

## **NO PRESIDENT IS AN ISLAND**

*\*By Maria L. Fornella*

In response to a lawsuit by the ACLU under the Freedom of Information Act, the Obama administration released several memos by the Office of Legal Counsel of the Justice Department between the years 2002-2005 that gave the green light for “harsh interrogation techniques” of detainees in the fight against terrorism, the euphemism du jour for the use of torture.

Although from the beginning the Justice Department under present Attorney General Eric Holder assured that CIA officials would not be prosecuted for following orders, the lawyers in the OLC are under investigation and could be prosecuted for their recommendations to the Bush White House. When asked if members of the Bush administration may also be prosecuted for making the final decisions to use those procedures, Obama said a week ago that this was a time for “Reflection, not Retribution,” thus implying that he would protect the disclosure from politicization.

He might as well have called for immediate peace in the Middle East. The huge public outcry from both sides of the political spectrum was instantaneous, with Cheney accusing the President for jeopardizing national security, and human rights and other groups calling for an on-the-spot decision to prosecute former White House authorities for war crimes.

In a visit to CIA headquarters at Langley on Monday, Obama tried to personally reassure CIA officers that they won't be prosecuted for carrying out orders and explained, in very rational terms as is his custom, his decision to release those memos and put an end to those practices:

“Now, in that context I know that the last few days have been difficult. As I made clear in releasing the OLC memos -- as a consequence of a court case that was pending and to which it was very difficult for us to mount an effective legal defense -- I acted primarily because of the exceptional circumstances that surrounded these memos; particularly the fact that so much of the information was public, had been publicly acknowledged, the covert nature of the information had been compromised.

I have fought to protect the integrity of classified information in the past, and I will do so in the future. And there is nothing more important than protecting the identities of CIA officers. So I need everybody to be clear: We will protect your identities and your security as you vigorously pursue your missions. I will be as vigorous in protecting you as you are vigorous in protecting the American people.

Now, I have put an end to the interrogation techniques described in those OLC memos, and I want to be very clear and very blunt. I've done so for a simple reason: because I believe that our nation is stronger and more secure when we deploy the full measure of both our power and the power of our values --

including the rule of law. I know I can count on you to do exactly that.”

As more information trickles in, it is becoming clear there were deep internal divisions and intense infighting within the Obama White House over whether to disclose the information or not. But now that it is out, pressure is mounting for Obama to allow the appropriate institutions to deal with the issue and for the rule of law to be applied. At present, there are two courses of action being considered: for Congress to establish an independent bipartisan commission or for the Attorney-General to appoint a special prosecutor.

An independent commission would be similar to the 9-11 one: it would conduct public hearings and issue a report. This is the less confrontational, more conciliatory approach, similar to the “Truth and Reconciliation Commissions” in other countries, and one that would not lead to criminal prosecutions. It is being advocated by moderates who do not want to shut out the past, but would like to move on with the new agenda. It is more in line with President Obama’s dictum of “reflection, not retribution.” But this is a very fluid situation and he now seems to be leaning toward the second option.

The other possibility is for the Attorney General to designate a Special Prosecutor, a neutral, well-respected person to investigate suspected crimes by high ranking officials. This is the option preferred by those who insist that Truth and Reconciliation commissions are acceptable for those countries that are still in the stage of nation-building. But in the United States, there are strong institutions that can enforce the laws, and there is nothing to “reconcile”. A Special Prosecutor would let the investigation go where the evidence leads it. He or she would uphold the rule of law and prosecute those responsible, according to evidence of crimes committed. In contradiction with President Obama’s judgment, Jonathan Turley, Professor of Constitutional Law at George Washington Law School observes that “that would not be retribution, it would be justice.”

The problem for the President is that he cannot have it both ways, first authorizing a full disclosure of CIA harsh interrogation methods and then refusing to let justice take its course. Or worse yet, allowing half measures such as the prosecution of attorneys who gave the legal advice to proceed with the practices (perhaps on pre-ordained decisions from the White House), and not holding responsible the higher authorities who gave the final order.

The use of torture in pursuit of national security by the US government is a grey legal and emotional area that this country has still not been able to figure out. The goal posts have constantly been moved depending on perceived fears, and the post 9-11 state of mind was conducive to excesses in proportion to the horrific event itself, as well as to its effect on the American psyche. The Bush White House, with its natural penchant for aggressive action, was moving into uncharted waters in a war against non-state actors, so it used this grey legal area to its full advantage. Having been asked by the White House whether these methods were lawful, lawyers in the OLC explicitly recognized in one of these memos that the techniques they were endorsing were the ones the United States condemned other countries for using. This obvious moral double standard notwithstanding, they explicitly stated that “*the standards we impose on*

*others **do not bind us** in any way...however...given the paucity of relevant precedent...we cannot predict with confidence whether a court would agree with his conclusion.*” This conclusion was informed by a blatantly narrow interpretation of both international and national laws, but was wholly embraced by the White House, in spite of a dissenting view by Condoleezza Rice and others at the State Department.

At almost a hundred days into his presidency, Barack Obama is finding out that that no decisions can be taken “outside politics” and that the center of the political spectrum is an uncomfortable and lonely place to be. No president is an island and his hand will be forced in one direction or the other. By trying to square the circle between values and national security so early into his first term, the President is putting the tombstone on bipartisanship for good.

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