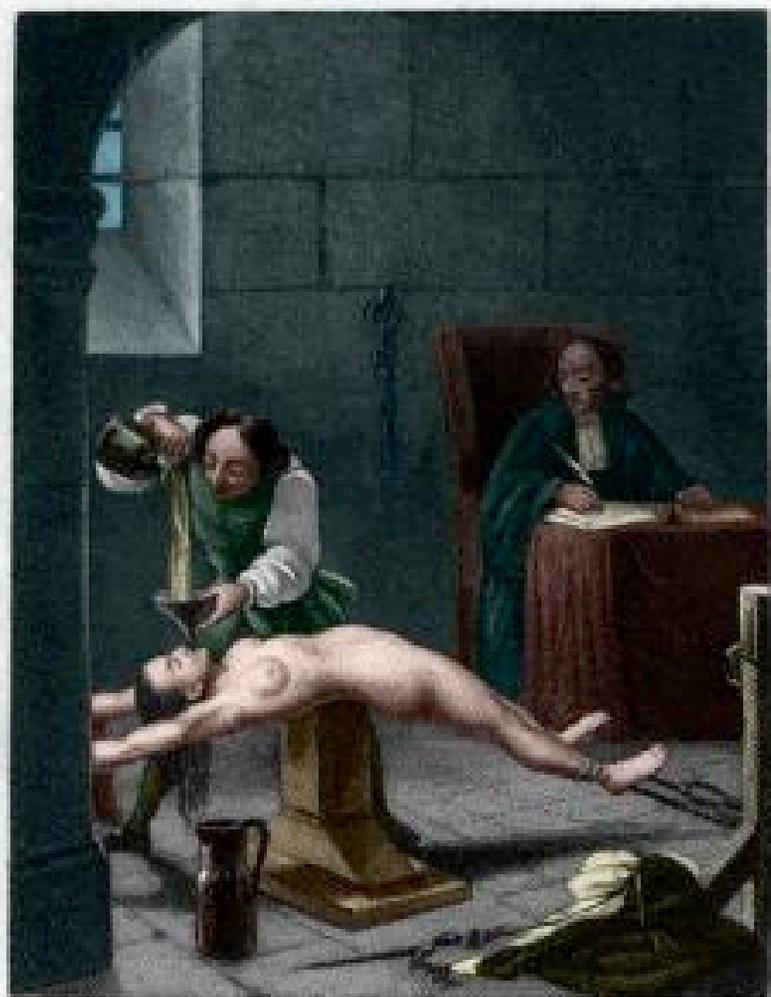


Torture in the Age of Terrorism: An Old Tactic Returns to Fight a New Threat?



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George Mason University
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How do you feel?

1. The captured accomplice in an ongoing plot
2. A leader of the Iraqi insurgency, a general under Saddam, in 2003
3. An al Qaeda terror training camp leader

My talk today

I. Brief history of torture

I. From 9-11 to Abu Ghraib

II. Torturing the Laws

IV. Obama's burden and the future of American torture

I. History of Torture

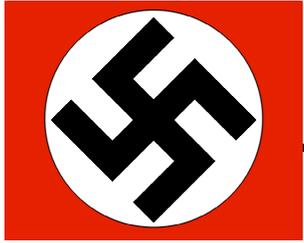
- Central role in European law and practice for more than 2000 years.
- Greek and Roman law recognized
- Inquisition—water boarding and strappado
- Widespread adoption by all Western authorities
- The Enlightenment damaged torture in three ways

Why did torture fade?

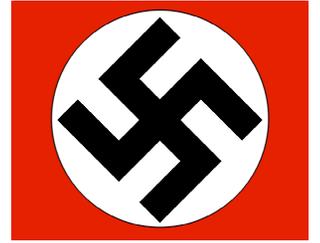
- Rise of individual rights and limited state power—it asked—is this ever **right**?
- Rise of science—it asked—does this **work**?
Can we rely on it?
- An **alternative**: The rise of prisons (Foucault)
- Voltaire and Frederick II of Prussia played crucial roles
- By 1874, Victor Hugo could say “torture has ceased to exist”

CAVEATS!

