



## By the Book: Bush's Memoirs and the Rule of Law

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The publication of President George W. Bush's memoirs<sup>1</sup> has put the American government in a sensitive legal position. By admitting in writing that he personally approved waterboarding as a policy of the government, Mr. Bush may have made a formal declaration of state-sponsored torture. This has significant consequences for him and for the United States: it creates obligations on the US government under international law and legal liability for President Bush as an individual in both the domestic and international domains.

Recognizing these obligations is not the same as concluding that President Bush is guilty of any crime. His guilt or innocence is an entirely separate question, not answerable except by a court with the appropriate jurisdiction. The issue that is raised by Mr. Bush's book relates to what legal obligations exist for the US government in light of his admissions regarding waterboarding. This is a question that exists at the point of intersection between domestic law and international law. There are several recent cases that help illuminate the formal rules of

1 George W. Bush, *Decision Points* (Crown, 2010).

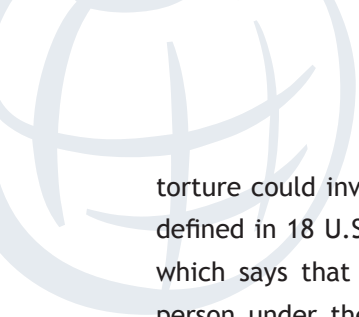
### At a glance...

- *In his memoirs, George W. Bush admits in writing that he personally approved waterboarding of some terrorism suspects.*
- *This admission raises legal problems for him as an individual and for the U.S. government, which has previously prosecuted individuals for waterboarding in both civilian and military settings.*
- *The Convention Against Torture requires that all signatory states investigate alleged offenders in their territory, regardless of their citizenship. Recent precedent suggests that heads of state are vulnerable under these laws.*

law. None of this requires that we either demonize or exculpate the individual.

### *Torture in American domestic law*

American domestic law distinguishes between “torture” as a formal legal category and other criminal acts such as murder, rape, and assault. The legal designation of torture in US criminal law applies only to acts committed abroad, although a conspiracy to commit



torture could involve actors based in the US. This is defined in 18 U.S. C. § 2340 of the US Criminal Code which says that torture is “an act committed by a person under the color of law specifically intended to inflict severe pain and suffering.” It calls for punishments up to twenty years in jail, or life in jail if the victim dies as a result.

This is the section of law that was recently applied in Miami federal court against “Chuckie” Taylor, the American son of former Liberian leader Charles Taylor. Chuckie Taylor organized and participated in torture and other crimes in Liberia and was arrested upon his return to the United States. Similar behaviors committed within the US would be prosecuted under the more general headings of murder and assault, or (when organized by the government) under the Eighth Amendment prohibiting “cruel and unusual punishments.” Foreigners found guilty of torture can also face expulsion from the US under new rules in the Immigration and Nationality Act. Taylor, as a US citizen, could not be expelled and was sentenced to 97 years in prison.

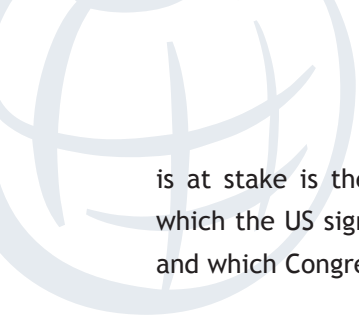
Waterboarding is unquestionably within the definition of torture, and American courts have consistently convicted people for it. The issue has come up at military tribunals, in civilian courts, and at international tribunals, and the US has maintained in all these settings that waterboarding is a crime: A US soldier was court-martialed for waterboarding prisoners in Vietnam; a Texas sheriff was convicted for it in 1983 and sentenced to 10 years in prison; Japanese officers at the Tokyo Tribunal after World War II were convicted of war crimes for it. The State Department routinely criticizes other countries for allowing the use of water torture, as it did recently in 2005 while critiquing Tunisia’s human-rights situation. The US Attorney General recently reaffirmed that waterboarding is torture, as has the International Committee of the Red Cross, as well as the British and other governments. There is no serious controversy over this.

