

**MICHAEL TRAYNOR**  
ONE MARITIME PLAZA  
SUITE 2000  
SAN FRANCISCO, CALIFORNIA 94111-3580  
TELEPHONE: 415-693-2110  
FACSIMILE: 415-951-3699  
EMAIL: mtraynor@cooley.com

December 16, 2004

VIA FEDERAL EXPRESS

Philip B. Heymann  
James Barr Ames Professor of Law  
Harvard Law School  
Hauser 22  
Cambridge, MA 02138  
email: heymann@law.harvard.edu

**Re: Highly coercive interrogations, degrading and humiliating techniques, and the hypothetical case of “dire necessity”**

Dear Phil:

You and Juliette Kayyem prepared a thoughtful, balanced, and constructive Long-Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism. I was glad to be one of the advisers. You both were very gracious about accepting most of my suggestions on the eve of publication to clarify the black letter portion of the recommendations on highly coercive interrogations (“HCI”). However, differences of principle remained and I felt impelled to prepare a brief dissenting statement as to some of those recommendations, which I distributed and summarized at the press conference on the overall report in Washington, D.C. on November 16, 2004. (A copy is attached for convenient reference.)

In your email message to me of December 2, 2004, you posed the following questions:

“I’m not sure I understand your position on interrogation outside the Geneva Conventions. I assume that, for example, purposely humiliating a prisoner would be degrading treatment forbidden by Article 16 of the Torture Convention. It should almost never occur. But is it your position that if doing something that humiliated a prisoner were likely to generate an angry, but informative threat that would prevent a reasonably imminent lethal terrorist attack likely to kill ten people--that even then the President should not be permitted to authorize humiliation?”

Juliette and I agree with you in forbidding any imposition of severe physical pain, even in that dire situation. Do you really disagree with us that forms of degrading interrogation that are and should be generally prohibited, can occasionally be used with factual findings of dire necessity and a decision by the President himself. If so, how do you defend that balance of humiliation against lives.?”

Recognizing that your long term legal strategy is aimed at government, not just this one but also future ones, I merely note that the current government would be the first consumer of the project's recommendations.

I want to acknowledge the challenging and serious case you put of "dire necessity" and to set forth in more detail below the reasons for my dissenting statement, which I intentionally kept brief, and my disagreement with the notion that degrading, humiliating or other methods that would be unconstitutional as applied to prisoners accused of crime should somehow be permissible if applied to persons in cases of alleged "dire necessity." My reasons are both moral and pragmatic:

**1. There is no demonstrable and convincing evidence that degradation, humiliation and other HCI techniques will produce truth more effectively and quickly than equally or potentially more persuasive methods of skilled interrogators that are not degrading or humiliating.**

In the case of dire necessity that you pose, let us make two assumptions, first that there is substantial probable cause for the president to believe that a bomb will explode or other deadly event will transpire unless prevented, and, second, that the subject of the proposed interrogation has sufficient information that if elicited in time can be acted on to defuse the bomb or prevent the deadly event and thereby save lives. As a factual matter, the second assumption may be unrealistic but I will make them both to try to test your example fairly.

Suppose further, to emphasize the direness of the case, that the president has substantial probable cause to think that if the information is not elicited promptly and truthfully, the deadly event will happen in just a few hours. The president can choose between interrogators, one who has great skill and experience and is psychologically attuned to asking questions and getting results using methods that may be rigorous but that would be constitutional if applied to a person accused of crime, and one who says that in his experience degradation and humiliation short of torture is an effective means of interrogation in cases of dire necessity. Neither method will assure that the necessary information can be elicited in time. There may not be time to try both approaches. Moreover, there is a serious risk that using degrading and humiliating techniques will elicit false confessions and admissions and only delay and impede the investigation. If you were president, which choice would you make?

The interrogator who wants to use degrading and humiliating techniques may recite his familiarity with them, including the 21 techniques described by General Taguba. See Report of General Taguba regarding Abu Ghraib, including his specific reference to various humiliating and coercive techniques and to "numerous photos and videos portraying in graphic detail detainee abuse", see [http://www.publicintegrity.org/docs/AbuGhraib/Taguba\\_Report.pdf](http://www.publicintegrity.org/docs/AbuGhraib/Taguba_Report.pdf) (particularly, Findings and Recommendations Part One, paras. 6 and 8).