- Torture widely practiced by colonial rulers of Africa, Asia, and the Middle East
- Torture sometimes practiced by those few states in those regions not controlled by the West
- So torture never vanished in huge swathes of the world
- And here in America, where lynching was common, it was not uncommon for the accused to experience torture



Torture Makes a Comeback



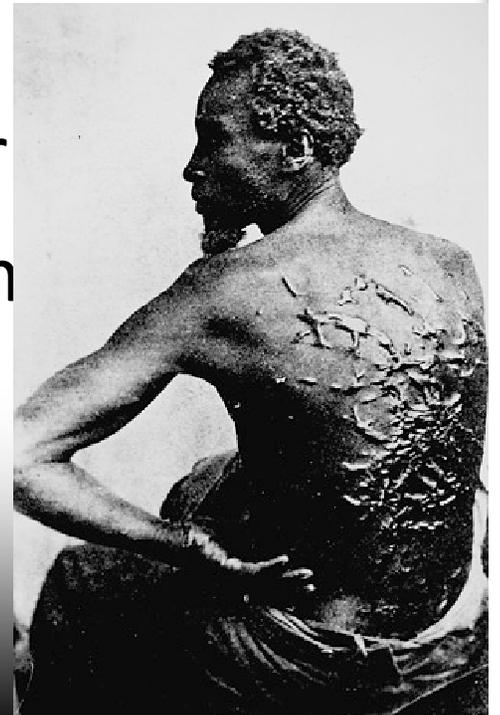
- The rise of totalitarian states in Europe of both the right and the left
- Widespread use of torture on the Eastern front (but some reciprocity in the West).
- Keitel's "Night and Fog" order, along with authorizing "enhanced interrogation techniques" explicitly allowing certain torture techniques
- Among the greatest opponents of torture by the Nazis—Military lawyers with the Wehrmacht who took Geneva seriously

Post war

- The U.S. led the prosecution not only of torturers, but also of lawyers who authorized it, and doctors who participated.
- U.S. service members were tortured in Korea and in Vietnam
- France practiced in Algeria (Battle of Algiers)
- The false confessions in Korea were very influential on military training (remember this)

America the Torturer?

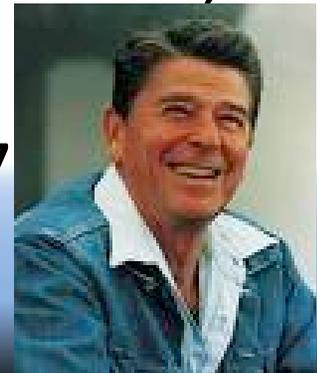
- Slavery and torture
- Torture by criminal justice authorities even after the 8th amendment and 5th amendment
- Torture taught to allied nations in CIA manuals throughout the Cold War
- Torture of Viet Cong during Vietnam

