WOODROW WILSON SCHOOL
PRINCETON UNIVERSITY

WWS 516a/SOC 518: The Rule of Law

Tuesdays 1-4 pm
Robertson 035
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COURSE OVERVIEW

What is required to have a "government of laws and not of men" (or women)? The short answer: A commitment to the Rule of Law.

The ideal of the Rule of Law appears so often in discussions of proper government that one would imagine that its contours are uncontroversial. But most of what has been written about it is platitudinous, romantic, idealistic or otherwise not particularly grounded in real-world concerns, however uplifting such discussions may be. To understand what the Rule of Law is, why it is valued and why it is so hard to achieve, we might learn more by setting off in the opposite direction: how bad is it to be *without* the Rule of Law? How much Rule of Law can one sacrifice before getting into real trouble?

To approach the topic this way, we will consider the role of law in government and ask: When should a state in fact be constrained by law and when it may legitimately change or ignore the law by which it is bound? We will consider moments when heads of state (or pretenders, generals or revolutionaries) have decided that there is some value more important than law and have used the rationale of expediency, war, emergency, epidemic or revolution to cast law aside. In short, we will consider the strong temptations in political life to go around the law in order to do better. Sometimes, the drive to do better makes things worse. But, importantly, not always. In considering these questions, we will work our way through a series of concrete case studies in order to figure out how law works in times of state stress with the aim of making more nuanced a theory of the Rule of Law and its application.

But the idea of the Rule of Law does not just implicate the efforts to do end runs around the law. The Rule of Law is such a powerful idea that autocrats and illegitimate rulers of all sorts have been tempted to cloak their power in law. As a result, anti-democratic governments often use appeals to law, public trials and scrupulous adherence to legality as a method for white-washing their otherwise nefarious projects. In thinking about the Rule of Law, then, we must also work out when adhering to law is a cover for anti-legal projects of all sorts.

In large measure, our course will proceed by negative examples and hard cases. We will consider the troubled constitutional history of the US, the conflicted internal politics of countries ranging from the Soviet Union to Germany to Pakistan to South Africa, and the drive to establish new law by setting aside old law in the international arena:

- On the US side, we will examine the history of American emergency government, including Abraham Lincoln's conduct during the Civil War, Franklin Roosevelt's economic emergency, the exigencies of the Cold War, Nixonian exceptionalism, responses to natural disasters and the "war on terror" after 9/11 in the US.
- In comparative perspective, we will look at *gacaca* tribunals in Rwanda, at show trials in the Soviet Union, at the collapse of the Weimar constitution and the resulting rise of Nazism in Germany, the effort to bring human rights abusers to trial and at the state of emergency and subsequent constitutional revolution in South Africa.
- In the international arena, we will look at the Nuremberg Trials and consider more generally the uses of international trials to bring state leaders to justice. We will also consider whether there need to be legal justifications for war, with the Kosovar War and the current Iraq War as our key examples.

Depending on the news this semester, we will also bring into the class relevant current events. To understand the Rule of Law and its opposites, we will use a range of materials from the creation of new laws to court cases, from legal theory to political history, as we ask to what extent the Rule of Law is a value in itself, and whether there are any legitimate exceptions to it. Throughout the course, we will focus primarily on primary documents, writings produced by those who had a role to play in the construction of the law – or in its interpretation – in the moment.

The intent of the course is to raise *excruciating* questions. The readings bring us face to face with the very real temptation in times of crisis to think that law is too rigid, incapable of dealing with unexpected events, too formal, distant and bloodless. By contrast, in many of our cases, political leaders will often seem driven by noble principles or high-minded values – or at least (by their own lights) engaged in important political change. Sometimes the reverse will be true: leaders without anything to recommend them in moral terms will lean heavily on law to legitimate their rule. While some cases are morally obvious (who would do anything other than condemn in the strongest terms Nazi Germany or apartheid South Africa?), many of the cases we will examine are morally and politically complicated, and it is not at all clear that the formal law and Rule-of-Law values are on the right side of the question.

So, we will learn about the Rule of Law this term by staring its serious challenges in the face. As a result, there will be plenty of opportunity for disagreement and debate – and for all learning what we think about the subject from its hardest cases.

COURSE REQUIREMENTS

This is a seminar, which means you should do the reading **before** each class session and come prepared to discuss what you have read. Participation in the discussion is an important part of the course.

For one seminar session this term, you will be on the line to do extra preparation, reading behind the scenes of our main example for the week to have something more to say about it in class than others will know about it from the class readings. I will give you choices at the beginning of the term about which subject you'd like to take on for this special assignment.

You have two choices about writing assignments for the course:

1) You can write a midterm and a final essay, drawn from a list of topics I will hand out in class. Each essay will be 10-15 pages. This option gives you a way to explore the materials for the class in a constrained fashion, since the paper can be drawn entirely from class discussion and assigned readings. This is a good approach for those of you new to the material or pressed for time at the end of the course.

2) You may do an independent research paper. Before you select this option, you should clear with me the topic you would write on and the scope and methods of your project. This option is recommended for those who have some background or serious and sustained interest in the subject. This is a way to develop more specialized knowledge of the subject of the course.

COURSE MATERIALS

Books have been ordered for this class through Labyrinth Books on Nassau Street. The books that have been ordered are:

- Michael R. Marrus, *The Nuremberg War Crimes Trial, 1945-46: A Documentary History* (The Bedford Series in History and Culture) (Bedford/St. Martin's Press, 1995). ISBN: 0-3121-3691-9 (pbk.)
- Harold Relyea, *A Brief History of Emergency Powers in the United States* (U Press of the Pacific, 2005). ISBN: 1-4102-2421X
- Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in Modern Democracies* (Transaction Publishers, 2002 [1948]). ISBN: 0-7658-0975-3

All books have also been put on reserve through e-reserve or in the Stokes Library. The other readings are available through e-reserves and/or on Blackboard.

COURSE OUTLINE – WEEK BY WEEK

Week 1. Introduction to the Rule of Law (3 February)

In an ideal situation, a society is governed by rules laid down in advance so that all have notice of them. And the rules are enforced in a manner that guarantees fairness and due process. Accused persons have the advantage of counsel, the ability to present evidence of their own and to challenge evidence adduced on the other side, and the guarantee of a neutral decision-maker.

But what is the situation is not ideal? We will start our class with the example of a devastated state attempting to do justice under difficult circumstances. The genocide in Rwanda in 1994 left 800,000 people dead, many hacked to death by the machetes wielded by their neighbors. The primary victims were Tutsis, who were the ruling minority in the country, along with moderate Hutus who often governed with them. As a result, the genocide particularly depleted the ranks of state officials, judges and lawyers. Before the genocide, Rwanda had 785 professional judges, but afterwards, the country had fewer than 50. There were only 60 lawyers left.

