

# Bush-era US torture system: The Nuremberg Truth and Reconciliation Commission?

Only Prosecution of War Crimes Will Bring Out the Facts?

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Representatives John Conyers and Jerrold Nadler are officially asking Attorney General Eric Holder to appoint an independent Special Prosecutor “to investigate and, where appropriate, prosecute” participants in the Bush-era US torture system. “A Special Counsel is the most appropriate way to handle this matter,” Nadler said. “It would remove from the process any question that the investigation was subject to political pressure, and it would preempt any perceptions of conflict of interest within the Justice Department, which produced the torture memos.” But, as Politico reports, “Holder is likely to reject that request – his boss, the president, has indicated he doesn’t see the need for such a prosecutor.” The Democratic Leadership, particularly Obama, Senate Majority Leader Harry Reid and Sen. Diane Feinstein have pushed for secret, closed-door hearings in the Senate Intelligence Committee. Other Democrats, like Patrick Leahy, advocate establishing a Truth Commission, though that is not gaining any momentum. The fact remains that some powerful Democrats knew that the torture was happening and didn’t make a public peep in opposition.

This week, Lawrence Wilkerson, the former chief of staff to Secretary of State Colin Powell came out in favor of prosecutions of “the decision-makers and their closest advisors (particularly the ones among the latter who may, on their own, have twisted the dagger a little deeper in Caesar’s prostrate body — Rumsfeld and Feith for instance). Appoint a special prosecutor such as Fitzgerald, armed to the teeth, and give him or her carte blanche. Play the treatment of any intermediaries — that is, between the grunts on the ground and the Oval — as the law allows and the results demand.”

Wilkerson, though, understands Washington. “Is there the political will to carry either of these recommendations to meaningful consequences?” he wrote to the Huffington Post. “No, and there won’t be.”

As of now, Conyers and Nadler aren’t exactly looking for over-flow space for their meetings on how to get criminal prosecutions going.

Officially joining the anti-accountability camp this week was The Washington Post’s David Broder who wrote this gem in defense of the Bush administration: “The memos on torture represented a deliberate, and internally well-debated, policy decision, made in the proper places — the White House, the intelligence agencies and the Justice Department — by the proper officials.” (For a great response to this, check out Scott Horton). Broder is urging Obama to “stick to his guns” in standing up to pressure “to change his mind about closing the books on the ‘torture’ policies of the past.” Don’t you love how Broder puts torture in quotes? I really wonder how Broder would describe it if he was waterboarded (and survived).

Can't you just imagine him making the little quote motion with his hands? Broder's Washington Post column was titled "Stop Scapegoating: Obama Should Stand Against Prosecutions:"

[Obama was] right to declare that there should be no prosecution of those who carried out what had been the policy of the United States government. And he was right when he sent out his chief of staff, Rahm Emanuel, to declare that the same amnesty should apply to the lawyers and bureaucrats who devised and justified the Bush administration practices.

But now Obama is being lobbied by politicians and voters who want something more — the humiliation and/or punishment of those responsible for the policies of the past. They are looking for individual scalps — or, at least, careers and reputations.

Their argument is that without identifying and punishing the perpetrators, there can be no accountability — and therefore no deterrent lesson for future administrations. It is a plausible-sounding rationale, but it cloaks an unworthy desire for vengeance.

Obama has opposed even the blandest form of investigation, a so-called truth commission, and has shown himself willing to confront this kind of populist anger.

Thank goodness we have a president who opposes "even the blandest form of investigation"—how uncouth such savagery would prove to be. While the elite Washington press corp works hard to make sure things don't get too uncomfortable at the wine and cheese cocktail parties, some liberal journalists are also making the case against a special prosecutor (or at least the immediate appointment of one). Last week it was Elizabeth de la Vega, who made an interesting case for waiting to prosecute while evidence is gathered:

We must have a prosecution eventually, but we are not legally required to publicly initiate it now and we should not, as justifiable as it is. I'm not concerned about political fallout. What's good or bad for either party has no legitimate place in this calculus. My sole consideration is litigation strategy: I want us to succeed.

