

ON THE RULE OF LAW AND CRIMES OF TORTURE



graphic by csb.dk

Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.

And thus was stated by Plato the general theory underlying what we have come to know and understand as the "Rule of Law". Plato's student and protege, Aristotle, refined the thought:

Now, absolute monarchy, or the arbitrary rule of a sovereign over all citizens, in a city which consists of equals, is thought by some to be quite contrary to nature; . . . That is why it is thought to be just that among equals everyone be ruled as well as rule, and therefore that all should have their turn. And the rule of law, it is argued, is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law . . . Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.

In American, and modern anglo-saxon iterations,

there is no one set of constructs defining the "Rule of Law", but there are universal elements common to all. They have been generally identified as follows:

- 1) a government bound by and ruled by law;
- 2) equality before the law;
- 3) the establishment of law and order;
- 4) the efficient and predictable application of justice; and
- 5) the protection of human rights.

There are other lists as well. Political/legal theorist Joseph Raz has promulgated the following factors:

- * That laws should be prospective rather than retroactive.
- * Laws should be stable and not changed too frequently, as lack of awareness of the law prevents one from being guided by it.
- * There should be clear rules and procedures for making laws.
- * The independence of the judiciary has to be guaranteed.
- * The principles of natural justice should be observed, particularly those concerning the right to a fair hearing.
- * The courts should have the power to judicial review the way in which the other principles are implemented.
- * The courts should be accessible; no man may be denied justice.
- * The discretion of law enforcement and crime prevention agencies should not be allowed to pervert the law.

In the United States, the Founders, taking their cue from the Magna Carta and *Habeas Corpus*, laid the foundation for the Rule of Law as the ethos of our fledgling democracy in the Declaration of Independence with the words:

We hold these truths to be self-evident,

that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.

The real work, however, was done in the Constitution and the Bill of Rights. The Framers wanted to install "a government of laws, not of men." Look back at the list of elements common to societies that live under the Rule of Law, and think about the Constitution. It is magnificent in the way it sets up what America would and shall be. Simple, and yet enduring. The different branches of government, separation of powers, the provision for an independent judiciary, due process, the process for regular elections and legislation, the guarantee of fundamental fairness and equal protection.

There is a reason the President and all Federal officers of the United States swear their oath to "preserve, protect and defend the Constitution of the United States" and not protect individuals, or the flag or any of the other nonsense that neoconservative nitwits bandy about. It is why men and women have given their lives throughout our history, to defend the concept and the rule of law that is America, not the corpus of those that live in it. The Constitution defines us as a nation promulgated under, and bound by, the Rule of Law.

James Madison, in Federalist #57, stated:

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust. The elective mode of obtaining rulers is the characteristic policy of republican government. The means relied on in this form of

government for preventing their degeneracy are numerous and various.

And Alexander Hamilton from Federalist #51:

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? 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. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

A wonderful summation comes from James McClellan in *Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government* (2000):

The Federal Constitution of 1787 drastically changed the concept of constitutional government by introducing

the principle of constitutional supremacy. Article VI declared that "This Constitution ... Shall be the supreme law of the land." Laws passed by Congress, though supreme in relation to State constitutions and State laws, were ranked below the Constitution. Indeed, Article VI explicitly stated that such laws must conform to, and be made in pursuance of, the Constitution. Noting the significance of the Supremacy Clause, Chief Justice John Marshall held in the famous case of *Marbury v. Madison* (1803) that an Act of Congress contrary to the Constitution was not law:

[I]n declaring what shall be the supreme law of the land, the Constitution is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

It may thus be seen that the American Constitution and the power of judicial review are an extension of rule of law. The Constitution is law, the highest law, and the President, Congress, and the Federal Judiciary are bound by its terms. A government of laws and not of men is, then, the underlying principle of the American political and legal system.

This means that no person, however powerful or talented, can be allowed to act as if he were superior to the law of the land. Public decisions must be made upon the basis of law, and the laws must be general rules that everybody obeys, including those who make and enforce the law. A law that violates the Constitution is not a law and is not, therefore, enforced. This was the principle that Marshall followed in *Marbury v. Madison*. Likewise, rule of law means equality before the law. A law

that singles out certain people for discriminatory treatment, or is so vague and uncertain that one cannot know what it requires, will not be treated as a law.

✖ With the foundation and principles of the Rule of Law now in mind, let us consider its significance to the lawless morass left festering by the Bush/Cheney Administration. Illegal and unwarranted surveillance/wiretapping, evisceration of environmental and social safety net protections, politicization of the Department of Justice and subjugation by the Executive of the other equal branches. It has been a full frontal assault on the American Rule of Law, and it is still ongoing under the Obama Administration. By far, however, the worst assaults have come from the illegal and immoral indefinite detention without charges or hearing and the unbridled torture applied. As the ACLU has stated:

We are finally beginning to learn the full scope of the Bush administration's torture program. Government documents show that hundreds of prisoners were tortured in the custody of the CIA and Department of Defense, some of them killed in the course of interrogations. Justice Department memos show that the torture policies were devised and developed at the highest levels of the Bush administration.

The facts are incontrovertible, the United States instituted a designed and dedicated regime of brutal torture in contravention of national and international norms. The American Executive branch under George W. Bush and Richard B. Cheney created a bureaucracy of lawyers, doctors, soldiers and spies to build and execute the regime that led to detainees being waterboarded serially 183 times in one month, a crime the US has historically

prosecuted as a war crime in conflict situations and as a domestic crime at home. Others we have tortured and then left to die:

In November 2002, a newly minted CIA case officer in charge of a secret prison just north of Kabul allegedly ordered guards to strip naked an uncooperative young Afghan detainee, chain him to the concrete floor and leave him there overnight without blankets, according to four U.S. government officials aware of the case.

The Afghan guards – paid by the CIA and working under CIA supervision in an abandoned warehouse code-named the Salt Pit – dragged their captive around on the concrete floor, bruising and scraping his skin, before putting him in his cell, two of the officials said.

As night fell, so, predictably, did the temperature.

By morning, the Afghan man had frozen to death.

So, what do we do about the criminal, immoral and depraved acts officials of the US government have conducted in our name? Clearly Bush and Cheney had no interest in accountability for their crimes of torture. But now President Barack Obama, who sold the electorate that he was the man to bring change and accountability, has shown himself to be more of the same. He truly desires to walk the other way and not address the wrongs committed against our nation, Constitution and fiber of existence. And, as Glenn Greenwald adroitly points out, President Obama even wants to raise the ante on indefinite detention without charges. How should we deal with that?

What do you say to citizens who say we cannot have accountability, cannot address what has been done in our name because now is:

...not the time to let fly the dogs of revenge. With all the pressing issues facing this country and the world right now, tearing the country apart would be a terrible thing to do. Iran, North Korea, the Middle East, Health Care, Energy, the deficit, immigration, etc. It would be insane to do so.

The Founders gave us the answer to that conundrum. You follow the Rule of Law. You uphold the Constitution, what it stands for, and honor every drop of blood spilled since the Revolution to establish and defend it. You honor your oath to office. You do the right thing and have accountability on the merits. That is what you do, and it is time for a concerted effort from the grassroots to demand just that. To paraphrase Ben Franklin, those who would give up the essential Rule of Law for temporary security and political gain, deserve neither.