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Farewell to the Laws Against Torture?

The American Treatment of Detainees in the Fight Against Terrorism

Johannes Thimm

Following the nomination of Alberto Gonzales for Attorney General of the United States, the debate about the use of torture in the "Global War on Terror" has become more intense. Gonzales favors giving the President far-reaching authority in matters concerning the treatment of detainees. His hearing at the Senate provides new insight into the Administration's legal understanding of the meaning of torture. His confirmation by the Senate will allow the existing inhumane treatment of suspects held outside of the US to continue.

In the aftermath of the Abu Ghraib prison scandal, the question of whether the administration has tolerated or even authorized the abuse of prisoners has been the subject of much debate. In the meantime, a series of documents, which originated in the Departments of Justice and Defense and the White House, have been made public, exposing the interpretation of the legal limitations on torture. After President George W. Bush nominated Alberto Gonzales for Attorney General, the public's attention shifted to legal memoranda showing Gonzales' role in approving the use of psychological and physical pressure against suspected terrorists.

Gonzales' hearing before the Senate Judicial Committee and his confirmation were important for two reasons: First, the transcript of the hearing and his written responses to questions posed to him by the Senators give a clearer picture of the legal reasoning of the Administration. Second, the confirmation of Gonzales strengthens the administration's position vis-a-vis its critics. As the appearance of Gonzales in front of the Senate and documents now available to the public demonstrate, the Executive is not willing to renounce using harsh interrogation methods. By confirming Gonzales, the majority of the Senate effectively turned a blind eye to these questionable methods. American and international laws prohibiting the coercion of statements are no longer unconditionally applicable to the conduct of the Bush Administration.

The Administration's Legal Reasoning

In a series of memoranda dating from 2002, legal advisors of the Administration addressed the question of which interroga-

tion techniques can be applied to detainees in order to extract intelligence information. President Bush and Secretary of Defense Donald Rumsfeld have emphasized on various occasions that torture was neither authorized nor tolerated and that soldiers had instructions to treat prisoners humanely. At the same time, however, they permitted the creation of exceptions to this policy. On some key issues they re-interpreted the law in order for the interrogators to have the maximum leeway in the treatment of detainees.

The President, in reliance on a recommendation from Alberto Gonzales, refused to grant prisoners captured during the military intervention in Afghanistan the status of prisoners of war according to humanitarian international law and instead declared them "unlawful combatants." In a draft memorandum from January 2002, Gonzales, in his role as legal counsel for the White House, referred to the fight against terrorism as a "new paradigm," which "rendered obsolete Geneva's strict limitations on questioning of enemy prisoners." The high standard of the *Geneva Convention relative to the Treatment of Prisoners of War* of August 12 1949 (Third Geneva Convention), which states in Article 17 "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever" no longer seemed to matter.

This leaves as a point of reference the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Convention Against Torture). Its second Article clearly states that no exceptional circumstances whatsoever may be invoked as a justification for torture. In August 2002, Jay S. Bybee, Assistant Attorney General in the Justice Department's Office of the Legal Counsel, wrote a memorandum at Gonzales' request. The so-called *Bybee Memorandum* argued that in the fight against terrorism the President was not constrained by national or international laws prohibiting aggressive treatment of prisoners. Furthermore, any legislation passed by Congress, which limited the President's freedom to act, was unconstitutional. The *Bybee Memorandum* re-interprets the term torture, raising the level of abuse needed in order for conduct to constitute torture. To be considered torture, the pain caused must be "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." For psychological pressure to constitute torture it must cause psychological harm lasting months or even years. It is not only this extremely limited understanding of torture that is problematic. Equally troubling is the effort that went into distinguishing torture from cases that "only" qualify as cruel treatment, even though Article 16 of the Convention against Torture prohibits both. This distinction is evidence of a belief that inhumane treatment short of torture is acceptable. To justify this reasoning Gonzales draws on the implementation of the prohibition of torture in American law. American citizens and prisoners held within the U.S. are protected by the prohibition of "cruel and unusual punishment" in the Eighth Amendment to the Constitution. When the Senate ratified the Convention Against Torture in 1994, it made a reservation interpreting the Prohibition of "cruel, inhumane and degrading treatment" according to the term used in the Eighth Amendment. The legislation implementing the Convention Against Torture into US criminal law (*18 U.S.C. §§ 2340–2340a*) for crimes outside the U.S., only mentions *torture*. Gonzales argues that aliens held abroad have no rights under the U.S. constitution and are therefore not protected against cruel treatment. Responding to a question asked by the Senators at his confirmation hearing, he merely affirmed that the Justice Department concluded that there was no legal impediment to the cruel, inhumane, or degrading treatment of aliens held outside the U.S., refusing to comment on the legality of specific interrogation techniques.