The United Nations set up an International Criminal Tribunal for Rwanda, based in Arusha, Tanzania, to try the key perpetrators. But as of 2008, that tribunal had convicted only 30 people of anything having to do with the genocide. Eight years after the mass atrocities, upwards of 120,000 people were in prison within Rwanda awaiting trial for serious offenses, and the devastated court system there could not begin to handle the backlog of ordinary cases. Many of those suspected of the killings had not ever been arrested.

In 2002, the Rwandan government set up more than 12,000 "*gacaca* courts" to handle these cases. *Gacaca* courts were meant to return the country to older practices of village dispute settlement, but practically speaking, they radically short-cut modern due process guarantees enshrined in international human rights law. Accused had no counsel or ability to present a coherent case with evidence rebutting the accusations. Instead, evidence was collected by government officials, backed up by testimony of members of the community -- primarily victims. Accused were induced to confess by the promise of having their sentences cut in half. There were very limited rights of appeal. According to the most recent reports, the *gacaca* courts had prosecuted 88,000 "category 1" cases trying persons who constituted the leadership of the genocide and 818,000 prosecutions overall including those who carried out the killings. (All figures are from the official website of the *Gacaca* Tribunals at http://www.inkiko-gacaca.gov.rw/En/EnIntroduction.htm. See http://www.inkiko-gacaca.gov.rw/pdf/abaregwa%20english.pdf for the figures.)

In this class, we will watch a documentary of *gacaca* trials in action and start our difficult discussion of the rule of law. Do the *gacaca* tribunals represent a reasonable attempt to satisfy rule of law norms? Or are they so flawed that they cannot be held out as legitimate legal processes at all? What are/were the alternatives? Is it better that thousands of potentially guilty people go free rather than suffer abuses of due process? How important is the rule of law in post-conflict situations where the ideal situation rarely exists?

Film: Anne Aghion (director), *Gacaca: Living Together Again in Rwanda?* (2002)

Week 2: The Rule of Law and Its Ambivalences (10 February)

This week, we will introduce our semester's dilemmas by looking at some sympathetic lawbreakers and their reasons for breaking the law. To start in the US, Abraham Lincoln's Emancipation Proclamation is generally thought of as one of the world's great human rights documents. It just so happened that, with this document, Lincoln used his commander-in-chief powers to nullify the clear legal property rights of slaveholders by issuing a military order. Was this a legal act? Does it matter? Our other famous lawbreaker, Sir Thomas More, was beheaded for refusing to swear that the King of England was the head of the Church, something he believed was forbidden by his Catholic belief that this title belonged only to the Pope. His refusal to swear this oath violated the Act of Supremacy passed by the Parliament in 1534 and he was tried for treason on grounds of *praemunire,* or the offense of introducing a foreign power in England.

So what is the rule of law supposed to value anyhow? This is the subject of theoretical set of writings whose authors are earnestly committed to rule-of-law principles. But do their theories cover the cases of our sympathetic lawbreakers?

Theories of the Rule of Law:

Clinton Rossiter, Chapter 1, "Constitutional Dictatorship." Pp. 3-14 in *Constitutional Dictatorship* (Princeton U Press 2005),

Jeremy Waldron, Chapter 3: The Rule of Law. Pp. 29-55 in *The Law* (Routledge, 1990).

Lon L. Fuller, Chapter 2, "The Morality that Makes Law Possible." Pp. 33-94 in *The Morality of Law*, rev'd ed. (New Haven: Yale University Press, 1969).

Andrei Marmor, "The Ideal of the Rule of Law" in the *Blackwell Companion to the Philosophy of Law and Legal Theory,* also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1106243 .

Sympathizing with lawbreakers:

Abraham Lincoln, Emancipation Proclamation, available at http://www.yale.edu/lawweb/avalon/emancipa.htm .

The Trial of Sir Thomas More, available at http://www.law.umkc.edu/faculty/projects/FTrials/more/moretrialreport.html

Background (Optional Readings to put the primary sources in context):

Sanford Levinson, "Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?" 2001 *U. Ill. L. Rev*. 1135-1158 (2001).

Oliver Moore, "Sir Thomas More's Final Years: Silence, Silencing, and Constitutional Change," *Law and Humanities, Vol. 2, No. 1, 2008*.

Week 3: American Emergencies (17 February)

America, famously, has a written constitution that has survived for longer than any constitution in the world. One might think from this that the constitution "works," even though the US has been tested with a number of difficult national crises. But from up closer at different moments in history, it has not been at all clear that the constitution was actually in effect during America's worst crises, or that the constitution seriously constrained what leaders wanted to do when they found the constitution inconvenient. In this week's class, we will consider the Lincoln's actions during the American Civil War, Roosevelt's declarations of economic emergency in the 1930s, and Nixonian exceptionalism.

Harold Relyea, *A Brief History of Emergency Powers in the United States* (U Press of the Pacific, 2005).

John W. Dean III, Watergate: What Was It? 51 *Hastings Law Journal* 609-659 (2000).

Optional Reading:

Clinton Rossiter, *Constitutional Dictatorship*, Part IV: Crisis Government in the United States, pp. 209-287.

Week 4: Show Trials and the Communist Legacy in Law (24 February)

Karl Marx, trained as a lawyer, didn't think much of law as a moral force. Instead, he believed that law was simply a tool -- a means through which the state kept class relations in place. Not surprisingly, when Russia, overtaken by revolution in 1917, took Marxism as a plan of action, it treated the law as primarily instrumental in character, useful as a tool of governance. But, nonetheless, law was absolutely crucial in legitimating the Soviet regime to itself.

Peter Solomon, "Returning to the traditional legal order" and "Stalin's criminal policy: from tradition to excess." Pp. 153-266 in Peter Solomon, *Soviet Criminal Justice Under Stalin*. Cambridge University Press, 1966.

Andrei Vyshinsky, Chapter I, Section 2, "The Foundations of the Marxist-Leninist Theory of State and Law." Pp. 5-38 in The Law of the Soviet State, available in full at http://ia311543.us.archive.org/2/items/lawofthesovietst008593mbp/lawofthesovietst008593mbp.pdf .

Martin Krygier, "The Rule of Law: An Abuser's Guide" [2007] UNSWLRS 4, available at http://www.austlii.edu.au/au/journals/UNSWLRS/2007/4.html .