Is it credible that degrading and humiliating the subject, for example, by forcing him to be naked, wear women's underwear, wear a hood, stand on a box with a sandbag on his head, and/or have attached to his body parts wires that simulate electric wires will be more effective to cause the subject to reveal the critical information than other rigorous but constitutional methods? It is quite likely that the suspect will be zealous about his own beliefs and consider our country and its representatives to be the devil or evil incarnate, so that using degrading and humiliating techniques against him may also reinforce his views and his will to resist. How will the

president who opts for such degrading and humiliating methods and finds that they have reinforced the suspect's hatred of our country and also his determination to withhold information until the deadly event occurs explain, after that event occurs, why he did not opt for familiar and constitutional methods rather than more experimental and unconstitutional ones?

The major unstated assumptions in your example of "dire necessity" are that degrading, humiliating or other unconstitutional techniques will be effective to elicit truthful information that will save lives and that they will be more effective than other methods. The long term strategy report does not make the empirical case that either assumption is valid, and, in fact, especially in Appendices A and B, it appropriately makes clear that there is no demonstrable and convincing evidence. In putting the case of dire necessity, it does not follow that anything goes.

Appendices A and B to your report summarize the uncertain data regarding the effectiveness of HCI to elicit truth. They also refer to reports of police and other interrogators, for example, noted New York Police Department interrogator Jerry Giorgio, who says "I'm always the Good Cop. I don't work with a Bad Cop either. Don't need it" (Appendix B, page 167-168).

If HCI is permitted, it may become the first resort rather than the last. It may foster interrogation by incompetents, sadists, and untrained personnel rather than trained personnel. How many people who are really skilled at interrogation would claim that their ability to elicit truthful information is significantly enhanced by the ability to degrade, humiliate, or otherwise physically abuse a suspect? Consider, for example, the following comment in the Report in Tom Parker's analysis of Counterterrorism Policies in the United Kingdom: "Former British Intelligence officer Frank Steele, who served in Northern Ireland during this period [when the UK used techniques described by the European Court of Human Rights as inhuman and degrading], told the journalist Peter Taylor: 'As for the special interrogation techniques, they were damned stupid as well as morally wrong . . . in practical terms, the additional usable intelligence they produced was, I understand, minimal'"(Appendix A, p. 132).

I remember my early experience as a college senior when I had a chance to work with the Berkeley Police Department and in particular with an inspector (Albert E. Riedel), who was gifted at eliciting information without abuse but with persuasion, careful and rigorous questioning, a psychological understanding of the subject and skill with the polygraph, and with a psychiatrist (Douglas Kelley), who had been chief U.S. psychiatrist to the Nuremberg jail and was familiar with the psychopathology of the principal defendants. See Harry Farrell, *Shallow Grave in Trinity County* 81-83, 95-96, 100, 107, 115, 160-61, 172, 177, 199, 201, 267, 282-83, 287 (1997) (reviewing the Stephanie Bryan kidnap and murder case in 1955 and interrogations by Riedel and Kelley of Burton Abbott, who was convicted and executed); Albert E. Parker, *The Berkeley Police Story* 76-78 (1972). I remain highly skeptical that degradation and humiliation of human beings is an effective means for eliciting truthful information or that terrorists or fanatics will be readily susceptible to it and promptly give up truthful information of sufficient detail to be acted on in time to save lives.

You did not mention and accordingly I will not develop or take a position on but only note here the issue whether improvements in pharmaceutical technology might lead to an effective, nondegrading, nonhumiliating, and potentially constitutional and internationally valid means for eliciting information from suspects in cases of dire necessity.

## **2. The "dire" case does not represent the realities of intelligence gathering.**

Much if not most of intelligence gathering does not involve a substantial and immediately usable amount of information blurted out by one suspect. Intelligence is a mosaic building process. It builds on fragments of information. It is realistic to expect that, except at the highest levels, operatives, including our own counterintelligence people and terrorists, will be given only highly compartmentalized information so that if captured they may not be able to reveal an entire picture. The case you put seems like an unrealistic one. As I mentioned at the press conference, I think it is a bogeyman, used to justify serious violations of the Constitution and a shameless erosion of due process.

**3. The true terrorist is likely to be trained to withstand interrogation for the time necessary for the bomb to explode or the dire event to occur.**

The scenario of a captured terrorist yielding or blurting out crucial information that can be acted on to save lives does not seem realistic. Such persons will be trained to withstand degradation and humiliation for the time necessary for the bomb to explode or other deadly event to occur. If the HCI guidelines are adopted they will know that the worst that can happen to them, and then only upon a presidential finding, will be cruel, inhuman, or degrading treatment that does not “shock the conscience,” assuming the guidelines are followed.

