

Dangerous Executive Orders

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The Center for Constitutional Rights has expressed concern that President Obama's executive order banning torture may contain a loophole. But no president has any right to declare torture legal or illegal, with or without loopholes. And if we accept that presidents have such powers, even if our new president does good with them, then loopholes will be the least of our worries.

Torture is, and has long been, illegal in every case, without exception. It is banned by our Bill of Rights, the Universal Declaration of Human Rights, the Geneva Convention relative to the Treatment of Prisoners of War, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, and Title 18, U.S. Code, Section 2340A. Nothing any president can do can change this or unchange it, weaken it or strengthen it in any way.

Preventing torture does not require new legislation from Congress or new orders from a new president. It requires enforcing existing laws. In fact, adherence to the Convention Against Torture, which under Article VI of our Constitution is the supreme law of the land, requires the criminal prosecution of torturers and anyone complicit in torture.

Most of the seemingly noble steps taken by Congress in recent years and by President Obama in his first week have served to disguise the fact that torture always was, still is, and shall continue to be illegal.

In 2005, John McCain championed the McCain Detainee Amendment to the Defense Appropriations bill for 2005, which passed the Congress and was signed into law by President Bush. This was yet another law banning torture. It was not needed, but no harm done, right? Wrong. Passing laws like this serves to create the illusion that torture was previously legal. And that allows the new laws to create exceptions. In fact, McCain allowed a major loophole for the CIA. And that would have been bad enough. But President Bush tacked on a "signing statement" throwing out the entire ban on torture. So, with Congress trying to ban torture, and the president eliminating the ban, people could hardly be blamed for believing torture was legal.

President Bush also signed executive orders and ordered the creation of legal opinions claiming that torture was legal. President Obama's new order revokes one of Bush's. But Obama has no more right to undo the legalization of torture than Bush had to legalize it in the first place. Only Congress has or should have the power to legislate. Obama's new order requires adherence to laws, rather than claiming the right to violate them, and yet there is a wide gap between publishing an order requiring adherence to the laws and actually enforcing the laws by indicting violators.

The same order that President Obama uses to ban torture also orders the closure of all CIA detention facilities. Congress never authorized the creation of such things in the first place. Ordering their closure is the right thing to do. But if a president can give the order to close them, what is to prevent another president giving the order to reopen them? The answer should be all of the laws and treaties violated.

Obama's executive order largely orders the government to cease violating various laws. But in so doing, rather than strengthening the laws, the new president weakens them almost to the point of nonexistence. For, what power does a law have to control behavior if it is never enforced? What deterrent value can be found in a law the violation of which results merely in a formal order to begin obeying it? And what status are we supposed to give all the other violated laws for which no such formal orders have been given?

Rather than picking certain of Bush's unconstitutional executive orders or signing statements to revoke, leaving the others in apparent need of revocation, President Obama should simply announce that he will not give any consideration to any past orders or statements that claim the right to legalize the illegal. And the new attorney general should appoint a special prosecutor to indict and prosecute the previous president, vice president, and all top officials who violated laws.

David Swanson is the author of the upcoming book "Daybreak: Undoing the Imperial Presidency and Forming a More Perfect Union" by Seven Stories Press and of the introduction to "The 35 Articles of Impeachment and the Case for Prosecuting George W. Bush" published by Feral House and available at Amazon.com. Swanson is Co-Founder of www.AfterDowningStreet.org, creator of www.ConvictBushCheney.org and Washington Director of Democrats.com, a board member of Progressive Democrats of America, the Backbone Campaign, and Voters for Peace, a member of the legislative working group of United for Peace and Justice, and convener of the accountability and prosecution working group of United for Peace and Justice.

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