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Torture and Legitimacy

RONALD SUNDSTROM

George W. Bush's administration has undermined the legitimacy of the United States of America as a member of the international community through an astonishing array of unilateral policies that do not respect the interests and concerns of that community. On matters of serious concern to the peoples of the world, such as the global environment, human rights, nuclear weapons proliferation, terrorism, and, of course, war, the United States has pursued its foreign policy interests guided by "political realism" and a stubborn commitment to its narrowly interpreted national interests. It is not enough, however, to merely identify and condemn the legitimacy crisis of the United States; action is required to bring it into alignment with the laws of the international community. Responsibility for that action belongs to the American people. Action sufficient to restore U.S. legitimacy would include the reclamation of our democratic political structures, as well as public acts that denounce torture.

The international legitimacy of the United States is not self-generated. It arises from the recognition of other members in the international community that our domestic and international practices are in keeping with international law and ideals. Despite purporting to be defending civilization, Bush's unilateral decisions have undermined the standing of the United States in the eyes of the international community. Some of its practices, most notably the torture of its prisoners of war and the enemy combatants in its custody, have distanced the United States from international standards of civility and undermined the force of those very standards. U.S. actions have given terrorists further incentives to violently lash out against its people, increased the probability that U.S. military personnel in enemy hands will be tortured, and eroded the international anti-torture standards.

The interests the Bush administration claims it pursues for the sake of the United States have not, of course, been devised through any democratic process. Bush has declared that he possesses faith, good intentions, and the right values, and that he is the "decider." The very idea of the "decider," which is a folksy, domestic description of the Bush administration's

tendency to make unilateral international policy decisions, is an extension of his “you’re either with us or against” absolutist and nationalistic moralism. The administration does not encourage the people of the United States to deliberate about the value of the administration’s foreign policies. Rather, the people of this nation are dictated to: we are told that the decider’s decisions are in the interests of Americans, and, really, all those who love freedom and civilization.

Although the president and his administration support the right of individuals to protest and dissent (as he is the decider and has access to information that his administration hides away from public scrutiny for their own safety), he does not have to actually consider the inconvenient ideas of dissidents. Unfortunately, a number of Americans welcome Bush’s dictate. The procedures, designed to exclude dissent and democratic deliberation, which George W. Bush has used to make his decisions have, for most Americans, undermined the legitimacy of his administration, as well as his decisions. Hence, Noam Chomsky, in his latest book, *Failed States*, argues via a litany of examples that the United States flouts and excepts itself from international law, that it has crossed the moral (by intentionally committing atrocities) and political (by flouting international law and treaties against the will of its citizens) threshold that makes it an international rogue, an outlaw nation.

The Bush administration’s policy on torture illustrates its hubris in particular, and the destruction of its legitimacy at home and abroad. The very idea of torture is repellant on many levels, and the U.S. practice of using and assisting other nations in this most uncivilized practice brings Chomsky’s hard accusations into a sharp focus. A quick review of Mark Danner’s *Torture and Truth* or David Cole’s *Enemy Aliens*, shows the truth of Chomsky’s condemnation, when one considers the documented U.S. torture of its detainees at Abu Ghraib, Guantanamo, and other locations; its use of extraordinary rendition, kidnapping, and “disappearances”; and the open attempt by the Bush administration to distance itself from the standards of the Geneva Convention and exempt itself from the international law banning torture.

For these practices, the United Nation’s Committee Against Torture has urged the U.S. to reject and criminalize torture in all its forms—in other words, to align itself with international standards and the behavior expected of a “reasonable liberal people.” Thankfully, the U.S. Supreme Court, in *Hamdan v. Rumsfeld*, has finally declared some of the excesses of the Bush administration unconstitutional, and the administration has now agreed that article three of the Geneva Convention applies to detainees.

John Rawls, in *The Law of Peoples*, defines a “reasonable liberal people” as one that meets several standards, including having a just liberal domestic order, recognizing the human rights of all individuals, and accepting the equal dignity of all peoples and a relationship between

peoples based on mutual respect and reciprocity. In short, being reasonable entails a willingness to abide by, and be held accountable to, the law of peoples as determined by the society of peoples. The image of a society of peoples in Rawls's theory is, of course, an ideal meant to be employed as a guide and goal for the nations that represent the liberal core of the society of peoples. This liberal core is meant to provide the basis of the law of peoples that serves as the foundation for a just and stable society of peoples, thus capturing the moral spirit of Kant's "kingdom of ends" and providing the condition for global "perpetual peace."