Optional reading:

A detailed record, including much verbatim (in translation) questioning of the defendants, in **THE CASE OF THE TROTSKYITE-ZINOVIEVITE TERRORIST CENTRE** can be found online at http://art-bin.com/art/omoscowtoc.html . You might be particularly interested in the testimony of Zinoviev at http://art-bin.com/art/omosc20m.html#3 as he is cross-examined by Vyshinsky.

Excerpts from the trial of Nikolai Bukharin, who was one of the defendants in the Case of the Anti-Soviet Block of Rights and Trotskyites," can be found at http://www.marxists.org/archive/bukharin/works/1938/trial/ . Vyshinsky's cross-examination of Bukharin can be found at http://www.marxists.org/archive/bukharin/works/1938/trial/1.htm and http://www.marxists.org/archive/bukharin/works/1938/trial/2.htm .

Week 5: Nazi Law (3 March)

If any government has come to represent the embodiment of evil in the world, it is the government of Nazi Germany. But the important condemnation of the Nazis is likely to miss the extraordinary "law work" that went into justifying their rise to power, their hold on the state, and even their extreme actions of genocide, aggression and war crimes. Though the Nazi regime was brutal and immoral, it was not lawless. This week, we will examine the role that law played in holding the Nazi regime together and ask what sort of law could live alongside these state actions.

Carl Schmitt, *Political Theology* (U Chicago Press, 2005), Chapter 1, "Definitions of Sovereignty," pp. 5-15.

Michael Stolleis*, Law Under the Swastika* (U Chicago Press, 1998), General Introduction pp. 5-22 + footnotes pp. 193-200

Clinton Rossiter, *Constitutional Dictatorship* (Princeton U Press, "Constitutional Dictatorship in the German Republic", pp. 31-73.

Ernst Fränkel, *The Dual State* (Oxford U Press, 1941). Introduction, pp. xiii-xvi, and Part I: The Legal System of the Dual State, pp. 3-103 + footnotes pp. 213-227.

Week 6: The Nuremberg Trials and Retroactive Justice (10 March)

When the Nuremberg Trials were constituted in the immediate aftermath of the Second World War, there was one small problem. There was no preexisting law to use to judge the Nazi leadership, and many lawyers worried about the spectacle of making up the law after the fact. The principle that there shall be no law made only after the potential crime was committed, no *ex post facto law*, is one of the deepest principles of the Rule of Law, and the Nuremberg Trials ran a very real risk of violating just that principle. In fact, international tribunals established after the fact of the crimes that they are charged with trying all run this risk of violating basic rule-of-law principles in order to establish justice.

Michael R. Marrus, *The Nuremberg War Crimes Trial, 1945-46: A Documentary History* (The Bedford Series in History and Culture).

Decision 11/1992 of the Hungarian Constitutional Court, "On Retroactive Criminal Legislation." In László Solyóm and Georg Brunner (eds.), *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (U Michigan Press, 2000), pp. 214-228.

Simon Chesterman, "An International Rule of Law?" 56 *American Journal of Comparative Law* 331-361 (2007).

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Spring Break
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Week 7: The Rule of Law as a Development Project (24 March)

The Rule of Law such an unquestioned good thing that it is often part of any package for the political development of new and newly transforming societies. But when the Rule of Law is exported to new places, what happens? This week, we will examine the Rule of Law as a political project, urged by some states on others as a part of what it means to be a "civilized" country.

John K.M. Ohnesorge, "The Rule of Law," University of Wisconsin Law School Working Paper. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1006093 .

Martin Krygier, "Subjects, Objects and the Colonial Rule of Law." Pp. 56-91 in *Civil Passions: Selected Writings* (Black, Inc. 2005).

Kim Lane Scheppele, "The Empire's New Laws: Terrorism and the New Security Empire after 9/11." Forthcoming in George Steinmetz (ed.), *Sociology and Empire*. Published in French as "Le Droit de la Sécurité International: Le Terrorisme et l'Empire Sécuritaire de l'Après-11 Septembre 2001." (International Security Law: Terrorism and the Security Empire after September 11) in 173 *Actes de la Recherche en Sciences Sociales* 28-43 (2008).

Frank Upham, "Mythmaking in the Rule of Law Orthodoxy." *Carnegie Endowment for International Peace Working Paper*. Available at http://www.carnegieendowment.org/files/wp30.pdf .

Consider also, some current Rule of Law Programs. The following websites will give you some idea of what national and international organizations are doing to promote the Rule of Law Abroad. Browse a couple of them to get a sense for what sorts of projects are supported under this rubric:

- US State Department Rule of Law Initiative -- http://www.state.gov/r/pa/prs/ps/2006/60089.htm .
- United States Institute of Peace -- http://www.usip.org/ruleoflaw/index.html .
- The World Bank -- http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,con

tentMDK:20934363~menuPK:1989584~pagePK:210058~piPK:210062~theSitePK:1974062,00.html
- International Bar Association Rule of Law Directory -- http://www.roldirectory.org/ .
- American Bar Association Rule of Law Programs -- http://www.abanet.org/rol/ .
- UN Rule of Law Initiatives -- http://www.un.org/ga/search/view_doc.asp?symbol=A/63/64

Week 8: Natural Disasters (31 March)

So far, we have looked at the reactions of governments to political crises. But not all crises fit that label. Natural disasters, floods, famines, hurricanes, epidemics, fires and other such catastrophes may also call for state action – action that might be limited if it had to follow the rules. This week, we will consider whether there are any better reasons for suspending ordinary law when the emergencies in question are "natural." We will focus our attention on the legal framework for handing disasters in the United States.

Kim Lane Scheppele, Small Emergencies, 40 *Georgia Law Review* 835-862 (2005-2006).

Epidemics:

Felice Batlan, Law in a Time of Cholera, 80 *Temple Law Review* 53-122 (Spring 2007)

Lesley A. Jacobs, Rights and Quarantine During the SARS Global Health Crisis: Differentiated Legal Consciousness in Hong Kong, Shanghai, and Toronto. 41 Law & Soc'y Rev. 511-547 (2007).

Katrina:

William P. Quigley, Thirteen Ways of Looking at Katrina: Human and Civil Rights Left Behind Again. 81 *Tulane Law Review* 955-1017 (2007).

Congressional Research Service, *Hurricane Katrina—Stafford Act Authorities and Actions by Governor Blanco and President Bush to Trigger Them* (September 12, 2005), available at http://www.au.af.mil/au/awc/awcgate/crs/12sep05memo.pdf .

