

SICUREZZA e SCIENZE SOCIALI

Ultimate sanctions: life sentences, death sentences, and solitary confinement

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Editorial. A brief commentary on extreme sanctions

*Robert Johnson**

This volume is about extreme sanctions. Some of the sanctions under consideration in this issue are extreme in themselves; others are extreme in their consequences. There is a sense in which all sanctions in modern justice systems are life sanctions, since sentences are virtually never expunged and thus are a stain on one's record that endures for the remainder of one's life. Likewise, all sanctions leave their mark on the offender in a psychological sense. For better or worse, and mostly worse, exposure to the justice system and its sanctions changes the character of those punished. Sanctions also change the lives of the loved ones of those punished, and indeed, we learn from the work of Todd Clear and Natasha Frost (2013), take a toll on the community from which offenders and their loved ones originate. To punish is to inflict pain. Pain has consequences. We are admonished to face and ameliorate those consequences – by way of alternative, less intrusive interventions (Carlone, this volume) or by a focus on restoration (Moretti, this volume) – but in the absence of fundamental reforms, a presumption of harm attends all criminal sanctions.

Many of the entries in this volume deal directly with life sentences, death sentences, and solitary confinement, sentences that inflict great suffering, indeed suffering that violates the human dignity of offenders and arguably constitutes a case of torture. These harsh sanctions are most commonly deployed in America, which has the highest incarceration rate in the Western world, if not the entire world. Conditions in American prisons, particularly high security prisons reserved for those serving extreme sanctions, are uniquely harsh and have been described by Alison Liebling (2011) as “dehumanizing” and “hellish”, and ultimately

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“un-survivable” in the face of widespread and even routine violations of human dignity. In the memorable parlance of the pseudonymous American prison writer B.M. Dolarman (2014), «prison is the place where a man’s dignity goes to die». Women, too, suffer this unseemly death of dignity in the face of an invasive daily penal regime (George, 2015). In essence, respect for dignity in prison means allowing prisoners to live like human beings, rather than caged animals or stored objects (Johnson, 2014). This is a low bar, but one that many prisons around the world, but perhaps especially in America, fail to meet.

In the opening essay, “What We Do”, Nagelson and Huckelbury (this volume) make a strong case that solitary confinement is antithetical to human rights and, as a practical matter, is an instance of torture. This regimen of torture is used widely in American prisons, affecting some 80.000 or more prisoners on any given day. The simple fact that isolation is a widespread punishment in the United States adds weight to the moving assertions made by Nagelsen and Huckelbury. The punishment of solitary confinement, as used in American prisons, amounts to torture on a grand scale, affecting more prisoners than found in the entire prison systems of some nations. That such sanctions flow from a system that often is lawless, as made plain by Fagelson (this volume) in his thoughtful essay, adds to the enormity of this practice, as well as other torturous practices, such as waterboarding, that take shape in the hidden and often anonymous spaces provided by the isolation of prisons and by isolated settings within prisons called “special housing units”, an ironic and disturbing euphemism.

«Harsh and degrading punishments», state Chiappetta and Johnson (this volume), «are standard practice in the American justice system». This can be seen in the routine violations of self that are the found in the regular use of strip searches in the American justice system, including for arrests of persons charged with minor crimes. A telling case in point is the notorious “perp walk,” in which “perpetrators” – persons accused or convicted of crime – are paraded in handcuffs before the media and the viewing public. This practice is little more than a modern version of primitive communal shaming. Shaming, which brings mortification in its wake, is an extreme sanction in the sense that it is a kind of death penalty of the self; mortification comes from the Latin *mortificare* (to put to death). The person mortified suffers a mortal wound to the personality at the juncture of insult. The personality, if you will, has been put to death. This experience of mortal insult may not be permanent, though presumably it is when the shaming is a continuing enterprise, but surely such assaults on the self leave a mark on its victims long after the shaming has ceased. More generally, the sheer contempt for the personhood of those accused or convicted of crime makes each and every

encounter in the American justice system a potential exercise in extreme sanctions. Violent deaths at the hands of police during the arrest process are stark reminders of the underlying violence of the justice system, but the routine violations of the person inherent in the administration of justice are the background and impetus of this violence.