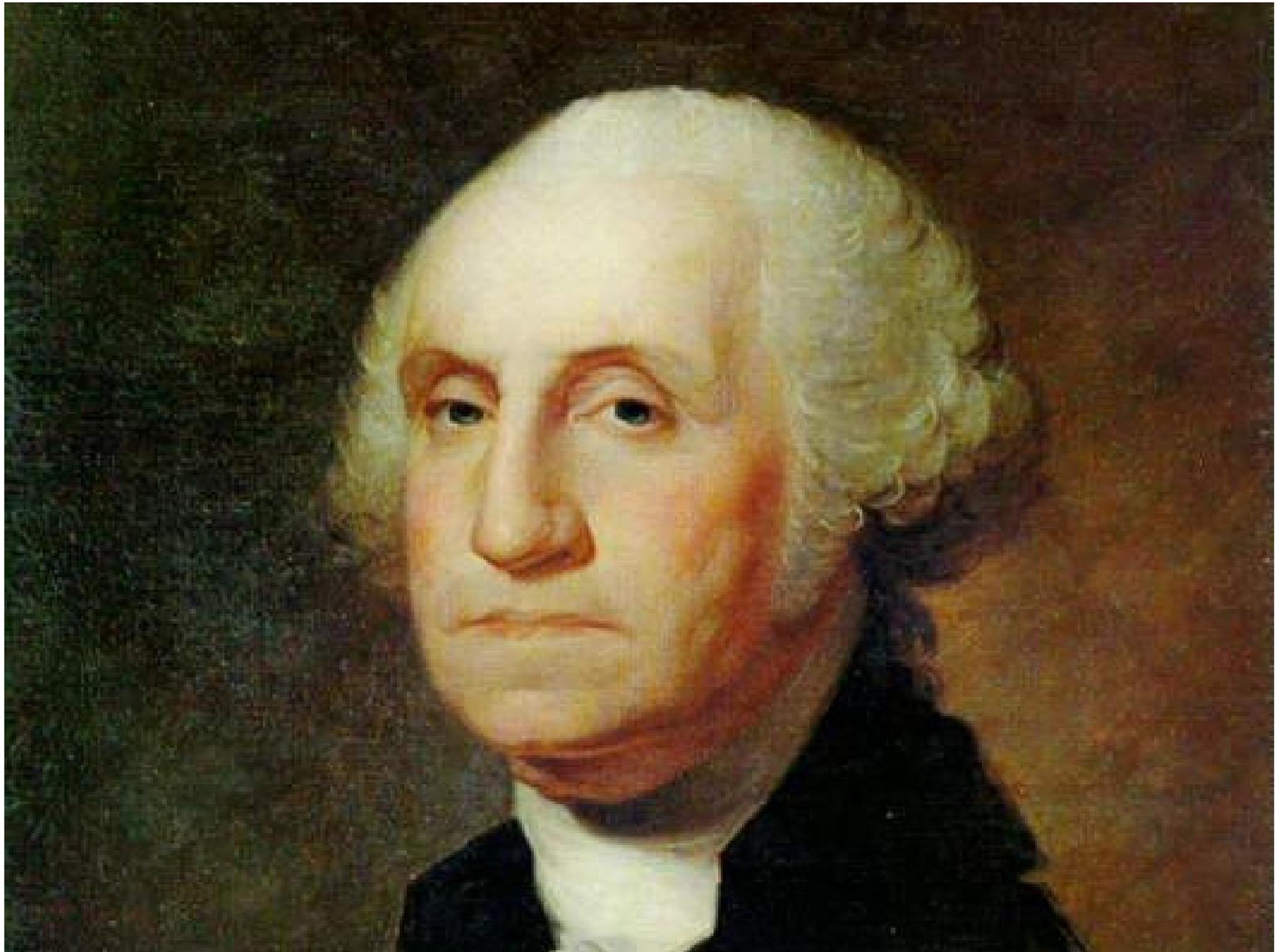




America, the anti-torture nation?

- Prosecuting our own troops for waterboarding during the Filipino occupation
- We did not authorize torture even against the Japanese and Germans. Or the Soviets...
- 1948--Eleanor Roosevelt and the Universal Declaration of Human Rights Article 5,
- 1949--U.S. adopts new Geneva Convention, stronger anti-torture provisions
- CAT signed by Ronald Reagan in 1987





II. From 9-11 to Abu Ghraib

Did this...



Lead to this?



“The prohibition on both terrorism and torture is equally absolute, unambiguous, and final. The parallelism here may provide a clue to the unexplained choice of inhumane interrogation techniques by the American government and its approval after the fact by American voters...the American public is prepared to accept any conceivable treatment of Arabs, including the torture of innocents unto death, so long as such behavior is presented to them as a response to 9/11...The 9/11 hijackers violated an absolute prohibition. What possible reaction could be adequate to what they did? A response that trespasses on equally sacred ground...because it violates an absolute prohibition, torture sends a message that there is nothing the United States is not willing to do....We can respond to their lawlessness with our own lawlessness.”

Legal Scholar Stephen Holmes

“Taking the gloves off”

- At the very top, VP Cheney endorsed “taking the gloves off” “working the dark side”.
- The initial reports on interrogations of captured Al Qaeda operatives indicated that traditional methods were not working
- Quickly, a new set of tactics was devised.
- Problem—how do you do this well (legally is another question)?

SERE—We learn from the Chi-coms

- After the spectacle of Americans confessing to imaginary crimes on North Korean TV...
- Survival Evasion Resistance Escape (SERE)



- » We backwards engineered the way that our troops were treated in North Korea.
- » The goal was to prepare them for the abuse they would face if they were captured by a country that didn't respect the Geneva Conventions.
- » This became justification for using it against Al Qaeda—if we do it to our OWN troops, then why not Osama?

