

by agreeing to bolster security: have outside security audits every other year for the next 20 years, encrypt stored and transported data, set time limits on how long data is stored, and install better wireless security. Congress should take a page from BJ's settlement and push to strengthen security for institutions that handle large amounts of data. While compliance will cost money up front, the investment will help reduce the costs of lost data in the future and increase consumer confidence.

At least one of the bills in Congress envisions giving the FTC an additional \$60 million per year to help identify theft victims. But this is a pittance compared with the billions lost to identity theft every year. Congress is also considering allowing consumers to freeze access to their credit reports. Under credit freezes, which are already allowed in a dozen or so states, no new credit can be issued under an individual's name until the consumer lifts the freeze, a much stronger protection than fraud alerts or notification requirements.

But Peter Swire, chief privacy counselor under President Clinton, has suggested what might be the most compelling solution—a \$50 cap and automatic dispute resolution for identity theft losses, similar to the basic anti-fraud provisions for credit cards. If a criminal steals your credit card number, the card issuer pays for unauthorized purchases above \$50 and investigates disputed charges. Once credit card companies were put on the hook for fraud losses in the 1970s, they found ways to cut fraud dramatically. To be

sure, a \$50 rule for identity theft would be more difficult. Identity thieves target not only credit cards, but also car loans, home loans, and bank accounts, as well as identification and travel documents. When credit cards are stolen, consumers simply call the issuer of their card. With identity theft, the responsible party is far less clear. The company or agency that lost the data? The institution that made the loan or issued false documents? Credit reporting agencies? Some federal agency?

Although there are challenges in designing such a system for identity theft, the idea is still promising: Have the big organizations in the middle of the system address the fraud, and don't let all the costs fall on innocent victims.

For any solution to work, it must dramatically shift liability to data owners while better protecting consumers. The bills before Congress fail on this front. Business interests want to keep using data to grow profits, and they will continue to lobby in favor of self-regulation, as they have for years. Homeland security officials want to use more data to aid counterterrorism efforts, and politicians want to use more data to win elections. What will it take for Congress to do the right thing? Maybe the best thing that could happen would be for someone to take Leahy's lost data problem one step further and actually steal his identity, too. And, while they're at it, they should also steal Senator Bill Frist's identity—just to ensure bipartisan support. ■

Saving the United States from a totalitarian future.

The Abolition of Torture

BY ANDREW SULLIVAN

WHY IS TORTURE WRONG? It may seem like an obvious question, or even one beneath discussion. But it is now inescapably before us, with the introduction of the McCain Amendment banning all “cruel, inhuman, and degrading treatment” of detainees by American soldiers and CIA operatives anywhere in the world. The amendment lies in legislative limbo. It passed the Senate in October by a vote of 90 to nine, but President Bush has vowed to veto any such blanket ban on torture or abuse; Vice President Cheney has prevailed upon enough senators and congressmen to prevent the amendment—and the defense appropriations bill to which it is attached—from moving out of conference; and my friend Charles Krauthammer, one of the most respected conservative intellectuals in Washington (and a *NEW REPUBLIC* contributing editor) has written a widely praised cover essay for *The Weekly Standard* endors-

ing the legalization of full-fledged torture by the United States under strictly curtailed conditions. We stand on the brink of an enormously important choice—one that is critical, morally as well as strategically, to get right.

This debate takes place after three years in which the Bush administration has defined “torture” in the narrowest terms and has permitted coercive, physical abuse of enemy combatants if “military necessity” demands it. It comes also after several internal Pentagon reports found widespread and severe abuse of detainees in Afghanistan, Iraq, and elsewhere that has led to at least two dozen deaths during interrogation. Journalistic accounts and reports by the International Committee of the Red Cross paint an even darker picture of secret torture sites in Eastern Europe and innocent detainees being murdered. Behind all this, the grim images of Abu Ghraib—the worst of which have yet to be released—linger in the public consciousness.