Several contributions shed light on the theoretical rationales for harsh justice and offer a valuable comparative theoretical perspective on justice, punishment, correction, and human rights. A sentence of life imprisonment, we learn from Vianello (this volume), «challenges the very essence of the modern penalist doctrine based on the premise that all forms of punishment must respect an individual's dignity». Such sanctions, she contends, are a kind of death penalty; as such, they are morally repugnant and without merit as legal sanctions in Europe, where the death penalty has been outlawed. Life sentences without the possibility of parole come in for harsh criticism by Vianello. Permanent imprisonment, in the view of many Italian life-sentence prisoners, is arguably worse than a death sentence. A group of 300 Italian lifers signed a petition sent to the President of the Republic demanding «that our life sentence be converted to a death sentence». In the words of one prisoner, «at least a death sentence gives you the chance to stop suffering». Such claims about endless suffering adduced by Vianello make questions about the prevalence and extent of violence in society and in the justice process, examined by Baldani (this volume), all the more compelling. These testimonials about suffering also reinforce the centrality of the notion of human dignity in punishment, which we learn is routinely violated in the “hard prison regimes” to which some Italian offenders are subjected. These regimes, vividly described by Siino (this volume), limit freedom within the prison and impose sharp restrictions on contacts with loved ones in the free world. These hard regimes bring to mind the solitary and other “special housing units” so common in the United States and which, like their counterparts in Italy, are rooted in what Fabbri (this volume) aptly describes as «a history of neglect». That history continues on both sides of the Atlantic, finding painful expression in regimes that produce extreme suffering as a matter of course.

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Torture(d) policies of the war on terror: decoupling power from reason

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Abstract

Many of the policies of the “War on Terror” have been controversial because of their possible violation of the law and redistribution of power amongst the different branches of government. In this article I show that the problem with these policies goes much deeper. By showing the necessary conceptual elements of law, I show that many of these policies, are not simply illegal but they fail to be law governed at all by any conception of law. This violates the foundations of American constitutionalism that subordinates every government action to the rule of law.

Keywords: rule of law, war on terror, power, torture, reason

1. The rule of law and its value

While officials may disagree about the proper distribution of power between the President and Congress, no one disputes that the Rule of Law is the basis of all government authority. My paper will test this fundamental assumption by examining the effect of the American “War on Terrorism” on the rule of law in America. This inquiry is fundamentally distinct from the large literature focusing on the potential violations of international and American constitutional law caused by these policies. That will *not* be the concern of this essay. My question is not whether these policies are legal but rather whether they are law governed in any sense of that term.

The burden of this essay is to identify and explain those elements necessary for the rule of law and apply them to specific government

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behavior. This will enable us to determine whether that behavior is consistent with our idea of the rule of law. Over the last decade and a half, there have been seismic shifts in government behavior and assertions of government authority. Some of these changes, while important, are susceptible to legal argument. Whether or not one thinks that warrantless wiretapping is constitutional, no one can argue that the some law applies to the changed procedures¹. I am concerned with state actions where it appears that no law governs. That is to say, there are state institutions whose behavior is not subject to a court's legal authority.

When we speak of the supremacy of law as the foundation of American Constitutionalism, we are identifying the ultimate source of its authority. The mechanism that achieves this end is the rule of law. It performs this function by providing reasons that rational actors take as good enough reasons to do it (Raz, 1979). Legal responsibility is premised on the idea that people are autonomous beings who can choose whether or not to follow a rule. This is what distinguishes law from arbitrary forms of government. While the rule of law cannot expunge arbitrary or irrational policies from a legal system, it can ensure that rational actors understand the rule sufficiently for officials to apply it and for citizens to decide whether or not to follow it. Further, it will enable rational actors to understand the consequences that will follow from their choices. This rational link between rule and action is what makes law possible and its absence signals law's absence.

