

Obama's Torture Loopholes

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On January 22, 2009, President Obama signed a number of executive orders purporting to end the Bush administration's abusive practices in dealing with treatment of terrorism suspects. Before Americans get too elated, however, they should look carefully at the inhumane interrogation practices these orders may still permit.

When first announced, the new president's executive orders seemed cause for celebration, prompting the American Civil Liberties Union to feature a link on its website encouraging visitors to email the president and "Send Him Thanks!"

The ACLU summarized the new orders:

President Obama . . . ordered the closure of the prison camp at Guantánamo Bay within a year and the halting of its military commissions; the end of the use of torture; the shuttering of secret prisons around the world; and a review of the detention of the only U.S. resident being held indefinitely as a so-called "enemy combatant" on American soil. The detainee, Ali al-Marri, is the American Civil Liberties Union's client in a case pending before the Supreme Court.

Like many reacting to the president's orders, ACLU Executive Director Anthony Romero expressed unbridled enthusiasm:

These executive orders represent a giant step forward. Putting an end to Guantanamo, torture and secret prisons is a civil liberties trifecta, and President Obama should be highly commended for this bold and decisive action so early in his administration on an issue so critical to restoring an America we can be proud of again.[1]

Torture by US officials has long been illegal, but the president's executive order entitled "Ensuring Lawful Interrogations" seems to clarify, to some extent, what activities are proscribed. Disappointingly, though, this order contains loopholes big enough to drive a FEMA camp train through them.

Loophole 1: Torture is prohibited only of persons detained in an "armed conflict."

The executive order applies only to "armed conflicts," not counterterrorism operations.

The order states in part:

Consistent with the requirements of the Federal torture statute, . . . the Detainee Treatment Act of 2005, . . . the [United Nations] Convention Against Torture, [the Geneva Conventions] Common Article 3, and other laws regulating the treatment and interrogation of individuals detained *in any armed conflict*, such persons shall in all circumstances be treated humanely

and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States [emphasis added].

This sounds salutary: America should not torture people detained in armed conflicts. But are such conflicts the only situations in which the US military, federal agencies, and private security companies can detain people today in the name of the war on terror?

Hardly. Many US and foreign citizens have been detained in *counterterrorism operations*, which another of Obama's January 22 executive orders carefully differentiates from *armed conflicts*.

In that other executive order, entitled "Review of Detention Policy Options," a special task force is commissioned to review procedures for detention suspects. This order clearly distinguishes between "armed conflicts" and "counterterrorism operations":

The mission of the Special Task Force shall be to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with *armed conflicts and counterterrorism operations*, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice.

As the president has made this distinction, so should we.

To date, counterterrorism operations have resulted in hundreds of arrests of persons in America and abroad, having nothing whatever to do with any armed conflict. Does President Obama wish limits on what is done to these people when detained and interrogated? His executive order on torture is silent on the issue.

Moreover, we know that many Guantanamo detainees from Pakistan and Afghanistan were sold to US officials by bounty hunters paid up to \$25,000 per detainee, regardless of innocence.[2] Are these persons to be considered "individuals detained in [an] armed conflict"? Or must they be arrested while fighting on the battlefield to fit this qualification? Put differently, are blameless, uneducated goat herders who were sold into detention by warlords and mercenaries exempted from the president's clarified prohibition of torture, simply because they never stepped foot on a battlefield?

Another concern is the US military's deployment in American cities, which began on October 1, 2008, according to the Army Times.[3] Perhaps this deployment is in preparation for social unrest in the event of an economic collapse. If martial law were declared in America, how would citizens be treated? What if they were detained in FEMA detention facilities? Could they be tortured under the umbrella of "counterterrorism operations" because that is different from "armed conflict"?

To Americans wishing to remain free of torture, a far greater threat than detention during armed conflict is that resulting from what the federal government labels as counterterrorism operations, conducted both on US soil and overseas. Unfortunately, President Obama has

not yet clearly addressed torture in this category.