**4. Given the uncertainties that attend the vague definition of “degradation” or “humiliation”, there is a danger that the use of such techniques will escalate.**

Degradation, humiliation and other forms of highly coercive interrogation techniques are vaguely defined in your long-term legal strategy as falling between those that “shock the conscience” and those that go beyond the standards for voluntary confessions in a criminal case. Given the exigencies of the “dire” case, there is a danger that these vague boundaries will be exceeded. Consider just the techniques used at Abu Ghraib and enumerated by General Taguba. Which would you permit and which would you prohibit? For example, in addition to the examples of degradation and humiliation recited above, would you permit forcing the subject to masturbate in front of others or be intimidated by dogs? Do you really believe such degradation and humiliation would result in the saving of lives? Would you draw the line at sodomizing the suspect with a chemical light or broom or using dogs not just to frighten and intimidate but also nip, but in a way that will not impose the “severe physical pain” that an actual dog bite might cause? How would you draw the line between acceptable “degradation” and “humiliation” and nonacceptable torture or cruel, inhuman, or degrading treatment that would violate not only the Constitution of the United States but also treaties and conventions to which the United States is a party?

**5. If the end justifies the means, why not torture?**

The “dire” case is simply another example of the argument that the end justifies the means. If the suspect has the information and getting it promptly would save lives, why bother with potentially time-consuming degradation and humiliation? Why not just torture him with a view to getting the information as quickly as possible so that it can be acted on to save lives?

**6. The requirement for presidential findings is not likely to lead to reviewable factual findings.**

The so-called presidential findings are not likely to be real findings of fact, only cursory and conclusory allegations reciting the applicable language (Report IV-A, pp. 25-26), without any effective oversight or ability to effectively enforce the guidelines. In one case I had, the U.S. attorney justified a gag order simply by alleging that without a gag order a government investigation would be seriously jeopardized; he provided no supporting details to the court and it took a year of litigation in the Fifth Circuit to get the gag order vacated and the record unsealed. There has to be more than presidential box-checking if real and reviewable findings are going to be required. *See also* paragraph 9 below. (I note in passing that your example assumes a presidential finding of “dire necessity”, which may or may not be the same as “a finding of an urgent and extraordinary need” recommended by the report (IV-A, p. 25) and that the report does not require a specific finding that the use of HCI will elicit the information or be “likely to generate” information such as “an angry, but informative threat,” a requirement assumed in your example.)

## **7. The departure from basic values that you propose should be publicly debated, not kept secret.**

A set of principles has been built up over a long time in criminal cases regarding what is permitted and what is prohibited in attempting to elicit confessions and admissions from criminal suspects. If we are going to depart from them, there should be public debate such as op-eds, public forums, media and other discussions, both by nonexperts and experts. Whether degradation, humiliation, and other forms of abuse should be bureaucratized and made the subject of guidelines or rules, training manuals, and implementation in the field as part of a legal strategy for the long-term is an important public policy issue. Many of our citizens would be disgusted at torturing captives, for example with electric shocks. Why should they not be able to debate whether some form of “torture-lite” would be permissible, such as attaching the electrodes but applying only 65% of the power that torturers would use but without imposing “severe physical pain,” the limit you use in your example? The moral values, the pragmatic issue whether HCI is effective at eliciting truth, and the issue whether alternatives such as modern drugs can be developed, should be debated. In open discussion, our country can consider whether to debase or to enrich “the law as it comes to terms with emerging standards of decency.” *See* William H. Webster, *Tribute to Judge Theodore McMillian*, 52 Wash. U. J. Urb. & Contemp. L. 33 (1997).

Two examples of judicial efforts to recognize emerging standards of decency are the decision by the European Court of Human Rights in *The Republic of Ireland v. The United Kingdom*, (1979-80) 2 E.H.R.R. 25, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=ireland%20%7C%20v.%20%7C%20united%20%7C%20kingdom&sessionId=81195&skin=hudoc-en>, and the decision by the Supreme Court of Israel in *Public Committee Against Torture in Israel v. State of Israel* (1999), HCJ 5100/94, [http://62.90.71.124/files\\_eng/94/000/051/a09/94051000.a09.pdf](http://62.90.71.124/files_eng/94/000/051/a09/94051000.a09.pdf).