Case 2: The Iraqi General

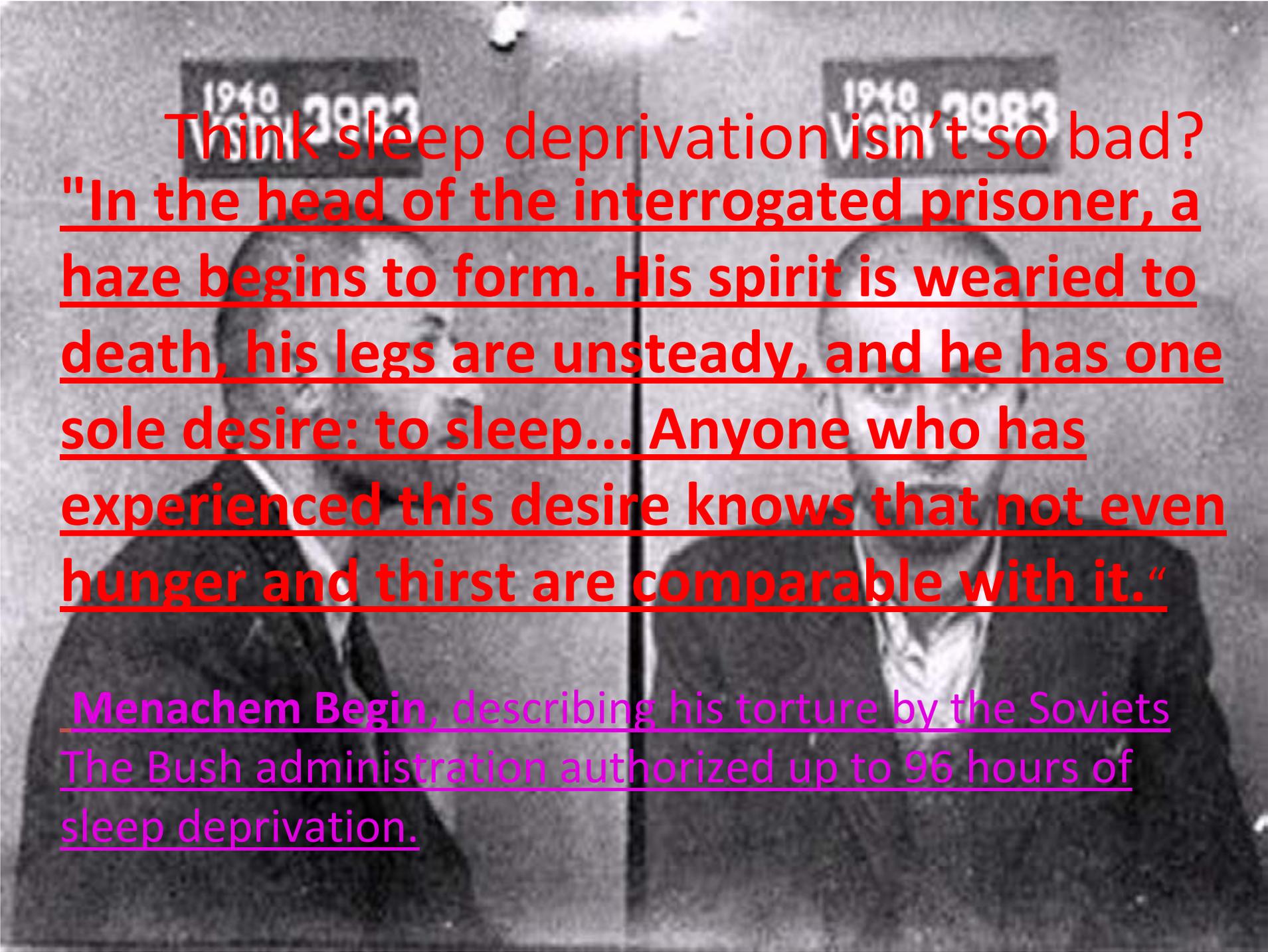
Original US Military report: **Abed Hamed Mowhoush** died November 26 2003--Arrested during a raid, confessed to being a key leader of the Iraqi insurgency, and died of natural causes during questioning.

The military ultimately admitted that Mowhoush, who gave himself up to our military to free his two sons from military captivity, later died during aggressive treatment: "[asphyxia](#) due to smothering and chest compression"-- body showed "evidence of blunt force [trauma](#) to the chest and legs"



“Enhanced interrogation techniques”

- Waterboarding,
- Sleep deprivation
- Sensory deprivation
- Exploiting phobias (dogs, insects)
- Stress positions
- Nudity and sexual humiliation
- Hot and cold temperatures
- Slapping and “walling”
- Boxing
- Self-injury



Think sleep deprivation isn't so bad?
"In the head of the interrogated prisoner, a haze begins to form. His spirit is wearied to death, his legs are unsteady, and he has one sole desire: to sleep... Anyone who has experienced this desire knows that not even hunger and thirst are comparable with it."

Menachem Begin, describing his torture by the Soviets
The Bush administration authorized up to 96 hours of sleep deprivation.

