

# THE BOSTON PHOENIX

## Oh, pardon me

By HARVEY SILVERGLATE | September 27, 2006

Forget all the hoopla: George W. Bush is still going to have to issue a flurry of pardons at the end of his term. The White House and a group of dissident Republican senators led by John McCain of Arizona may have reached a compromise on how to authorize the CIA's controversial interrogation tactics for captured terrorism suspects. But the hastily conceived legislation — like so much recent law expanding federal statutory authority — will likely fail to do what its shills and chief architects promise it will do: control the future excesses of CIA interrogators and provide CIA operatives with immunity for excesses committed between September 11, 2001 and the passage of this legislation.

Under the bill, certain “extreme” tactics like sleep deprivation, forced hypothermia, and biological experiments would be outlawed — and rightfully so. But at the same time, the president would be given the authority to define what *other* coercive methods may be used, even if they conflict with the Geneva Conventions. This gaping hole in the legislation was carved out by the Bush administration and congressional negotiators in response to the Supreme Court's June Hamdan opinion, in which the high court ruled that interrogators who violated international standards could be held accountable under domestic criminal law. As the *Washington Post* reported on September 25, presidential national-security adviser Stephen J. Hadley wanted to ensure that prosecution could be brought for *future* interrogations only, and even then only for the most clearly outrageous tactics.

But what about prosecutions for rough interrogations that occurred between 9/11 and the bill's enactment? In August, “Freedom Watch” predicted Bush would have to rely on the presidential pardon to exonerate those officials and field operatives who tortured detainees at the behest of the Commander in Chief (“Pardons Are Forever,” News and Features, August 18). In the new “compromise” bill, there is enough ambiguity in the distinction between torture versus “merely coercive” techniques — neither the bill's supporters nor critics can be certain, for example, whether “water-boarding” would be allowed or not — that CIA agents following the boss's

orders might still have reason to fear prosecution once a new administration takes office in January 2009. The president won't be tossing away the pardon pen just yet.

After all, one of the hallmarks of modern-era federal criminal statutes is that ordinary people, often ordinary lawyers and judges, cannot figure out what is and is not a crime. The inability — or perhaps tactical unwillingness — of Congress to speak clearly plagues this legislation. Pardons remain Bush's only surefire way to protect those who zealously, or at least dutifully, follow his more dubious orders.