The criminality of the act is not mitigated by the intent of the perpetrator. There is nothing in the law to make it relevant whether the torture was conducted to intimidate political opponents, to extract information, or to drive people from their towns. In fact, the intent of the law is precisely to deal with people who believe that their political objectives justify gross violations of human rights. It is designed to deter and to punish politically motivated abuse, regardless of the perpetrator’s political objectives and their self-styled sense of emergency. Thus, it was no help to Augusto Pinochet to claim that torturing his opponents was necessary to avert a Marxist threat to the country; it did not help “Comrade Duch” in Cambodia to claim that the Tuol Seng prison contributed to law and order after the Khmer Rouge revolution. The claim that waterboarding is a means to an end, perhaps even an unpleasant means to a vital end, can be quickly rejected as a matter of law.

As a formal legal matter, therefore, to admit to waterboarding is an act of great consequence, and President Bush has made this move. It provides prima facie evidence of criminal culpability and opens the usual paths to criminal prosecution in the US and in other jurisdictions around the world. One likely consequence is foreshadowed by the experience of Augusto Pinochet: any country which President Bush seeks to visit in the future is likely to precede his visit by considering its own laws on torture to assess whether he should be arrested upon arrival.

### *Torture in International Law*

Torture is a crime with a very specific place in international law, and the US government has made commitments in the past as to how it will treat those suspected of using torture abroad. Here, the legal jeopardy is for the US government as a whole rather than for Mr. Bush as an individual, in the sense that failing to live up to these commitments would entail a violation by the US government of its obligations under international law. The primary document that



is at stake is the Convention Against Torture (CAT), which the US signed in 1988 under President Reagan, and which Congress ratified in 1994.

The Convention Against Torture commits its signatory states to certain obligations which are relevant in light of Mr. Bush's book, and none of the American reservations to the treaty seriously alter these obligations. First, it says that states "shall ensure that all acts of torture are offenses under criminal law." This includes "an act by any person which constitutes complicity or participation in torture." This the US has done, with the relevant articles on torture in the criminal code, and with the criminalization of the acts which constitute torture (even if not under that name).

Second, it says "Each state party shall ensure that its competent authorities proceed in a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed." This remains an open question, and one which Mr. Bush's admissions in his book bring to the fore. The most reasonable legal interpretation is that President Bush has essentially provided these "reasonable grounds" and thus has activated this part of the CAT for the United States. The Obama administration has, entirely without its choosing, found itself bound by this language of the Torture Convention. To do nothing in response would constitute a violation of its obligations under the convention.

International law is an odd creature: it represents legally binding commitments among states, but almost every commitment is entirely voluntary. That is, countries can pick and choose which international treaties to sign, and therefore choose what obligations to take on. For example, the Comprehensive Test Ban Treaty centers on the promise "not to carry out any nuclear weapon test explosion or any other nuclear explosion." The United Kingdom has ratified this treaty and so this obligation is binding on the UK. The United States has not. The net effect is that

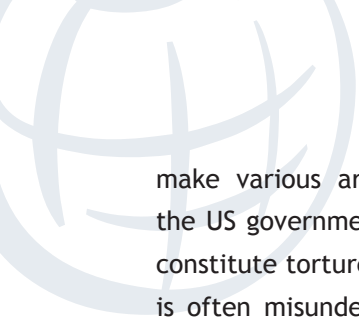
there exists in international law a rule against making nuclear explosions but the rule does not apply to the United States. Britain would be violating the law if it conducted a nuclear explosion but the same behavior by the United States would be lawful.

Having made the commitment to the Convention Against Torture, the United States is obligated to comply with it. If one believes in the rule of law in international politics, this is an important obligation. Failure to "proceed in a prompt and impartial investigation" therefore leads to two further implications: first, the way is opened for other parties to the Torture Convention to bring the dispute to the International Court of Justice, which is the venue for cases where states renege on their commitments; and second, other parts of the Convention Against Torture come into effect. All states that have signed the treaty have an equal obligation to investigate acts of torture, and Article 6 says that any state that finds a suspect in its territory has an obligation to "take him into custody... only for such time as is necessary to enable any criminal or extradition proceedings to be instituted." Without further American action on the case, other countries are obligated to step in and provide accountability, though only "where the alleged offender is present in any territory under its jurisdiction." Legal institutions in other CAT countries will be required to consider this obligation should Mr. Bush arrive in their jurisdictions.

### *A President's Special Status: Three Legal Detours*

As a former head of state, three further issues arise in the case of President Bush: these relate to his legal counsel, his bureaucratic distance from the act of torture, and the idea of head-of-state immunity in international customary law.

