regimes cannot justify attacks on the body of principles that makes their repression illegal.

So, how did we get here? How did the United States, historically perhaps the most vigorous governmental proponent of human rights, come to undermine through its own actions one of the most basic human rights there is? Several books, both new and old, provide insight into this sorry state of affairs. Cover-Up and Self-Investigation When the photos from Abu Ghraib became public, the Bush administration reacted like many abusive governments that are caught redhanded: it went into damage control mode. It agreed that the torture and abuse featured in the photographs were wrong but sought to minimize the problem.

The abusers, it claimed, were a handful of errant soldiers, a few “ bad apples” at the bottom of the barrel. The problem, it argued, was contained, both geographically (one section of Abu Ghraib prison) and structurally (only low-level soldiers, not more senior commanders). The abuse photographed at Abu Ghraib and broadcast around the world, it maintained, had nothing to do with the decisions and policies of more senior officials. President Bush vowed that “ wrongdoers will be brought to justice,” 9 but as of March 2005, virtually all of those facing prosecution were of the rank of sergeant or below.

To some extent, the sheer outrageousness of the sexual and physical depravity featured in the Abu Ghraib photographs made it easier for the administration to disownresponsibility. Few believe that President Bush or his senior officials would have ordered, for example, Lyndie England to parade about a naked detainee on a leash. Yet behind this particular mistreatment was an atmosphere of abuse to which the Bush administration, at the highest levels, did contribute. The ingredients of that atmosphere are described in several new books.

The most comprehensive compilation of the documentary record is contained in The Torture Papers, a book edited by Karen Greenberg and Joshua Dratel, which includes all of the administration’s notorious “ torture memos” available by late 2004. Mark Danner’s book, Torture and Truth, includes many of these same documents, as well as his insightful analysis, drawn from his articles in the New York Review of Kenneth Roth 395 Books, of the policy decisions that lay behind them. The Human Rights Watch report, The Road to Abu Ghraib, 10 details how this atmosphere played out on he ground, as American interrogators deployed “ stressand duress” interrogation techniques and then covered up the cruel and occasionally deadly consequences. Torture: A Collection, a new set of essays on torture edited by Sanford Levinson, contains thoughtful essays from a range of scholars, including a vigorous debate about how to limit torture in the post-September 11environment. The key to the administration’s strategy of damage control was a series of carefully limited investigations—at least ten so far.

The reports of several of these are reprinted in the Greenberg and Dratel compilation. Most of the investigations, such as those conducted by Maj. Gen. George Fay and Lt. Gen. Anthony Jones, involved uniformed military officials examining the conduct of their subordinates; these officers lacked the authority to scrutinize senior Pentagon officials. Typical was the most recent investigation, conducted by Vice Admiral Albert T. Church III, who said he did notinterviewsenior officials such as Secretary of Defense Donald Rumsfeld or draw conclusions about their individual responsibility. 11

The one investigation with the theoretical capacity to examine the conduct of Secretary Rumsfeld and his top aides—the inquiry led by former secretary of defense James Schlesinger—was initiated by Rumsfeld himself and seemed to go out of its way to distance Rumsfeld from the problem. At the press conference releasing the investigative report, Schlesinger said that Rumsfeld’s resignation “ would be a boon to all America’s enemies. ” The Schlesinger investigation lacked the independence of, for example, the September 11 Commission, which was established with the active involvement of the U.

S. Congress. 12 As for the CIA—the branch of the U. S. government believed to hold the most important terrorist suspects—it has apparently escaped scrutiny by anyone other than its own inspector general. Meanwhile, no one seems to be looking at the role of President Bush and other senior administration officials. As for criminal investigations, there has been none independent of the Bush administration. When an unidentified government official retaliated against a critic of the administration by revealing that his wife was a CIA agent—a erious crime because it could endanger her—the administration agreed, under pressure, to appoint a special prosecutor who has been promised independence from administration direction. Yet the administration has refused to appoint a special prosecutor to determine whether senior officials authorized torture and other coercive interrogation—a far more serious and systematic offense. So far, prosecutors 396 Getting Away with Torture under the direction of the administration have focused only on the little guy. The Policies Behind Abu Ghraib What would a genuinely independent investigation find?

