

The Tortured Law on Torture

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Ah yes, those torture confessions have proved so useful. That, at least, was the claim of our president in justifying one of the most egregious assaults ever on this nation's commitment to the rule of law. But now comes news that charges have been dropped against the so-called Sept. 11 attacks' 20th hijacker, one of dozens so identified, because the "evidence" he supplied under torture and later recanted is not credible enough to go to trial.

That fact, of course, will not compel President Bush to cut the tortured prisoner loose. After all, Saudi citizen Mohammed al-Qahtani has only been held in confinement for more than six years without being charged with a crime, and without being allowed to confront his accusers in a court of law.

The fact that the information produced is worthless—as evidenced by Qahtani, once driven insane, naming everyone around him in the camp as a major al-Qaida operative—will not deter those who condone torture. But others expert in these matters, including presumptive Republican presidential nominee John McCain, will recoil from such tactics.

It was the treatment of Qahtani and other prisoners, as witnessed by horrified U.S. Navy Department investigators at Guantanamo, that got the attention of the Navy's then-General Counsel Alberto J. Mora. In one of those all too rare examples of true heroism that makes one proud to be an American, Mora challenged the Bush administration to practice the human rights standards that America proclaims to the world. But Bush would stay true to his own values: "Any activity we conduct is within the law," Bush stated in November 2005, adding, "We do not torture."

What was it then? As the *New Yorker's* Jane Mayer reported in 2006, citing the Army's own interrogation logs, Qahtani, in addition to being subjected to documented beatings and other physical abuse, was put through an S&M routine calculated to drive him mad, which it accomplished:

"Qahtani had been subjected to 160 days of isolation in a pen perpetually flooded with artificial light. He was interrogated on 48 of 54 days, for 18 to 20 hours at a stretch. He had been stripped naked; straddled by taunting female guards, in an exercise called 'invasion of space by a female;' forced to wear women's underwear on his head, and to put on a bra; threatened by dogs; placed on a leash and told that his mother was a whore."

Quite an advertisement for the American way of life. Should we expect the rest of the world to boycott the Olympics when we next get to host the Games? Others might question why the Third 1949 Geneva Convention's prohibition against "outrages upon personal dignity, in particular humiliating and degrading treatment," doesn't apply to the United States.

The failure to elicit any usable incriminating information from Qahtani once again supports the view of most experts that torture is not only morally repugnant, it is in fact counterproductive to getting at the truth.

But this didn't trouble John Yoo, then the Justice Department lawyer who wrote the infamous Bybee memo on torture, named after Yoo's boss, Jay S. Bybee, who was rewarded for his leadership with a judgeship on the Ninth Circuit Court of Appeals in Los Angeles. Yoo, the best recent example of what the great anti-Nazi writer Hannah Arendt once referred to as the "banality of evil," teaches law at UC Berkeley when not touring the country to argue that if an action does not produce death through organ failure it can't be torture. Audiences tend to clap politely and observe that while they don't agree with him, he is, as I was told by a UCLA professor after such an appearance, "a very bright fellow."

On Feb. 6, 2003, as Qahtani was being led around on a leash, Yoo visited Mora in his Pentagon office. Mora later told the New Yorker writer Mayer that he asked Yoo, "Are you saying the president has the authority to order torture?" Yoo answered with a clear "yes." Following that stellar legal advice, then-Defense Secretary Donald Rumsfeld, with Yoo's encouragement, officially approved "hooding," "exploitation of phobias," "stress positions," "deprivations of light and auditory stimuli" and the other horrors that the scandals of Abu Ghraib and Guantanamo would burn into the legacy of the United States.

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