

Will War Crimes Be Outed?

by **JEREMY BRECHER & BRENDAN SMITH**

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As the officials of the Bush administration pack up in Washington and move into their posh suburban homes around the country, will they be able to rest easy, or will they be haunted by the fear that they will be held accountable for war crimes?

There are many reasons to anticipate that the incoming Obama administration and the new Congress will let sleeping dogs lie. Attention to criminal acts by the former administration would probably anger Republicans, whose support Obama is hoping to win for his first priority, his economic program. Democratic Congressional leaders have known a great deal about Bush administration lawlessness, and in some cases have even given it their approval--making an unfettered review seem unlikely. Some of Obama's own top appointees would undoubtedly receive scrutiny in an unconstrained investigation--Obama's reappointed defense secretary Robert Gates, for example, has had responsibility not only for Guantánamo but also for the incarceration of tens of thousands of Iraqis in prisons in Iraq like Camp Bucca, which the *Washington Post* **described** in a headline as "a Prison Full of Innocent Men," without even a procedure for determining their guilt or innocence--unquestionably a violation of the Geneva Conventions in and of itself.

But the repose of the Cheneys, Bushes, Gonzaleses and Rumsfelds may not turn out to be so undisturbed. In his notorious torture memo, Alberto Gonzales warned about "prosecutors and independent counsels" who may in the future decide to pursue "unwarranted charges" based on the US War Crimes Act's prohibition on violations of the Geneva Conventions. While no such charges are likely to be brought anytime soon, neither are they likely to vanish. In the short run, Obama and his team face inescapable questions about the legal culpability of the Bush administration. And in the long run, such charges are likely to grow only more unavoidable once the former officials of that administration have lost the authority to quash them.

In April Obama said that if elected, he would have his attorney general initiate a prompt review of Bush-era action to distinguish between possible "genuine crimes" and "really bad policies."

"If crimes have been committed, they should be investigated," Obama **told** the *Philadelphia Daily News*. He added, however, that "I would not want my first term consumed by what was perceived on the part of Republicans as a partisan witch hunt, because I think we've got too many problems we've got to solve."

Obama's nominee for attorney general, Eric Holder, speaking to the American Constitution Society in June, **described** Bush administration actions in terms that sound a whole lot more like "genuine crimes" than like "really bad policies":

Our government authorized the use of torture, approved of secret electronic surveillance against American citizens, secretly detained American citizens without due process of law, denied the writ of habeas corpus to hundreds of accused enemy combatants and authorized

the use of procedures that violate both international law and the United States Constitution....
We owe the American people a reckoning."

A Reckoning?

While attention has focused on whether, once president, Obama will move quickly to close Guantánamo, shut down secret prisons, halt rendition and ban torture, there's a less visible struggle over whether and how to provide a reckoning for war crimes past.

A growing body of legal opinion holds that Obama will have a duty to investigate war crimes allegations and, if they are found to have merit, to prosecute the perpetrators.

In a December 3 *Chicago Sun-Times* **op-ed**, law professors Anthony D'Amato (the Leighton Professor at Northwestern University School of Law) and Jordan J. Paust (the Mike & Thersa Baker Professor at the Law Center of the University of Houston) ask whether president-elect Barack Obama will have "the duty to prosecute or extradite persons who are reasonably accused of having committed and abetted war crimes or crimes against humanity during the Bush administration's admitted 'program' of 'coercive interrogation' and secret detention that was part of a 'common, unifying' plan to deny protections under the Geneva Conventions."

They answer, "Yes."

"Under the US Constitution, the president is expressly and unavoidably bound to faithfully execute the laws." The 1949 Geneva Conventions "expressly and unavoidably requires that all parties search for perpetrators of grave breaches of the treaty" and bring them before their own courts for "effective penal sanctions" or, if they prefer, "hand such persons over for trial to another High Contracting Party."

The statement is particularly authoritative--and particularly striking--because Paust is also a former captain in the United States Army JAG Corps and member of the faculty at the Judge Advocate General's School.

Michael Ratner of the Center for Constitutional Rights **says** that one of Barack Obama's first acts as president should be to "instruct his attorney general to appoint an independent prosecutor to initiate a criminal investigation of former Bush Administration officials who gave the green light to torture."

Parallel to the legal community, members of Congress and president-elect Obama are trying to chart a **strategy** that avoids the appearance of seeking to punish Bush administration officials without appearing blatantly oblivious to their apparent war crimes. **According to** the AP's Lara Jakes Jordan, "Two Obama advisors say there's little--if any--chance that the incoming president's Justice Department will go after anyone involved in authorizing or carrying out interrogations that provoked worldwide outrage." Instead, "Obama is expected to create a panel modeled after the 9/11 Commission to study interrogations, including those using waterboarding and other tactics that critics call torture."

Asked if Bush administration officials would face prosecution for war crimes, Senate Judiciary Chairman Patrick Leahy flatly **said**, "In the United States, no," but he does intend to **continue to investigate** Bush administration officials and their interrogation policies. "Personally, I would like to know exactly what happened. Torture is going to be a major issue."