We can find the absence of law even in situations where there is a trial and legal decision. This idea is foreign to most actors within a legal system. Those who break the law and those who litigate and adjudicate it focus on the applications of specific rules to particular situations. This paper must evaluate whether or not those rules, in their content and application, ensure that legal responsibility is rooted in reasons that can guide behavior. A judge believes this is the upshot of adjudication and lawyers agree even if they disagree with the result because they see some rule purporting to cover some behavior.

These participants can be mistaken for at least two reasons. Firstly, sometimes a legislature may fail to make a rule with regard to specific behavior. This happens for many reasons. The generalization upon which the rule is based can be vague, and hence, incapable of being rationally interpreted. Failure also occurs in cases of *ex post facto* and secret

¹ This assumes that the documents released by Edward Snowden don't show the government acting according to no rules whatsoever.

legislation. In these cases, no signal is sent to rational actors appealing to their reason and enabling them to comply with the rule. It is conceptually impossible to obey *ex post facto* legislation. Anyone whose behavior comports with *ex post* legislation does so by coincidence not through reason and hence, not through obedience.

So the question is not whether there is a legal decision purporting to cover a government practice, but whether that decision can signal reasons to rational actors to decide whether and how to comply with the law. The hearings employed with prisoners at Guantanamo Bay illustrate phenomena. Even after multiple revisions in response to Supreme Court review it remains unclear whether the hearings actually produce any data that would enable judges to link rational behavior to known rules.

The two best descriptions of failures to have law are by the natural lawyer, Lon Fuller and the legal positivist Joseph Raz. Although their concepts of law reflect opposite ends of the spectrum, their views on what is not law are mostly compatible and non-controversial on the issues of this paper. They disagree about whether the requirements for law entail any moral feature that generate an obligation to obey it. The rule of law entails other necessary conditions, however, about which there is little dispute among different conceptions of it.

My essay will start by identifying the necessary elements for any concept of law. I will then examine whether those laws and policies roughly styled as the “War on Terror” that were pursued in the United States, post 9/11, comport with those essential features for the rule of law. Law is not a necessary condition of government. As Weber observed systems of authority have been legitimated by charisma and custom also (Weber, Gerth, Mills, 2009). The American Constitutional structure, not only bases government authority in the rule of law, but it makes the law supreme. If political and legal practices during the War on Terror are inconsistent with settled concepts of law governed behavior then their effect is far more significant than shifts in the relative powers of the Congress and Executive. At stake is the justification of power in American Constitutionalism. If state institutions have intentionally or not, put some government activity outside of the law we have a new system of government.

Part two will concern itself with identifying features of governance that are incompatible with the concept of law. In the third and final section of the essay, I will consider specific policies of the War on Terror to see whether they incorporate any of those elements that have been shown in part two to be incompatible with the rule of law.

2. Necessary Conditions For The Rule of Law

What separates a law-governed society from an arbitrary one? The rule of law entails some level of transparency about what behavior is expected. It is part of the meaning of arbitrary rule that no such reasons are forthcoming. Actions of an arbitrary power appear random, capricious and unpredictable. In Hobbes' estimation, the uncertainty about nearly every aspect of life in the State of Nature imposes a cost that is greater than living under an absolute dictator in a law-governed state. The fundamental feature of the rule of law is the conveyance of reasons by the monopoly of power to rational actors it controls concerning the behavior that is expected for each actor to achieve particular ends. Want to leave property to someone after you die? The statute of wills provides reasons why and how to execute a will. If one wants to avoid getting a fine, a red light provides a reason to stop at an intersection. While the moral force of these reasons is disputable, the implications of their absence are not (Fuller, 1977). For Raz the virtue of law is the capacity for free agency that is part of the liberal idea of human dignity (Raz, 2009).

There are many ways a to fail to give that reason and it is possible to do so inadvertently even while trying to contain power under law. So government officials, including judges and lawyers can go about the business of adjudication without necessarily noticing that the product of their effort does not amount to the rule of law.

