Written by **Thomas R. Eddlem** on February 26, 2010

Congressional Democrats Nix Anti-torture Measure

House Democrats have caved in to Republican pressure, removing an anti-torture provision from the Fiscal 2010 Intelligence Authorization Act (H.R. 2701). "The controversial provision," the Washington Post reported February 26, "would have subjected intelligence officers to up 15 years in prison for interrogations that violate existing anti-torture laws, including the use of extreme temperatures, acts causing sexual humiliation or depriving a prisoner of food, sleep or medical care."

While federal law already provides up to a 20-year penalty for inflicting torture, the Democratic measure would have expounded upon the definition to include specific forms of torture (but did not expand the overall meaning of torture) previously approved by Bush administration Justice Department lawyers. The felony torture statute already on the books merely describes torture as "severe physical or mental pain or suffering."

Ranking Republican on the House intelligence committee Pete Hoekstra of Michigan opposed the more detailed prohibition on torture because, in his words, the "annual intelligence bill should be about protecting and defending our nation, not targeting those we ask to do that deed and giving greater protections to terrorists." Of course, it is a matter of established fact that many of those tortured under the Bush administration were not terrorists, but instead innocents picked up by greedy bounty hunters (or sold by the Pakistani government).

Perhaps the Democrats were willing to remove that provision from the bill because they had long approved of the Bush administration torture program. A recent Freedom of Information Act request by Judicial Watch revealed that — despite past denials by House Speaker Nancy Pelosi — the CIA had briefed leaders of both parties on its torture program frequently. "According to the documents, previously marked 'Top Secret,' between 2001 and 2007," Judicial Watch reported, "the CIA briefed at least 68 members of Congress on the CIA interrogation program, including so-called 'enhanced interrogation techniques.'"

Additionally, the Republican minority claimed in the House Permanent Select Committee on Intelligence report on H.R. 2701 that "the memoranda clearly indicate that members of the Committee supported the activities in question on a bipartisan basis and raised no objections to the activities in question." The Judicial Watch documents give that statement added credibility.

The Judicial Watch briefings obtained from the CIA went into more than sufficient detail to establish the fact that the United States was torturing detainees, and even covered the case of CIA contractor David Passaro, who beat a detainee to death and was indicted on four counts of assault. Although the CIA Inspector General and General Counsel briefing congressional committees claimed that everything they were doing was "legal" because the John Yoo memo of August 1, 2002 "was the legal foundation for the debriefings and interrogations," CIA officials fretted to congressional leaders that the interrogations may violate international Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. "The question was whether CIA's use of the enhanced techniques would transfress U.S. obligations under Article 16 [of the Torture Convention]. The IG [Inspector General] indicated he was also bothered in that the DOJ 1 August document did not address interrogations as we carried them out."

The Judicial Watch revelations and Democratic wavering on the torture issue come just as the White House elected to let Yoo off the hook legally for giving a "legal" green light to felony torture. A Justice Department investigation concluded last week that Yoo and his supervisor, current U.S. Appellate Court Judge Jay S. Bybee, would escape criminal prosecution for their clear legal malpractice.

The White House whitewash prompted Yale University law professor Jack M. Balkin to summarize the decision in a blog headline: "Justice Department will not punish Yoo and Bybee because most lawyers are scum anyway." Balkin concluded that the legal profession is less a self-policing profession as a self-protecting profession. "It's not about what people should do, but about how badly they have to screw things up before they are subject to professional sanctions," Balkin wrote. "This is how the American legal profession simultaneously polices and takes care of its own."

Bush-era torture lawyer John Yoo's essential legal argument was that foreigners had no rights under U.S. courts in a time of war. Ironically, Yoo is of Korean descent, and it was against Asian immigrants of the 19th century that the argument that foreigners have no rights in U.S. courts was made (and rejected by the U.S. Supreme Court). "The rights of the petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the emperor of China," a unanimous Supreme Court ruled in the case of *Yick Wo v. Hopkins* in 1886. The decision repealed a San Francisco ordinance that essentially banned Chinese laundry service within city limits. The court continued:

> The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

While the Fourteenth Amendment was limited to rights a state must respect, the Fifth and Sixth Amendments protect essentially the same limitations against Federal government excesses. The Fifth Amendment requires that "No person shall … be deprived of life, liberty, or property, without due process of law" and the Sixth Amendment requires a jury trial "in all criminal prosecutions." The Eighth Amendment bans "cruel and unusual punishments," categorically.

As the Justice Stanley Matthews explained of the constitutional principles involved in the Yick Wo case:

> The fundamental rights to life, liberty, and the pursuit of happiness, considered as individual

> possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts bill of rights, the government of the commonwealth "may be a government of laws and not of men." For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

This is the long legal tradition Yoo destroyed. And House Democrats — together with a like-minded Justice Department — just ratified Yoo's mentality that government officials should be immune from the most heinous of crimes against people, many of whom turned out to be innocent.

Photo: AP Images