In this inevitably emotional debate, perhaps the greatest failing of those of us who have been arguing against all tor-

ture and “cruel, inhuman, and degrading treatment” of detainees is that we have assumed the reasons why torture is always a moral evil, rather than explicating them. But, when you fully ponder them, I think it becomes clearer why, contrary to Krauthammer’s argument, torture, in any form and under any circumstances, is both antithetical to the most basic principles for which the United States stands and a profound impediment to winning a wider war that we cannot afford to lose.

TORTURE IS THE polar opposite of freedom. It is the banishment of all freedom from a human body and soul, insofar as that is possible. As human beings, we all inhabit bodies and have minds, souls, and reflexes that are designed in part to protect those bodies: to resist or flinch from pain, to protect the psyche from disintegration, and to maintain a sense of selfhood that is the basis for the concept of personal liberty. What torture does is use these involuntary, self-protective, self-defining resources of human beings against the integrity of the human being himself. It takes what is most involuntary in a person and uses it to break that person’s will. It takes what is animal in us and deploys it against what makes us human. As an American commander wrote in an August 2003 e-mail about his instructions to torture prisoners at Abu Ghraib, “The gloves are coming off gentlemen regarding these detainees, Col. Boltz has made it clear that we want these individuals broken.”

What does it mean to “break” an individual? As the French essayist Michel de Montaigne once commented, and Shakespeare echoed, even the greatest philosophers have difficulty thinking clearly when they have a toothache. These wise men were describing the inescapable frailty of the human experience, mocking the claims of some seers to be above basic human feelings and bodily needs. If that frailty is exposed by a toothache, it is beyond dispute in the case of torture. The infliction of physical pain on a person with no means of defending himself is designed to render that person completely subservient to his torturers. It is designed to extirpate his autonomy as a human being, to render his control as an individual beyond his own reach. That is why the term “break” is instructive. Something broken can be put back together, but it will never regain the status of being unbroken—of having integrity. When you break a human being, you turn him into something subhuman. You enslave him. This is why the Romans reserved torture for slaves, not citizens, and why slavery and torture were inextricably linked in the antebellum South.

What you see in the relationship between torturer and tortured is the absolute darkness of totalitarianism. You see one individual granted the most complete power he can ever hold over another. Not just confinement of his mobility—the abolition of his very agency. Torture uses a person’s body to remove from his own control his conscience, his thoughts, his faith, his selfhood. The CIA’s definition of “waterboarding”—recently leaked to ABC

News—describes that process in plain English: “The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner’s face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt.” The ABC report then noted, “According to the sources, CIA officers who subjected themselves to the waterboarding technique lasted an average of 14 seconds before caving in. They said Al Qaeda’s toughest prisoner, Khalid Sheikh Mohammed, won the admiration of interrogators when he was able to last between two and two and a half minutes before begging to confess.”

Before the Bush administration, two documented cases of the U.S. Armed Forces using “waterboarding” resulted in courts-martial for the soldiers implicated. In Donald Rumsfeld’s post-September 11 Pentagon, the technique is approved and, we recently learned, has been used on at least eleven detainees, possibly many more. What you see here is the deployment of a very basic and inescapable human reflex—the desire not to drown and suffocate—in order to destroy a person’s autonomy. Even the most hardened fanatic can only endure two and a half minutes. After that, he is indeed “broken.”

THE ENTIRE STRUCTURE of Western freedom grew in part out of the searing experience of state-sanctioned torture. The use of torture in Europe’s religious wars of the sixteenth and seventeenth centuries is still etched in our communal consciousness, as it should be. Then, governments deployed torture not only to uncover perceived threats to their faith-based autocracies, but also to “save” the victim’s soul. Torturers understood that religious conversion was a difficult thing, because it necessitated a shift in the deepest recesses of the human soul. The only way to reach those depths was to deploy physical terror in the hopes of completely destroying the heretic’s autonomy. They would, in other words, destroy a human being’s soul in order to save it. That is what burning at the stake was—an indescribably agonizing act of torture that could be ended at a moment’s notice if the victim recanted. In a state where theological doctrine always trumped individual liberty, this was a natural tactic.