- Lack of generality: a rule is a generalization whose boundaries are determined by relevant common traits. To have rule governed behavior there must be some general categories established that obviate the need for *ad hoc* justifications of each and every action. Laws are void for vagueness when they fail to identify a set of common characteristics that enable like to be treated alike.
- Lack of promulgation: the assumption that ignorance of the law is no excuse is based on the prior principle that the law is available for anyone to know in advance. Without notice of expected behavior citizens lack not only a reason to obey, but any capacity to do so. Obedience to a rule is purposeful behavior. So among other necessary conditions, the actor must intend to be compliant to the rule in order to be obeying it. Absent promulgation, any confluence of behavior with state expectations is coincidence, not obedience.
- Retroactive laws: apart from being unfair, such laws fail to give notice. No one can rationally guide his or her behavior according to a rule before the rule exists.

- Lack of clarity: this goes to the question of notice that would permit a law to be followed. In this case the failure is one of communication.
- Enactment of contradictory rules: a law or laws that require a person both to do X and not to do X cannot be followed or rationally adjudicated. A judge cannot arbitrarily choose one to follow because that is not the application of a rule to that litigant.
- Rules that require the impossible: behavior that is beyond the capacity of anyone to perform cannot be obeyed.
- Inconstancy of law: laws that change frequently frustrate the notice requirement by confusing people or making it uncertain what behavior is expected of a rational actor.
- Constancy between declared rule and official action: if officials do not comply with enacted rules then their action are not governed by those rules.

The element missing from all Fuller's mythical King Rex's failed attempts to make law was the failure to give a reason that would motivate a rational person to act. Raz agrees with Fuller that the failure of state power to have internally consistent rules defeats its lawfulness, though he doesn't think that achieving consistency produces any moral authority to command obedience. This consistency is merely a formal requirement that like situations be treated alike. Yet even for Raz law has a very important virtue that deserves our respect, even if not our obedience. To see it we must look away from law's consistency and look instead at the connection law makes between human action and responsibility. Human action, as opposed to behavior, Raz notes, is done purposefully and therefore it is done for reasons. Our heart *behaves* involuntarily but it cannot *act*. The whole idea of legal responsibility stems from this distinction. Responsibility implies purposeful behavior. This entails the actor having a reason to behave in a certain way. These reasons make the object of the behavior cognizable and motivate him only because, using free will, he or she decides that those reasons are good enough reasons to impel action. Responsibility requires free will. Someone forms a will to do something when he or she develops reasons to act that are in the actor's view, good enough to justify the action being taken.

While oppressive law can remove someone's freedom, arbitrary power makes free agency itself impossible by removing any opportunity to plan. An arbitrary environment, Raz argues, constricts one's freedom by removing one's ability to make and act upon reasons. If power is applied irrationally, no one can develop sound reasons for behaving one way or the other because good and bad outcomes cannot be aligned with behavior to avoid punishment. By eliminating the ability of people to act for a reason,

random or arbitrary power removes the ability of people to act purposefully in relation to it. So arbitrary power doesn't merely limit our freedom to act, it removes the capacity for free will to be exercised at all in relation to it. Law, however oppressive, permits people to make the sort of plans and calculations that become reasons for actions. It is only by letting people develop reasons for action that they can have the free agency necessary for any array of political, social or economic freedoms.

A review of his list of state actions that defeat the rule of law shows how this might happen (Raz, 2009).

- *All laws should be prospective, open and clear.*

It is impossible to have reasons to follow a rule that was enacted after the regulated activity occurred. Any concurrence with the rule must be coincidental and not an act for which one can be held responsible. Similarly, vague laws fail to create a general category with boundaries. "Keep of the grass", can be obeyed, but a rule that says "no short people on the roller coaster" cannot be followed because it has no boundaries. How tall can a short person be?

- *Laws should be stable.*

Constant change produces uncertainty about what law is in force. This inhibits purposeful behavior because one cannot know what reasons to have for behaving one way or the other.

