Sins of Commission

For Bush, being tough on terror requires torture, secret prisons, and no accountability.

By James Bovard

HAVE REPUBLICANS become the party of torture, secret prisons, and indefinite detention? In his speech last month on signing the Military Commissions Act (MCA), President Bush declared that the bill "sends a clear message. ... We will never back down from the threats to our freedom." "Rough interrogation" (a.k.a. torture) in the name of freedom may be Bush's clearest ideological legacy.

The president endlessly reminds listeners that "the U.S. does not torture" and that "torture is not an American value." But "What is torture?" is the Bush version of the Pontius Pilate question. He appears to be using the definition of torture crafted by Justice Department official John Yoo: if detainees weren't maimed or killed, they weren't tortured. And the Justice Department acts as though, even if detainees are killed during interrogations, it is best to treat the deaths as harmless errors.

The MCA was rushed through Congress in September to overturn a Supreme Court decision that struck down Bush's military tribunals and his scorning of the Geneva Conventions. The new law—far more dangerous than the more controversial Patriot Act—is perhaps the biggest disgrace Congress has enacted since the Fugitive Slave Act of 1850. Stephen Gray, the author of *Ghost Plane*, notes, "The act grants fewer rights to defendants than the Nazis got at Nuremberg."

The new law awards Bush power to label anyone on earth an enemy combatant and lock him up in perpetuity, nullifying the habeas corpus provision of the Constitution and "turning back the clock 800 years," as Sen. Arlen Specter (R-Pa.) said. While only foreigners can be tried before military tribunals, Americans accused of being enemy combatants can be detained indefinitely without charges and without appeal. Even though the Pentagon has effectively admitted that many of the people detained at Guantanamo were wrongfully seized and held, the MCA presumes that the president of the United States is both omniscient and always fair.

Instead of clear standards established by the legislature, the president decrees what methods of brutalizing detainees are allowed, regardless of the Geneva Conventions or the U.S. Anti-Torture Act. As Yale law professor Jack Balkin notes, "The President has created a new regime in which he is a law unto himself on issues of prisoner interrogations. He decides whether he has violated the laws, and he decides whether to prosecute the people he in turn urges to break the law." White House press spokesman Tony Snow agreed that this law makes Bush the "final arbiter on torture."

Though U.S. government interrogation methods have been intensely controversial around the world, most congressmen looked the other way and rubber-stamped Bush's legislative wish list. The *Boston Globe* reported in September that "because of the Bush administration's restrictive policy on sharing classified information with Congress, very few of the people engaged in the debate will know what they're talking about." Sen. Jeff Sessions (R-Ala.) epitomized the prevailing righteous ignorance when he declared, "I don't know what the CIA has been doing, nor should I know." The less they know, the easier it is for Republican congressmen to deny government wrongdoing.

Since the end of the Middle Ages, civilized nations have frowned on relying on brute force to determine facts in judicial proceedings. But Monty Python appears to be the patron saint of the MCA. "Evidence" gained via coercion is admissible as long as a military judge deigns that the methods used did not rise to torture. Military commissions can accept "evidence" produced by interrogations that violated "cruel, unusual or inhumane treatment" standards—as long as such abuses occurred before Dec. 30, 2005, when Congress passed the Detainee Treatment Act. (Bush effectively vetoed this law with a signing statement.) It was nice that Congress formally picked a date for the rebirth of decency, but it doesn't have sticking power.

The Bush team is exploiting fears about national security to practically guarantee the use of tortured confessions. For example, the Justice Department has asked a federal judge to prohibit defendant Majid Khan, a former Catonsville, Md. resident who was nabbed in Pakistan, from revealing to anyone—even his defense attorney—the interrogation methods he endured. A Justice Department spokeswoman claimed that letting Khan discuss his interrogation with his lawyer "is inadequate to protect unique and potentially highly classified information that is vital

to our country's ability to fight terrorism." Thus the feds can use whatever Khan said against him while hiding the methods that made him squeal.