Continue the Cover-Up?

President-elect Obama may well seek to delay taking a stand for or against such accountability actions. But he is likely to be confronted early in his administration by choices about whether to continue or terminate legal cover-up operations the Bush administration currently has under way.

For example, the Bush administration has blocked the civil suit against US officials by Canadian **Maher Arar** for his "rendition" to Syria and his torture there by invoking the "state secrets" privilege. According to **Christopher Anders**, senior legislative counsel for the ACLU, they have appointed a prosecutor to investigate the destruction of videotapes of CIA interrogations, but the investigation is limited only to whether crimes were committed in relation to the destruction of the tapes--not whether what was being videotaped is a crime. The administration has **refused** to cooperate with the trial of twenty-six Americans, mostly CIA agents, who kidnapped a terrorism suspect in Milan and flew him to Egypt where, he says, he was tortured. And they have refused to provide secret documents to the British High Court in the case of Guantánamo detainee Binyam Mohamed that may demonstrate that US officials were complicit in his torture in Morocco.

If the Obama administration continues the Bush administration's efforts to prevent investigators from investigating and courts from hearing such cases, it will rapidly become part of the cover-up. If it begins to, at a minimum, stop obstructing such proceedings, the result could be a rapid crumbling of the wall of silence the Bush administration has tried so assiduously to build around its "war on terror."

A bipartisan **report** issued by the Senate Armed Services Committee on December 11 will make it far more difficult to evade the responsibility of holding Bush administration officials legally accountable for war crimes. Released by Senators Carl Levin and John McCain after two years of investigation, the report concluded:

The abuse of detainees in US custody cannot simply be attributed to the actions of 'a few bad apples' acting on their own.... The fact is 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.... Secretary of Defense Donald Rumsfeld's authorization of aggressive interrogation techniques for use at Guantánamo Bay was a direct cause of detainee abuse there.

In an **interview** published in the *Detroit News*, Senator Levin said he was not responsible for deciding whether officials should be prosecuted for authorizing torture, but he admitted that there is enough evidence that victims of abuse could file civil lawsuits against their assailants. Levin also suggested that the Obama administration "needs to look for ways in which people can be held accountable for their actions."

An Accountability Movement

Outside the Beltway, a movement to hold Bush administration officials accountable for torture and other war crimes after they leave office is gradually emerging. It received a boost when over a hundred lawyers and activists met in Andover, Massachusetts on September 20 at a **conference** entitled "Planning for the Prosecution of High Level American War Criminals." The conference created an ongoing committee to coordinate accountability efforts. At the close, conference convener Dean Lawrence Velvel of the Massachusetts School of Law noted more than twenty strategies and specific actions that had been

proposed, ranging from the state felony prosecutions proposed by former district attorney Vincent Bugliosi to the international prosecutions pioneered by the Center for Constitutional Rights' Rumsfeld cases; and from impeaching Bush appointees like Federal Judge Jay Bybee to public shaming of torture-tainted former officials like John Yew, now a professor at the University of California Law School.

One of proposals discussed at the Andover conference was the creation of a citizens' War Crimes Documentation Center, modeled on the special office set up by the Allied governments before the end of World War II to investigate and document Nazi war crimes. Such a center could be the nexus for research, education and coordination of a wide range of civil society forces in the US and abroad that are demanding accountability. It could bring together the extensive but scattered evidence already available, to compile a narrative of what actually happened in the Bush administration. It could help or pressure Congress to conduct investigations to fill in the blanks. It could pull together high-profile coalitions to campaign around the issue of accountability for specific crimes like torture. If Obama does initiate some kind of investigating commission, such a center could provide it with information and help hold it accountable.

A Moral Education

There are a myriad of reasons for urgently holding the Bush regime to account, ranging from preventing unchallenged executive action from setting new legal precedent to providing a compelling rationale for the immediate cessation of bombing civilians in the escalating Afghan war.

But the issue raised by Bush administration war crimes is even larger than any person's individual crimes. As Thomas Paine wrote in *Common Sense*, "A long habit of not thinking a thing wrong gives it a superficial appearance of being right." The long history of aggressive war, illegal occupation, and torture, from the Philippines to Iraq, have given the American people a moral education that encourages us to countenance war crimes. If we allow those who initiated and justified the illegal conquest and occupation of Iraq and the use of torture at Abu Ghraib and Guantánamo to go unsanctioned, we teach the world--and ourselves--a lesson about what's OK and legal.

As countries like Chile, Turkey and Argentina can attest, restoration of democracy, civic morality and the rule of law is often a slow but necessary process, requiring far more than simply voting a new party into office. It requires a wholesale rejection of impunity for the criminal acts of government officials. As Rep. Robert Wexler (D-FL) **put it**, "We owe it to the American people and history to pursue the wrongdoing of this administration whether or not it helps us politically.... Our actions will properly define the Bush Administration in the eyes of history."

About Jeremy Brecher

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