This week it is Mother Jones Washington editor David Corn, who comes out in favor of a congressional investigation "that placed a premium on public disclosure" or "an independent commission." Corn describes how he recently warned a Congressman who supports the appointment of a Special Prosecutor, "That's not necessarily a good idea." Corn talks about how a coalition of groups from the Center for Constitutional Rights and the ACLU to Democrats.com and MoveOn.org have all petitioned for a prosecutor:

These liberals all want to see alleged Bush administration wrongdoing exposed. But there's one problem with a special prosecutor: it's not his job to expose wrongdoing. A special prosecutor does dig up facts—but only in order to prosecute a possible crime. His mission is not to shine light on misdeeds, unless it is part of a prosecution. In many cases, a prosecutor's investigation does not produce any prosecutions. Sometimes, it leads only to a limited prosecution.

That's what happened with Patrick Fitzgerald. He could not share with the

public all that he had discovered about the involvement of Bush, Cheney, Karl Rove, and other officials in the CIA leak case... A special prosecutor, it turns out, is a rather imperfect vehicle for revealing the full truth.

[...]

Prosecuting government officials for providing legal opinions that greenlighted waterboarding and the like would pose its own legal challenges. Could a government prosecutor indict the government lawyers who composed and signed the torture memos for aiding and abetting torture without indicting the government employees who actually committed the torture? (President Barack Obama has pledged that the interrogators will not be pursued.) And could a prosecutor win cases in which his targets would obviously argue that they were providing what they believed was good-faith legal advice, even if it turned out that their advice was wrong?... Several lawyers I've consulted have said that a criminal case against the authors of these memos would be no slam dunk. One possible scenario is that a special prosecutor would investigate, find out that sordid maneuvering occurred at the highest levels of the Bush-Cheney administration, and then conclude that he or she did not have a strong enough legal case to warrant criminal indictments and trials.

The bottom line: Anyone who wants the full truth to come out about the Bush-Cheney administration's use of these interrogation practices cannot count on a special prosecutor.

Corn's advice to that unnamed Democratic Congressman wasn't exactly well received by lawyers who have been pushing for prosecutions. Perhaps the most passionate advocate for the appointment of an independent Special Prosecutor right now is Michael Ratner, the president of the Center for Constitutional Rights.

"To argue that we should not have prosecutions because it won't bring out all the facts when taken to its logical conclusion would mean never prosecuting any official no matter the seriousness of the crimes," Ratner told me. "Right now is not the time to be backing off on prosecutions. Why are prosecutions of torturers ok for other non-western countries but not for the US? Prosecution is necessary to deter torture in the future and send a message to ourselves and the rest of the world that the seven or eight year torture program was unlawful and must not happen again. The purpose of prosecutions is to investigate and get convictions so that officials in the future will not again dispense with the prohibition on torture."

Constitutional Law expert Scott Horton says that the problems with a Special Prosecutor Corn lays out are "correct, but he makes the latent assumption that it's either/or. That's absurd. Obviously it should be both a commission and one or more prosecutors as crimes are identified."

Jameel Jaffer, one of the leading ACLU attorneys responsible for getting the torture memos released by the Obama administration, agrees with Horton. "I don't think we should have to choose between a criminal investigation and a congressional inquiry," Jaffer told me. "A congressional committee could examine the roots of the torture program and recommend legislative reform to prevent gross human rights abuses by future administrations. At the same time, a Justice Department investigation could investigate issues of criminal responsibility. One shouldn't foreclose the other."

Jaffer adds, "It might be a different story if we thought that Congress would need to offer immunity in exchange for testimony. But many of the key players - including John Yoo,

George Tenet, and Dick Cheney – have made clear that they have no qualms about talking publicly about their actions (Yoo and Tenet have both written books, and Cheney is writing one now).”

The bottom line, Ratner argues, is that “prosecutions will bring out facts.” He cites the example of the Nuremberg Tribunals:

What if we had had a truth commission and no prosecutions? Right now we have many means of getting the facts: FOIA, congressional investigations such as the Senate Armed Services Report, former interrogators, document releases by the Executive. There are plenty of ways to get information even if it does not all come out in prosecutions. Many of the calls to not prosecute are by those, particularly inside the beltway, who cannot imagine Bush, Cheney et al. in the dock or by those who accept the argument that the torture conspirators were trying their best. This is not a time to hold back on the demand that is required by law and fact: appoint a special prosecutor.

David Swanson, who for years has pushed for prosecutions of Bush administration officials, was one of the organizers of the petitions calling for the appointment of a Special Prosecutor. “My top priority is not ‘truth,’” he said. “My top priority is changing the current truth, which is that we don’t have the nerve and decency to enforce our laws against powerful people.”

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