The MCA creates procedural biases akin to a 1938 Moscow show trial. Defense attorneys can "challenge the use of hearsay information obtained through coercive interrogations in distant countries only if they can prove it is unreliable," the *Washington Post* noted. But it will be almost impossible to disprove an accusation when a defense lawyer is not allowed to question—or perhaps even know—who made the charge.

From early 2002, some high-ranking Bush administration officials have apparently feared that they could face prosecution for their interrogation policies. But the MCA retroactively decriminalized torture—at least such actions committed before the end of 2005. The act will make it almost impossible for victims of torture (or their survivors) to bring cases against perpetrators. The closest precedent for this blanket pardon comes not from American justice but from the amnesty laws Latin American regimes enacted to immunize military officials who carried out bloody crackdowns against leftists in the 1970s and 1980s.

Like an old-time Southern segregationist campaign, the Republican Party has proceeded to portray any congressmen who failed to vote for the MCA as a "terrorist lover." House Speaker Dennis Hastert (R-Ill) claimed that Democrats had "voted in favor of new rights for terrorists," and House Majority Leader John Boehner declared that Democrats "voted against bringing the most dangerous terrorists to justice." The National Republican Senatorial Committee denounced incumbent Democrats who voted against suspending habeas corpus for having "sided with trial lawyers and terrorists." After Bush signed the bill, a Republican National Committee press release was headlined, "Democrats would let terrorists free."

Throughout the fall campaign, the GOP used the MCA to flaunt its "tough on terrorism" message. At a "Texas Victory Rally" on Oct. 30, Bush declared, "When it came time to vote on whether or not to allow the CIA to continue its program to detain and question captured terrorists, more than 80 percent of House Democrats voted against it." Bush coached the audience to respond to his questions as if the event were a giant DARE rally. The president asked, "When it comes to questioning terrorists, what's the Democrat's answer?" The audience roared, "Just say no!"

Aside from Bush and other Republicans' dishonest taunts of Democrats, torture was a non-issue in congressional campaigns. The *New York Times* noted, "In a season of shameless attack ads, torture is still too shameful to be debated." Few, if any, Democratic candidates had enough confidence in themselves or the voters to highlight the Bush administration's worst abuse of power.

That doesn't mean, however, that they won't use the investigative powers their new majority affords. For though Bush rhetorically takes the high ground on the torture issue, it now appears that the president may personally have blood on his hands. On Nov. 14, the ACLU released a CIA letter confirming the existence of "a directive signed by President Bush granting the CIA the authority to set up detention facilities outside the United States and outlining interrogation methods that may be used against detainees." This confirms a May 2004 e-mail from the FBI's "On Scene Commander" in Baghdad stating that U.S. military officials in Iraq assured him that a secret presidential executive order permitted extreme interrogation techniques considered illegal by the FBI including "sensory deprivation through the use of hoods," stress positions, and military dogs.

The Justice Department has so far blocked release of the actual document, but a federal judge may force the feds to cough it up. Sen. Patrick Leahy (D-Vt.), the incoming chairman of the Senate Judiciary Committee, is also demanding to see the document. If this Bush letter does hit the streets, it may be akin to a 1972 memo from Richard Nixon specifying the exact methods of lock-picking the Watergate burglars should use. Bush's involvement in the torture scandal may be far deeper than Nixon's involvement in Watergate.

The Bush secret ruling on interrogation methods may explain the Justice Department's passivity on torture cases. The CIA Inspector General recommended that the Justice Department prosecute a CIA agent involved in the demise of an Iraqi detainee at Abu Ghraib. As *The New Yorker* reported, Manadel al-Jamadi died during an interrogation in which his head was covered in a plastic bag and he was "shackled in a crucifixion-like pose that inhibited his ability to breathe." This was one of at least eight cases the CIA referred for prosecution, including cases of homicides during CIA interrogations in Afghanistan and Iraq. But the Justice Department refuses to prosecute any of the alleged torturers. The feds cannot bring charges against CIA agents without risking public disclosure of the presidential order authorizing the torture of detainees.

