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[Conyers and Nadler Press Mukasey on Statements Denying Criminal Liability of Bush Officials](#)

    ... By [Daphne Eviatar](#) 12/5/08 9:17 AM

I'm glad to see that somebody isn't just taking at face value Attorney General Michael [Mukasey's recent statements](#) that Bush administration officials who approved the use of torture shouldn't be prosecuted and needn't be pardoned because they all reasonably believed their actions were lawful.

On Thursday, House Judiciary Committee Chairman John Conyers, Jr. (D-MI) and Constitution, Civil Rights, and Civil Liberties Subcommittee Chairman Jerrold Nadler (D-NY) [wrote to Mukasey](#) asking him to provide the factual basis for that assertion. The letter noted that Mukasey's comments were hard to square with the record of substantial internal objections to these policies, and were inappropriate given that there are several ongoing investigations looking at precisely these same questions.

As the letter reads: "The public record reflects ample warning to Administration officials that its legal approach was overreaching and invalid, such as repeated objections by military lawyers to Department legal opinions on interrogation issues and the stark warning by then-Deputy Attorney General James Comey that the Department would be "ashamed" if the world learned of the legal advice it had given on torture issues. Indeed, FBI interrogators were so troubled by some approved interrogation methods that they refused to participate, as the Department's own Inspector General has described."

At a packed forum at NYU Law School last night addressing the same topic, Hofstra law professor and [Harper's contributor Scott Horton](#) offered that Mukasey is trying to "bait Obama into saying that there won't be prosecutions, we'll let bygones be bygones." Obama is not likely to take that bait, though.

Indeed, Obama and his transition team have been so tight-lipped about what they'll do about crimes committed under the Bush administration, and Bush has been so elusive about what he might do on the pardon issue, that it had led to all sorts of energetic speculation on the subject. Much of this debate was on display at last night's forum, which attracted several hundred attendees and left dozens more outside and clamoring to get in.

While Horton reiterated his call for a commission to investigate, which he laid out in detail [in this month's Harper's](#), Michael Ratner, president of the Center for Constitutional Rights, insisted a commission is too slow, complicated and prone to coverups, and only a special prosecutor can do the job. Nadler, also on the panel, seemed to advocate for both, while NYU law professor and Brennan Center legal director Burt Neuborne suggested the more conciliatory truth and reconciliation commission approach, which would expose but not prosecute abuses, should also be considered. But as Ratner responded, citing a comment recently made to him: "Imagine if at Nuremberg we had had a truth commission and not a prosecution?" Doesn't really have the same historical impact — or deterrent effect.

Elizabeth Holtzman, the former congresswoman and author of the book, "The Impeachment of George W. Bush," warned that "If we don't act to address this problem," referring to executive lawbreaking, "we will be beset with this problem again and again."

General Anthony Taguba, the retired military general who wrote the scathing 2004 report on Abu Ghraib, calling the conduct there not only "sadistic" but "criminal," also made some interesting points. He noted, in carefully tempered remarks, the disconcerting fact that the the government passed laws protecting senior government officials from prosecution, then directs soldiers in the military to follow the Geneva Conventions and international law. What kind of a message does that send to our troops?

All in all, a convincing set of arguments that ultimately weigh in favor of both a special prosecutor to investigate specific instances of criminal wrongdoing, and an investigatory commission to look more broadly at how the Bush administration went

down this path in the first place and how to keep it from happening again.

As Neuborne noted, employing his usual eloquence (as I recall from the days when he was my fed courts professor), “we have a panic button in the Constitution” that has led to constitutional transgressions by US officials during wartime far too often in American history.

Something must be done – whether in the form of criminal prosecutions, truth commissions or perhaps lawsuits for civil liability and monetary damages — to deter government officials from pressing that button so reflexively in the future.



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