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JURISPRUDENCE

Anybody's Guess

The legality of water-boarding as work in progress.

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It's been a banner week for water-boarding. This centuries-old practice of simulated drowning to extract false confessions and false testimony has really benefited of late from a good old legal reassessment and a smoking-hot PR campaign. In the course of a few short years, water-boarding has morphed from torture that unquestionably violates both federal and international law to an indispensable tool in the fight against terror.

Charting that progression is almost not worth doing anymore, so familiar are the various feints and steps. First, the administration breaks the law in secret. Then it denies breaking the law. Then it admits to the conduct but asserts that settled law is not in fact settled anymore because some lawyer was willing to unsettle it. Then the administration insists that the basis for unsettling the law is secret but that there are now two equally valid sides to the question. And then the administration gets Congress to rewrite the old law by insisting it prevents the president from thwarting terror attacks and warning that terrorists will strike *tomorrow* unless Congress ratifies the new law. Then it immunizes the law breakers from prosecution.

That's how Americans have come to reconcile themselves to illegal warrantless eavesdropping and to prisoner abuse at Guantanamo Bay. It's why we're no longer bothered in the least by the abuse of national-security letters or extraordinary rendition or by presidential signing statements. Deny, admit, codify, then immunize. The law as quickstep.

What used to be an unambiguous legal test for torture—"conduct that shocks the conscience"—is hardly a useful bench mark anymore. How can anything shock the conscience after the vice president, in a [parody of](#)

[himself](#), crowed [this week](#) that "it's a good thing" top al-Qaida leaders underwent torture in 2002 and 2003 — "a good thing we had them in custody" and "a good thing we found out what they knew." Even our conscience is a moving target. Water-boarding has gone from torture to a Martha Stewart slogan overnight.

After making it clear that they did, in fact, torture people, there were only two actions left to the Bush administration, and both were briskly accomplished this week: The first was to immunize the torturers. Enter the new attorney general, Michael Mukasey, with the promise that he would neither [investigate nor prosecute](#) the people who tortured, since they relied on (secret) Justice Department authorization to do so. The second was to establish clearly and unequivocally that the question of whether water-boarding was illegal in 1968, legal in 2002, illegal again in 2006, and perhaps legal again tomorrow will be determined by the president and nobody else. In secret.

Let me say that again, for the benefit of folks who believe this matter [might be resolved](#) by the passage of pending legislation to force the CIA to use only those [techniques permitted in the U.S. Army Field Manual](#). It doesn't matter to this president what the laws say. FISA was a law once, too.

Listen to testimony this week from [CIA Director Michael Hayden](#): "[I]t is not certain that that technique would be considered to be lawful under current statute." Compare it with the testimony of [National Intelligence Director Michael McConnell](#): Water-boarding "is a legal technique used in a specific set of circumstances. You have to know the circumstances to be able to make the judgment." Contrast that with the words of [Attorney General Michael Mukasey](#): I will not be drawn into "imagining facts and circumstances that are not present and thereby telling our enemies exactly what they can expect in those eventualities." Seemingly the one thing they all agreed upon this week is that they have no real idea whether water-boarding is currently legal or illegal and no legal basis from which to decide, anyhow.

The only thing the Three Mikes did know beyond a reasonable doubt was that the legality of water-boarding has nothing to do with international treaties, secret legal memos, acts of Congress, or their personal interpretations of same. The claim on which they were all perfectly clear is that the legality of future torture will be determined by the president and the attorney general as the occasion arises. It will not be measured by any objective standard of conduct but will turn on "the circumstances"

surrounding them (in McConnell's formulation) or the value "of the information you might get" (in Mukasey's). It will be a secret decision, made using shifting, subjective standards, for which neither the torturers nor the legal decision-makers will ever be held to account.

This is not simply the theory of a unitary executive at work; this isn't the notion that the president makes the law, and acts of Congress are legal elevator music. This vision of executive power is that the law not only emanates from the president but also ebbs and flows with his hunches, hopes, and speculations, on a moment-to-moment basis. What we are hearing now from senior Bush administration officials is that if the president thinks someone looks kinda like a terrorist and the information sought from him seems kinda worth getting, it will be legal to torture him. And it's legal no matter who justified it, regardless of the supporting legal doctrine, because, well, the president just had a feeling that the information would prove valuable.

That's not an imperial presidency. That's the kind of presidency Yahweh might establish. I'm sure there's some law professor out there who can make the legal argument that executive power in wartime encompasses even the reckless guesses and impressionistic whims of a single man, as they arise. At which point, that too will become an "open question" on which "reasonable people will differ." And the dance will begin again.

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