It would reveal that the abusive interrogation seen at Abu Ghraib did not erupt spontaneously at the lowest levels of the military chain of command. It was not merely a “ management” failure, as the Schlesinger investigation suggested. As shown in the collection of official documents organized by Greenberg and Dratel and Danner, Danner’s analysis, and the Human Rights Watch study, these abuses were the direct product of an environment of lawlessness, an atmosphere created by policy decisions taken at the highest levels of the Bush administration, long before the start of the Iraq war.

They reflect a determination to fight terrorism unconstrained by fundamental principles of international human rights and humanitarian law, despite commitments by the United States and governments around the world to respect those principles even in times of war and severe security threats. These policy decisions included: • The decision not to grant the detainees in U. S. custody at Guantanamo their rights under the Geneva Conventions, even though the conventions apply to all people picked up on the battlefield of Afghanistan.

Senior Bush officials vowed that all detainees would be treated “ humanely,” but that vow seems never to have been seriously implemented and at times was qualified (and arguably eviscerated) by a selfcreated exception for “ military necessity. ” Meanwhile, the effective shredding of the Geneva Conventions—and the corresponding sidestepping of the U. S. Army’s interrogation manual—sent U. S. interrogators the signal that, in the words of one leading counterterrorist official, “ the gloves come off. ” 13 The decision not to clarify for nearly two years that, regardless of the applicability of the Geneva Conventions, all detainees in U. S. custody are protected by the parallel requirements of the International Covenant on Civil and Political Rights and the Convention Against Torture. Even when, at the urging of human rights groups, the Pentagon’s general counsel belatedly reaffirmed, in June 2003, that CAT prohibited not only torture but also other forms of ill treatment, that announcement was communicated to interrogators, if at all, in a way that had no discernible impact on their behavior.

Kenneth Roth 397 • The decision to interpret the prohibition of cruel, inhuman, or degrading treatment narrowly, to permit certain forms of coercive interrogation—that is, certain efforts to ratchet up a suspect’s pain, suffering, and humiliation to make him talk. At the time of ratifying the ICCPR in 1992 and the CAT in 1994, the U. S. government said it would interpret this prohibition to mean the same thing as the requirements of the Fifth, Eighth, and Fourteenth Amendments to the U. S. Constitution.

The clear intent was to require that if an interrogation technique would be unconstitutional if used in an American police station or jail, it would violate these treaties if used against suspects overseas. Yet U. S. interrogators under the Bush administration have routinely subjected overseas terrorist suspects to abusive techniques that would clearly have been prohibited if used in the United States. That the use of cruel, inhuman, or degrading treatment was intentional was suggested by AttorneyGeneral Alberto Gonzales during his confirmation process.

In his written reply to Senate questions—after the administration had supposedly repudiated the worst aspects of its torture memos—he interpreted the U. S. reservation as permitting the use of cruel, inhuman, or degrading treatment so long as it was done against non-Americans outside the United States. 14 That makes the United States the only government in the world to claim openly as a matter of policy the power to use cruel, inhuman, or degrading treatment.

Other governments obviously subject detainees to inhumane treatment or worse as a matter of clandestine policy, but the Bush administration is the only government to proclaim this policy publicly. Reflecting that policy, the Bush administration in late 2004 successfully stopped a congressional effort to proscribe the CIA’s use of torture and inhumane treatment in interrogation. • The decision to hold some suspects—eleven known15 and reportedly some three dozen—in unacknowledged incommunicado detention, beyond the reach of even the International Committee of the Red Cross (ICRC).