- *The procedures for making the laws must be open, stable, clear and general rules.*

Part of knowing the substance and validity of the law knows its pedigree. Without an open clear procedure for making and enforcing rules officials will not know the boundaries of their own authority and citizens won't know whether the law is the product of the state or some college prank. This entails clear and transparent rules of recognition about who has the authority to create rules and instructions on how they can exercise their power.

- *The Independence of the judiciary must be guaranteed.*

Some people argue that any government body that promises to apply the rule of law is capable of policing itself. The most succinct repudiation of that idea was given by Madison in "The Federalist Papers": «If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary» (Hamilton, Madison, Jay, Goldman, 2008: 51). The Rule of law requires that there be a single source that provides finality about what the law is. The inability of people to be judges in their own cases was why Locke thought that individuals would move to law governed society. This idea requires three sub parts.

1. Courts Must Observe Principles Of Natural Justice.

Due process is not simply a matter of fairness. These are the procedures that actually protect the chain of fact and law showing that a specific person is responsible for a specific crime. Prohibiting confrontation of witnesses is not merely unfair, it weakens the rational basis for believing the facts introduced and so undermines the law's desire to hold responsible the person who purposefully violated a rule.

2. Courts Have Review powers over the implementation of other principles.

This entails the power to review every department of government claiming to act under color of law but only to determine one issue: Is the department or rule in conformity to the Rule of Law.

3. Courts Should be Accessible.

If the law is too expensive or difficult to access then nothing else about the Rule of law matters.

Discretion of Crime Preventing Agencies Must Not be allowed to pervert the law. Prosecutors, Police and Security Agencies must not be able to select which laws will be enforced or which class of citizens will be exempt from prosecution. The mission of the agency cannot trump the Rule of law.

There is considerable overlap between Fuller and Raz's ideas about what the Rule of law entails. As with Fuller, Raz's first few principles deal with ensuring that the law is posited so that people can comprehend it and follow it if so inclined. The rest of his principles deal with secondary rules officials use to ensure that the laws are made and posited correctly and that they remain subordinate to the law themselves. While Fuller and Raz might disagree with the moral virtue of these principles, they agree on the part they play in making the Rule of law possible. The internal consistency or formal equality that Fuller requires for law is consistent with Raz's notion that the Rule of law provides reasons for a rational actor to decide what to do. One cannot have rules at all, let alone enable them to provide reasons for action unless there is some formal consistency that permits coherent generalizations that treat like cases alike. They agree about the constitutive elements needed to have the Rule of law.

3. From Theory To Practice: Testing The lawfulness of the War On Terror”

3.1. Introduction

In this section we will be looking for ways in which the policies of the War on Terror either lack the internal consistency of Fuller’s schema or the reasons for action of Raz’s plan. We may find instances of non-legality where all three branches agree on its constitutionality. Not even the Supreme Court can make something legal that does not meet the conceptual requirements of being law in the first place. Given that the American form of government authorizes no non-law governed behavior, any policies that fail to satisfy law’s conceptual requirements violate the constitutional structure of government that makes law supreme. This will require a choice between the offending policies of the War on Terror, or the idea of law as the basis of authority in American Constitutionalism.

3.2. Torture(d) Policies of The War On Terror

Not surprisingly, one tool of the War on terror was secrecy. This came in several forms but for this article we will consider the “State Secret” privileges and “secret laws”. These secrets were often secret interpretations of laws that purported to justify government behavior significantly different from the law as written or from the way it had been traditionally understood by prior officials. A second important tool was retroactive legislation designed both to protect secrets and to avoid criminal and civil liability for the use of torture, warrantless wiretaps, and the denial of due process rights prior to taking life and liberty that have been considered necessary at least since the Magna Charta.

I. Retroactive Immunity and the Foreign Intelligence Surveillance Act

The Rule of law requires that Legislation be prospective while adjudication is retrospective. It is conceptually impossible to follow a rule that did not exist at the time you acted. Nevertheless, in July 2008, the FISA Amendments Act of 2008 was passed by Congress and signed into law by President Bush². After the 9/11 attacks the Bush admin-

² FISA Amendments Act of 2008, P.L. 110-261 (July 10, 2008).

istration initiated a Terrorist Surveillance Program (“TSP”) that asked telecommunication companies to provide data that required a judicially approved search warrant. When the New York Times disclosed the existence of this program, several targets sued the private companies for civil liberty, contract and tort violations. President Bush claimed the authority to perform warrantless searches based on his inherent power as commander in chief and the Authorization for Use of Military Force passed (“AUMF”) by Congress in 2001³.