Consequences for the Practice of Interrogation

Following the publication of the photos showing the abuse at the Abu Ghraib prison in April 2004, more and more information on prisoner abuse has surfaced. Investigations by the press, reports of human rights organizations and publicized or leaked official documents give ample evidence of abuse at the hands of members of the U.S. armed forces and intelligence agencies in Iraq, Afghanistan and at the US Naval Base in Guantanamo Bay, Cuba. The emerging picture shows that the abuse went beyond isolated instances, and was widespread and systematic. In his report from February 2004, Major General Anthony Tabuga, who was charged with investigating the situation in Abu Ghraib, lists a number of abuse cases that occurred between October and December 2003. According to his findings, some cases of abuse occurred under orders from military intelligence officers in connection with interrogations intended to obtain strategic information. An independent panel set up by the Pentagon and headed by former Secretary of Defense James R. Schlesinger concluded in August 2004 that about one third of the 150 confirmed cases of abuse took place during interrogations. Based on inspections of Iraqi prisons between March and November 2003 the International Committee of the Red Cross made strong accusations. According to a report from February 2004 the systematic nature and the extent of the application of psychological and physical pressure were "tantamount to torture." Lieutenant General Anthony Jones und Major General George Fay describe in their report that methods previously used in Guantanamo and Afghanistan were adopted in September and October 2003 for use in Iraq. For detainees in Guantanamo Bay and Afghanistan who had been labeled "unlawful combatants" Secretary of Defense Rumsfeld had already by April 2003 approved the use harsh interrogation techniques.

The interrogation techniques used in Iraq included solitary confinement, manipulation of lighting, temperatures, so-called stress positions, forced nudity, and deprivation of sleep and food for up to several days. Only interrogation specialists, not the prison guards who were members of the Military Police, were allowed to administer these techniques. The latter were bound by their Rules of Engagement (in particular U.S. Army Field Manual 34–52) and a Presidential Directive of February 7, 2002 to treat prisoners humanely. However, a high degree of confusion about these differences existed among all concerned.

The actual systematic application of violent interrogation techniques, including the particularly controversial method called water-boarding (making the prisoner think he is going to drown) was never officially confirmed, but has been widely documented. The CIA is detaining terror suspects at various facilities around the world who are not granted any right of due process and to which the International Committee of the Red Cross is denied access. In some cases, suspects were handed over to states who are known to torture, a practice known as "extraordinary rendition." Both the secret detention of prisoners without judicial review and the rendition of suspects to torturing states violate international law.

The Effect of Checks and Balances

So far the uncovering of the systematic nature of brutalizing prisoners has resulted in few political changes. In December 2004 the Department of Justice, reacting to public criticism, revised parts of the August 2002 *Bybee Memorandum* and replaced the narrow definition of torture with a broader one: In order to qualify as torture, severe pain must not necessarily reach the extent of serious injury; psychological pressure may constitute torture, even if the impact does not last months or years. But even the revised memorandum upholds the distinction between torture and inhumane treatment and does not exclude the use of the

methods below the threshold of torture. The interrogation techniques used by the Pentagon remain legal. The new memorandum explicitly does not address the question of whether the President has authority to disregard laws against torture. This question, according to the memorandum, is hypothetical because the President has stated that he would not order the use of torture.

Gonzales' hearing before the Senate has been interpreted as a referendum on the administration's interrogation policy because so many of the questions focused on prisoner abuse. While Gonzales originally had bi-partisan support, the Democrats withdrew their support over the course of the hearing because he evaded critical questions on his position regarding torture and did not condemn the application of aggressive interrogation techniques. But the Democrats chose not to use a filibuster to block his confirmation and the Republican majority in the Senate ensured a vote of 60 to 36 in his favor. Thus the Senate did not use its constitutional power to put checks on the executive to condemn the application of aggressive interrogation techniques.

Attempts by some in the Senate to pass legislation prohibiting the intelligence services from using inhumane methods have remained unsuccessful. A draft bill to that end was dropped after Condoleezza Rice –who was National Security Advisor at the time of the proposed legislation and has since been appointed Secretary of State—argued the bill would grant detainees rights, which thus far they are not entitled to and limit the possibilities to interrogate terror suspects. Congress did not want an open confrontation with the administration over the issue.

The question of whether the President can, in reliance on his powers as Commander-in-Chief, authorize the use of torture will eventually be decided by the Supreme Court. The Justices will have to determine whether laws limiting the President's autonomy in the fight against terrorism, such as the Convention Against Torture, are in fact unconstitutional. As long as the Supreme court does not the refute the judicial interpretation by the Attorney General and the administration as a whole, a change of the current practice seems unlikely.

Such a decision may take time, and its outcome cannot be predicted. In the meantime, the American conduct will continue be a concern of international politics and may increase the need for Europeans to take a position on the matter.

SWP
Stiftung Wissenschaft und Politik
German Institute for International and Security Affairs

Ludwigkirchplatz 3–4
10719 Berlin
Telephone +49 30 880 07-0
Fax +49 30 880 07-100
www.swp-berlin.org
swp@swp-berlin.org