Many other suspects were apparently temporarily hidden from the ICRC. Victims of such “ disappearances” are at the greatest risk of torture and other mistreatment. For example, U. S. forces continue to maintain closed detention sites in Afghanistan, where beatings, threats, and sexual humiliation are still reported. At least twenty-six prisoners have died in U. S. custody in Iraq and Afghanistan since 2002 in what army and navy investigators have concluded or suspect were acts of criminal homicide. 16 One of those deaths was as recently as September 2004. The refusal for over two years to prosecute U. S. soldiers implicated in the December 2002 deaths of two suspects in U. S. custody in Afghanistan—deaths ruled “ homicides” by U. S. Army pathologists. 398 Getting Away with Torture Instead, the interrogators were sent to Abu Ghraib, where some were allegedly involved in more abuse. • The approval by Secretary of Defense Rumsfeld of some interrogation methods for Guantanamo that violated, at the very least, the prohibition of cruel, inhuman, or degrading treatment and possibly the ban on torture.

These techniques included placing detainees in painful stress positions, hooding them, stripping them of their clothes, and scaring them with guard dogs. That approval was later rescinded, but it contributed to the environment in which the legal obligations of the United States were seen as dispensable. • The reported approval by an unidentified senior Bush administration official, and use, of “ water boarding”—known as the “ submarine” in Latin America—a torture technique in which the victim is made to believe he will drown, and in practice sometimes does.

Remarkably, Porter Goss, the CIA director, defended water boarding in March 2005 testimony before the Senate as a “ professional interrogation technique. ” 17 • The sending of suspects to governments such as Syria, Uzbekistan, and Egypt that practice systematic torture. Sometimes diplomatic assurances have been sought that the suspects would not be mistreated, but if, as in these cases, the government receiving the suspect routinely flouts its legal obligation under the CAT, it is wrong to expect better compliance with the nonbinding word of a diplomat.

The administration claimed that it monitored prisoners’ treatment, but a single prisoner, lacking the anonymity afforded by a larger group, would often be unable to report abuse for fear of reprisal. One U. S. official who visited foreign detention sites disparaged this charade: “ They say they are not abusing them, and that satisfies the legal requirement, but we all know they do. ” 18 • The decision (adopted by the Bush administration from its earliest days) to oppose and undermine the International Criminal Court (ICC), in part out of fear that it might compel the United States to prosecute U.

S. personnel implicated in war crimes or other comparable offenses that the administration would prefer to ignore. The administration spoke in terms of the ICC infringing U. S. sovereignty, but since the ICC could not have jurisdiction over offenses committed by Americans in the United States without Washington’s consent, the sovereignty argument actually cuts the other way: it is a violation of the sovereignty of other governments on whose territory an atrocity might be committed not to be free to determine whether to prosecute the crime themselves or to send the matter to the ICC.

The administration’s position on the ICC was thus reduced to an assertion of exceptionalism—a claim that no international enforcement regime should regulate U. S. criminality overseas. Kenneth Roth 399 That signaled the administration’s determination to protect U. S. personnel from external accountability for any serious human rights offense that it might authorize. Since, in the absence of a special prosecutor, the administration itself controlled the prospects for domestic criminal accountability, its position offered an effective promise of impunity. The decision by the Justice Department, the Defense Department, and the White House counsel to concoct dubious legal theories to justify torture, despite objections from the State Department and professional military attorneys. Under the direction of politically appointed lawyers, the administration offered such absurd interpretations of the law as the claim that coercion is not torture unless the pain caused is “ equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result. Similarly, the administration claimed that President Bush has “ commander-in-chief authority” to order torture—a theory under which Slobodan Milosevic and Saddam Hussein may as well be given the keys to their jail cells, since they too presumably would have had “ commander-in-chief authority” to authorize the atrocities that they directed. The Justice Department, in a December 2004 memorandum modifying the definition of torture, chose not to repudiate the claim about commander-in-chief authority to order torture but instead stated that repudiation was unnecessary because, it said, the president opposes torture as a matter of policy.

