



## Bringing Transitional Justice Home: President Obama's Dilemma about the Past Administration's Human Rights Abuses -- What is to be Done, and Who'll be the Judge?

By RUTI TEITEL

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While we don't know what Barack Obama will do first after he becomes President January 20th, it is clear that he has been given a mandate to end some of the worst abuses of the rule of law in U.S. history. President-elect Obama has already said he will close Guantanamo and put an end to torture, whether by the US military or civilian operatives. But there is also a need to reckon with the last seven years. Those who both planned and carried out the abuses should be held responsible, while the innocent must have a chance to be cleared.

Yet who should judge is a challenging question, one that arose in my native Argentina when the junta came to an end in the 1980's. Then, I argued in papers and briefs that it was important that Argentines judge themselves, and not wait to be judged by others. Indeed, I contended that it was one of the cornerstones of maintaining—and building—the solidarity of a people.

We now have decades of experience with "transitional justice," a term I coined in 1991—whether in Latin America, Eastern Europe or elsewhere. What this history reflects is that neither a policy of blanket pardons and amnesties, nor a full-court press of criminal prosecutions will serve the interests of truth and justice. These lessons should affect the way the U.S. handles the transition from the Bush Administration's rights-violating policies and practices, to what have been promised to be the more just approaches of the Obama Administration.

### The Urgent Need to Resolve Domestically Whether Individuals Bear Criminal Responsibility - Before It Is Resolved Abroad

As things stand now, a shadow of suspicion hangs over all those associated with the policies of the previous administration that flouted legal constraints—at worst, countenancing torture. Yet it also seems clear that many of the individuals concerned acted patriotically and conscientiously.

The hard question of individual criminal responsibility cannot be avoided, for if we don't take action ourselves, others will. In some corners, foreign lawyers and judges have already begun. Two weeks ago, the British attorney general was asked to investigate possible "criminal wrongdoing" in Guantanamo after allegations were made of CIA and MI5 torture policies; in Milan, a trial is now underway to challenge the CIA's rendition policy; in France and Germany, criminal complaints have been launched against Secretary of Defense Donald Rumsfeld and other high level US officials for authorizing and ordering torture.

These complaints, grounded in so-called "universality" jurisdiction, would hardly have a leg to stand on were there credible investigations underway here at home or in Iraq. We risk foreign lawyers and judges' (through processes already underway in Europe) supplanting a process of truth-telling that, given our own political transition, we Americans owe to ourselves.

### The Best Option: Proceed Soon, Through an Independent Nonpartisan Commission

Delaying action at home also means that evidence could be "lost" or destroyed, and witnesses rendered inaccessible with the passage of time. The selective prosecutions or selective pardons that are in the air during the dwindling hours of the Bush Administration run the risk of being perceived as either partisan witch-hunts or grim favoritism—both of which would flout the rule of law.

The best way forward is through an independent nonpartisan commission, modeled along the lines of the truth commissions that have been used so effectively in other countries that have had to confront similar problems over the last quarter-century. Such a body should have the credibility to investigate the methods condoned and used in the "war against terror." It should be given the necessary powers, subpoena and otherwise, to conduct a thorough inquiry culminating in a full report. Wherever there is evidence of torture or cruel and inhuman detainee treatment, moreover, a commission should recommend prosecutions in civilian federal courts to ascribe individual responsibility to those who should bear it, and vindicate those who should not.

And restorative justice is also important—perhaps by a symbolic ceremony conducted by the new President at Guantanamo's door, as well as through financial reparations to victims. A commission would allow the nation to move forward deliberately, based on a full account of the facts, and to get past the bitter divisiveness that is the legacy of the outgoing administration. This commission could also free the new administration's hands, allowing it to conserve its energies. At the same time, the commission could contribute to the vital task of rebuilding America's moral authority in the world.

### It is Time for America to Address Its Shameful and Very Recent Past, As It Failed to Do in the Wake of Vietnam

America has missed earlier opportunities for healing through truth and accountability, whether in the wake of the end of slavery and segregation, or during the denouement of the Vietnam War. But the more recent reopening and repair of the harsh treatment of Japanese-Americans during World War II shows that, today, the country is more open to reckoning with the bleak aspects of its own past.

This is not just a matter of pointing fingers, but of learning lessons. Had we looked at ourselves more closely in the mirror after Vietnam, might we have been better prepared for the challenges of the last eight years?

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