Congress sought to halt these private civil lawsuits against the telecommunication companies. While the President could pardon or choose not to prosecute potential defendants in criminal trials, the US was not a party to any of these private lawsuits. So although the government induced the private companies to act, and may have violated the rights of the plaintiffs in various ways, the subjects of these lawsuits involved only the wrongs of one private entity against another private entity. By giving the telecom defendants retroactive immunity, the government removed the existing rights of other private citizens that the government had a hand in violating.

This immunity also violated the independence of the judiciary by instructing the court to dismiss any lawsuit that the attorney general certifies resulted from the Telecom’s cooperation with the US Government where the Telecoms had been told that the President had authorized the warrantless searches and had determined it was legal. Although the court is instructed to dismiss the cases that are so certified, that does not mean that the data collections were actually lawful since the courts had already determined that the president didn’t have the authority under the constitution to make that determination. So even though the court might find that the authorization was not legal, the Congress is instructing the court to dismiss the case.

While the warrantless wiretapping program or TSP entailed many other uses of state power that obviate law-governed activity, these alone violate both Fuller and Raz’s prohibition against retroactive lawmaking. In as much as the TSP program was undertaken in secret while President Bush asserted that he was seeking wiretaps in accordance with the law, it also violates Fuller’s requirement of concordance between the law as promulgated and official action. Moreover, this attempt to retroactively exclude the courts from enforcing pre-existing constitutional and legislative rights violates Raz’s requirement of an independent judiciary to ensure the rule of law and the requirement that the judiciary make the final determina-

³ P.L. 107-40, 115 Stat. 224 (2001).

tion of lawfulness of the behavior of other state entities. It also violates the requirement that courts be accessible to litigants so that the law can actually be applied. The Congress here explicitly made the courts inaccessible to litigants so that the rule of law could not be applied. Finally, this legislation permitted the goals of the security agencies and police to trump the law, in violation of Raz's proviso.

II. The Use of Torture and And Government Secrecy To Hide it

Perhaps no policies violate more elements of the Rule of law than the decisions to engage in the torture of captured prisoners. To see why this is so, one needs to understand the legal status of torture under international and US law and the prior practice of the American government.

The prohibition against torture is well established under customary international law as *jus cogens*. This is the highest status in customary law and supersedes all other treaties and customary laws except laws that are also *jus cogens*. Acts criminalized under *jus cogens* are subject to universal jurisdiction, meaning that any state can exercise its jurisdiction, regardless of where the crime took place, the nationality of the perpetrator or the nationality of the victim. Torture is additionally prohibited by treaty under article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights, and in the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment. Under US law, the 5th and 8th Amendments to the Constitution prohibit coerced self-incrimination as well as cruel and unusual punishment, while the Federal Criminal Code §2340 and the UCMJ, a federal statute, prohibits U.S. armed forces from, among other things, engaging in cruelty, oppression or maltreatment of prisoners (art. 93), assaulting prisoners (art. 128) (a prohibition that includes a demonstration of violence that results in reasonable apprehension of immediate bodily harm), and communicating a threat to wrongfully injure a detainee (art. 134).

As part of the War on Terror, prisoners were brought to the American Naval base at Guantanamo Bay in Cuba. One of them, Mohammed al-Qahtani, a Saudi National and purportedly the 20th hijacker, was subjected to torture⁴. In addition to torture that took place under American

⁴ Statement of Susan Crawford Convening Authority of Guantanamo Military Commissioners, see, Bob Woodward (2009-01-14). "Detainee Tortured, Says U.S. Official: Trial Overseer Cites 'Abusive' Methods Against 9/11 Suspect". The Washington Post, p. A01.

