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## Torture, Ticking Time Bombs, and Waterboarding Americans

By Conor Friedersdorf

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There is a categorical ban on broadcasting child pornography in the United States. Is that prudent? Victims of the industry suffer horrifically. On the other hand, what if an al-Qaeda terrorist had a nuclear device in Times Square and credibly threatened to incinerate millions of people unless NBC broadcast an hour of depraved smut? Would the categorical broadcast ban seem prudent in that case?

The thought experiment is no less absurd when applied to "ticking time bombs" that can only be stopped by torturing.

In a throwback to the unsettled debate over what Bush Administration officials called "enhanced interrogation," Andrew McCarthy of *National Review* revives the case against categorical torture bans. To his credit, he mentions a huge cost imposed by the policy that he favors:

People who want a categorical ban on such tactics constantly avoid addressing the ticking-bomb scenario and similar questions that bring the logic of their position into stark relief: forced to choose, they would prefer the occurrence of a preventable atrocity and the loss of perhaps thousands of lives to interrogation that harms a hair on the head of a culpable terrorist. In turn, people who argue against categorical bans (as I have done) often avoid addressing the

inevitability that tactics they endorse for dire circumstances will be applied in less dire circumstances—and that our resistance to a ban, even though highly qualified, could encourage rogue regimes in their more routine use of abusive practices.

This has always been a worthy debate.

This way of framing the torture debate has always been highly suspect, even though many torture apologists still cite the ticking time bomb as a major rationale.

So let's entertain it. The hypothetical is suspect because, unless Hollywood screenwriters start engaging in murderous acts of performance art, no actual terror plot is ever going to involve a time bomb, a code to defuse it, a collaborator in custody who has that code, FBI or CIA agents who know it, and a waterboarding table on hand. The image of the "ticking time-bomb" was carefully chosen to evoke an inevitable catastrophe unfolding on a specific time frame that's already been set in motion but can still be stopped ... but only with knowledge that torture alone will elicit.

This is comic-book stuff.

No one can cite even a single terrorist attack that has been stopped, or could have been stopped, with torture in this manner. Scour all of history and you come up empty. Little wonder that it's always invoked as a hypothetical, not a cautionary tale. Who can prove it won't ever happen?

Unless Hollywood screenwriters start engaging in murderous acts of performance art, no terror plot will ever involve a time bomb and a waterboarding table on hand.

Not me.

Maybe Graham Yost will go rogue. Of course, a Secret Service agent on a foreign trip *could* head for the bathroom and stumble on the room where a foreign leader is about to press a button to nuke us. Should we end the categorical prohibition on Secret Service agents killing foreign leaders without permission, just in case?

McCarthy suggests a parallel between anti-torture commentators who "avoid addressing the ticking-bomb scenario" and "people who argue against categorical bans" who "avoid addressing the inevitability that tactics they endorse for dire circumstances will be applied in less dire circumstances." But the parallel breaks down when one examines the different reasons these scenarios are seldom addressed. People avoid the ticking time bomb because the hypothetical is a debating trap. Those who invoke it wouldn't wager money on the U.S. facing such a situation no matter what odds they were given. They uncomplainingly accept all sorts of risks far more dire than the lack of a ticking-time-bomb exception. There's one reason the hypothetical is part of the discussion: It's unfalsifiable. It's more useful in justifying torture than any reality-based argument.

Now consider those who won't address the fact that "tactics they endorse for dire circumstances will be applied in less dire circumstances." They are avoiding reality. The Bush Administration

never faced a ticking time bomb. But it did torture. No historical knowledge is required to know this. You just have to read the news. You'd never know it watching 24, but surveying every known instance of torture in world history, a torture-defused time bomb can't be found. Torture is constantly used in less dire circumstances. That's why Western civilization erected taboos around it that the Bush Administration foolishly tore down.

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Elsewhere in McCarthy's article, in an effort to cast doubt on whether the Bush Administration perpetrated torture, he writes:

As we discussed ad nauseum during the debate over “enhanced interrogation,” there is no question that waterboarding can amount to torture (and, indeed, can result in death) depending on the technique used. Nevertheless, torture—if we are talking about the crime, as opposed to using loose rhetoric about physical or mental abuse—has a legal definition. It requires the infliction of severe pain and suffering by a government official who deliberately and consciously intends to torture his victim. (Title 18, U.S. Code, Sec. 2340 et seq.) Moreover, to qualify as psychological torture, the infliction needs to be “prolonged mental harm” of the kind caused by the infliction or threatened infliction of severe pain, or “the threat of imminent death.”

... Waterboarding the way the CIA executed was highly uncomfortable, but it did not cause severe pain, it was of short duration, and it did not cause fear of imminent death (the detainees were told that they were not going to be killed).

This is unpersuasive for two reasons.

1) Even if prisoners were told that they wouldn't be killed, that hardly warrants the conclusion that they didn't fear imminent death. Imagine yourself captured by a foreign government, spirited off to a faraway country, blindfolded, gagged, and strapped down to a board. Masked men who've been slapping you around and intimidating you say, "We're not going to kill you." Then, your mouth still gagged, they force water through your nasal cavity into your lungs, until you feel you're drowning. Would you fear for your life? Of course you would. Everyone would. The tactic is designed to terrify a man so dramatically that he betrays his deepest loyalties.

2) McCarthy says Bush-era waterboarding was "of short duration." This is misleading. Each instance of waterboarding was of short duration—after all, you can't fill a man's lungs up for very long without killing him. What's missing from McCarthy's characterization is the fact that "C.I.A. officers used waterboarding at least 83 times in August 2002 against Abu Zubaydah," as well as the fact that they "used waterboarding 183 times in March 2003 against Khalid Shaikh Mohammed."

Does anyone doubt that being waterboarded 183 times in the course of a month, presumably at unpredictable intervals, would cause a person "prolonged mental harm"? McCarthy writes as if stopping and starting again and again is *more* humane.

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In conclusion, I'd like to press McCarthy on a point that he and I first discussed on Twitter, where he was good enough to engage. He conceded that the United States has to "conduct ourselves within [the] definition of torture we'd establish for ourselves."

So let me put the question to him this way. Imagine that the Chinese government captured a U.S. spy or an American soldier. Say that the Chinese bound and gagged the American, slapped him in the face and belly, put him in a cold cell without a blanket, and finally dragged him off to a room with a table. They tell the blindfolded American, "Don't worry, we're not going to kill you!" Then they tape his mouth shut, tie him down to the table, and put a rag over his nose, the only orifice through which he can still breathe. A moment later, they pour water through that rag, funneling it down his nasal cavity into his lungs. They fill up his lungs with water, purposely making him feel on the verge of drowning.

The American soldier is subjected to this treatment 183 times.

I'd ask McCarthy to examine his conscience here. If that had happened to an American in 1999, before any of us ever imagined the United States using waterboarding—if McCarthy heard that American's story, and the 183 times he was brought to the brink of drowning—would he have hesitated at all in calling it torture?

One more question. Now imagine that the U.S. is at war with a foreign country five or six years from now. This could actually happen.

The enemy is a signatory to the anti-torture convention. In the course of hostilities, an American double-agent is captured. An enemy general orders him to be waterboarded using exactly the same standards that Bush Administration lawyers laid out. Over the course of the next month, he is waterboarded a total of 183 times.

Would McCarthy consider *that* a violation of the enemy's obligations under the torture treaty? Or would it be an example of great care being taken to avoid torturing anyone?