Indeed, the very concept of Western liberty sprung in part from an understanding that, if the state has the power to reach that deep into a person’s soul and can do that much damage to a human being’s person, then the state has extinguished all oxygen necessary for freedom to survive. That is why, in George Orwell’s totalitarian nightmare, the final ordeal is, of course, torture. Any polity that endorses torture has incorporated into its own DNA a totalitarian mutation. If the point of the U.S. Constitution is the preservation of liberty, the formal incorporation into U.S. law of the state’s right to torture—by legally codifying physical coercion, abuse, and even, in Krauthammer’s case, full-fledged torture of detainees by the CIA—would effectively end the

American experiment of a political society based on inalienable human freedom protected not by the good graces of the executive, but by the rule of law.

The founders understood this argument. Its preeminent proponent was George Washington himself. As historian David Hackett Fischer memorably recounts in his 2004 book, *Washington's Crossing*: "Always some dark spirits wished to visit the same cruelties on the British and Hessians that had been inflicted on American captives. But Washington's example carried growing weight, more so than his written orders and prohibitions. He often reminded his men that they were an army of liberty and freedom, and that the rights of humanity for which they were fighting should extend even to their enemies. . . . Even in the most urgent moments of the war, these men were concerned about ethical questions in the Revolution."

Krauthammer has described Washington's convictions concerning torture as "pieties" that can be dispensed with today. He doesn't argue that torture is not evil. Indeed, he denounces it in unequivocal moral terms: "[T]orture is a terrible and monstrous thing, as degrading and morally corrupting to those who practice it as any conceivable human activity including its moral twin, capital punishment." But he maintains that the nature of the Islamofascist enemy after September 11 radically altered our interrogative options and that we are now not only permitted, but actually "morally compelled," to torture.

This is a radical and daring idea: that we must extinguish human freedom in a few cases in order to maintain it for everyone else. It goes beyond even the Bush administration's own formal position, which states that the United States will not endorse torture but merely "coerce interrogation techniques." (Such techniques, in the administration's elaborate definition, are those that employ physical force short of threatening immediate death or major organ failure.) And it is based on a premise that deserves further examination: that our enemies actually *deserve* torture; that some human beings are so depraved that, in Krauthammer's words, they "are entitled to no humane treatment."

Let me state for the record that I am second to none in decrying, loathing, and desiring to defeat those who wish to replace freedom with religious tyranny of the most brutal kind—and who have murdered countless innocent civilians in cold blood. Their acts are monstrous and barbaric. But I differ from Krauthammer by believing that monsters remain human beings. In fact, to reduce them to a subhuman level is to exonerate them of their acts of terrorism and mass murder—just as animals are not deemed morally responsible for killing. Insisting on the humanity of terrorists is, in fact, critical to maintaining their profound responsibility for the evil they commit.

And, if they are human, then they must necessarily not be treated in an inhuman fashion. You cannot lower the moral baseline of a terrorist to the subhuman without betraying a fundamental value. That is why the Geneva Conventions have a very basic ban on "cruel treatment and tor-

ture," and "outrages upon personal dignity, in particular humiliating and degrading treatment"—even when dealing with illegal combatants like terrorists. That is why the Declaration of Independence did not restrict its endorsement of freedom merely to those lucky enough to find themselves on U.S. soil—but extended it to all human beings, wherever they are in the world, simply because they are human.