Jennifer Elsea, *The Use of Federal Troops for Disaster Assistance: Legal Issues*. Congressional Research Service, Report Order Code RS22266. April 24, 2007, available at ftp.fas.org/sgp/crs/natsec/RS22266.pdf .

Week 9: South Africa – From Emergency to Constitutionalism (7 April)

The new democratic South Africa currently has one of the world's most admired constitutions, along with an active constitutional culture, a highly respected Constitutional Court and a government committed to the Rule of Law. But the apartheid government that ran South Africa from 1948 until the early 1990s also claimed to be committed to the Rule of Law. The apartheid system was nothing if not legalistic. From the Group Areas Act to the system for classifying (and sometimes reclassifying) the population by race, the apartheid system was scrupulously legalistic even as it deprived a majority of the South African population of basic human rights. This week we will look at the apartheid system and the way it was held together by law, as well as at the Rule of Law challenges facing newly democratic African states.

Elizabeth Landis, South African Apartheid Legislation I: Fundamental Structure. 71 *Yale Law Journal* 1-52 (1961).

Elizabeth Landis, South African Apartheid Legislation II: Extension, Enforcement and Perpetuation. 71 *Yale Law Journal* 437-500 (1962).

Jennifer Widner, *Building the Rule of Law* (WW Norton, 2001), Introduction, pp. 23-40.

Week 10: Kosovo and Iraq (14 April)

The wars over Kosovo and Iraq II were controversial in international law because, in both cases, the US bypassed the UN Security Council and did not get its permission to launch a war. In the Kosovo case, the rationale was humanitarian: Serbia was launching a potentially genocidal campaign against the Kosovars . As a result, the US – with NATO – intervened to stop the slaughter. In Iraq, the rationale was preemptive: the "gathering threat" could not be allowed to mature into a force that would be harder to stop. In neither case – humanitarian intervention or preventive attack – was the rationale for launching military action easily accepted as a matter of international law. Should that have mattered? This week, we will look at the debates among internationalists and international lawyers over these questions.

Kosovo:

Michael Glennon, "The New Interventionism," 78 *Foreign Affairs* 1-7 (May/June 1999)

"Sidelined in Kosovo?" Responses to Glennon by Thomas Franke, Edward C. Luck + Walter J. Rockler + Glennon's response to his critics, 78 *Foreign Affairs* 116-122 (1999).

Iraq:

Special Agora Discussion in 97 *American Journal of International Law* 553-642, July 2003.

- Editor's Introduction by Lori Fisler Damrosch And Bernard H. Oxman
- William Howard Taft and Todd Buchwald, Preemption, Iraq, and International Law
- John Yoo, International Law and the War in Iraq
- Ruth Wedgwood, The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense

- Richard Gardner, Neither Bush nor the "Jurisprudes"
- Richard Falk, What Future for the UN Charter System of War Prevention?
- Miriam Sapiro, Iraq: The Shifting Sands of Preemptive Self-Defense
- Thomas Franck, What Happens Now? The United Nations after Iraq
- Tom Farer, The Prospect for International Law and Order in the Wake of Iraq
- Jane Stromseth, Law and Force after Iraq: A Transitional Moment

Week 11: Torture (21 April)

Until September 11, 2001, there was general international agreement that torture was the one practice that no government could conduct without condemnation. It had risen to the level of a universally accepted legal norm, *jus cogens* in international law parlance. Not that all governments had stopped using torture. Those that still tortured their opponents, however, generally hid their actions so as not to generate an international outcry. But this public international consensus changed after September 11 as the US government openly advocated the need to engage in harsh interrogation techniques, methods that international bodies like the International Committee of the Red Cross later determined from site visits were "tantamount to torture." How can a legal norm come unraveled? Torture provides an interesting case study.

Memo, August 1, 2002: To Alberto Gonzales from Jay S. Bybee. Re: Standards of Conduct for Interrogation under 18 U.S.C. sec. 2340-2340A. Reprinted in *The Torture Papers* (Karen Greenberg and Joshua Dratel eds.) Cambridge University Press, 2005) at pp. 172-217.

Memorandum, December 30, 2004. To the Deputy Attorney General, James Comey, from the Assistant Deputy Attorney General, Daniel Levin. Re: Legal Standards Applicable under 18 U.S.C. sec. 2340-2340A. Available at http://www.usdoj.gov/olc/18usc23402340a2.htm .

Jeremy Waldron, Torture and Positive Law: Jurisprudence for the White House. 105 *Columbia Law Review* 1681-1750 (2005).

Kim Lane Scheppele, Hypothetical Torture in the War on Terrorism. 1 *Journal of National Security Law and Policy* 285-340 (2005).

Optional Background Reading:

Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned Into a War on American Ideals* (Doubleday, 2008).

Week 12: Transitional Law (28 April)

What should a government do in the transition from a law-violating state to a law-following state. Does the new government have an obligation to prosecute those who violated the law in the previous government?

In this week, we will take up a debate originally launched in the context of bringing the Argentinian junta to justice and ask what those lessons are for President Obama's treatment of the Bush Administration's alleged violations of international law.

National Trials

Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, *100 Yale Law Journal. 2537 (1991)*

Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights in Context: The Case of Argentina, 100 Yale Law Journal 2619 (1991*

Diane F. Orentlicher, A Reply to Professor Nino, *100 Yale Law Journal 2641 (1991).*

Alternatives to National Trials

Princeton Principles on Universal Jurisdiction, available at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf .

Prosecution of Bush Administration Officials?

Scott Horton, "Justice After Bush: Prosecuting an Outlaw Administration." *Harper's Magazine*, December 2008, available at http://www.harpers.org/archive/2008/12/0082303 .

See also articles attached to this syllabus.

Epilogue to the Course

E.P. Thompson, The Rule of Law." Pp. 258-269 in *Whigs and Hunters* (NY Pantheon, 1975).

The Bush Administration: To Prosecute or Not to Prosecute?

For Prosecution

From http://www.consortiumnews.com/Print/2008/121908c.html

Deterring Torture Through the Law

By Coleen Rowley and Ray McGovern
December 20, 2008

"First, let's kill all the lawyers" may have made sense in that Shakespearian scene, but there is a far simpler solution to the legal ambiguities regarding what to do now about the torture approved by President George W. Bush. We suggest this variant: First, let's have the lawyers review their notes from *Criminal Justice 101*.

The professor whom Coleen Rowley had for that course at the University of Iowa was the consummate curmudgeon. He kept repeating himself. It is now clear why. The old fellow hammered home the basic purposes of the criminal justice system and the various kinds and degrees of criminal intent. For Rowley, 24 years as a FBI special agent and attorney helped make it all real.