In the *Ireland* case, the court held that the five techniques of wall-standing, hooding, subsection to noise, deprivation of sleep, and deprivation of food and drink (described in paras. 96-104 of the court's decision) "were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3 [of the European Convention on Human Rights]. The techniques were also degrading since they

were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance" (para. 167). "The Court concludes that recourse to the techniques amounted to a practice of inhuman and degrading treatment, which practice was in breach of Article 3" (para. 168).

The report of the *Ireland* case also notes that the offending practices had been discontinued and that the United Kingdom did not contest the allegations or the findings in connection with the five techniques. The UK's action prompts the question: why should inhuman, degrading, and humiliating techniques that were discontinued by the United Kingdom long ago notwithstanding numerous acts and threats of terrorism be revived today?

The *Israel* case held decisively that "necessity" does not create *ex ante* authority for the use of degrading, humiliating, and abusive techniques of interrogation. It is discussed more fully in paragraph 9 below.

The important values of human liberty and open discussion are not outweighed by the argument, stated but not developed in the report, that publicly disclosing HCI techniques would create "legitimate worries that knowing which interrogation techniques are available would assist terrorists" (Report, p. 30). In my view, this argument is spurious. A number of these techniques are already outlined in General Taguba's report, as well as in the above two cases, and other reports (see references in Appendices A and B), and more will be described in subsequent reports as the investigation not only of Abu Ghraib but also now Guantanamo, Afghanistan, and other locations in Iraq progresses. Many will already be known to or even used by terrorists themselves.

#### **8. There is a danger of adverse spillover effects from using HCI.**

If HCI is permitted in so-called "dire" cases for the purpose of saving lives, there is a danger that it will spill over in other areas. (*Cf.* the so-called "migration" that has already occurred with the use of HCI techniques at Guantanamo, Afghanistan, Abu Ghraib, and other locations in Iraq.) Two particular areas come to mind:

First, given the now permitted crossover between counterintelligence and criminal prosecution, it is not difficult to foresee the government argument that if the country is willing to accept HCI against terrorists, it should be willing to accept HCI against persons accused of crime. A "dire" case can be put in that context as well, for example, the person arrested on substantial probable cause for kidnapping who knows the location of the kidnapped child but refuses to divulge it. Allowing HCI in any context may lead to its being used to undermine familiar safeguards in the criminal context.

Second, if HCI would be useful not for eliciting truthful information but for political purposes, why should it not be used just as China did during the Korean War and North Vietnam did in the Vietnam War? Attempts to justify HCI reek of the bureaucratic machismo emitted by our country's intellectual hawks in the Vietnam War. Again, an end-justifies-the-means argument could be made that many lives will be saved if the terrorists who are not yet captives can be shown propaganda and photographic and video examples, as in Abu Ghraib, of what will befall them if they do not refrain from terrorism.

**9. The "dire necessity" contention fails to distinguish between impermissible *ex ante* authorization of HCI and a very limited *ex post* criminal defense of necessity or claim of mitigating circumstances in exceptional cases (which itself is questionable).**

In your report, you properly state in the black letter that "No information obtained by highly coercive interrogation techniques may be used in a U.S. trial, including military trials, against the individual detained" (V-B, p. 26), and you propose a civil damage remedy in cases where the conditions for HCI have not been followed (V-A, p. 26). Apart from the issues of exclusion of evidence and civil damages, however, you disregard the critical legal distinction between, on the one hand, using the "dire necessity" or "ticking bomb" case as *ex ante* authority for HCI, as you do, and, on the other hand, recognizing in exceptional cases the much narrower *ex post* defense of "necessity" to a criminal prosecution or possible claim of mitigating circumstances to reduce a sentence. In failing to recognize this important distinction, the long-term legal strategy allows the "dire necessity" case to be used not solely as an exceptional defense or basis for mitigation in a criminal case but as *ex ante* authority for HCI.

The Supreme Court of Israel articulated this distinction in the leading recent case of *Public Committee Against Torture in Israel v. The State of Israel* (1999), HCJ 5100/94, [http://62.90.71.124/files\\_eng/94/000/051/a09/94051000.a09.pdf](http://62.90.71.124/files_eng/94/000/051/a09/94051000.a09.pdf). The court recognized that "the State of Israel has been engaged in an unceasing struggle for its security--indeed its very existence. Terrorist organizations have set Israel's annihilation as their goal" (para. 1). Nonetheless, the court refused to use "necessity" as a justification for using such coercive techniques as shaking, waiting in the "Shabach" position, the "Frog Crouch," excessively tight handcuffs, and sleep deprivation beyond that inherent to an interrogation.