Control, US government officials also rendered prisoners to foreign states that were known by those officials to torture its prisoners. One such person, Khaled El-Masri, a German national was kidnapped and tortured by CIA officials in a secret prison in Afghanistan. After determining that he was wrongfully imprisoned the CIA dropped him in Albania.

While the facts of both these cases were widely known via press coverage and admitted by US officials, the US government still sought to have suits for wrongful imprisonment, assault and violations of various other rights dismissed from federal court under the “States Secrets Privilege”. This privilege, which is used against private plaintiffs who are seeking redress against the invasion of their rights by the federal government, comes in two varieties. The first, called a Totten Bar, is jurisdictional. This dismisses any suit that will disclose information lawfully secret. The second, called the Reynolds Exclusion, is simply an evidentiary principle that is meant to exclude the introduction of evidence that will reveal a lawfully held secret. This is not supposed to result in the dismissal of a suit and a judge is meant to determine whether or not the evidence will actually reveal anything lawfully secret. The Bush Administration asserted that the courts could not even examine the evidence *in camera* to determine whether the evidence was lawfully secret or if its use at trial would expose it. The 4th circuit combined the lesser judicial oversight of Reynolds, with the much greater legal consequences of Totten. So perversely, even though the legal consequences of secrecy were significantly greater, the 4th Circuit was giving the almost non-existent oversight designed for a standard with much milder legal consequences. They wrote the courts out of examining the evidence, even *in camera*, if the President asserted a national security purpose⁵.

When the incidents of torture were first exposed, President Bush blamed individual soldiers and denied that it was the policy of the US to engage in torture or inhuman treatment of prisoners. Once evidence from Guantanamo in Cuba, Abu Ghraib Prison in Iraq and Bagram Air Base in Afghanistan, all under US government control made such denials incredible, President Bush claimed authority as Commander in Chief to nullify these laws due to necessity, even though no US law permitted this and International Law specifically precludes necessity as a defense for torture.

⁵ (5) *El Masri v Tenet Director of Central Intelligence*, 479 F.3d 296, 303 (4th Cir. 2007) («Although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities»).

The CIA and the military were aware that the behavior was illegal because they refused to engage in it without a written finding by the President or Justice Department that the behavior was legal or that they would be immunized. As the Naval Inspector General's report made clear, all the relevant JAG officers and military service counsels opined that the treatment was at least assault under the UCMJ and also torture under international and federal criminal law⁶. Indeed, the Staff Judge Advocate advising the military interrogators at Guantanamo, Diane Beaver, said the techniques were illegal but could be used if the President provided immunity. The general counsel of the Navy Alberto Mora, agreed that the techniques constituted torture although he pointed out, correctly, that the President did not have the authority under US or International law to provide immunity for war crimes such as torture⁷. It's important to note that immunize here means a promise not to prosecute, or a pardon if prosecuted. This not only violates the no selective prosecution requirement for security purposes. Given that President Bush ordered the behavior about which the CIA is demanding immunity, he is really immunizing himself and hence removing himself from legal accountability.

Once the military lawyers refused to sanction the techniques suggested by White House lawyers, rather than change the techniques the White House simply removed the military lawyers from future consultations. In order to satisfy the interrogators however, they generated a legal opinion from the Justice Department's Office of Legal Counsel (OLC)⁸. This office is the chief legal advisor to the President concerning his legal authority. Its rulings trump the legal opinions of any other government official. While its interpretations govern the executive branch, it does not make it legal. That is to say, they are only the President's lawyer. If its interpretations are mistaken, then they have all violated the law and their lack of accountability is lawless.

The Courts can and do over rule OLC opinions. One such instance was the case of *Hamdan v Rumsfeld* where the Supreme Court held that the President did not have the authority as commander in chief to amend or dispense with requirements of the Uniform Code of Military Justice or

⁶ Vice Admiral Albert T. Church, Inspector General, US Navy, "Review of Dept. of Defense Detention Operations and Detainee Interrogation Techniques", May 25, 2004.