NEVERTHELESS, IT IS important to address Krauthammer's practical points. He is asking us to steel ourselves and accept that, whether we like it or not, torture and abuse may be essential in a war where our very survival may be at stake. He presents two scenarios in which he believes torture is permissible. The first is the "ticking bomb" scenario, a hypothetical rarity in which the following conditions apply: a) a terrorist cell has planted a nuclear weapon or something nearly as devastating in a major city; b) we have captured someone in this cell; c) we know for a fact that he knows where the bomb is. In practice, of course, the likelihood of such a scenario is extraordinarily remote. Uncovering a terrorist plot is hard enough; capturing a conspirator involved in that plot is even harder; and realizing in advance that the person knows the whereabouts of the bomb is nearly impossible. (Remember, in the war on terrorism, we have already detained—and even killed—many innocents. Pentagon reports have acknowledged that up to 90 percent of the prisoners at Abu Ghraib, many of whom were abused and tortured, were not guilty of anything.) But let us assume, for the sake of argument, that all of Krauthammer's conditions apply. Do we have a right to torture our hypothetical detainee?

According to Krauthammer, *of course* we do. No responsible public official put in that position would refuse to sanction torture if he believed it could save thousands of lives. And, if it's necessary, Krauthammer argues, it should be made legal. If you have conceded that torture may be justified in one case, Krauthammer believes, you have conceded that it may be justified in many more. In his words, "Once you've established the principle, to paraphrase George Bernard Shaw, all that's left to haggle about is the price."

But this is too easy and too glib a formulation. It is possible to concede that, in an extremely rare circumstance, torture may be used without conceding that it should be legalized. One imperfect but instructive analogy is civil disobedience. In that case, laws are indeed broken, but that does not establish that the laws should be broken. In fact, civil disobedience implies precisely that laws should *not* be broken, and protesters who engage in it present themselves promptly for imprisonment and legal sanction on exactly those grounds. They do so for demonstrative reasons. They are not saying that laws don't matter. They are saying that laws do matter, that they should be enforced, but that their conscience in this instance demands that they disobey them.

In extremis, a rough parallel can be drawn for a president faced with the kind of horrendous decision on which Krauthammer rests his entire case. What should a president

do? The answer is simple: He may have to break the law. In the Krauthammer scenario, a president might well decide that, if the survival of the nation is at stake, he must make an exception. At the same time, he must subject himself—and so must those assigned to conduct the torture—to the consequences of an illegal act. Those guilty of torturing another human being must be punished—or pardoned ex-post-facto. If the torture is revealed to be useless, if the tortured man is shown to have been innocent or ignorant of the information he was tortured to reveal, then those responsible must face the full brunt of the law for, in Krauthammer's words, such a "terrible and monstrous thing." In Michael Walzer's formulation, if we are to have dirty hands, it is essential that we show them to be dirty.

What Krauthammer is proposing, however, is not this compromise, which allows us to retain our soul as a free republic while protecting us from catastrophe in an extremely rare case. He is proposing something very different: that our "dirty hands" be wiped legally clean before and after the fact. That is a Rubicon we should not cross, because it marks the boundary between a free country and an unfree one.

Krauthammer, moreover, misses a key lesson learned these past few years. What the hundreds of abuse and torture incidents have shown is that, once you permit torture for someone somewhere, it has a habit of spreading. Remember that torture was originally sanctioned in administration memos only for use against illegal combatants in rare cases. Within months of that decision, abuse and torture had become endemic throughout Iraq, a theater of war in which, even Bush officials agree, the Geneva Conventions apply. The extremely coercive interrogation tactics used at Guantánamo Bay "migrated" to Abu Ghraib. In fact, General Geoffrey Miller was sent to Abu Ghraib specifically to replicate Guantánamo's techniques. According to former Brigadier General Janis Karpinski, who had original responsibility for the prison, Miller ordered her to treat all detainees "like dogs." When Captain Ian Fishback, a West Point graduate and member of the 82nd Airborne, witnessed routine beatings and abuse of detainees at detention facilities in Iraq and Afghanistan, often for sport, he tried to stop it. It took him a year and a half to get any response from the military command, and he had to go to Senator John McCain to make his case.