In directly addressing the "ticking bomb" scenario and the arguments of dire necessity, the court recognized the collision of values and held that "a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment, and free of any degrading conduct whatsoever. . . . These prohibitions are 'absolute.' There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice. The use of violence during investigations can lead to the investigator being held criminally liable" (para. 23).

Although the matter "is open to debate" (para. 34) (and I would debate it), the court assumed for discussion that an investigator may avail himself of the "necessity defense" if criminally indicted (para. 35). "This, however, is not the issue before this Court. . . . We are dealing with a different question. The question before us is whether it is possible, *ex ante*, to establish permanent directives setting out the physical interrogation means that may be used under conditions of 'necessity.' . . . In the Court's opinion, the authority to establish directives respecting the use of physical means during the course of a GSS interrogation cannot be implied from the 'necessity defense.' The 'necessity defense' does not constitute a source of authority, which would allow GSS investigators to make use of physical means during the course of interrogations. The reasoning underlying our position is anchored in the nature of the 'necessity defense.' The defense deals with cases involving an individual reacting to a given set of facts. It is an improvised reaction to an unpredictable event. . . . Thus, the very nature of the defense does not allow it to serve as the source of authorization. . . . The 'necessity defense' has the effect of allowing one who acts under the circumstances of 'necessity' to escape criminal liability. The 'necessity defense' does not possess any additional normative value. It cannot authorize the use of physical means to allow investigators to execute their duties in circumstances of necessity. The very fact that a particular act does not constitute a criminal act--due to the 'necessity

defense'--does not in itself authorize the act and the concomitant infringement of human rights. The rule of law, both as a formal and as a substantive principle, requires that an infringement of human rights be prescribed by statute. The lifting of criminal responsibility does not imply authorization to infringe a human right. . . . [G]eneral directives governing the use of physical means during interrogations must be rooted in an authorization prescribed by law and not in defenses to criminal liability. The principle of 'necessity' cannot serve as a basis of authority" (paras. 35-37).

The court concluded by recognizing the "harsh reality of terrorism" facing Israel but stated, "We are, however, judges. We must decide according to the law" (para. 40).

Moreover, there is a crucial procedural, substantive, and practical difference between an *ex ante* contention of "dire necessity" and an *ex post* contention. In the *ex ante* case, the official need only make or rely on a presidential finding, which is likely not to be challenged and, if challenged, to be accorded substantial deference. (See also para. 6 above). In the *ex post* case, if there is a prosecution, the official must bear the burden of proving a factual defense of necessity or claim of mitigating circumstances to a court and possibly also a jury. Moreover, the president or the official must take into account the possibility of subsequent prosecution by a different administration within the period of any applicable statute of limitations. The *ex post* case thus should foster a higher degree of discipline and accountability than the *ex ante* case as well as a more effective testing of contentions of dire necessity by judges and juries.

In recommending highly coercive interrogation techniques to be promulgated secretly by the executive branch and without legislative or constitutional authority, the long-term strategy report undermines the development of "emerging standards of decency," disregards the distinction between *ex ante* authority and the very limited and fact-dependent arguable *ex post* defense of necessity or claim of mitigation in a criminal prosecution, and disregards the fundamental principle that issues of such great moral consequence should be publicly debated and considered and eventually decided by legislative bodies representing the people, rather than the executive.

Accordingly, I do not think your hypothetical case of "dire necessity" justifies *ex ante* secret executive guidelines.

Whether an *ex post* defense of necessity or claim of mitigating circumstances to reduce a sentence in an individual criminal case would ever be justified is a separate and much narrower issue, one that is very troubling for the reasons stated in this letter. I would be inclined to oppose such a defense or claim on the grounds that it is morally and pragmatically unjustifiable; but this is a very different and far more limited issue than the one you raised. See also, criticizing even the defense of necessity in the *Israel* case, Paola Gaeta, *May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Suspects*, 2 J. Int'l Crim. Just. 785, 791, 793 ("there is no reasonable certainty that the information, assuming it is provided, is concretely and specifically apt for achieving the purpose of the interrogator - - preventing a terrorist attack") ("A better solution would be simply to rule out the defense of necessity . . . while clarifying that the extreme circumstances envisaged by the ticking-bomb paradigm may be taken into account as mitigating circumstances").

