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Why Sen. McCain's anti-torture language is hypocritical

It is the middle of the night just a few days before Christmas. I am somewhere over Russia, once again traveling to the war zone with the Army Chief of Staff. His Gulfstream V is eerily smooth and quiet. The lights are out. Everyone's asleep except me and the crew. I'm alone with my laptop and thoughts about terror and torture and Sen. John McCain, R-Ariz.

By now you know Sen. McCain's bill prohibiting "cruel, inhuman or degrading treatment" of detainees was incorporated into the Senate version of the Defense Authorization bill by a vote of 90 to 9. Nothing like the language in McCain's bill was in the House version. So the Defense Authorization Conference Committee (composed of senior representatives and senators) had the task of reconciling this discrepancy. The conference committee could drop, alter, supplement or include verbatim McCain's language.

You may also know by now that my Democratic colleague, John Murtha, D-Penn., authored a non-binding Motion to Instruct Conferees, directing the House members of the conference committee to simply accept the Senate's language - McCain's language. I was the lone Democrat to vote against this Motion to Instruct. I did so because I thought the intent behind McCain's language needed clarification. So I did not want the conferees to simply accept it. It needed more work.

As I expected, my vote against the Murtha motion was taken as pro-torture. That's why many of my colleagues voted the other way. Nothing surprising about that. The Motion to Instruct wasn't binding, they rationalized. And why foster such an ugly impression by voting against it? Imagine the press coverage. Imagine the hate mail. I no longer have to imagine either.

McCain has been interviewed extensively about his bill. Clearly it emphatically outlaws

the already illegal treatment of detainees in the Abu Ghraib scandal. That's certainly an appropriate signal to send to the world. But suppose our agents capture a senior Al Qaeda terrorist who admits he knows the location of a nuclear weapon planted in an American city and set to detonate at any moment.

When asked what our agents should do in such a "ticking time bomb" hypothetical situation, McCain said something like, "You do what you have to do" but "then you take responsibility for it."

In essence, clearly uncomfortable with the hypothetical, McCain was saying our agents should violate his proposed law and then "take responsibility" for the violation.

We should not pass laws hoping our agents have the sense and guts to violate them under dire circumstances. In 1994, when it ratified the United Nations Convention against Torture and Cruel, Inhuman and Degrading Treatment, the Senate did so subject to a formal reservation that the rights created in detainees would be no greater than those afforded to American citizens by the Fifth, Eighth and Fourteenth Amendments to our Constitution.

Experts had interpreted this Senate reservation to incorporate a "shocks the conscience" standard governing our agents in dealing with detainees. This term was first coined by the United States Supreme Court in Rochin v. California, a case in which the court ruled inadmissible evidence obtained when California police, with no warrant, entered the home of a suspected drug dealer, saw him swallow suspected drugs and literally made him cough up the evidence by forcibly induced vomiting.

A "shocks the conscience" standard is scaled to the surrounding circumstances. What shocks our consciences in a routine interrogation would not shock us in the proverbial "ticking time bomb" scenario. Sen. McCain evidently agrees. But his answer to the "ticking time bomb" hypothetical was equivocal, at best. So I urged the conferees to explicitly add the "shocks the conscience" standard in the final language of the bill.

Unfortunately, adding or changing language became essentially impossible upon the overwhelming passage of the Murtha Motion to Instruct. The best I could do under the

circumstances was use an unusual procedure, a colloquy - which is a formal discussion recorded in the Congressional Record - with the Chairman of the Armed Services Committee. Just before the House voted on final passage of the entire bill, including the McCain language, I formally asked the chairman if he understood the McCain language to incorporate the "shocks the conscience" standard in determining when our agents were in violation of the law. The chairman responded that this was his understanding. No one objected or offered a contrary interpretation on the record. Then we voted.

Hopefully this colloquy will support a court's application of the "shocks the conscience" standard." Better yet, when calmer heads prevail, Congress itself might offer some clearer legislation.

No, "shocks the conscience" is not the bright line test we would all prefer. One is not possible here as in so many other conflicts between societal need and individual rights. Ultimately appropriate treatment of our prisoners and detainees requires judgment, control and leadership in many different circumstances.

Put yourself in the shoes of the experienced Al Qaeda terrorist, the "ticking time bomb" detainee. Would it shock his conscience if we used extreme means to extract his information? Would it shock his conscience if we didn't? Which choice would shock yours?

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