In short, what was originally supposed to be safe, sanctioned, and rare became endemic, disorganized, and brutal. The lesson is that it is impossible to quarantine torture in a hermetic box; it will inevitably contaminate the military as a whole. Once you have declared that some enemies are subhuman, you have told every soldier that every potential detainee he comes across might be exactly that kind of prisoner—and that anything can therefore be done to him. That is what the disgrace at Abu Ghraib proved. And Abu Ghraib produced a tiny fraction of the number of abuse, torture, and murder cases that have been subsequently revealed. The only way to control torture is to ban it outright. Everywhere. Even then, in wartime, some "bad apples" will

always commit abuse. But at least we will have done all we can to constrain it.

KRAUTHAMMER'S SECOND CASE for torture is equally unpersuasive. For "slow-fuse" detainees—high-level prisoners like Khalid Sheikh Mohammed with potentially, if not immediately, useful intelligence—Krauthammer again takes the most extreme case and uses it to establish a general rule. He concedes that torture, according to almost every careful student and expert, yields highly unreliable information. Anyone can see that. If you are screaming for relief after a few seconds of waterboarding, you're likely to tell your captors anything, true or untrue, to stop the agony and terror. But Krauthammer then argues that, unless you can prove that torture *never* works, it should always be retained as an option. "It may indeed be true that torture is not a reliable tool," he argues. "But that is very different from saying that it is *never* useful." And if it cannot be deemed always useless, it must be permitted—even when an imminent threat is not in the picture.

The problem here is an obvious one. You have made the extreme exception the basis for a new rule. You have said that, if you cannot absolutely rule out torture as effective in every single case, it should be ruled in as an option for many. Moreover, if allowing torture even in the "ticking bomb" scenario makes the migration of torture throughout the military likely, this loophole blows the doors wide open. And how do we tell good intelligence from bad intelligence in such torture-infested interrogation? The short answer is: We cannot. By allowing torture for "slow-fuse" detainees, you sacrifice a vital principle for intelligence that is uniformly corrupted at best and useless at worst.

In fact, the use of torture and coercive interrogation by U.S. forces in this war may have contributed to a profound worsening of our actionable intelligence. The key to intelligence in Iraq and, indeed, in Muslim enclaves in the West, is gaining the support and trust of those who give terrorists cover but who are not terrorists themselves. We need human intelligence from Muslims and Arabs prepared to spy on and inform on their neighbors and friends and even family and tribe members. The only way they will do that is if they perceive the gains of America's intervention as greater than the costs, if they see clearly that cooperating with the West will lead to a better life and a freer world rather than more of the same.

What our practical endorsement of torture has done is to remove that clear boundary between the Islamists and the West and make the two equivalent in the Muslim mind. Saddam Hussein used Abu Ghraib to torture innocents; so did the Americans. Yes, what Saddam did was exponentially worse. But, in doing what we did, we blurred the critical, bright line between the Arab past and what we are proposing as the Arab future. We gave Al Qaeda an enormous propaganda coup, as we have done with Guantánamo and Bagram, the "Salt Pit" torture chambers in Afghanistan,

and the secret torture sites in Eastern Europe. In World War II, American soldiers were often tortured by the Japanese when captured. But FDR refused to reciprocate. Why? Because he knew that the goal of the war was not just Japan's defeat but Japan's transformation into a democracy. He knew that, if the beacon of democracy—the United States of America—had succumbed to the hallmark of totalitarianism, then the chance for democratization would be deeply compromised in the wake of victory.

No one should ever underestimate the profound impact that the conduct of American troops in World War II had on the citizens of the eventually defeated Axis powers. Germans saw the difference between being liberated by the Anglo-Americans and being liberated by the Red Army. If you saw an American or British uniform, you were safe. If you didn't, the terror would continue in different ways. Ask any German or Japanese of the generation that built democracy in those countries, and they will remind you of American values—not trumpeted by presidents in front of handpicked audiences, but *demonstrated* by the conduct of the U.S. military during occupation. I grew up in Great Britain, a country with similar memories. In the dark days of the cold war, I was taught that America, for all its faults, was still America. And that America did not, and constitutively could not, torture anyone.