These policy decisions, taken not by low-level soldiers but by senior officials of the Bush administration, created an “ anything goes” atmosphere, an environment in which the ends were assumed to justify the means. Sometimes the mistreatment of detainees was merely tolerated, but at other times it was actively encouraged or even ordered. In that environment, when the demand came from on high for “ actionable intelligence”—intelligence that might help stem the steady stream of U. S. asualties at the hands of Iraqi insurgents—it was hardly surprising that interrogators saw no obstacle in the legal prohibition of torture and mistreatment. Nor did these basic human rights rules limit the broader effort to protect Americans from the post-September 11 risks of terrorism. To this day, the Bush administration has failed to repudiate many of these decisions. It continues to refuse to apply the Geneva Conventions to any of the more than 500 detainees held at Guantanamo (despite a U. S. court ruling rejecting its position) and to many others detained in Iraq and Afghanistan.

It continues to “ disappear” detainees, despite ample proof that these “ ghost detainees” are extraordinarily vulnerable 400 Getting Away with Torture to torture. It continues to defend the practice of “ rendering” suspects to governments that torture on the basis of unbelievable assurances and meaningless monitoring. It refuses to accept the duty never to use cruel, inhuman, or degrading treatment anywhere. It continues its vendetta against the ICC. It has only selectively repudiated the many specious arguments for torture contained in the administration lawyers’ notorious “ torture memos. And long after the abuses of Abu Ghraib became public—at least as late as June 2004—the Bush administration reportedly continued to subject Guantanamo detainees to beatings, prolonged isolation, sexual humiliation, extreme temperatures, and painful stress positioning, all practices that the ICRC reportedly called “ tantamount to torture. ” 19 In selecting his cabinet for his second presidential term, President Bush seemed to rule out even informal accountability. Secretary of State Colin Powell, the cabinet official who most forcefully opposed the administration’s disavowal of the Geneva Conventions, left his post.

Secretary Donald Rumsfeld, who ordered abusive interrogation techniques in violation of international law, stayed on. White House Counsel Alberto Gonzales, who sought production of the memos justifying torture and who wrote that the fight against terrorism renders “ obsolete” and “ quaint” the Geneva Conventions’ limitations on the interrogation and treatment of prisoners, was rewarded with appointment as attorney general. 20 As for the broader Bush administration, the November 2004 electoral victory seems to have reinforced its traditional disinclination to serious self-examination.

It persists in its refusal to admit any policylevel misconduct in the treatment of detainees under interrogation. The Twisted Logic of Torture The Bush administration’s policy of abusive interrogation has received important support in the United States from threeHarvardprofessors: Alan Dershowitz and Phil Heymann of Harvard Law School and Juliette Kayyem of Harvard’s Kennedy School. Rather than reinforce the absolute prohibitions of international law, each would seek to regulate exceptions to the prohibitions on mistreating detainees.

Ostensibly their aim is to curtail that mistreatment but, by legitimizing it through regulation, they would have the opposite effect. Dershowitz, in his book Why Terrorism Works and in his chapter in the Levinson compilation, typifies this regulatory approach. In his view, torture is inevitable, so prohibiting it will only drive it underground, where low-level officials use it in their discretion. Instead, he would subject torture to judicial oversight by requiring investigators who want Kenneth Roth 401 to use it to seek the approval of a judge—to procure a torture warrant, much like they would seek a search warrant or an arrest warrant.

This independent scrutiny, he posits, would reduce the incidence of torture. Dershowitz’s argument is built largely on faith that forcing torture into the open would reduce its use. But he simply assumes that judges would have a less permissive attitude toward torture than do the senior members of the Bush administration. The available evidence is not encouraging. Since torture would presumably be sought in connection with investigations into serious criminal or national security matters, the information behind the request for a torture warrant would presumably be secret.

As in the case of a search warrant or a wiretap, that would mean an ex parte application to a judge, with no notice to the would-be victim of torture and no independent counsel opposing the request. How rigorous would judicial oversight be in such cases? We can derive some sense from the record of the courts used to approve foreign intelligence wiretaps, and the picture is not impressive. According to the Center for Democracy andTechnology, between 1993 and 2003, courts operating under the Foreign Intelligence Surveillance Act (FISA) were asked to approve nearly 10, 000 wiretaps of foreign sovereign agents.

