

# Slate

JURISPRUDENCE

## Truth or Consequences?

Why can't we hold torturers accountable and still find out the truth?

By Dahlia Lithwick

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I am test-driving my new persona as petty pursuer of vengeance, who, in continuing to seek legal accountability for the architects of President Bush's abusive-interrogation, secret-rendition, and warrantless-wiretapping programs, fits neatly into Attorney General Michael Mukasey's classification as someone who is "relentless," "hostile," and "unforgiving." My desire to see an Obama administration dedicated to both investigating and, if needed, holding accountable the Bush officials who authorized torture, rape, and worse is seen as [naive](#) at best and ruinous to the Democrats at worst.

There is a growing schism between the cranky legal purists and the pragmatic liberals who were delighted last week when two Obama advisers [told the Associated Press](#) that "there's little *if any* chance that the incoming president's Justice Department will go after anyone involved in authorizing or carrying out interrogations." A [Newsweek report](#) this week confirmed that Obama advisers are pushing instead for a 9/11-style commission that would "investigate counterterrorism policies and make public as many details as possible." It would not be in keeping with the spirit of the new president, who reaches across the aisle, for him to do so with an arrest warrant in his hand.

Part of me agrees with former Clinton [prosecutor Robert S. Litt, who argued](#) recently that pursuing Bush administration officials would be perceived as partisan and vindictive. "It would not be beneficial to spend a lot of time calling people up to Congress or in front of grand juries," Litt said. "It would really spend a lot of the bipartisan capital Obama managed to build up." But I agree even more with [Salon's Glenn Greenwald](#) that to paper over years of brutal abuse and injustice in the interest of all getting along swimmingly is a piece of pragmatism America cannot afford. "How is this anything other than a full-scale exemption issued to political leaders to break our laws?" he wrote.

I want to agree with professor Kermit Roosevelt, [who told Salon](#) that the prospect of a blanket presidential pardon followed by a truth-and-reconciliation commission would have the salutary effect of "healing the country and moving forward," leading us toward "getting a clear picture of what happened and letting the public make an informed decision." But framing this question as a tension between getting the truth out and holding wrongdoers accountable is premised on a false choice. I fall in with [professor Jonathan Turley](#), who argues that "there is nothing that brings out cooperative witnesses more than the threat of prosecution."

It's sweet and fanciful to think that with a grant of immunity and a hot cup of chai, Bush-administration officials who have scoffed at congressional subpoenas and court dates will sit

down and unburden themselves to a truth commission about their role in the U.S. attorney firings. I agree completely with Charles Homans, who, in this [must-read piece for the \*Washington Monthly\*](#), argues for the release of classified information at all costs. But I just cannot bring myself to believe that the full story will ever be told to our collective satisfaction. Even if every living American were someday to purchase and read the truth commission's collectively agreed-on bipartisan narrative, weaving together John Yoo's best intentions and Khalid Sheikh Mohammed's torment on the water board, sweeping national reconciliation will elude us.

As my friend [Jack Goldsmith points out](#) in an op-ed today, we already know the truth of what happened. Not all of it, to be sure, but we know a good deal about who made which critical decisions and when. Just read Michael Ratner's devastating new book, [The Trial of Donald Rumsfeld](#). Read Philippe Sands' [Torture Team](#). Read Jane Mayer's [The Dark Side](#). Read this painfully detailed [new report from U.C.-Berkeley, in partnership with the Center for Constitutional Rights](#), chronicling the experiences of former detainees held in Afghanistan and Guantanamo Bay. These writers are not crackpots. We may not have every memo, and we may not be able to name every name. But do truth commissions alone ever reveal the full story? If we decline to hold lawbreakers to account, we may find out a whole lot of facts and arrive at no truth at all. Is the truth that if the president orders it, it isn't illegal? Or is the truth that good people do bad things in wartime, but that's OK? Is the truth that if we torture strange men with strange names, it's not lawbreaking? What legal precedent will this big bipartisan narrative set for the next president with a hankering for dunking prisoners?

In any event, we already know what the other side of the story is. Michael Mukasey holds that those who authorized lawbreaking did so out of "a good-faith desire to protect the citizens of our Nation from a future terrorist attack." Witness after witness will tell the truth commission that they were scared; they were making quick decisions in the heat of battle, and that their hearts were pure. The real problem, they will go on to say, was that there was too much law—a crippling maze of domestic and international laws that paralyzed government lawyers and the intelligence community. Goldsmith makes that same point in his op-ed today, in arguing against criminal investigations or even a bipartisan commission: Under the threat of criminal sanctions or even noncriminal commissions, "lawyers will become excessively cautious in giving advice and will substitute predictions of political palatability for careful legal judgment." It seems that after 9/11, the solution to the problem of too much law was to simply do away with the stuff. And the solution to the lawlessness that followed 9/11? Do away with any legal consequences for the perpetrators. If there exists a more perverse method of restoring the rule of law in America than announcing that legal instruments are inadequate to address them, I can't imagine it.

In this [new piece in \*Harper's\*](#) (subscription required), professor Scott Horton argues for a hybrid system of a powerful truth commission followed by prosecutions, if warranted. The authors of the Berkeley study similarly recommend "the establishment of an independent, non-partisan commission" and "if applicable ... criminal investigation of those responsible for any crimes at all levels of the chains of command." I agree that a very thorough, possibly yearslong inquiry is necessary. But I cannot agree that grants of immunity, a presidential pardon, or promises not to prosecute should be celebrated by liberals in the hopes that the full story that emerges will be worth it or that the benefits of turning the page and focusing on the economic crisis far outweigh the costs of understanding what happened here and why.

And that's the crazy-making bit in all the talk of bygones and goodwill. Nobody is suggesting that those who authorized torture and wiretapping were sadists or brutes. But they did a lot worse than mix stripes and plaids. They broke the law. They violated domestic and international laws, and they committed war crimes. They did so deliberately and with the "cover" of cynically bad legal memoranda. And those who have been entrusted as the nation's top law enforcers now claim that public disapproval is punishment enough.

Right now, I can't get enough [of this debate at TPM Café](#) among Homans, Horton, former Rep. Mickey Edwards, and others as they work through these thorny questions about who should investigate and whether and when to prosecute. But as each of them imagines a perfect truth commission or a perfect congressional inquiry (done by a perfect Congress that had suddenly grown a perfect spine), it occurs to me yet again that we already have a pretty perfect system for investigating terrible wrongdoing and punishing wrongdoers. And we call it the justice system for a reason. For eight years we've been told, time and again, that the U.S. courts just aren't good enough to try terrorists, and that they aren't smart enough to monitor wiretapping, and that they aren't capable of keeping state secrets. Anyone who believes they are also not good enough to investigate government lawbreaking might reasonably be asked what's changed.

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