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# Cheney Meant Well



By Marty Kaplan

It's grasping at straws, I know, but I'm looking for a benign explanation of the high crimes and misdemeanors of the Bush administration.

Criminal law says that facts aren't enough to establish guilt. There also has to be mens rea — a guilty mind. Crooks don't just perform illegal acts; to be convicted, their intent must also be shown to be crooked.

There are plenty of ugly facts about the past eight years already on the table. Prisoners were waterboarded, which is torture by any definition, and videotaped evidence of it was destroyed. The government intercepted the domestic phone calls and emails of millions of Americans without obtaining the court orders legally required to spy on them. The CIA expanded its counterterrorism operations without conducting the mandated briefings of congressional oversight committees.

The list of publicly known illegalities goes on and on, and if a special prosecutor or commission were empowered to look under more rocks, it's a safe bet that more vermin would turn up. What could possibly excuse the failure to investigate such lawbreaking?

Republicans in Congress are charging that CIA director Leon Panetta's shutting down a secret Bush-era program the moment he belatedly was informed of it, and his telling Congress about it less than 24 hours later, is just political theater, an attempt to distract from the controversy over House speaker Nancy Pelosi's (D-CA) charge that the CIA had lied to her about waterboarding.

But the media's kneejerk acceptance of this framing, its buying the idea that this dispute is typical Washington posturing, is both lazy and cynical. On Sunday morning, I heard an MSNBC anchor and a reporter from *Politico* speculate that if Attorney General Eric Holder appoints a special prosecutor, it could be because the president's poll ratings are dropping, and this move would change the subject from Obama's problems to people's reasons for disliking Bush. The TV pair went on to agree that this whole surveillance and torture donnybrook is basically a partisan dispute, as if the rule of law were a left-right issue, as if the meaning of the Constitution were merely in the political eye of the beholder.

For his part, the president says he wants to look forward, not backward. By that standard, there would have been no Nuremberg trials. The president's defenders say that prosecuting Bush-era criminality would take all the oxygen out of the room, that it would deplete his political capital, that it would create a media circus which would distract the public and doom progress on health care, energy and the economy. By that standard, the Iraq war should have so consumed the Bush administration that it would have had no mojo left over to deregulate Wall Street, fire U.S. Attorneys, cut millionaires' taxes, gut clean-air standards, politicize science, theologize policy or put any of the other right-wing notches in its belt.

If our country actually were to shake off its amnesia, what mens rea could possibly spare the architects of our national shame from accountability? "They were told it was legal" — the 21st century version of "they were only following orders" — is the low bar that's already been established for torturers. "He only knew what they told him" is the best that can be said for the embubbled Bush, as though ignorance of the facts and of the law were an acceptable criminal defense.

But what of Cheney, who knew the facts and the law? What frame of mind could exculpate him from ordering the CIA not to brief the intelligence committees of Congress and not to inform the Foreign Intelligence Surveillance Court? What mental state could get him off the legal hook for using John Yoo as the Justice Department's secret apologist for torture, surveillance and every other arrogation of presidential power? What thought process could absolve him from ordering kidnappings and secret detentions in Eastern European hellholes, and from passing off to Congress as truth the worthless confessions extracted under torture? What intent could clear him from blowing CIA agent Valerie Plame's covert status, or distorting and falsifying CIA intelligence, or concealing and destroying evidence of his actions?

Here's the best I can do on Cheney's behalf: He meant well, and he knew better. He truly believed that Saddam Hussein was about to give weapons of mass destruction to Al Qaeda. He was completely convinced that the restrictions that Congress put on the CIA and the NSA starting in the 1970s were dangerous impediments to learning the truth and nailing the bad guys. He had no doubt that if the president did something, it by nature could not be illegal. Laws? He didn't need no stinkin' laws, not when they were written by legislators cravenly unwilling to do what it takes to protect and defend America, and interpreted by judges pathetically incapable of distinguishing good from evil.

He was smarter than us, and he loved his country more than us, and if the Constitution stood in his way, well, who the hell's going to care about a piece of paper when sarin takes out Chicago and anthrax takes out New York and a dirty bomb takes out LA?

But motive is not a legal defense.

Cheney's mens rea was this: I am above the law. And now — because of the media's ADD and our leaders' lack of will — the rule of law, the future of health care, and pretty much everything else on the national agenda is being held hostage by the threat of more "Obama's-helping-the-terrorists" screeds from the ex-vice president.

We have all been witnesses to terrible crimes these last eight years. Will we hold Cheney and his ilk accountable for what they did? If we don't, it will be more than a pity. It will itself be another crime.

*This is my column from The Jewish Journal of Greater Los Angeles. You can read more of my columns here, and e-mail me there if you'd like.*

UPDATE: Note to self, after reading comments: Irony and sarcasm don't work online — at least, they don't work when the writer's as ham-handed as me. Plain and simple, here's what I think: Cheney should have been impeached. Now that he's out of office, he should be prosecuted, shamed and described in history textbooks as an arrogant despot who undermined democracy, cost countless lives and caused damage that will take years to undo.

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