Eight years of the Bush/Cheney administration have served to make the matter of criminal intent the first essay question on the final exam for *Criminal Justice 101*, so to speak. But obfuscation (much of it deliberate) reigns; worst of all, it impedes the important task of seeking accountability for those responsible for torture.

Criminal intent comes in essentially three kinds:

No one needs much help understanding the "deliberate-premeditated-cold blooded" *first-degree intent*, because that's the stuff of the movies – the perfect murder scheme or elaborate plot to pull off the heist of the century.

"Second-degree intent" is also easy to grasp. It is the usual label for what prompts people to commit unplanned crimes in the heat of passion, for example.

It was to that *third type of guilty intent* -- "recklessness" -- that the old law professor devoted most emphasis, using his favorite "Russian Roulette" hypothetical to distinguish it from the first two types and from mere negligence.

His words still ring: "One cannot simply put a gun on a table knowing there is a bullet in the cylinder, spin the cylinder, point it at a person, pull the trigger and then say (when it goes off), 'It's not my fault, because I was hoping it would spin to one of the empty chambers.'"

The First and Third Degrees

The evidence on the Bush administration's torture decisions, which is becoming more abundant and damning as the weeks go by, rules out *second-degree intent*; i. e., unplanned crimes in the heat of passion.

These decisions were much more deliberate. As the saying goes, after 9/11 "everything changed." With virtually no opposition, the President was allowed to declare the country in a "war on terror" and consider himself above the law.

Indeed, after his address to the nation on the very evening of 9/11, Bush assembled his top aides in the White House bunker and set a lawless path from the start.

One of the aides present, Richard Clarke, has written in his memoir, *Against All Enemies*, that the President insisted: "[W]e are at war…Nothing else matters…Any barriers in your way, they're gone…I don't care what the international lawyers say, we are going to kick some ass."

A bipartisan report, released on Dec. 11 and entitled *Senate Armed Services Committee Inquiry Into the Treatment of Detainees in U.S. Custody*, highlights in its "First Conclusion" the fact that on Feb. 7, 2002, the President issued a written determination that the Geneva protections for POWs did not apply to al-Qaeda or Taliban detainees; and that following that determination, techniques like waterboarding were authorized for use in interrogation. [See Consortiumnews.com's "Torture Trail Seen Starting with Bush."]

It would take more than four years for the U.S. Supreme Court to rule in June 2006 that such detainees could not be exempted from the protections of Geneva, despite efforts to "redefine the law to create the appearance of legality" for aggressive techniques, as the recent Senate report puts it.

Sounds Premeditated, No?

All that might sound to most people as if the Bush administration operated with clear premeditation. Bush even had senior officials on his Principals Committee – the likes of Vice President Dick Cheney, then-national security adviser Condoleezza Rice, Attorney General John Ashcroft and CIA Director George Tenet – sit around a White House table and discuss precise methods of torture to be applied to which detainees.

But administration apologists, from Rush Limbaugh to Attorney General Michael Mukasey, claim that none of those who approved or conducted torture had guilty intent; they were only trying to protect national security and thus are guilty of nothing.

On Dec. 3, during a roundtable discussion with reporters, Mukasey said, "There is absolutely no evidence that anybody who rendered a legal opinion, either with respect to surveillance or with respect to interrogation policies, did so for any reason other than to protect the security in the country and in the belief that he or she was doing something lawful."

The core of this line of defense boils down to Richard Nixon's famous formulation that "when the President does it, that means that it is not illegal."

To add another layer of legal protection for Bush and his subordinates, Mukasey also has professed not to know whether waterboarding is torture.

Mukasey's sophistry fits with the disingenuous argument of other administration lawyers – that one could apply harsh interrogation techniques to a detainee, as long as your intent is not to inflict pain but rather to obtain information. Not to mention the pithy hint provided by a CIA attorney: "If the detainee dies, you're doing it wrong."

Add to this mix the remarkable guidance of Justice Department counsel, Jay Bybee (now a federal judge), quoted in the Senate report:

"Violent acts aren't necessarily torture; if you do torture, you probably have a defense; and even if you don't have a defense, the torture law doesn't apply if you act under the color of presidential authority."

Clearly, in the case of the Bush administration policy of abusing detainees, the so-called "rotten apples" sat atop the proverbial barrel, as the Senate report demonstrates time and time again.

If you'd like still more proof of premeditation and you missed Vice President Cheney on Monday bragging on ABC-TV about his role in facilitating waterboarding, please read the transcript.

Cheney's was the familiar above-the-law attitude, a reprise on his contemptuous "So?" — in this case meaning, "So what are you going to do about it?"

With Cheney admitting to his key role in waterboarding, Mukasey is no doubt relieved that during his confirmation hearing he obeyed White House instructions to stonewall all attempts to get him to concede what the whole world knows — that waterboarding is torture.

Indeed, the law is not in question. Waterboarding was wrong during the Spanish Inquisition and during the Spanish-American war in the Philippines. It was illegal during WW-II. Americans as well as Japanese have been convicted and severely punished for it.

Recklessness

For those, who despite the above prefer to give President Bush the benefit of the doubt regarding *first-degree intent*, should know that the *third type of guilty intent*, recklessness, also applies — in spades.

For example, Cheney's lawyer, David Addington, and then-White House Counsel Alberto Gonzales dissed the hapless former Gen. Colin Powell, who as Secretary of State wrote to the White House in January 2002:

"A determination that Geneva does not apply could undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat, and could introduce an element of uncertainty in the status of adversaries."

A pity Powell did not have the courage of his convictions, for he now has reason to be concerned about an eventual conviction of a different kind. Powell also served on Bush's Principals Committee.

Beneath the circumlocution quoted above is his clear appreciation that, if he did not fight against what was clearly in the cards, torture was likely to sully the Army and the nation to both of which he owed so much.

“Could introduce an element of uncertainty in the status of adversaries,” writes Powell. Could introduce, say, reckless Russian roulette. In his interview with ABC News, Cheney put the old law professor’s hypothetical smoking gun right out there on the table.

Deterrence

A widespread lack of understanding regarding the purposes served by the criminal justice system — and the penal system — is a major obstacle to even entertaining the thought of prosecuting administration officials for torture.

All too many pundits are claiming that the country should simply move on and just close the book on this painful chapter — and that to do otherwise would simply be to try to extract vengeance.

But it is not about vengeance. The key goal here is *deterrence* — the final and most important goal of our criminal justice *and* penal systems in such circumstances.