If American conduct was important in Japan and Germany, how much more important is it in Iraq and Afghanistan. The entire point of the war on terrorism, according to the president, is to advance freedom and democracy in the Arab world. In Iraq, we had a chance not just to tell but to show the Iraqi people how a democracy acts. And, tragically, in one critical respect, we failed. That failure undoubtedly contributed to the increased legitimacy of the insurgency and illegitimacy of the occupation, and it made collaboration between informed Sunnis and U.S. forces far less likely. What minuscule intelligence we might have plausibly gained from torturing and abusing detainees is vastly outweighed by the intelligence we have forfeited by alienating many otherwise sympathetic Iraqis and Afghans, by deepening the divide between the democracies, and by sullyng the West's reputation in the Middle East. Ask yourself: Why does Al Qaeda tell its detainees to claim torture regardless of what happens to them in U.S. custody? Because Al Qaeda knows that one of America's greatest weapons in this war is its reputation as a repository of freedom and decency. Our policy of permissible torture has handed Al Qaeda this weapon—to use against us. It is not just a moral tragedy. It is a pragmatic disaster. Why compound these crimes and errors by subsequently legalizing them, as Krauthammer (explicitly) and the president (implicitly) are proposing?

Will a ban on all “cruel, inhuman, and degrading treatment” render interrogations useless? By no means. There are many techniques for gaining intelligence from detainees other than using their bodies against their souls. You can start with the 17 that appear in the Army Field Manual, tested by decades of armed conflict only to be discarded by this

administration with barely the blink of an eye. Isolation, psychological disorientation, intense questioning, and any number of other creative techniques are possible. Some of the most productive may well be those in which interrogators are so versed in Islamic theology and Islamist subcultures that they win the confidence of prisoners and pry information out of them—something the United States, with its dearth of Arabic speakers, is unfortunately ill-equipped to do.

ENEMY COMBATANTS NEED NOT be accorded every privilege granted legitimate prisoners of war; but they must be treated as human beings. This means that, in addition to physical torture, wanton abuse of their religious faith is out of bounds. No human freedom is meaningful without religious freedom. The fact that Koran abuse has been documented at Guantánamo; that one prisoner at Abu Ghraib was forced to eat pork and drink liquor; that fake menstrual blood was used to disorient a strict Muslim prisoner at Guantánamo—these make winning the hearts and minds of moderate Muslims far harder. Such tactics have resulted in hunger strikes at Guantánamo—perhaps the ultimate sign that the coercive and abusive attempts to gain the cooperation of detainees has completely failed to achieve the desired results.

The war on terrorism is, after all, a religious war in many senses. It is a war to defend the separation of church and state as critical to the existence of freedom, including religious freedom. It is a war to persuade the silent majority of Muslims that the West offers a better way—more decency, freedom, and humanity than the autocracies they live under and the totalitarian theocracies waiting in the wings. By endorsing torture—on anyone, anywhere, for any reason—we help obliterate the very values we are trying to promote. You can see this contradiction in Krauthammer's own words: We are “morally compelled” to commit “a terrible and monstrous thing.” We are obliged to destroy the village in order to save it. We have to extinguish the most basic principle that defines America in order to save America.

No, we don't. In order to retain fundamental American values, we have to banish from the United States the totalitarian impulse that is integral to every act of torture. We have to ensure that the virus of tyranny is never given an opening to infect the Constitution and replicate into something that corrupts as deeply as it wounds. We should mark the words of Ian Fishback, one of the heroes of this war: “Will we confront danger and adversity in order to preserve our ideals, or will our courage and commitment to individual rights wither at the prospect of sacrifice? My response is simple. If we abandon our ideals in the face of adversity and aggression, then those ideals were never really in our possession. I would rather die fighting than give up even the smallest part of the idea that is ‘America.’” If we legalize torture, even under constrained conditions, we will have given up a large part of the idea that is America. We will have lost the war before we have given ourselves the chance to win it. ■