

# INFORMAL OPINION

BY DOUGLAS G. MORRIS

## Tortured Justice

Here is a hypothetical that has made the rounds, in one form or another, especially since September 11. Would you condone torturing a terrorist if it were the only way to obtain information to thwart the imminent explosion of a dirty atomic bomb in a major city? Hypotheticals are useful when they make assumptions that generate thoughtful debate, but this hypothetical is insidious, for it uses its assumptions to bury debate. Why should anyone assume that torture is the only way to obtain crucial information? In fact, why should anyone assume that crisis situations require solutions outside the law?

Human Rights First (formerly the Lawyer's Committee for Human Rights), has now issued an incisive study, *Tortured Justice: Using Coerced Evidence to Prosecute Terrorist Suspects*, that tackles these two issues head-on.<sup>1</sup> Is using torture ever legal? Is information obtained by torture reliable? Rather than using hypotheticals, it turns to legal authority, empirical studies and thoughtful analysis. Crisply presented and richly documented, it is compelling and hard-hitting.

Midway through, *Tortured Justice* quotes President Bush on the interrogation of Guantánamo detainee Abu Zubaydah. Once "he stopped talking" and withheld information "that could save innocent lives," according to President Bush:<sup>2</sup>

[T]he CIA used an alternative set of procedures. . . . I cannot describe the specific methods used. . . . But I can say the procedures were tough, and they were safe, and lawful, and necessary.

Gradually these unspoken procedures, or unspeakable ones, came to light. Reportedly, they included strip-

ping Zubaydah naked and exposing his injuries; denying him medication; subjecting him to so much air-conditioning that he "seemed to turn blue;" making him stand for hours in a cold cell; slapping and grabbing him; and handcuffing and strapping his feet onto a water board until "he begged for mercy and began to cooperate."<sup>3</sup> But the value of his information appears dubious.<sup>4</sup> Still his statements may be admissible at a trial. How can this be?

The impetus for *Tortured Justice* is the Military Commissions Act of 2006 (MCA), which the Bush administration pressed and Congress obeisantly passed. MCA's provisions "authorize, for the first time in American history, the admission of coerced confessions as evidence during military commission trials."<sup>5</sup> While paying lip service to excluding evidence "obtained by use of torture," the MCA "expressly authorizes the admission of statements obtained by coercion, provided that 'the totality of the circumstances renders the statement[s] reliable and possessing sufficient probative value' and their introduction serves the 'best interest of justice.'"<sup>6</sup> The vagueness of the standard is matched only by the absence of definitions. The MCA neither defines torture nor distinguishes it from other cruel, inhuman or degrading treatment that constitutes coercion. Those tasks are left to each military commission judge's discretion — which erodes any standard at all. Abu Zubaydah's statements might be admissible if a military commission judge rules that they resulted from coercion rather than torture.

*Tortured Justice* shows that, besides violating international law, these MCA provisions "completely disregard[]" the prohibition in Supreme Court precedent against the admissibility of involuntary statements, i.e., coerced confessions, and adds that this prohibition includes "no emergency exceptions. . . ."<sup>7</sup>



That should end the matter, for "[t]he Constitution proscribes such lawless means irrespective of the end."<sup>8</sup> Here is the American constitutional tradition's bedrock belief in human dignity that would have made Immanuel Kant proud.

Of course, that does not end the matter. President Bush has declared the "alternative set of procedures" used on Zubaydah "lawful," and the MCA is law. Do its apparently unconstitutional provisions have any legal justification? While referring to the Bush administration's aggressive promotion of "law-free zones," *Tortured Justice* also touches upon the MCA's supporting legal theory. It is the old standby, the scourge of clear-cut standards: a balancing test. For determining whether interrogation "shocks the conscience," i.e., constitutes unconstitutionally cruel, unusual and inhuman treatment, the administration insists on "a sliding scale, allowing for increasingly aggressive interrogation techniques as the government's interest in a particular interrogation increases."<sup>10</sup> By this theory, as authorities deem the potential intelligence increasingly important, they may interrogate their captive with increasing cruelty. But

when national security is at stake, is there a limit to how hard the blows must be to shock this administration's well-padded conscience?