⁷ A.J. Mora (July 7, 2004). "Memorandum from Navy General Counsel Alberto J. Mora to Navy Inspector General".

⁸ Memorandum of John Yoo to Alberto Gonzales regarding legality of "enhanced" interrogation techniques. August 1, 2002.

any of the Geneva Conventions⁹. There are two notable aspects of these attempts to keep the detainees out of either the military courts martial, or civilian courts. The first relates to the procedures accorded the detainees in the commissions and the Combatant Status Review Panels that were developed by President Bush in response to Hamdan. These review panels gave the detainee assistance in the preparation of his status review and access to unclassified evidence. However, because the evidence against the detainee was almost always classified, the detainee could not confront the witnesses against him and indeed often could not know the evidence against him. In some cases the detainee could not even know what he was accused of doing that caused his detention in the first place.

The Yoo and Bybee OLC memos used to authorize “enhanced interrogation” were not only widely rejected by legal experts outside the government, but when Jack Goldsmith became the head of the Office of Legal Counsel, he too repudiated the memos as incorrect. He said that the president did not have the power to unilaterally legalize the techniques that prior memos had sanctioned. He withdrew the memos as legally unsound. President Bush insisted that the techniques were still legal notwithstanding the opinion of his lawyers. When pressed to justify this assertion, President Bush relied on a completely unique argument in Anglo-American legal tradition. He argued that the legal position of “enhanced interrogation” was justified according to legal principles that were sound, yet secret and which could not be revealed for national security reasons.

4. Torture Policies and The Rule of Law

The policies used to justify the use of torture and then evade accountability for this behavior violate nearly every element of law-governed behavior. Starting in reverse chronological order, the idea that there can be such a thing as a secret law or a secret legal argument is completely antithetical to both Raz and Fuller’s requirement that law be open, transparent and knowable. There is no such thing as a secret legal argument in the common law tradition and conceptually there cannot be such a thing. For similar reasons, these actions also violate Fuller’s requirement of promulgation. The use of the secrets privilege at all let alone its expansion into a jurisdictional bar where the courts are not even able to examine the evidence to determine if it is lawfully secret, violates Raz’s requirement of the independence of

⁹ Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

the judiciary and his separate requirements that the judiciary be in charge of determining the legality of the other branches of government. Of course, the dismissal of suits against the government based on the mere assertion of national security also violates his requirement for the rule of law that the courts be easily accessible so that the state's power can be evaluated for its conformity to the rules. In this case, the court is explicitly saying it will not make the courts available to determine whether state power is in conformity to the rules if the state merely asserts that its behavior is in conformity.

The insistence by the President that the United States was not engaging in torture as a matter of policy while he was explicitly developing a legal framework to engage in what he was told by his military and civilian legal advisors would amount to torture violate Fuller's requirement that state actions do not deviate from let alone repudiate the law as written. The decision to employ techniques that were against the law for the sake of national security "necessity" violates Raz's requirement that the mission of police and security agencies not be permitted to transcend the law.

The denial of *habeas* due process protections violates both Fuller and Raz's idea of law depending upon providing people with reasons for actions. Just as the law is designed to provide individuals with reasons to obey the power of the state, legal procedures are also designed to ensure that legal responsibility is only attached to people who have in fact deviated from a rule. But the decisions of the military tribunals and combatant status review boards by their own lights could not have produced any rational reason for their decisions because they had no basis to test their evidence by procedures that would give them the basis to employ reason. If the detainees cannot even know the acts they are accused of, let alone the evidence adduced for their criminal responsibility then the Judges have no basis to determine its veracity. In many cases the judges in these tribunals were relying on evidence procured through torture of the detainee or an accusing witness. The judges were not told which evidence they used was the result of torture so they couldn't judge its veracity. As William Blackstone pointed out, because evidence produced by torture depended on the victim's endurance of pain and not his actual guilt, the evidence it produced did not actually produce a reason to believe one way or the other about anyone's responsibility for breaking a rule. This led him to label torture as "extralegal" or, "an engine of state, not law" (Blackstone, Chase, 1929).

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