As long as the Justice Department doesn't prosecute federal torturers, Bush can continue denying U.S. torture. People killed during interrogations thus remain the exceptions that prove the rule that the U.S. never tortures. The military classified the deaths of at least 34 detainees as suspected or confirmed homicides; the CIA has released no tally of its morgue entries.

The New Yorker noted, "under the Bush administration's secret interrogation guidelines, the killing of Jamadi might not have broken any laws." Unfortunately, there is no reason to assume that Bush has not given interrogators a license to kill. Steven Bradbury, head of the Justice Department's Office of Legal Counsel, told a closed session of the Senate Intelligence Committee early this year that Bush could order killings of suspected terrorists within the United States. When *Newsweek* contacted the Justice Department to verify this novel legal doctrine, spokeswoman Tasia Scolinos stressed that Bradbury's comments occurred during an "off-the-record briefing." Any Bush-ordered killings within the United States would also presumably be off the record.

President Bush has been able to seize nearly boundless power because his administration has been able to control what Americans know. But this control is crumbling. Democratic congressional investigations, court cases, and the military tribunals themselves could unearth far more damaging documents and photographs than anything seen thus far.

The MCA is "enabling act" legislation that preserves the appearance of law while empowering the commander in chief to do as he pleases. Bush's torture policies may signal that he accepts the dicta of Richard Nixon: "When the president does it, that means that it is not illegal." But the firewall of high approval ratings that buttressed Bush when the first Abu Ghraib photos leaked is gone. The media is exasperated with the administration's penchant for secrecy. Much of Bush's conservative intellectual bodyguard has given up the fight. It remains to be seen how much dunking, thumping, and cold water the Bush team can survive. ■

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Prisoners' Dilemma

Indefinite detention of terrorist suspects poses a challenge to America's most valuable legal traditions.

By Gerald J. Russello

THE RECENTLY ENACTED Military Commissions Act and the Supreme Court *Hamdi* and *Hamdan* decisions, which tried to limit the suspension of the protections of habeas corpus, have spurred a new series of debates on the somewhat technical legal area of habeas corpus. The Great Writ, as it was known, stands for a very simple principle: power does not trump. A government may wish to detain someone secretly, perhaps indefinitely, and may believe it has good reasons to do so, but in the Anglo-American legal tradition, that is not good enough. As the Supreme Court stated in 1969, the writ is "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." The government therefore has to "produce the body for examination," as the translation of the full Latin tag put it, before a magistrate and justify the reasons for the person's detention.

The position announced in the MCA and its related statutes may or may not be bad policy for defeating terrorism, but it certainly undermines a key component of free government. Government must in the normal course act in the open and must be held to a standard of reasonableness as to its actions, including being forced to explain why it has decided to detain someone. In the American legal tradition, and more broadly that of the West in general, providing the protections of habeas corpus has been a mark of civilizational achievement and we rightly consider those countries that do not do this to be less developed.

Americans across the political spectrum support the general principle of habeas corpus, but the war on terror has created opposing views about its application. On the one hand, some, mostly conservatives, have supported the government's authority to hold possible enemy combatants in foreign countries or at home without charge or judicial process. For them, the exigencies of the new threats to our safety justify reconsideration of traditional civil liberties. Others, generally liberals, have sought to extend the Constitution's guarantee of habeas corpus to anyone brought within the power of the American government, even non-citizens captured in military operations abroad. For this side, the war on terror is analogized to the civil-rights movement and seen as another area for expansion of rights beyond their traditional scope.

While both sides are playing to their respective bases, the dispute is real, and each side has legitimate arguments to which it can turn. It is clear, however, that no one had thought out the situation that has led to the MCA beforehand. This is especially the case for those supporting the war, for whom the conquest would be a "cakewalk" and the possibility of holding persons for over three years in military facilities, if ever considered, was never stated publicly. As a result of its invasions of Iraq and Afghanistan, the United States is now