At this point, priority must be given to determining how our country ended up torturing people. Just as Cheney has termed waterboarding a “no brainer,” it is equally a “no brainer” that we must focus now on his self-admitted role, as well as the revelations in the Senate report and other evidence that has come to light.

An independent prosecutor like Patrick Fitzgerald would not need a lot of time to establish the facts. Then, the emphasis can turn to the appropriate punishment.

Our country’s values and the immorality of torture are important considerations. And the law, of course, is also key — or should be.

Seldom have we seen it more cynically twisted and abused. But here is something else that must be thrust into public consciousness — the reality that, TV hero Jack Bauer’s mythical exploits aside, torture *never* can be counted upon to yield reliable information.

THAT is the quintessential “no brainer.” For, as the head of U.S. Army intelligence, Lt. Gen. John Kimmons, asserted on Sept. 6, 2006: “No good intelligence is going to come from abusive practices. I think history tells us that. I think the empirical evidence of the last five years, hard years, tells us that.”

Stop Torture Now

Let us have no backsliding. Barack Obama must order an abrupt halt to torture, as he has promised — and preferably on Jan. 20, right after he is sworn in as President. A timely report from an independent prosecutor would surely be helpful in buttressing and justifying that order.

Before the Senate Armed Services Committee's released its report on Dec. 11, and before Cheney threw down the gauntlet four days later, what seemed to make the most sense was the more gradual approach proposed by the insightful lawyer/writer, Scott Horton (see December issue of *Harper's*).

Horton called for the appointment of a commission peopled by men and women of unimpeachable integrity, in order to "provide a comprehensive narrative, setting out in detail how U.S. torture policy came to be formed and identifying the key actors and the decisions they made."

An excellent approach. And this, of course, is where the penal factors and deterrence would come very much to the fore.

It is important to point out that the independent prosecutor and the commission approaches are in no way mutually exclusive. If both can be done expeditiously, both should be approved.

What Horton may not have anticipated is that, in releasing the shatteringly candid results of their Senate committee's two-year investigation, Senators Carl Levin and John McCain have named names, jump-starting — and hopefully shortening — deeper investigation.

It may be a hopeful sign of the times that on Dec. 18, even the editors of the *New York Times* lifted their heads out of the sand long enough to endorse the importance of doing what is necessary to deter crimes like torture:

"Unless the nation and its leaders know precisely what went wrong in the last seven years, it will be impossible to fix it and make sure those terrible mistakes are not repeated."

Coleen Rowley, a FBI special agent for almost 24 years, was legal counsel to the FBI Field Office in Minneapolis from 1990 to 2003. She came to national attention in June 2002, when she testified before Congress about serious lapses before 9/11 that helped account for the failure to prevent the attacks. She now writes and speaks on ethical decision-making and on balancing civil liberties with the need for effective investigation.

Ray McGovern, a former Army infantry/intelligence officer, and then a CIA analyst for 27 years, now works with Tell the Word, the publishing arm of the ecumenical Church of the Saviour in inner-city Washington. Both authors are members of the Steering Group of Veteran Intelligence Professionals for Sanity (VIPS).

For and Against Prosecution:

From http://www.nytimes.com/2008/12/18/opinion/18thu1.html

The Torture Report
New York Times Editorial
December 18, 2008

Most Americans have long known that the horrors of Abu Ghraib were not the work of a few low-ranking sociopaths. All but President Bush's most unquestioning supporters recognized the chain of unprincipled decisions that led to the abuse, torture and death in prisons run by the American military and intelligence services.

Now, a bipartisan report by the Senate Armed Services Committee has made what amounts to a strong case for bringing criminal charges against former Defense Secretary Donald Rumsfeld; his legal counsel, William J. Haynes; and potentially other top officials, including the former White House counsel Alberto Gonzales and David Addington, Vice President Dick Cheney's former chief of staff.

The report shows how actions by these men "led directly" to what happened at Abu Ghraib, in Afghanistan, in Guantánamo Bay, Cuba, and in secret C.I.A. prisons.

It said these top officials, charged with defending the Constitution and America's standing in the world, methodically introduced interrogation practices based on illegal tortures devised by Chinese agents during the Korean War. Until the Bush administration, their only use in the United States was to train soldiers to resist what might be done to them if they were captured by a lawless enemy.

The officials then issued legally and morally bankrupt documents to justify their actions, starting with a presidential order saying that the Geneva Conventions did not apply to prisoners of the "war on terror" — the first time any democratic nation had unilaterally reinterpreted the conventions.

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That order set the stage for the infamous redefinition of torture at the Justice Department, and then Mr. Rumsfeld's authorization of "aggressive" interrogation methods. Some of those methods were torture by any rational definition and many of them violate laws and treaties against abusive and degrading treatment.

These top officials ignored warnings from lawyers in every branch of the armed forces that they were breaking the law, subjecting uniformed soldiers to possible criminal charges and authorizing abuses that were not only considered by experts to be ineffective, but were actually counterproductive.

One page of the report lists the repeated objections that President Bush and his aides so blithely and arrogantly ignored: The Air Force had "serious concerns regarding the legality of many of the proposed techniques"; the chief legal adviser to the military's criminal investigative task force said they were of dubious value and may subject soldiers to prosecution; one of the Army's top lawyers said some techniques that stopped well short of the horrifying practice of waterboarding "may violate the torture statute." The Marines said they "arguably violate federal law." The Navy pleaded for a real review.

The legal counsel to the chairman of the Joint Chiefs of Staff at the time started that review but told the Senate committee that her boss, Gen. Richard Myers, ordered her to stop on the instructions of Mr. Rumsfeld's legal counsel, Mr. Haynes.

The report indicates that Mr. Haynes was an early proponent of the idea of using the agency that trains soldiers to withstand torture to devise plans for the interrogation of prisoners held by the American military. These trainers — who are not interrogators but experts only on how physical and mental pain is

inflicted and may be endured — were sent to work with interrogators in Afghanistan, in Guantánamo and in Iraq.

On Dec. 2, 2002, Mr. Rumsfeld authorized the interrogators at Guantánamo to use a range of abusive techniques that were already widespread in Afghanistan, enshrining them as official policy. Instead of a painstaking legal review, Mr. Rumsfeld based that authorization on a one-page memo from Mr. Haynes. The Senate panel noted that senior military lawyers considered the memo " 'legally insufficient' and 'woefully inadequate.' "

Mr. Rumsfeld rescinded his order a month later, and narrowed the number of "aggressive techniques" that could be used at Guantánamo. But he did so only after the Navy's chief lawyer threatened to formally protest the illegal treatment of prisoners. By then, at least one prisoner, Mohammed al-Qahtani, had been threatened with military dogs, deprived of sleep for weeks, stripped naked and made to wear a leash and perform dog tricks. This year, a military tribunal at Guantánamo dismissed the charges against Mr. Qahtani.

