**The Case for Torture Warrants**

**by Alan M. Dershowitz**

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Now that it has been disclosed that our government had information of “undetermined reliability”, from an agent whose code name is Dragonfire, that New York City may have been targeted for a 10 kiloton nuclear weapon, the arguments for empowering law enforcement officials to do everything necessary to prevent a catastrophic terrorist attack are becoming more compelling. In the immediate aftermath of the September 11th attacks, FBI officials leaked a story about their inability to obtain information from suspected terrorists by conventional means, such as buying the information by offers of cash or leniency, or compelling the information by grants of immunity and threats of imprisonment for contempt of court. Those who leaked the story suggested that there may come a time when law enforcement officials might have to resort to unconventional means, including non-lethal torture. Thus began one of the most unusual debates in American legal and political history: should law enforcement be authorized to torture suspects who are thought to have information about a ticking bomb?

This ticking bomb scenario had long been a staple of legal and political philosophers who love to debate hypothetical cases that test the limit of absolute principles, such as the universal prohibition against the use of torture which has long been codified by international treaties. The ticking bomb case has also been debated, though not as a hypothetical case, in Israel, whose security services long claimed the authority to employ “moderate physical pressure” in order to secure real time intelligence from captured terrorists believed to know about impending terrorist acts. The moderate physical pressure employed by Israel was tougher than it sounds, but not nearly as tough as the brutal methods used by the French in interrogating suspected terrorists during the Algerian uprisings. The Israeli security service would take a suspected terrorist, tie him to a chair in an uncomfortable position for long periods of time with loud music blaring in the background, and then place a smelly sack over his head and shake him violently. Many tongues were loosened by this process and several terrorist acts prevented, without any suspects being seriously injured.

Torture, it turns out, can sometimes produce truthful information. The Israeli experience suggested that information obtained as a result of torture should never be believed, unless it can be independently confirmed, but such information can sometimes be self-proving, as when the subject leads law enforcement to the actual location of the bomb.

Nonetheless, the Israeli Supreme Court outlawed all use of even moderate, non-lethal physical pressure. It responded to the ticking bomb scenario by saying that if a security agent thought it was necessary to use physical pressure in order to prevent many deaths, he could take his chances, be prosecuted, and try to raise a defense of “necessity”. In my book *Shouting Fire*, I wrote critically of this decision on the ground that it places security officials in an impossible dilemma. It would be better if any such official could seek an advanced ruling from a judge, as to whether physical pressure is warranted under the specific circumstances, in order to avoid being subject to an after the fact risk of imprisonment. Thus was born the proposal for a torture warrant.

Actually it was a rebirth, because half a millennium ago torture warrants were part of the law of Great Britain. They could be sought only in cases involving grave threats to the Crown or the Empire and were granted in about one case a year. Judges even in those times, were extremely reluctant to authorize the thumb screw.

Why then should we even think about returning to an old practice that was abolished in England many years ago. The reason is because if we ever did have a ticking bomb case - - especially a ticking nuclear bomb case - - law enforcement officials would in fact resort to physical force, even torture, as a last resort. In speaking to numerous audiences since September 11th - - audiences reflecting the entire breadth of the political and ideological spectrum - - I have asked for a show of hands as to how many would favor the use of non-lethal torture in an actual ticking bomb case. The vast majority of audience members responded in the affirmative. So have law enforcement officials to whom I have spoken. If it is true that torture would in fact be used in such a case, then the important question becomes: is it better to have such torture done under the table, off the books and below the radar screen - - or in full view, with accountability and as part of our legal system? This is a very difficult question with powerful arguments on both sides. On the one hand, we have had experience with off the book policies such as President Nixon’s “plumbers” and Oliver North’s “foreign policy initiatives”. In a democracy, accountability and visibility must be given high priorities. On the other hand, to legitimate torture and make it part of our legal system, even in extreme cases, risks reversion to a bad old time when torture was routine.

One key question is whether the availability of a torture warrant would, in fact, increase or decrease the actual amount of torture employed by law enforcement officials. I believe, though I cannot prove, that a formal requirement of a judicial warrant as a prerequisite to non-lethal torture would decrease the amount of physical violence directed against suspects. Judges would require compelling evidence before they would authorize so extraordinary a departure from our constitutional norms, and law enforcement officials would be reluctant to seek a warrant unless they had compelling evidence that the suspect had information needed to prevent an imminent terrorist attack. Moreover the rights of the suspect would be better protected with a warrant requirement. He would be granted immunity, told that he was now compelled to testify, threatened with imprisonment if he refuses to do so and given the option of providing the requested information. Only if he refused to do what he was legally compelled to do - - provide necessary information which could not incriminate him because of the immunity - - would he be threatened with torture. Knowing that such a threat was authorized by the law, he might well provide the information. If he still refused to, he would be subjected to judicially monitored physical measures designed to cause excruciating pain without leaving any lasting damage. A sterilized needle underneath the nail might be one such approved method. This may sound brutal, but it does not compare in brutality with the prospect of thousands of preventable deaths at the hands of fellow terrorists.

Let me cite two examples to demonstrate why I think there would be less torture with a warrant requirement than without one. Recall the case of the alleged national security wiretap being placed on the phones of Martin Luther King by the Kennedy administration in the early 1960’s. This was in the days when the Attorney General could authorize a national security wiretap without a warrant. Today no judge would issue a warrant in a case as flimsy as that one. When Zaccarias Moussaui was detained after trying to learn how to fly an airplane, without wanting to know much about landing it, the government did not even seek a national security wiretap because its lawyers believed that a judge would not have granted one. If Moussaui’s computer could have been searched without a warrant, it almost certainly would have been.