The administration's legal theory is only as good as its critical assumption, namely that torture (or, in its lingo, "an alternative set of procedures," or "tough" interrogation techniques) is "necessary," that it bears fruit. But does it? While the media generally ignores this question, or lets it slip away, *Tortured Justice* answers it and will not let it go. The study quotes a former FBI agent:<sup>11</sup>

[A]ny agent who walked into a room and saw a subject . . . crawled up in the fetal position, either deprived of water or subjected to unusually warm temperatures, pulling his hair out . . . understands that that person is no good to you from an intelligence perspective. They've collapsed; they're not coherent. So what good is it?

The point is not just a matter of an anecdote. Amazingly, "[t]he United States has not, in any scientific manner, studied the effectiveness of its interrogation methods since WW II."<sup>12</sup> But others have. Of the research, virtually none shows that "torture and other coercive interrogation techniques . . . produce accurate, useful information from unwilling sources."<sup>13</sup> To the contrary, torture and coercion often have the opposite result, prompting subjects to "provide false or misleading information," either because they seek to stop the abuse by saying what they believe the interrogators want to hear or because their mental and physical functions have been impaired.<sup>14</sup> The experience at Guantanamo backs up the scientific evidence, as FBI officials worry that the military's interrogation methods there have hurt "the FBI's own interrogations, disrupting the cooperative relationships agents were seeking to establish, and impeding the acquisition of useful and reliable information."<sup>15</sup>

*Tortured Justice* concludes that by creating "a second tier of justice," the Bush administration has both "threaten[ed] the successful prosecutions of those allegedly responsible for the September 11 attacks and ignore[ed] deeply held American principles of due process."<sup>16</sup> Having so effectively exposed the flawed justification for using coerced statements, *Tortured Justice*

implicitly raises a perplexing issue. If coercion both subverts constitutional values and fails to elicit reliable information, what is its real purpose? That question exceeds the bounds of *Tortured Justice*, but at least one footnote cites to a case that suggests an answer.<sup>17</sup>

More than 70 years ago, the Supreme Court in *Brown v. Mississippi*<sup>18</sup> reversed three convictions as violating due process because they were based exclusively on coerced confessions. In that case, a deputy sheriff and "a number of white men" accused the first defendant, a black man, of a murder, and "[u]pon his denial they seized him, and . . . they hanged him by a rope to the limb of a tree, and, having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped."<sup>19</sup> But he finally confessed after more severe whippings and being warned that the deputy "would continue the whipping until he confessed. . . ." <sup>20</sup> Confronted by the same deputy and "a number of white men," the other two defendants, also black men, "were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it," and "the whippings progressed and were repeated" until the two men both "confessed the crime and . . . adjusted their confession in all particulars of detail so as to conform to the demands of their torturers."<sup>21</sup>

In *Brown v. Mississippi*, what was the purpose of the torture? Was it a last resort to solve a murder? Or was it the pathological self-therapy of men who knew no better way to boost their own egos in the face of social frustration and distress?

The September 11 attacks left many Americans shocked, infuriated and frustrated. Some felt the attacks as a national humiliation. One way to answer humiliation is to try to turn the humiliation back around in the face of the humiliator, i.e., to humiliate those who appear to have caused the original humiliation. It is a primitive response that needs neither legal justification nor reliable results. For those in this mindset, like the Bush administration, the torture itself, or the knowledge of the torture, provides the satisfaction. We can be grateful for those at Human Rights First who help to expose the indecency of that response, to explain the illegality and the unreliability of coercion, and to describe the torture itself. Sadly, *Tortured Justice's* chilling

description of modern American torture — and torture by any other name is still torture — "reads more like pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government."<sup>22</sup>

## Notes

1. Deborah Colson & Avi Cover, *Human Rights First, Tortured Justice: Using Coerced Evidence to Prosecute Terrorist Suspects* (2008) available at <http://www.humanrightsfirst.info/pdf/08307-etn-tortured-justice-web.pdf>, 67 pages (hereinafter *Tortured Justice*).
2. *Tortured Justice*, at 16.
3. *Id.*
4. *Id.* at 17.
5. *Id.* at 2.
6. *Id.* at 8.
7. *Id.* at 23-24.
8. *Id.* at 24.
9. *Id.* at 5.
10. *Id.* at 8.
11. *Id.* at 29.
12. *Id.* at 16.
13. *Id.* at 26.
14. *Id.* at 2.
15. *Id.* at 29.
16. *Id.* at 35.
17. *Id.* at 63, n.163.
18. *Brown v. Mississippi*, 297 U.S. 278, 283-86 (1936).
19. *Id.*, at 281-82.
20. *Id.*
21. *Id.* at 282.
22. *Id.*

## About the Author

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