The abuse and torture of prisoners continued at prisons run by the C.I.A. and specialists from the torture-resistance program remained involved in the military detention system until 2004. Some of the practices Mr. Rumsfeld left in place seem illegal, like prolonged sleep deprivation.

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These policies have deeply harmed America's image as a nation of laws and may make it impossible to bring dangerous men to real justice. The report said the interrogation techniques were ineffective, despite the administration's repeated claims to the contrary.

Alberto Mora, the former Navy general counsel who protested the abuses, told the Senate committee that "there are serving U.S. flag-rank officers who maintain that the first and second identifiable causes of U.S. combat deaths in Iraq — as judged by their effectiveness in recruiting insurgent fighters into combat — are, respectively, the symbols of Abu Ghraib and Guantánamo."

We can understand that Americans may be eager to put these dark chapters behind them, but it would be irresponsible for the nation and a new administration to ignore what has happened — and may still be happening in secret C.I.A. prisons that are not covered by the military's current ban on activities like waterboarding.

A prosecutor should be appointed to consider criminal charges against top officials at the Pentagon and others involved in planning the abuse.

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Given his other problems — and how far he has moved from the powerful stands he took on these issues early in the campaign — we do not hold out real hope that Barack Obama, as president, will take such a politically fraught step.

At the least, Mr. Obama should, as the organization Human Rights First suggested, order his attorney general to review more than two dozen prisoner-abuse cases that reportedly were referred to the Justice Department by the Pentagon and the C.I.A. — and declined by Mr. Bush's lawyers.

Mr. Obama should consider proposals from groups like Human Rights Watch and the Brennan Center for Justice to appoint an independent panel to look into these and other egregious violations of the law. Like the 9/11 commission, it would examine in depth the decisions on prisoner treatment, as well as warrantless wiretapping, that eroded the rule of law and violated Americans' most basic rights. Unless the nation and its leaders know precisely what went wrong in the last seven years, it will be impossible to fix it and make sure those terrible mistakes are not repeated.

We expect Mr. Obama to keep the promise he made over and over in the campaign — to cheering crowds at campaign rallies and in other places, including our office in New York. He said one of his first acts as president would be to order a review of all of Mr. Bush's executive orders and reverse those that eroded civil liberties and the rule of law.

That job will fall to Eric Holder, a veteran prosecutor who has been chosen as attorney general, and Gregory Craig, a lawyer with extensive national security experience who has been selected as Mr. Obama's White House counsel.

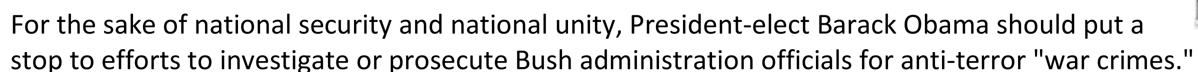
A good place for them to start would be to reverse Mr. Bush's disastrous order of Feb. 7, 2002, declaring that the United States was no longer legally committed to comply with the Geneva Conventions.

Against Prosecution:

From Roll Call at http://www.rollcall.com/news/30969-1.html

Obama Should Say 'No' to 'War Crimes' Probes of Bush Team

By Mort Kondracke
December 26, 2008



For the sake of national security and national unity, President-elect Barack Obama should put a stop to efforts to investigate or prosecute Bush administration officials for anti-terror "war crimes."

The motive behind such efforts is not -- as claimed -- "truth" or "justice," but political vengeance.

Republicans hated President Clinton and a GOP House impeached him. Many Democrats hate George W. Bush with equal or even greater passion, but they demurred on the idea of impeachment -- mainly because the action against Clinton hurt the GOP more than it hurt Clinton.

But now Bush haters are calling for the Obama administration to investigate Bush officials for alleged war crimes and other misdeeds connected with the war on terror.

Obama should make it clear right now that he opposes such action -- and also that he opposes the "compromise" idea of a "truth commission" to investigate alleged Bush-era wrongdoing.

The main reason has less to do with "turning the page," uniting the country and letting bygones be bygones -- all good Obama impulses -- than with preserving the morale of intelligence professionals in wartime.

If a special prosecutor were to be appointed to investigate possible criminality involved in detainee interrogations, "extraordinary renditions" or terrorist surveillance, it's not only Bush-era top officials who'd have to hire lawyers to defend themselves, but lower-down intelligence operatives as well.

The same would be true if Congress created a "truth commission" with subpoena power to report on Bush-era policies. The operatives wouldn't have to fear prosecution, but they'd still have to worry about their reputations.

And, when President Obama calls on the CIA to undertake a dangerous mission -- perhaps a terrorist "snatch" in the tribal areas of Pakistan or the assassination of Osama bin Laden -- any agent directed to undertake it would justifiably demand a legal opinion first.

And CIA lawyers, too, would err on the side of caution to avoid future second-guessing.

The latest call for a punitive action came from the New York Times editorial page on Dec. 18, but it's previously been by left-wing bloggers, liberal Rep. Jerrold Nadler (D-N.Y.) and commentators on MSNBC.

The take-off point for the Times was a Senate Armed Services Committee's bipartisan finding that high-level authorization of "aggressive" interrogation of terrorist detainees led to abuses such as those perpetrated at Iraq's Abu Ghraib prison.

The report, the Times wrote, "amounts to a strong case for bringing criminal charges against former Defense Secretary Donald Rumsfeld; his legal counsel, William Haynes; and potentially other top officials, including former White House counsel Alberto Gonzales and David Addington, Vice President Cheney's former chief of staff."

I'm surprised that the newspaper did not call -- as others have -- for prosecution of Cheney himself, and possibly Bush as well.

After all, among the committee's conclusions was that "On Feb. 7, 2002, Bush made a written determination that Common Article 3 of the Geneva Conventions, which would have afforded minimum standards for human treatment, did not apply to al-Qaida or Taliban detainees.

"Following the president's determination, techniques such as waterboarding, nudity and stress positions, used in (U.S.) training to simulate tactics used by enemies that refuse to follow the Geneva Conventions, were authorized for use in interrogations of detainees in U.S. custody."

But there's no need to investigate whether Bush -- or Cheney -- authorized the use of "enhanced" interrogation techniques or warrantless terrorist wiretapping or renditions ("snatching") of terrorist suspects.