Much of the recent debate over the legal implications of torture centers on the "torture memos" produced by the US government under President Bush. These



make various arguments for why the practices of the US government, including waterboarding, do not constitute torture. The legal effect of these writings is often misunderstood – in the end they make no meaningful contribution to Mr. Bush’s defense. The memos can rightly be seen as interpretations of the law provided by counsel to a client, and as such they do not by themselves make the law.

The argument that the memos can insulate senior officials from prosecution for criminality is vacuous. A memo from the Justice Department cannot make something that is illegal into something that is legal – the law stands as something apart from the self-serving interpretations of lawyers and their clients. It must be so if the rule of law is to have any meaning. Lawyers often give their clients erroneous advice on the meaning of law and courts remedy those errors by convicting their clients – a person exposed to such a situation suffers the consequences of having hired a bad lawyer. Torture (and waterboarding specifically) was illegal before, during, and after the Bush administration. Bad lawyering cannot change that.

Second, President Bush approved the policy of waterboarding but did not participate in its execution. This means that his liability, if any, rests on command responsibility or conspiracy rather than practice. These are well-known categories of criminality, and in international criminal practice the President’s distance from the act of torture does not change greatly the nature of his legal liability. Several recent treaties on the prosecution of torture and crimes against humanity make specific reference to responsibilities of commanders and senior officials, recognizing that it is often the most senior political and military leaders who should be held accountable for atrocities committed by lower-level actors. The International Criminal Court statute makes it clear that one who “orders, solicits, or induces the commission of a crime” is responsible equally with those who carry it out. The rules of the tribunals on Rwanda and the former Yugoslavia were similarly constructed.

More useful for Mr. Bush’s defense, at least against charges in other countries, is the principle of immunity for senior government officials. Heads of state have long enjoyed certain kinds of immunity from prosecution in domestic and foreign courts. These were thought to attach to the office of the individual and to the individual him- or herself, and to be necessary for peaceful diplomacy among nations. A recent case at the International Court of Justice affirmed that the foreign minister of Congo, Abdulaye Yerodia Ndombasi, could not be arrested in Belgium for having incited genocide in Congo. The Court reasoned that because states have long treated visiting senior government officials as immune from local criminal jurisdiction, this practice had taken on the quality of law and it should be respected in this and future cases. Mr. Bush might well claim the same principle in his defense.

This defense is limited, however, and has failed to rescue several former leaders in recent years. The Prime Minister of Cambodia, Hun Sen, failed to convince the US District Court for the Southern District of New York that head-of-state immunity should trump a civil suit by his torture victims. Charles Taylor of Liberia, Slobodan Milosovic in Yugoslavia, and most famously Augusto Pinochet all ended up facing criminal proceedings outside their home country. Recent practice suggests that head-of-state immunity is receding in the face of criminal responsibility for crimes against humanity and war crimes, such that the contours of immunity are increasingly unclear.

In Pinochet’s case, the British House of Lords decided that the Convention Against Torture took precedence over the customary law of immunity and therefore the latter was not available to the former General. It ordered that he be extradicted to Spain to face torture charges (his medical condition prevent the order from being carried out and he died in London in 2006). The International Criminal Court statute rejects the concept of immunity entirely, as do other important recent criminal tribunals. The ICC says

“This Statute shall apply equally to all persons without distinction based on official status.” These tribunals are not relevant to President Bush because they have no jurisdiction in this case, but their contribution to the evolving custom and practice of immunity may be significant. It is unlikely that the ICJ would come to the same conclusion regarding the practice of immunity for Mr. Yerodia if it were asked the same question today. How Mr. Bush’s behavior sits in relation to customary law on immunity is unknowable until it is determined by a judicial body, in the US or abroad.

The international legal regime on torture is well developed and clear. It encompasses the 147 countries that are parties to the Convention Against Torture, and in these states three things are certain: torture is defined as a crime by domestic criminal law; the government is committed to investigating and where necessary prosecuting its citizens; the government is legally obligated to investigate foreigners who are suspected of torture and to extradite or prosecute those where the evidence compels. Bush’s memoirs do not go further in substance than his previous informal statements about waterboarding and torture. But the book has the legal effect of providing a formal, self-implicating statement, made presumably without duress and without claiming immunity. It means that he has placed himself in the category of individuals for whom the details of domestic and international laws on torture are very important indeed. 🌐

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