

**The New York Times****January 4, 2010****EDITORIAL**

## **Yes, It Was Torture, and Illegal**

Bush administration officials came up with all kinds of ridiculously offensive rationalizations for torturing prisoners. It's not torture if you don't mean it to be. It's not torture if you don't nearly kill the victim. It's not torture if the president says it's not torture.

It was deeply distressing to watch the United States Court of Appeals for the District of Columbia Circuit sink to that standard in April when it dismissed a civil case brought by four former Guantánamo detainees never charged with any offense. The court said former Secretary of Defense Donald Rumsfeld and the senior military officers charged in the complaint could not be held responsible for violating the plaintiffs' rights because at the time of their detention, between 2002 and 2004, it was not "clearly established" that torture was illegal.

The Supreme Court could have corrected that outlandish reading of the Constitution, legal precedent, and domestic and international statutes and treaties. Instead, last month, the justices abdicated their legal and moral duty and declined to review the case.

A denial of certiorari is not a ruling on the merits. But the justices surely understood that their failure to accept the case would further undermine the rule of law.

In effect, the Supreme Court has granted the government immunity for subjecting people in its custody to terrible mistreatment. It has deprived victims of a remedy and Americans of government accountability, while further damaging the country's standing in the world.

Contrary to the view of the lower appellate court, it was crystal clear that torture inflicted anywhere is illegal long before the Supreme Court's 2008 ruling that prisoners at Guantánamo, de facto United States territory, have a constitutional right to habeas corpus. Moreover, the shield of qualified immunity was not raised in good faith. Officials decided to hold detainees offshore at Guantánamo precisely to try to avoid claims from victims for conduct the officials knew was illegal.

Reversing the Circuit Court would not have ended the matter. The plaintiffs would still have had to prove their case at trial. They deserved that chance. There are those who oppose trying to punish Bush-era lawlessness — some who argue that America should not look backward and some who excuse that lawlessness. But the rule of law rests on scrutinizing evidence of past behavior to establish accountability, confer justice and deter bad behavior in the future.

President Obama, much to his credit, has forsworn the use of torture, but politics and policy makers change and democracy cannot rely merely on the good will of one president and his aides. Such good will did not exist in the last administration. And the inhumane and illegal treatment of detainees could make a return in

a future administration unless the Supreme Court sends a firm message that ordering torture is a grievous violation of fundamental rights.

Anyone who doubts the degree of executive branch pliability in this realm needs to consider this: The party that urged the Supreme Court not to grant the victims' appeal because the illegality of torture was not "clearly established" was the Obama Justice Department.

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