Of those, all but four were approved. When an intelligence agent claims that life-and-death matters of national security are at stake, there is no reason to believe that the scrutiny by Dershowitz’s torture courts would be any more rigorous. In the meantime, by signaling that torture is at least sometimes acceptable, Deshowitz would reduce the stigma associated with its use. Torture would no longer be a despicable practice never to be used, but merely one more tool in the law enforcement arsenal.

Torture specialists eager to practice their trade would appear, international prohibitions of torture would be undermined, and America’s credibility as an opponent of torture would be deeply tarnished. Dershowitz points out that accepting clandestine torture also legitimizes it, but he seems never seriously to consider the alternative: vigorously trying to stop, and prosecute, anyone who breaches the absolute ban on torture. Heymann and Kayyem take a slightly different approach in their monograph, Preserving Security and Democratic Freedoms in the War on Terrorism. They foreswear torture but would allow a U. S. resident to order cruel, inhuman, or degrading treatment so long as he or she certified to Congress that American lives were at stake. Again, the theory is that such treatment would be rare because the president would be reluctant to invoke that power. But since the president has already claimed “ commander-in-chief authority” to order even torture, and since his attorney general claimed the power as recently as January 2005 to 402 Getting Away with Torture order cruel, inhuman, or degrading treatment so long as it is used against non-Americans overseas, 21 Heymann and Kayyem are probably overestimating presidential inhibitions.

Making the defense against cruel, inhuman, or degrading treatment depend on the man who has made such treatment a central part of U. S. counterterrorism strategy is truly asking the fox to guard the chicken coop. Heymann and Kayyem take a similar regulatory approach to coercive interrogation short of cruel, inhuman, or degrading treatment. The U. S. Army’s field manual on intelligence interrogation makes clear that coercive interrogation is unnecessary, unreliable, and wrong.

That’s because, as most professional interrogators explain, coercive interrogation is far less likely to produce reliable information than the time-tested methods of careful questioning, probing, cross-checking, and gaining the confidence of the detainee. A person facing severe pain is likely to say whatever he thinks will stop the torture. But a skilled interrogator can often extract accurate information from the toughest suspect without resorting to coercion. Yet Heymann and Kayyem would abandon that bright-line rule and permit coercive interrogation so long as the president notifies Congress of the techniques to be used.

However, setting American interrogators free from the firm mooring of the U. S. Army field manual can be dangerous, as we have seen so painfully in Abu Ghraib, Guantanamo, Afghanistan, and elsewhere. If mere coercion (itself a violation of the Geneva Conventions in wartime) does not work—and, given that the suspect is supposedly a hardened terrorist, often it will not—interrogators will be all too tempted to ratchet up the pain, suffering, and humiliation until the suspect cracks, regardless of the dubious reliability of information provided in such circumstances.

In this way, coercion predictably gives way to cruel, inhuman, or degrading treatment, which in turn gives rise to torture. The proposals from Dershowitz and Heymann and Kayyem suffer from the same fundamental defect: they seek to regulate the mistreatment of detainees rather than reinforce the prohibition against such abuse. In the end, any effort to regulate mistreatment ends up legitimizing it and inviting repetition. “ Never” cannot be redeemed if allowed to be read as “ sometimes. ” Regulation too easily becomes license.

Behind the Dershowitz and Heymann and Kayyem proposals is some variation of the “ ticking bomb” scenario, a situation in which interrogators are said to believe that a terrorist suspect in custody knows where a ticking bomb has been planted and must urgently force that information from him to save lives. Torture and inhumane treatment Kenneth Roth 403 may be wrong, those who talk of ticking bombs would concede, but the mass murder of a terrorist attack is worse, so in these supposedly rare situations, the lesser evil must be tolerated to prevent the greater one.

The ticking bomb scenario makes for great philosophical discussion, but it rarely arises in real life, at least not in a way that avoids opening the door to pervasive torture. In fact, interrogators hardly ever learn that a suspect in custody knows of a particular, imminent terrorist bombing. Intelligence is rarely if ever good enough to demonstrate a particular suspect’s knowledge of an imminent attack. Instead, interrogators tend to use circumstantial evidence to show such “ knowledge,” such as someone’s association with or presumed membership in a terrorist group.