Should a reasonable liberal people of a Western liberal democracy countenance a practice that has been roundly denounced by the society of peoples? The answer is that it should not, and that if it does, then the reasonableness of that people, as well as the commitment of the nation to liberalism, is questionable.

Unilateral decisions to engage in torture, to refuse to accept the international law against torture, to demand hypocritical double standards that criminalize the use of torture by our enemies and legalize its use by us and our allies, are unreasonable. Torturing human beings, which breaks internationally recognized standards of human rights, is to abandon any claim to legitimacy. The United States does not admit, of course, to the loss of legitimacy. Instead, it inverts the idea of legitimacy by claiming that its dictates are the source of political legitimacy, and then it twists the responsibilities that come with that legitimacy by using it to justify its illegitimate actions.

Thus, the United States both condemns torture as barbaric, and justifies its use of torture as a lesser and necessary evil. After all, the administration tells us, "terrorists" do not deserve the protections of the Geneva Convention, and they have left us little alternative. This, they say, is the post-9/11 reality. This political justification parallels what Elaine Scarry, in *The Body in Pain*, describes as the conversion of absolute pain into absolute power; the result in both the torture chamber and the international stage is the same, the production of the fiction of legitimacy that hides the expression of naked power.

Inversed and twisted ideas of legitimacy are displayed in Alan M. Dershowitz's *Why Terrorism Works*. Dershowitz does not believe that the use of torture by the United States is threatening its international and domestic legitimacy; for Dershowitz, who starkly contrasts with Chomsky on these points, never doubts the legitimacy of the states in Bush's "coalition of the 'willing.'" Indeed, Dershowitz argues that nations such as France and Germany, and the UN general assembly, the Nobel Peace Prize Committee, and an assortment of nongovernmental organizations and religious groups, justify the use of terror by capitulating to the demands of terrorists, expressing sympathy for their causes, and maintaining state relationships with state sponsors of terrorism. Naturally Dershowitz, unlike Chomsky, does not consider the United States as a state that sponsors terrorism.

Dershowitz extends his view of the relationship of torture and legitimacy by proposing that the United States and other Western liberal democracies can justifiably use torture and should do so to combat terrorists and their state sponsors. As he readily admits, the United States and other nations currently engage in the covert use of torture. Thus, as his argument goes, because the ends of the United States are legitimate, its means of torture are not overly brutal—his has a sterilized vision of the torture practices. He thinks it should overtly practice torture and add to its legitimacy by doing so transparently, in full view of its public and the international community. Dershowitz suggests that in the proverbial and fictional “ticking time-bomb” scenarios, the United States should issue torture warrants for those who we suspect of engaging or planning in terrorism so as to retrieve from them time-sensitive information. Torture, according to his view, would be countenanced by U.S. citizens because it would be done for national interests. Furthermore, the transparent use of torture would treat U.S. citizens as adults, and place the responsibility for any particular act of torture in the hands of their democratically elected executive.

What, though, is behind Dershowitz’s assumption that the use of torture by the United States is legitimate, while the opposition to our use of torture by our international critics, such as the UN, Amnesty International, and the International Committee of the Red Cross, is illegitimate? How is it, for those who, like Dershowitz, support American exceptionalism, that the United States can justifiably engage in a practice uniformly condemned by the international community, and that its international legitimacy can remain unquestioned? To answer this query, those who have faith in American exceptionalism would simply gesture to the dogma of American righteousness. Chomsky, however, offers another answer: the might of the United States, combined with its determination to pursue national interests at any cost, lead it to engage in double standards and to exempt itself from the law of peoples. It is the international equivalent of the Hobbesian sovereign—it determines law, yet answers to no law.

Hobbes’s theory of state is frequently invoked to describe the Bush administration’s domestic and foreign policies. Likewise, so is the specter of Carl Schmitt, who is invoked for his alignment with Hobbes, his cooperation with Germany’s Nazi Party, and his influence on U.S. neo-conservatives through the tutelage of Leo Strauss. Aside from these fantastic associations and the wild intellectual conspiracy theories they have bred, Schmitt’s theory of the political is relevant in this analysis of torture and legitimacy. Schmitt, defines the “political” as the division of friends from enemies, and it is the role of the state to distinguish its friends from its enemies, and to ruthlessly enforce this division. President Bush successfully tapped into this vein of political thought with his famous “You’re either with us or against us” comment. In Schmitt’s view,

legitimacy is given to the sovereign of the nation-state that finds itself in an international state of war, and it proves its legitimacy by precisely defending its citizen-friends from their enemy-aliens. Thus, there is no double standard to worry about, and so-called universal political concepts, such as legitimacy, are to be used to “legitimize one’s own political ambitions” and to “disqualify or demoralize the enemy.” So goes Dershowitz.

