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Looking Forward, Backward, or Just Away?

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Looking Forward, Backward, or Just Away?

Abstract

The declassification and leaking of the so-called “torture memos” only supplements much which was already publicly well-known, but has offered a fresh opportunity to frankly debate American values, in particular its commitment to the rule of law, its own constitution, and international human rights and humanitarian law obligations to which it has committed itself, and which the Supreme Court has confirmed are part of domestic law. It is a shame, therefore, that the debate has been so stunted, diverted by the red herring of Dick Cheney’s rantings, and the apparent willingness of a segment of the population to accept, first, without evidence, that torture and other illegal activities have actually generated valuable intelligence that has thwarted potential attacks, and, second, that the rule of law and our core values can simply be suspended when they appear to be inconvenient. This includes, apparently, not only international legal obligations, but obligations under the Constitution, and clear guidance formally embedded in military training through the documents such as the US Army Field Manual dealing with human intelligence gathering.

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Human rights, Torture, War on terror, National security

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Looking Forward, Backward, or Just Away?

by Chandra Lekha Sriram

The declassification and leaking of the so-called “torture memos” only supplements much which was already publicly well-known, but has offered a fresh opportunity to frankly debate American values, in particular its commitment to the rule of law, its own constitution, and international human rights and humanitarian law obligations to which it has committed itself, and which the Supreme Court has confirmed are part of domestic law. It is a shame, therefore, that the debate has been so stunted, diverted by the red herring of Dick Cheney’s rantings, and the apparent willingness of a segment of the population to accept, first, without evidence, that torture and other illegal activities have actually generated valuable intelligence that has thwarted potential attacks, and, second, that the rule of law and our core values can simply be suspended when they appear to be inconvenient. This includes, apparently, not only international legal obligations, but obligations under the Constitution, and clear guidance formally embedded in military training through the documents such as the [US Army Field Manual](#) dealing with human intelligence gathering.

Most critically, what Cheney’s diversionary tactics have enabled is a near-complete avoidance of a genuine discussion of the need for accountability in favor of a speculative debate about the effectiveness of torture, which characterizes advocates of accountability for past torture, or even proscription of future torture, as overly legalistic liberals.

Even President Barack Obama has, shamefully, been cowed by these tactics, promising to look forward rather than backward and “let the past be the past” even while taking important steps to close the detention facility in Guantanamo and to promise that a range of tactics, such as waterboarding, would henceforth be proscribed. This, however, will not suffice. Well-meaning though Obama’s future-oriented rhetoric might be, it is probably woefully familiar to citizens of countries emerging from abusive regimes and internal conflicts, from Chile to Mozambique, whose governments instruct them to forgive and forget, for the purposes of reconciliation, when what is really meant is that victims will be denied truth or other measures of justice, for the protection of those most culpable, or the stability of the government. In the US, we too have undergone a political transition, but an ordinary electoral one, so there is little need for concern that accountability may be destabilizing, and therefore little need for amnesties. There may well be a necessity for this enforced amnesia in some instances, but we should call it what it is. And there is certainly no justification regardless for the withholding of photos and other items which may document crimes, as Obama has suggested he might do to avoid inflaming anti-Americanism.

Furthermore, there are at least two critical distinctions that ought to be made. First, the majority of those tortured or otherwise abused have been foreign nationals, so it is at best hypocrisy for we, the citizens of the torturing country, to decide that their harms should be overlooked for our own sakes. Second, one of the more reasonable, non-cynical, rationales, for amnesties has been to enable the reconstruction of a destabilized post-conflict state. The United States is a fully institutionalized, functional democracy, with independent courts, as the Bush Administration learned the hard way with a series of US Supreme Court decisions rejecting executive overreaching and flat violations of domestic and international law in cases such as [Rasul v. Bush](#),

[*Hamdan v. Rumsfeld*](#), and [*Boumediene v. Bush*](#). If countries from Argentina to South Africa have endured commissions of inquiry and even prosecutions of former abusers, albeit with significant destabilization in Argentina, there is no reason to think that the more robust legal and political institutions of the United States could not.

Yet with rare exceptions, the discussion about accountability seems to have stopped short, as though we are afraid of seriously considering retributive or other measures. The proposal by Senator Patrick Leahy for the creation of a [truth commission](#) has been treated as something akin to comical by some in the media, and not just Fox News. And the [American Civil Liberties Union](#) seems to stand virtually alone in seriously suggesting that investigations which could lead to prosecutions should be undertaken. This may derive from the legacy of the Bush Administration's poisonous attitude to any law, not just international law, which constrained its behavior. However, more worryingly, the specious quasi-legal reasoning continues in the current Administration, most worryingly perpetuated in part by our president, a legal scholar.

This is most evident in the narratives suggesting not only that we should simply look the other way in the face of serious violations of law, an argument not worthy of a former professor of law, but also that the two categories of persons who appear to be most obviously culpable could not be. Specifically, there has been a dismissal of the idea that individuals who followed the dubious advice of the torture memos could not be to blame, either because they didn't know they were breaking the law, or because they were "just following orders." However, as already noted, military training includes clear guidance, through the US Army Field Manual and other processes, as to what is permissible and what is impermissible behavior. Individuals who engaged in torture ought in theory to have recognized that the guidance they were being given by superiors presumably conversant with the memos (there is no evidence to suggest that lower-level individuals came into contact with the memos directly) was inconsistent with their training, or for that matter common sense. Unless we are to assume that said individuals so lack autonomous moral compasses that they could not have recognized abuses for what they were, we must assume they might have questioned those orders; this appears to have been rare. However, as is well known, the "just following orders" defense was not acceptable before the Nuremberg Tribunal, nor has it been since. Similarly, it has been suggested that those who drafted the memos, or those who created the regime of abusive interrogation that relied upon those memos, could not be responsible for what they wrought because they were not physically present at, nor did they directly inflict, torture, yet that seems implausible as well. Those higher up the chain of command who created the regime, and issued explicit or implicit instructions to torture, would bear command responsibility, another principle well embedded in judgments at Nuremberg and since. It may be possible to attribute at a minimum a type of accomplice responsibility to those who drafted the memos, even if they were not part of the chain of command. There has been some discussion of impeachment, and the removal from office of individuals responsible for such legal violations would be an appropriate response whether or not prosecutions are pursued.

None of this is to state determinatively that guilt would be proven in all cases, or even, perhaps, that many prosecutions should take place. It is to say that we need to have a serious national debate, not about whether torture "works," but whether we remain a nation of laws, not men, and what consequences should follow when serious crimes are committed. But that debate seems to have been stopped before it ever had a chance to start.

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