Moreover, the ticking bomb scenario is a dangerously expansive metaphor capable of embracing anyone who might have knowledge not just of immediate attacks but also of attacks at unspecified future times. After all, why are the victims of only an imminent terrorist attack deserving of protection by torture and mistreatment? Why not also use such coercion to prevent a terrorist attack tomorrow or next week or next year? And once the taboo against torture and mistreatment is broken, why stop with the alleged terrorists themselves?

Why not also torture and abuse their families or associates—or anyone who might provide lifesaving information? The slope is very slippery. Israel’s experience is instructive in showing how dangerously elastic the ticking bomb rationale can become, as described by the Israeli human rights group B’Tselem in its report on interrogations by Israel’s intelligence agency, the General Security Services (GSS). In 1987, an official government commission, headed by former Israeli Supreme Court president Moshe Landau, recommended authorizing the use of “ moderate physical pressure” in ticking bomb situations.

As B’Tselem describes, a practice initially justified as rare and exceptional, taken only when necessary to save lives, gradually became standard GSS procedure. Soon, some 80 to 90 percent of Palestinian security detainees were being tortured until 1999 when the Israeli Supreme Court curtailed the practice. Dershowitz cites the court’s belated intervention as validation of his theory that regulating torture is the best way to defeat it, but he never asks whether the severe victimization of so many Palestinians could have been avoided with a prohibitory approach from the start.

Notably, Israel’s escalation in the use of torture took place even though a ministerial committee chaired by the prime minister was supervising interrogation practices—a regulatory procedure similar to the one proposed by Heymann and Kayyem. Indeed, in September 1994, following severalsuicidebombings, the ministerial committee 404 Getting Away with Torture even loosened the restrictions on interrogators by permitting “ increased physical pressure. ” Heymann and Kayyem never explain why, especially in light of the abysmal record of the Bush administration, we should expect any better from high-level U. S. officials.

The Way Forward Faced with substantial evidence showing that the abuses at Abu Ghraib and elsewhere were caused in large part by official government policies, the Bush administration must reaffirm the importance of making human rights a guiding force for U. S. conduct, even in fighting terrorism. That requires acknowledging and reversing the policy decisions behind the administration’s torture and mistreatment of detainees, holding accountable those responsible at all levels of government for this abuse (not just a bunch of privates and sergeants), and publicly committing to ending all forms of coercive interrogation.

These steps are necessary to reaffirm the prohibition of torture and ill treatment, to redeem Washington’s voice as a credible proponent of human rights, and to restore the effectiveness of a U. S. -led campaign against terrorism. Yet all that is easier said than done. How can President Bush and the Republican-controlled U. S. Congress be convinced to establish a fully independent investigative commission—similar to the one created to examine the attacks of September 11, 2001—to determine what went wrong in the administration’s interrogation practices and to prescribe remedial steps?

How can Attorney-General Gonzales, who as White House counsel played a central role in formulating the administration’s interrogation policy, be persuaded to recognize his obvious conflict of interest and appoint a special prosecutor charged with investigating criminal misconduct independently of the Justice Department’s direction? These are not steps that the administration or its congressional allies will take willingly. Pressure will be needed. And that pressure cannot and should not come from only the usual suspects.

The torture and abuse of prisoners is an affront to the most basic American values. It is antithetical to the core beliefs in the integrity of the individual on which the United States was founded. And it violates one of the most basic prohibitions of international law. This is not a partisan concern, not an issue limited to one part of the political spectrum. It is a matter that all Americans—and their friends around the world—should insist be meaningfully addressed and changed.

It is an issue that should preoccupy governments, whether friend or foe, as well as such international organizations and actors as Kenneth Roth 405 the UN Commission on Human Rights, Human Rights Committee, High Commissioner on Human Rights, and Special Rapporteur on Torture. Taking on the world’ssuperpoweris never easy, but it is essential if the basic architecture of international human rights law and institutions is not to be deeply compromised.