#### **10. HCI must be prevented before it leads to further evil.**

In his opening statement at Nuremberg, Robert Jackson, Chief Prosecutor, recounted the suppression of liberties that occurred as a prelude to the atrocities that followed, and Hannah

Arendt famously wrote about the “banality of evil.” Liberties and human rights and values that we treat as sacred are vulnerable to being undermined and attacked, particularly when a case of “dire necessity” is put. It is exactly in such a case that citizens must stand up for our freedoms and our values and for the human rights of the vulnerable and not permit any further erosion of due process, not “by even a fraction of an inch.” *Silverman v. United States*, 365 U.S. 505, 512 (1961); see Michael Traynor, *Citizenship in a Time of Repression*, Fairchild Lecture at the University of Wisconsin Law School, April 23, 2004, available at <http://www.cooley.com/news/inthenews.aspx?ID=000038767420> (to be published in 2005 Wisconsin Law Review).

Sincerely,

Michael Traynor

MT:ln

cc: Professor Juliette Kayyem (via Federal Express)

## DISSENTING STATEMENT OF MICHAEL TRAYNOR

**November 16, 2004**

### Highly Coercive Interrogations

I appreciated the chance to work on the Harvard project that seeks to bring law to challenging issues of liberty and security. I agree with the strong statements that the United States shall abide by its statutory and treaty obligations that prohibit torture and cruel, inhuman or degrading treatment. I dissent, however, from the exception permitting cruel, inhuman or degrading treatment in some circumstances and from the recommendations that permit highly coercive interrogations that would violate the Constitution of the United States if applied to a prisoner accused of crime.

In exceptional circumstances, the recommendations permit highly coercive interrogation techniques that are cruel, inhuman or degrading. In nonexceptional circumstances, they permit highly coercive interrogation techniques that fall into the vague and troubling zone between prohibited techniques that courts find “shock the conscience” and proposed techniques that exceed the reasonable standards set for “seeking a voluntary confession under the due process clauses of the U.S. Constitution.” The recommendations do not define the various techniques but leave them to be recommended secretly by the Attorney General, promulgated secretly by the President, and provided only to selected Congressional committees. This culture of secrecy in itself should set off alarm bells. The recommendations provide for briefing by the Attorney General to Congressional committees and oversight by them but only as “to which HCI’s are presently being utilized” and for making “probable cause” determinations available to congressional intelligence committees, the Attorney General, and inspectors general of pertinent departments. They do not call for briefing or oversight about such important questions as whether any lives were saved or any act of terrorism was prevented, whether any deaths or serious injuries occurred as a result of the interrogations, and whether the guidelines were breached. They do not require monitoring or oversight by inspector generals to guard against abuse. Moreover, the guidelines are only that; they are not enforceable rules.

The so-called “ticking bomb” scenario involving interrogation of a captured terrorist is a difficult theoretical one. In the real world, the scenario posed is both artificial and unlikely – a straw man, invented to create fear and a panicked public endorsement of the shameful erosion of due process. More likely, large numbers of captured people will be swept up by troops. Such people will include individuals who are innocent and have no useful information, neighbors, relatives, or others who are innocent but might have marginally useful information, and a few terrorists. This is not the example the United States should set for its own citizens or for our allies or even for our enemies. Moreover, highly coercive interrogation techniques are not demonstrably effective to elicit truthful information, as the report itself notes. (Appendix B) Techniques that by definition exceed constitutional limits on the interrogation of persons accused of crime are likely to be repugnant to people who cherish human rights as well as violate due process. They are likely to be ineffective against true terrorists and fanatics trained to withstand them and prepared to die and injurious to innocent people subjected to them. Moreover, they are likely to provoke retaliation against our own troops and civilians who are captured, foster disrespect and resentment around the world, and corrode discipline in our own forces.

Even if highly coercive interrogation **techniques** were shown convincingly to be effective in saving lives and could be conducted according to definable rules of law, the administration of them would have to be done by a government that has a rightful claim to integrity. This government can make no such claim. It detains masses of people unconstitutionally, as at Guantanamo; it tortures and degrades them inhumanely, as at Abu Ghraib; and it deceives the public about war, as with Iraq. In a government of questionable integrity, there is no basis for confidence that secret guidelines will be followed or that Congressional overseers will be informed promptly, fully, and forthrightly. Such a government will not refrain from violating secret guidelines that do not amount to enforceable rules or from falsely denying that any violations occurred, and the well-intentioned system of guidelines will then amount to nothing more than a sham and a cover for lawlessness.