It is a great tragedy that we have to be discussing the horrors of torture. Some even believe that any discussion of this issue is beyond the pale of acceptable discourse in 21st century America. But it is far better to discuss in advance the kinds of tragic choices we may encounter if we ever confront an actual ticking bomb terrorist case, than to wait until the case arises and let somebody make the decision in the heat of the moment.

An analogy to the shooting down of a passenger-filled hijacked airliner heading toward a crowded office building will be instructive. Prior to September 11th it might have been a debatable issue whether the plane should be shot down. Today that is no longer debatable. But would anyone suggest that the decision should be made by a low ranking police officer? Of course not. We all agree that this should be a decision made at the highest level possible - - by the President or the Secretary of Defense, if there is time to have such a dreadful decision made by accountable public figures. The use of torture in the ticking bomb case, like the shooting down of the hijacked airplane, involves a horrible choice of evils. In my view this choice should be made with visibility and accountability, either by a judicial officer or by the President of the United States. It should not be made by nameless and unaccountable law enforcement officials, risking imprisonment if they guess wrong.

Alan Dershowitz’s latest book is *Shouting Fire: Civil Liberties in a Turbulent Age.*

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**Alan Dershowitz's Tortuous Torturous Argument**

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It's torture. Literally. That is, whether or not the United States government should use torture as a method of interrogation for suspected terrorists is now a subject of debate.

Surprisingly, long-time civil-libertarian Alan Dershowitz has been writing unexpectedly in favor of the legal basis for torture. On November 8 2001, in a commentary for *Los Angeles Times* ["Is There a Torturous Road to Justice?"](http://groups.google.com/groups?selm=LpxG7.42870%24zK1.11056004%40typhoon.tampabay.rr.com) he discusses a proposal for a "torture warrant".

Much of the reaction to Alan Dershowitz's advocacy has blurred over a subtle point. Given that torture is such an incendiary subject, he's been accused of advocating torture itself ( ["Dershowitz: Make Torture An Option"](http://www.cbsnews.com/now/story/0%2C1597%2C324751-412%2C00.shtml) reads a headline on cbsnews.com). However, a careful reading of his commentary makes it clear that he isn't putting forth an argument in favor of torture *per se*. Rather, he postulates it will occur (*"I have no doubt that if an actual ticking bomb situation were to arise, our law enforcement authorities would torture"*). His point is then almost tangential from that perspective, a professorial concern with the due process of torture! To wit:

*The real debate is whether such torture should take place outside of our legal system or within it. The answer to this seems clear: If we are to have torture, it should be authorized by the law.*

In this piece, I will not take up the arguments against torture. That's been done far better elsewhere, by other civil-libertarians such as [Harvey Silverglate](http://www.bostonphoenix.com/boston/news_features/other_stories/multipage/documents/02042267.htm), or [Amnesty International](http://www.amnesty-usa.org/askamnesty/aa20011127.html). Rather, I stand in awe of Dershowitz's focus on legal authorization of torture as the *"real debate"*. All the moral and practical questions are swept away by his assumption of inevitability. We are left only to consider how to deal with what, if any, judicial procedures should surround torture.

He goes on to assert:

*Democracy requires accountability and transparency, especially when extraordinary steps are taken. Most important, it requires compliance with the rule of law. And such compliance is impossible when an extraordinary technique, such as torture, operates outside of the law.*

While this sounds stirring, on reflection, the meaning of the call for "accountability and transparency" is not at all clear to me. If torture is illegal, then by definition it's operating outside the law. So if a torture warrant is created, obviously torture *with warrant* would be within the law. But there seems to be a tail-wagging-the-dog situation here. Torture doesn't comply with the rule of law because it's against the law. If the law is changed so that torture is permitted (*with warrant*), then it's only become complaint with the rule of law because that rule has been changed to accept it.

What is the *purpose* of the torture warrant? Is it an anti-hypocrisy measure, to force us, as a society, to confront what we are doing? To have a public record of the event, that the defense attorney can use in a trial? To allow the torture to be supervised, with proper medical monitoring, to guard against it becoming life-threatening? To officially provide for doctors to treat the torturee during and after the ordeal?

Perhaps the idea is the simple belief that we can have legal torture, which is bad, but illegal torture would be worse. However, the obvious rebuttal is that we would end up having both legal and illegal torture, feeding off each other. Dershowitz even explicitly takes this into account (*"We know from experience that law enforcement personnel who are given limited authority to torture will expand its use."*)

So, in the face this expansion of authority to torture, what is gained by making it "accountable"? The anti-hypocrisy basis seems to be Dershowitz's rationale, as he justified the above by saying:

*Judges should have to issue a "torture warrant" in each case. Thus we would not be winking an eye of quiet approval at torture while publicly condemning it.*

Overall, Dershowitz's reasoning seems shockingly convoluted. We end up resolving the conflict between torture and the rule of law by changing the rule of law to accommodate torture. Then an admitted following expansion in torture (both from legal and illegal sources) is brushed aside with the argument that the legal torture would somehow possess accountability and transparency (accountable for what? transparent how?). Suppose Dershowitz is correct that there will be illegal torture under desperate circumstances, and without issuing a torture warrant, as a society we will be "winking an eye" to it. Is he really arguing that it's better to have more torture (due to the admitted effects of the tendency "expand its use"), but at least some of the torture will then be *authorized* torture? That is, judicial process is regarded as so sacred that it's worth **torturing more people** in order to preserve it in the merest formal sense?

That's both tortuous and torturous.

Finkelstein, Seth. "Alan Dershowitz's Tortuous Torturous Argument." *Alan Dershowitz's Tortuous Torturous Argument*. N.p., Feb. 2002. Web. 29 Jan. 2014.