As Secretary-General Kofi Annan told the March 2005 International Summit on Democracy, Terrorism and Security: “ Upholding human rights is not merely compatible with successful counter-terrorism strategy. It is an essential element. ” 22 There is no room for torture, even in fighting terrorism; it risks undermining the foundation on which all of our rights rest. Notes Kenneth Roth is executive director of Human Rights Watch. 1. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1. . Ibid. , Art. 16. 3. See “ Malaysia: P. M’s Visit Puts Spotlight on Detainee Abuse,” Human Rights Watch News, 19 July 2004, available online at http://hrw. org/english/ docs/2004/07/19/malays9097. htm. 4. Fifty-fifth Inaugural Ceremony, 20 January 2005; see www. whitehouse. gov/inaugural. 5. Headquarters, Department of the Army, Field Manual 34-52 Intelligence Interrogation, Washington, D. C. , 28 September 1992, available online at http://atiam. train. army. mil/portal/atia/adlsc/view/public/302562-1/FM/3452/FM34\_52. PDF. 6. ‘ Torture Intelligence’ Criticized,” BBC News, 11 October 2004, available online at http://news. bbc. co. uk/1/hi/uk/3732488. stm. 7. Douglas Jehl, “ C. I. A. Is Seen as Seeking New Role on Detainees,” New York Times, 16 February 2005. 8. “ Red Double-Crossed Again,” Wall Street Journal, 2 December 2004. 9. Remarks by President Bush and His Majesty King Abdullah II of the Hashemite Kingdom of Jordan in a Press Availability, 6 May 2004, available online at www. whitehouse. gov/news/releases/2004/05/20040506-9. html. 10. Available online at http://www. rw. org/reports/2004/usa0604/. 11. Josh White and Bradley Graham, “ Senators Question Absence of Blame in Abuse Report,” Washington Post, 11 March 2005. 12. The 9/11 Commission Report, see http://a257. g. akamaitech. net/7/257/ 2422/05aug20041050/www. gpoaccess. gov/911/pdf/fullreport. pdf. 13. Testimony of Cofer Black, former director of the CIA’s Counterterrorism Center, before a joint session of the Senate and House Intelligence Committees, 26 September 2002, available online at www. fas. org/irp/congress/ 2002\_hr/092602black. tml. (“ All I want to say is that there was ‘ before’ 9/11 and ‘ after’ 9/11. After 9/11 the gloves come off. ”) 14. “ A Degrading Policy,” Washington Post, 26 January 2005; “ U. S. Justifying Abuse of Detainees,” Human Rights Watch News, 25 January 2005. 406 Getting Away with Torture 15. Human Rights Watch, The United States’ “ Disappeared”: The CIA’s Long-Term “ Ghost Detainees” (New York: Human Rights Watch, 2004), available online at www. hrw. org/backgrounder/usa/us1004/index. htm. 16. Douglas Jehl and Eric Schmitt, “ U. S.

Military Says 26 Inmate Deaths May Be Homicide,” New York Times, 16 March 2005. 17. Douglas Jehl, “ Questions Are Left by C. I. A. Chief on the Use of Torture,” New York Times, 18 March 2005. 18. Dana Priest, “ CIA’s Assurances on Transferred Suspects Doubted,” Washington Post, 17 March 2005. 19. Neil A. Lewis, “ Red Cross Finds Detainee Abuse in Guantanamo,” New York Times, 30 November 2004. 20. Memorandum to the President from Alberto R. Gonzales, 25 January 2002, available online at www. msnbc. msn. com/id/4999148/site/newsweek. “ In my judgment, this new paradigm [the war against terrorism] renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded . . . [listed] privileges. ”) 21. “ A Degrading Policy” and “ U. S. Justifying Abuse of Detainees. ” 22. Keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security, “ A Global Strategy for Fighting Terrorism,” Madrid, Spain, 10 March 2005, available online at www. un. org/apps/sg/ sgstats. asp? nid= 1345.