Loophole 2: Only the CIA must close detention centers.

President Obama has ordered the CIA to close detention centers, except those “used only to hold people on a short-term, transitory basis,” which can stay open indefinitely. Exactly how long a duration is “short-term” and “transitory” is unclear.

The executive order states:

The CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future.

This sounds wonderful, but what about other federal agencies? Can the FBI, National Security Agency, Department of Homeland Security, and Defense Intelligence Agency maintain detention facilities where torture may occur? Can private military contractors like Blackwater do so? Under one interpretation of Obama’s executive order on torture, those facilities may still operate and even expand, provided the CIA doesn’t control them. Is it cynical to suspect this could be window dressing?

Loophole 3: Officials may still hide some detainees and abusive practices from the Red Cross.

On the Red Cross’s monitoring of detainees, the executive order reads:

All departments and agencies of the Federal Government shall provide the International Committee of the Red Cross with notification of, and timely access to, any individual detained *in any armed conflict* in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States Government, consistent with Department of Defense regulations and policies.

Here again, if a detainee is not one captured on the battlefield by US soldiers in an armed conflict, Obama’s order provides no guidance as to his fate. Government and private thugs may evidently still brutalize detainees obtained in counterterrorism operations and hide them from the Red Cross, unless and until the president issues a further executive order, or Congress passes a law, closing this loophole.

Loophole 4: Abuses not labeled “torture” may continue.

Obama’s executive order on torture does not label any particular practice “torture,” but instead requires that future interrogation practices conform to those outlined in the Army Field Manual. This may be in deference to Bush administration officials who authorized procedures like waterboarding while simultaneously declaring, “ America does not torture.” Debate in some circles will doubtless continue, therefore, over whether waterboarding; deprivation of food, water, and sleep; humiliation; and infliction of severe bodily pain and injury indeed constitute torture.

The executive order imparts the following limitations:

Effective immediately, an individual in the custody or under the effective control of an officer, employee, or other agent of the United States Government, or detained within a

facility owned, operated, or controlled by a department or agency of the United States, *in any armed conflict*, shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3 (Manual). Interrogation techniques, approaches, and treatments described in the Manual shall be implemented strictly in accord with the principles, processes, conditions, and limitations the Manual prescribes [emphasis added].

By this language, waterboarding and other harsh interrogation procedures are prohibited by implication because they are not authorized by the Army Field Manual. But like other parts of Obama's order, this prohibition apparently applies only to persons detained in an armed conflict. As discussed above, we are left to wonder whether detainees grabbed in counterterrorism operations can continue being tortured.

Conclusion

The loopholes in President Obama's executive order on torture may permit cruel abuses of prisoners to continue, using a legal parlor trick. Labeling detainees the product of counterterrorism operations rather than of armed conflict, or holding detainees in detention facilities operated by entities other than the CIA, may allow government agents and private contractors conforming to the letter of the president's order to continue practices most would consider torture. The president should close these loopholes or explain to Americans why he won't.

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Notes

[1] ACLU Press Release: President Obama Orders Guantánamo Closed And End To Torture; at

http://www.aclu.org/safefree/detention/38455prs20090122.html?s_src=RSS

[2] See: [Andy Worthington](#): The Guantanamo Files: The Stories of the 759 Detainees in America 's Illegal Prison. Pluto Press, 2007; and: Jeffery Rosen: Voices of Victims (a review of My Guantanamo Diary: The Detainees and the Stories They Told Me, by Mahvish Rukhsana Khan). The New York Times, August 10, 2008, at <http://www.nytimes.com/2008/08/10/books/review/Rosen-t.html?fta=y>

[3] [Gina Cavallaro](#): Brigade homeland tours start Oct. 1. Army Times, September 30, 2008, at

http://www.armytimes.com/news/2008/09/army_homeland_090708w

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