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A Truth Commission for the Bush Era?

By THE EDITORS

(Photo: Ron Edmonds/Associated Press) President George W. Bush and Vice President Dick Cheney with Attorney General Alberto Gonzales in 2006.

A USA Today/Gallup poll in February found that [62 percent of Americans favor a criminal investigation or an independent panel](#) to look into the use of torture, illegal wiretapping, and other alleged abuses of power by the Bush administration. But that idea has been dismissed by many as politically infeasible. And President Obama has said he was [“more interested in looking forward than I am in looking backwards.”](#)

Still, that hasn't deterred Sen. Patrick Leahy, chairman of the Senate Judiciary Committee, from [calling for a “truth commission”](#) and [scheduling a hearing on the issue](#) this Wednesday. Already, Rep. John Conyers Jr., chairman of the House Judiciary Committee, has introduced [a bill](#) to set up an inquiry panel.

Should Congress create a truth commission? Or is it time to move on?

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First, Find Out What Happened

David Cole, a professor at Georgetown University Law Center, is the author, most recently, of *Justice At War: The Men and Ideas That Shaped America's 'War on Terror.'*

Why are so many so afraid of the truth? Senator Patrick Leahy's proposal that a nonpartisan truth commission be appointed to investigate possible crimes committed in the “war on terror” has sparked criticism from a wide range of Republicans, all of whom urge us to look forward, not backward. But in the face of credible evidence that high-level Bush administration officials authorized torture, a crime against humanity, the least we should do is undertake a serious, independent investigation.

As a legal matter, we are compelled to investigate by the Convention Against Torture, a binding treaty, that requires its signatories to investigate and refer for possible prosecution credible evidence of torture under their jurisdiction.

It may have been wrong, but not criminal, to rely on flawed legal advice from the Justice Department's Office of Legal Counsel. That obligation has been triggered by, among other things, the admissions that C.I.A. interrogators used waterboarding on at least three suspects with the express approval of Vice President Dick Cheney and other Cabinet officials, and by the finding of Susan Crawford, head of military prosecutions at Guantanamo, that interrogators there, acting under orders of then Defense Secretary Donald Rumsfeld, tortured Mohammed al-Qahtani. If we do not investigate such evidence, foreign courts have the right to pursue torture prosecutions of U.S. officials under the principle of “universal jurisdiction.”

As a moral matter, investigation is also the right thing to do. The United States has committed grave wrongs in past security crises, most infamously when we interned over 110,000 Japanese and Japanese Americans during World War II. It took us more than 40 years to do it, but the United States eventually acknowledged its wrong in 1988, when Congress officially apologized and paid reparations to the surviving internees. We should not wait 40 years to admit our mistakes this time around.

Some complain that a truth commission is not enough — and that crimes require criminal prosecutions. Depending on what the evidence shows, prosecution may be the appropriate response in the long run, but for the moment, it is not yet obvious.

For example, it may have been wrong, but not criminal, to rely on flawed legal advice from the Justice Department's Office of Legal Counsel that waterboarding was not torture; the legal advice itself may have

been morally repugnant and professionally incompetent without necessarily being criminal. At this point, it is too early to conclude that prosecution is either required or ruled out. But it is too late to deny that a serious independent investigation is necessary.

A Cycle of Political Payback

Kenneth Anderson, a law professor at Washington College of Law, American University, is a research fellow of the Hoover Institution.

A truth commission to investigate actions by former Bush administration officials is a terrible idea from the standpoint of both law and policy.

If Congress wants to hold hearings, it is always free to hold hearings. But evoking the idea of a “truth commission” is needlessly inflammatory. “Truth commissions” are used in places like South Africa following apartheid, or following brutal civil wars or genocide or similar mass crimes. The call by some members of Congress for a “truth commission” underrates the authority already in the Constitution to investigate and prohibit illegal actions by any branch of government. It also undermines the serious idea of “truth commissions” where they are genuinely needed, and stains a noble concept with an American partisan “gotcha.”

The push for a commission will only provoke Republicans into investigating and prosecuting those who carried out Obama administration policies.

Second, if Congress were serious about criminalizing waterboarding or other interrogation tactics, all it has to do is draft a specific law. It doesn't have to just talk and hold truth commissions. It can raise its hands and vote, and declare waterboarding to be torture — no argument, no interpretation — and establish the criminal penalties. But so far it is not clear it will do that, even with Democrats controlling both houses and a Democratic president.

Politically, the push for a commission can only provoke Republicans into investigating and prosecuting those who carried out Obama administration policies - made during the escalating war in Afghanistan, for example — when they return to power.

Indeed, it would not be a stretch to imagine that President Obama's strategically sensible use of strikes by remotely piloted Predator drones in areas of Pakistan with Al Qaeda militants could be thought to raise international legal issues. Objections could be raised to alleged disproportionate loss of civilian life in such attacks, and such targeted killings are controversial among human rights lawyers.