They've admitted it and defended it as being necessary to defend the nation in the aftermath of the Sept. 11, 2001, attacks -- and justified it by pointing out that the homeland has not been attacked since.

In an interview with the Washington Times on Dec. 17, Cheney said "there were a total of about 33 (persons) who were subjected to enhanced interrogation. Only three of those who were subjected to waterboarding," including 9/11's top planner, Khalid Shaikh Muhammad.

Intelligence officials claim that his subjection to simulated drowning produced important information about the al-Qaida organization and future plans.

And, they say, the House and Senate Intelligence committees -- as well as top Congressional leaders -- have been fully briefed about and approved of all major U.S. covert operations, terrorist surveillance and interrogation methods.

What Obama plans to do about proposals for investigation or prosecution of Bush officials remains uncertain.

On one hand, Obama has said that if he found "that there were high officials who knowingly, consciously broke existing laws (and) engaged in cover-ups of those crimes ... then I think a basic principle of our Constitution is nobody above the law."

And Obama's attorney general designate, Eric Holder, has alleged that top Bush officials "authorized the use of torture, approved of secret electronic surveillance of American citizens, secretly detained American citizens without due process of law ... and authorized use of procedures that both violate international law and the U.S. Constitution."

On the other hand, Obama said on the campaign trail in April that "I would not want my first term consumed by what was perceived on the part of Republicans as a partisan witch hunt, because I think we've got too many problems to solve."

Obama should find an opportunity soon to reiterate that position. If he did so, he could eliminate the unseemly possibility that Bush, on his way out of office, would issue a blanket pardon to everyone in his administration who participated in the war on terror.

The fact is, Obama does have "many problems to solve." Among them is the possibility raised by a Congressionally mandated commission -- that terrorists will use a nuclear or biological weapon somewhere in the world by 2013.

To prevent that catastrophe, Obama might well want to order an "enhanced interrogation," wiretap a terrorist or even kill one. If he issues the order, he will want someone to carry it out.

Mort Kondracke is the Executive Editor of Roll Call, the newspaper of Capitol Hill since 1955.

From URL: http://www.newsweek.com/id/145842

The Truth About Torture

To get a full accounting of how U.S. interrogation methods were used, the president should give those accused of 'war crimes' a pass.

Stuart Taylor Jr.
NEWSWEEK
From the magazine issue dated Jul 21, 2008

Dark deeds have been conducted in the name of the United States government in recent years: the gruesome, late-night circus at Abu Ghraib, the beating to death of captives in Afghanistan, and the officially sanctioned waterboarding and brutalization of high-value Qaeda prisoners. Now demands are growing for senior administration officials to be held accountable and punished. Congressional liberals, human-rights groups and other activists are urging a criminal investigation into high-level "war crimes," including the Bush administration's approval of interrogation methods considered by many to be torture.

It's a bad idea. In fact, President George W. Bush ought to pardon any official from cabinet secretary on down who might plausibly face prosecution for interrogation methods approved by administration lawyers. (It would be unseemly for Bush to pardon Vice President Dick Cheney or himself, but the next president wouldn't allow them to be prosecuted anyway—galling as that may be to critics.) The reason for pardons is simple: what this country needs most is a full and true accounting of what took place. The incoming president should convene a truth commission, with subpoena power, to explore every possible misdeed and derive lessons from it. But this should not be a *criminal* investigation, which would only force officials to hire lawyers and batten down the hatches.

Pardons would further a truth commission's most important goals: to uncover all important facts, identify innocent victims to be compensated, foster a serious conversation about what U.S. interrogation rules should be, recommend legal reforms, pave the way for appropriate apologies and restore America's good name. The goals should not include wrecking the lives of men and women who made grievous mistakes while doing dirty work—work they had been advised by administration lawyers was legal, and which they believed was necessary to prevent terrorist mass murder.

A criminal investigation would only hinder efforts to determine the truth, and preclude any apologies. It would spur those who know the most to take the Fifth. Any prosecutions would also touch off years of partisan warfare. The lesson for occupants of the toughest government jobs—if the next administration could find people willing to fill them—would be that saving innocent lives is less important than covering their posteriors. Any hope of a civil conversation about lessons we need to learn would be dead.

Pardons would not be favors to criminals. One can argue that officials could have or should have resigned rather than implement questionable legal judgments, but there is no evidence that any high-level official acted with criminal intent. The officials involved appear to have approved only interrogation methods found legal by administration lawyers, and in particular by the Justice Department's Office of Legal Counsel (OLC). According to long tradition, the OLC is considered a sort of Supreme Court of the executive branch.

Those who have called for criminal investigations will not be easily persuaded otherwise. They include nearly 60 House Democrats and retired Maj. Gen. Anthony Taguba, who headed the Army's investigation into the Abu Ghraib torture scandal. Retired Col. Lawrence Wilkerson, who was chief of

staff to the then Secretary of State Colin Powell, has suggested that administration lawyers could be prosecuted in a foreign court (even though his old boss could find himself vulnerable as well). Former White House press secretary Scott McClellan told ABC News that he now thinks the administration has engaged in torture.

But Congress has defined torture very narrowly. The OLC has advised officials since 2002 that some highly coercive methods—including waterboarding, which is assailed by most of the world as torture—do not violate the federal anti-torture law. Until mid-2006, the OLC also advised that interrogators could ignore the 1949 Geneva Conventions' far more sweeping ban on all "cruel" and "humiliating and degrading" treatment of prisoners. The lawyers found, and Bush declared, that Geneva did not protect stateless terrorists, such as members of Al Qaeda.

Then five Supreme Court justices gave the administration a nasty surprise. Rejecting the views of a federal appeals court, President Bush, the OLC and four other Supreme Court justices, the majority held that Geneva *does* protect Qaeda members and other Guantánamo detainees. This brought into play the federal War Crimes Act, under which Geneva violations can be prosecuted as federal crimes.

But any such prosecutions would probably fail. Congress has retroactively amended the War Crimes Act to block any prosecutions for brutal interrogation methods short of torture. And officials could raise a nearly airtight defense of good-faith reliance on advice of counsel—OLC memos on approved methods would be like "get out of jail free" cards.

Of course, if he carries out pardons, Bush will be attacked for cronyism and accused of a cover-up. But one of the main beneficiaries would be the next president. Absent pardons, pressure to go after GOP "war criminals" would make it very hard to unite Americans of all stripes behind solutions to the many economic and social challenges facing the country. No new president—especially if he turns out to be Barack Obama, who has made such a point of getting beyond partisan bickering—needs that.