Initially for just the CIA...and for “high value detainees”

- Critics warned that going beyond what was allowed in military interrogations would quickly spin out of control, both in terms of methods and victims
- What began with a few Al Qaeda captives in secret locations spread first to everyone at Guantanamo, then to Abu Ghraib, then to Bagram.
- There is no question that the thousands arrested in Iraq and Afghanistan were covered by Geneva, but they were treated as if they were not

RENDITIONS—Our Night and Fog

- Captives drugged and transported without any notification to anyone, to secret prisons and to states known to practice torture. We do not know how many, but more than 100.
- Some kidnapped in public. Some entirely innocent, like Khalid Al-Masri, a German citizen accidentally sent to Afghanistan for five months.
- Some, like the Training Camp Leader...

Case 3: The training camp leader, Ibn al-Shaykh al Libi (the Libyan)

- [Video](#)



This is the first report from Ibn al-Shaykh in which he claims Iraq assisted al-Qaida's CBRN efforts. However, he lacks specific details on the Iraqi's [sic] involved, the CBRN materials associated with the assistance, and the location where training occurred. It is possible he does not know any further details; it is more likely this individual is intentionally misleading the debriefers. Ibn al-Shaykh has been undergoing debriefs for several weeks and may describing [sic] scenarios to the debriefers that he knows will retain their interest

The abuse at Abu Ghraib began...

- After Colonel Geoffrey Miller was sent to Abu to impose the same SERE methods that had been practiced at Gitmo.
- Abu Ghraib was not a few bad apples acting out. It was part of the same practices.
- The damage to America's reputation is unfathomable.











III. Torturing the Law

- This was done “legally”
- First, the Bush administration argued that the detainees were not covered by the Geneva convention, as unlawful combatants.
- And even if they were, the conduct was allowed under U.S. law—it was not torture.
- How?

The challenge

- Sleep deprivation and waterboarding, if nothing else, had been held by our executive branch and our courts, respectively, to absolutely be torture, in prior cases.
- How then, do you get the law to say they are not?

You deliberately misread Geneva and the Convention Against Torture and U.S. law

- John Yoo , in the OLC, was the point person for a new interpretation of international and constitutional law

In collaboration with Cheney's lawyer, Yoo argues that the treaty on torture can be overruled by the president in wartime, and that the Geneva Conventions and the CAT only ban acts that intentionally inflict pain equal to major organ failure or death.



What is torture, according to the law?

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.”

—**UN Convention Against Torture**

Legal games

- Yoo said severe pain and suffering did not cover anything the CIA wanted to do or had done.
- (Why are CAT and Geneva so vague?)
- Even if it did, it had to be done intentionally inflict pain. If done for information, okay.
- Even if that were done, if the act was justified by a need to protect national security, no one could be prosecuted
- Even if that were not upheld, the president's power as commander in chief in war would allow him to override a treaty. It's not illegal if the president orders it.
- CIA called this "get out of jail free"

- *Yoo once said, in response to the question of whether the President could ever order the crushing of the testicles of the child of an accused terrorist*

"I think it depends on why the President thinks he needs to do that." no law or treaty would forbid it.

Under oath, he said that the president's war-making authority was so broad that he had the constitutional power to order a village to be **'massacred'**

We may never know...

- How many were killed during interrogations but estimates of those in our own custody ranges above thirty.
- We do not know how many were kidnapped and rendered to nations that practice the most archaic and brutal torture
- We do not know the full scope because the CIA destroyed evidence