Is the ideal of legitimacy to be trumped by the necessity of torture? Is legitimacy an empty ideal to be rejected? If so, with what is it to be replaced, and what then is the basis of our scorn for the coalition of the willing? Although Chomsky cautiously separates the citizens of the United States from the government and distinguishes between federal administrations, it would be easy to conclude that not only is the United States a failed state, but that the idea of legitimacy has somehow also failed. Chomsky’s condemnations, however, depend on some notion of legitimacy, and concepts of universal, global justice and morality. Despite employing those political concepts, including Rawls’s *Law of Peoples*, to rightfully criticize U.S. policies, Chomsky, unfortunately, feeds political cynicism and offers few solutions to our current condition. He turns his readers away from international liberal ideals and the very idea of a successful state. Chomsky’s analysis leaves his readers with little but despair.

That individual despair too easily leads to a personal nihilism that is about the hopelessness of politics, and it is a direct result, according to Cornel West, of a global and national nihilism that is the consequence of American exceptionalism. West urges us to reject that exceptionalism and all its nihilistic results, and re-commit our nation to the ideals of legitimacy and universal standards of justice and morality determined by the comity of peoples. Those ideals provide the foundation for David Cole’s criticisms of the double standards in the Bush administration regarding human rights and constitutional freedoms. Like Chomsky, Cole employs the ideals of legitimacy, human rights, and liberty to criticize post-9/11 policies. Unlike Chomsky, however, Cole leaves little doubt about the overwhelming need of the United States to adopt and conform to those ideals; especially in the last sections of *Enemy Aliens*, in the chapters concerned with “Legitimacy and Double Standards” and “The Bill of Rights as Human Rights.”

Against the position of the American exceptionalists, Cole makes the case that the legitimacy of the U.S. government at home and abroad is threatened by its double standards on human rights. Weaving decades of social and legal history together, Cole demonstrates the proclivity of the U.S. government to pick out citizens and non-citizens it finds threatening and place them into categories of enemy aliens, dangerous citizens, and enemy races. Although Cole acknowledges the role of racism in the history of excluding immigrants, he underplays its significance in the targeting of Arabs, Muslims, persons from the Middle East, and those associated with

them. Through the language of the clash of civilizations, the prosecution of this war has racialized Islam and Muslims, and thereby has illogically united groups who are not associated with Islam, such as Sikhs. The racialization of Islam functions to justify our treatment of enemy aliens.

All the same, Cole demonstrates the thin line between enemy aliens and enemy citizens, and the risk that double standards pose to our constitutional rights as citizens. He goes, however, beyond this concern with the affects of double standards on the rights of Americans, and emphasizes that the United States has a legal, political, and moral obligation to grant equal respect and protection to citizen and non-citizen alike. Human rights, as Cole argues in the final chapter of *Enemy Aliens*, are enshrined in the Bill of Rights, and to employ a double standard in our recognition of the rights of citizens versus those of “aliens” is to move against both the U.S. constitution and the international community.

The double standards of the United States not only harms its international legitimacy, it harms the legitimacy, in the more immediate sense, of its antiterrorism policies, and its national security agencies in the eyes of the Arab-American and Muslim-American communities. According to Cole, a consequence of alienating those communities is that we imperil their cooperation, stoke the anger of Arabs and Muslims inside and outside the United States, and thus undermine our security. If, as Cole argues, the Bush administration was truly concerned with preventing terrorism in the United States (instead of being a global Leviathan), it would respect the constitutionally guaranteed human rights of all its citizens and residents. What is more, according to Peter Beinart and Will Marshall, if the United States is going to be a productive ally in the global struggle against jihadism and other apocalyptic, fundamentalist religious ideologies, it needs to align itself with the laws of the international community.

We need more, however, than yet another call to return to the purity of our liberal principles; that is the sort of empty pronouncement that is the object of Chomsky’s sarcastic critique. Sarcasm and criticism, though, without moral vision and without a commitment to justice, leaves us empty. West put the matter this way,

The dissonance of being a person who ardently believes in democratic ideals—how can we not fall in love with them if and when we are exposed to them?—and a wide-eyed realist about the dispiriting truths of everyday life in America can be alternately enraging, numbing, and crushing.

