

War Criminals, Including Their Lawyers, Must Be Prosecuted

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Since he took office, President Obama has instituted many changes that break with the policies of the Bush administration. The new president has ordered that no government agency will be allowed to torture, that the U.S. prison at Guantánamo will be shuttered, and that the CIA's secret black sites will be closed down. But Obama is non-committal when asked whether he will seek investigation and prosecution of Bush officials who broke the law. "My view is also that nobody's above the law and, if there are clear instances of wrongdoing, that people should be prosecuted just like any ordinary citizen," Obama said. "But," he added, "generally speaking, I'm more interested in looking forward than I am in looking backwards." Obama fears that holding Team Bush to account will risk alienating Republicans whom he still seeks to win over.

Obama may be off the hook, at least with respect to investigating the lawyers who advised the White House on how to torture and get away with it. The Office of Professional Responsibility (OPR) has written a draft report that apparently excoriates former Justice Department lawyers John Yoo and Jay Bybee, authors of the infamous torture memos, according to *Newsweek's* Michael Isikoff. OPR can report these lawyers to their state bar associations for possible discipline, or even refer them for criminal investigation. Obama doesn't have to initiate investigations; the OPR has already launched them, on Bush's watch.

The smoking gun that may incriminate George W. Bush, Dick Cheney, et al., is the email traffic that passed between the lawyers and the White House. Isikoff revealed the existence of these emails on *The Rachel Maddow Show*. Some maintain that Bush officials are innocent because they relied in good faith on legal advice from their lawyers. But if the president and vice president told the lawyers to manipulate the law to allow them to commit torture, then that defense won't fly.

A bipartisan report of the Senate Armed Services Committee found that "senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees."

Cheney recently admitted to authorizing waterboarding, which has long been considered torture under U.S. law. Donald Rumsfeld, Condoleezza Rice, George Tenet, Colin Powell, and John Ashcroft met with Cheney in the White House basement and authorized harsh interrogation techniques, including waterboarding, according to an *ABC News* report. When asked, Bush said he knew about it and approved.

John Yoo wrote in a *Wall Street Journal* oped that Bush “could even authorize waterboarding, which he did three times in the years after 9/11.”

A representative of the Justice Department promised that OPR’s report would be released sometime last November. But Bush’s attorney general Michael Mukasey objected to the draft. A final version will be presented to Attorney General Eric Holder. The administration will then have to decide whether to make it, and the emails, public and then how to proceed.

When the United States ratified the Convention Against Torture, we promised to extradite or prosecute those who commit, or are complicit in the commission, of torture. We have two federal criminal statutes for torture prosecutions – the Torture Statute and the War Crimes Act (torture is considered a war crime under U.S. law). The Torture Convention is unequivocal: nothing, including a state of war, can be invoked as a justification for torture.

Yoo redefined torture much more narrowly than U.S. law provides, and counseled the White House that it could evade prosecution under the War Crimes Act by claiming self-defense or necessity. Yoo knew or should have known of the Torture Convention’s absolute prohibition of torture.

There is precedent for holding lawyers criminally liable for giving legally erroneous advice that resulted in great physical or mental harm or death. In *U.S. v. Altstoetter*, Nazi lawyers were convicted of war crimes and crimes against humanity for advising Hitler on how to “legally” disappear political suspects to special detention camps.

Almost two-thirds of respondents to a USA Today/Gallup Poll favor investigations of the Bush team for torture and warrantless wiretapping. Nearly four in 10 favor criminal investigations. Cong. John Conyers has introduced legislation to establish a National Commission on Presidential War Powers and Civil Liberties. Sen. Patrick Leahy advocates for a Truth and Reconciliation Commission; but this is insufficient. TRC’s are used for nascent democracies in transition. By giving immunity to those who testify before them, it would ensure that those responsible for torture, abuse and illegal spying will never be brought to justice.

Attorney General Eric Holder should appoint a Special Prosecutor to investigate and prosecute high Bush officials including lawyers like John Yoo who gave them “legal” cover. Obama is correct when he said that no one is above the law. Accountability is critical to ensuring that our leaders never again torture and abuse people.

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