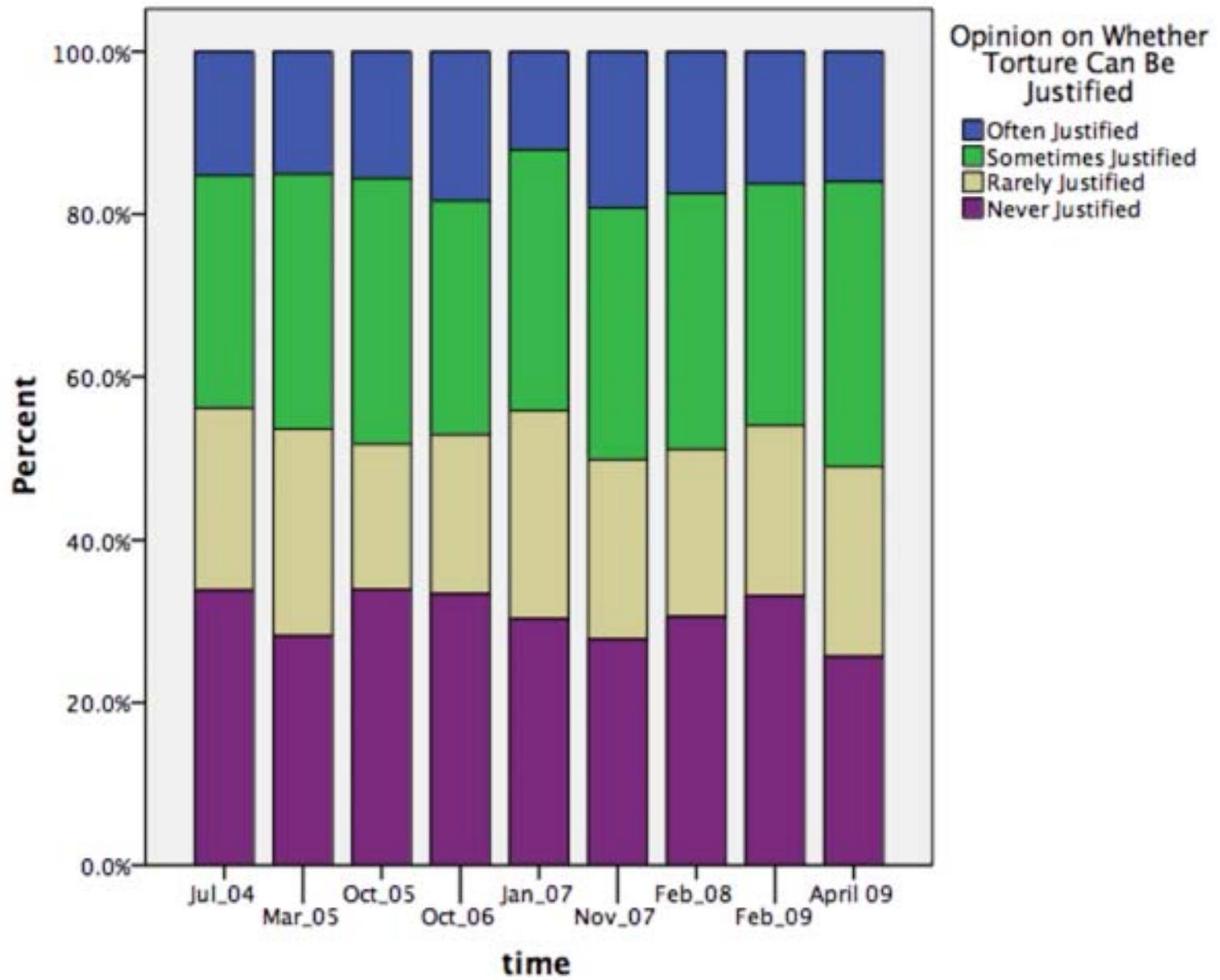
IV. Obama's Burden

- What now? He's said we've stopped.
- But CAT is more than a promise to not torture. It is binding domestic and international law that says if the government of the U.S. is aware that torture has been authorized or committed by its agents, it must be investigated and prosecuted.
- Obama is in violation of the CAT?



A political loser for Obama

- The public has little appetite for a prosecution of Yoo, Addington, Wolfowitz, Bush, or Cheney.
- The public is broadly supportive of some acts of torture.
- Many detainees ARE guilty of terrorism, and yet cannot now be tried because of the illegal acts done to them. What do we do also with the unlawfully abused and imprisoned who are innocent???



Method ^a	2004	2009	Difference
Sleep deprivation	60%	52%	-8
Hood over head	52%	51%	-1
Loud noise	51%	47%	-4
Stressful position	45%	43%	-2
Threatening dogs	37%	37%	0
Extreme heat, cold	30%	31%	1
Forced nudity	24%	27%	3
Electric shock	16%	17%	1
Punching, kicking	16%	17%	1
Head under water	14%	19%	5
Average (common 10)	35%	34%	-1

And about that Case 1...

- [Nachshon Waxman](#) was an Israeli soldier kidnapped by Hamas in 1994.
- They gave a deadline by which he would be executed if Israel did not free 200 prisoners.
- Israel captured and tortured the driver of the car that kidnapped him.
- He accurately revealed the location.

Further readings:

- Jane Mayer, *The Dark Side*
- Jim Pfiffner, *Torture As Public Policy*
- Barton Gellman, *Angler*
- Alfred McCoy, *A Question of Torture*