Cole’s answer to this is to applaud and encourage the exposures of, and interventions against, the Bush administration’s human rights abuses by non-governmental organizations, the courts, and the press. Certainly, we need

more of those interventions, such as the decision of *Hamdan v. Rumsfeld*, because they have had beneficial effects on U.S. policies. But to truly respond to the dissonance and crush of being a U.S. citizen during the war against terrorism, we need an answer that returns agency and responsibility into the hands of the people of the United States. If our institutions encourage what Stanley Milgram described as the “evaporation of authority,” then citizens of this nation must refuse such abdication and declare to the president: not in our name.

Thus, like Cornel West, we can invest hope in “deeper” democratic participation by the people of the United States in its foreign policies. Indeed, the lack of democratic participation, as a check against the administration’s power, is a centerpiece of Chomsky’s accusation that the United States is a failed state. Returning agency to the people is not itself a solution. We can welcome the increasing interest in the common good among Democrats, but democratic deliberation will result in harmony with the international community only if Americans invest in a common good that transcends narrow nationalist and corporate interests. To halt the excesses of the administration, the American people must insist that their government submit to the authority of international law. Then Americans must seriously consider, within the context of their purported desire to live in a just and stable world, their commitment to international justice and global ethics.

To prod its reflections, the United States needs an increase in the numbers of political heretics and eccentrics, those servants of liberty whose praise was sung by J.S. Mill in *On Liberty*, with the moral courage to engage in anti-torture acts that counter the torture practices of the nation. Such anti-torture practices would resemble those employed throughout Latin America by organizations such as the Mothers of the Plaza de Mayo, to remember the victims of torture, disappearances, and executions, and to demand justice. Their acts are a mix of protest, theatre, and ritual. Although such acts derive from Latin American liberation theology, they are properly political because they reclaim the moral and political obligations that liberal peoples must fulfill. They symbolically reverse the act of torture, converting pain into power, by remembering the victims and their personhood, and by granting the remembered voice and visibility (as opposed to dismemberment, degradation, and disappearance that characterize torture). Further, they are radical assertions of moral and political responsibility, and thus threaten to negate the legitimacy of the torture state.

By making torture visible, anti-torture acts place the responsibility of torture in the hands of the American people, and with that, Chomsky, Dershowitz, Cole, and West should approve. If the people of the United States do not follow through on the aforementioned threat, negating the domestic legitimacy of the U.S. government, then it will have failed as a liberal people, and its internal legitimacy, as a people, will be lost. To

rescue itself from such self-annihilation, Americans should emulate the Mothers of the Plaza de Mayo, which serves as a model of moral insurgency and political responsibility. The “Madres” are what West calls “prophetic” (in the sense of making an ethical call or demand for the future rather than a prediction of it). They are prophesying about a world of justice where human rights are honored, murders and tortures are brought to justice, and the dead are remembered. The people of the United States should stand with the *Madres* and proclaim common faith in the United Nations’ universal declaration of human rights and its convention against torture, and absolutely refuse to grant legitimacy to any administration that would torture in its name.

RECOMMENDED READINGS

- Beinart, Peter. 2006. *The Good Fight: Why Liberals—And Only Liberals—Can Win the War on Terror and Make America Great Again*. New York: HarperCollins.
- Cole, David. 2005. *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*. New York: The New Press.
- Chomsky, Noam. 2006. *Failed States: The Abuse of Power and the Assault on Democracy*. New York: Metropolitan Books.
- Danner, Mark. 2004. *Torture and Truth: America, Abu Ghraib, and the War on Terror*. New York: New York Review Books.
- Dershowitz, Alan M. 2003. *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*. New Haven: Yale University Press.
- Marshall, Will (ed.). 2006. *With All Our Might: A Progressive Strategy for Defeating Jihadism and Defending Liberty*. Lanham: Rowman & Littlefield.
- Rawls, John. 2001. *The Law of Peoples*. Cambridge: Harvard University Press.
- Scarry, Elaine. 1987. *The Body in Pain: The Making and Unmaking of the World*. Oxford: Oxford University Press.
- UN Committee Against Torture. 18 May 2006. *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention*. Office of the UN High Commissioner for Human Rights: <http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf>
- West, Cornel. 2004. *Democracy Matters: Winning the Fight Against Imperialism*. New York: The Penguin Press.

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