Empaneling a truth commission is little more than political payback. But it could provide a backdrop for European governments to issue indictments, or make implicit threats of indictments against former Bush administration officials. True, not investigating might provide other countries with the hook to investigate under treaty laws — but it is doubtful that a legally toothless, even if politically loaded, truth commission is enough to deter that if they are so inclined.

The consequences won't end there. If the U.S. role in Afghanistan increases, policy decisions over the next four years may subject current administration officials to exposure from actions in foreign courts.

We Need a Special Counsel

Michael Ratner is president of the Center for Constitutional Rights and author of “*The Prosecution of Donald Rumsfeld: A Prosecution by Book.*”

A criminal investigation and prosecution of the torture conspirators is a necessity, not a choice. As Maj. Gen. Antonio M. Taguba, who investigated the Abu Ghraib scandal for the Pentagon, declared in June 2008: “There is no longer any doubt as to whether the current (Bush) administration has committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held to account.”

Unless government officials know that consequences follow from such abuses, they will break the law again. This is why President Obama is wrong when he argues that prosecution is looking backward; it is not. Prosecution is a means of preventing torture in the future. Even though he signed an executive order ending the use of torture, that order can be undone by the next president.

Creating a “truth commission” could result in giving immunity to key actors.

Some claim that to prosecute those who approved torture techniques would criminalize a policy difference. But torture is against the law. The claim that the administration officials who promoted the use of

waterboarding and other measures were acting in the national interest does not absolve them; if it did, all torturers the world over would use the same justifications.

The Obama administration should carry out its legal obligations by directing the Department of Justice to appoint a special or independent counsel to investigate the actions of the Bush administration. Other politically sensitive cases have gone this route. Patrick Fitzgerald was appointed to investigate the outing of C.I.A. agent Valerie Plame, and Lawrence Walsh was appointed to investigate the Iran-contra scandal.

The Walsh investigation was only partially successful, in part, because a congressional investigation compromised the criminal prosecutions. That danger exists with creating a “truth commission,” which could result in giving immunity to key actors.

Appointment of the right special counsel could lessen the claim that the administration is engaging in partisan politics. The counsel should be a prosecutor that is beyond reproach — perhaps a respected Republican — who would be authorized to look into the actions of all who were involved authorizing the torture program.

We will continue to hear excuses as to why a criminal investigation should not occur. We should not be dissuaded. Only prosecutions can draw the clear, bright line that is necessary to insure that this will never happen again.

Other Nations May Investigate

Margaret L. Satterthwaite is an associate professor of clinical law and faculty director of the Center for Human Rights and Global Justice at New York University School of Law.

Long ago, the United States voluntarily accepted the obligation under international law to investigate those suspected of committing — or ordering the commission of — “grave breaches” of the Geneva Conventions. “Grave breaches” include the torture or inhumane treatment of detainees.

The United States also agreed to be bound by the Convention Against Torture, which requires that countries investigate and prosecute acts of torture committed by their nationals — including torture committed in times of war.

Together, these treaties embody the concept that no one — regardless of rank or position and regardless of the reason for the abuse — is above the law. Like all its peer countries, the United States has a duty to prosecute and punish individuals who ordered or engaged in the torture or inhumane treatment of detainees.

If the United States ignores these obligations, former U.S. officials may be vulnerable to criminal prosecution in other countries. Under the “universal jurisdiction” principle, countries could use their own criminal systems to prosecute individuals for torture. Such attempts — though embarrassing—would have a limited concrete impact, however, since former officials could avoid the reach of foreign courts by curbing travel.

More certain is the lasting damage to the rule against torture — which is made strong by the voluntary acts of countries to uphold that rule in all contexts. And that damage will affect our international interests for far longer than either political party may expect.

Flexibility With Truth Commissions

Jenny S. Martinez, a professor of law at Stanford University, argued the 2004 case of *Rumsfeld v. Padilla* before the United States Supreme Court.

The Bush administration tried to justify its behavior with outlandish legal opinions that claimed extraordinary powers for the president to disobey laws passed by Congress and international treaties like the Geneva Conventions. Those actions continue to provide excuses for governments of other countries to engage in undemocratic behavior and violate human rights. It is not enough for the Obama administration to simply say that we are changing our policies going forward.

Re-establishing the rule of law requires insisting on some accountability — though that need not necessarily take the form of criminal liability, at least initially. Such a commission would help bring to light what happened and why, and would solidify our nation’s repudiation of these illegal actions.

By the same token, creating a truth commission also need not imply that no one will ever be criminally

prosecuted. In fact, truth commissions in several countries, such as Chile, Uruguay, Peru and East Timor have had the power to and in some cases actually forwarded cases to prosecutors (actual prosecutions, however, have not always been forthcoming). In Argentina, the truth commission report on disappearances released in 1984 opened the door for criminal trials of members of the junta in 1985. Even the South African commission, which famously granted amnesty to perpetrators, only made those grants to those who gave full and truthful accounts.

Depending on what a truth commission finds about torture under the Bush administration, later criminal prosecutions may or may not be appropriate. But there is no reason to decide that question prematurely.