

Obama's first problem is US war crimes

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The president-elect must take a stand on Bush's dark legacy

A small and largely unnoticed spat among the transition planners for the president-elect, Barack Obama, broke out last week. It was the first genuinely passionate debate among the Obamaites and it centres on a terribly difficult and terribly important decision that will be among the first that Obama has to make.

How does he deal with the legacy of criminal actions of his predecessor's administration when it comes to detention, interrogation, abuse and torture of terror suspects? That has long hovered in the back of the minds of those of us who supported Obama, in large part because he alone had the moral authority to draw a line underneath the criminality of the George Bush-Dick Cheney years and restore credibility and hon-our to America's antiterror policies.

And so when it emerged Obama was planning to appoint one John Brennan as CIA director, alarm bells went off. Brennan had been close to George Tenet at the time Tenet devised what he called "enhanced interrogation techniques".

Brennan, a CIA company man who had left the agency for private employment, had made statements in the past couple of years suggesting some sympathy for the Bush-Cheney policy. "When it comes to individuals who are determined to destroy our nation, though, we have to make sure that we take every possible measure," he said elliptically. Including torture?

When pressed, he kept emphasising the need for a "debate" without tipping his own hand about what he personally believed. Take this Brennan statement looking forward to a change in administration from Bush: "I'm hoping there will be a number of professionals coming in who have an understanding of the evolution of the capabilities in the community over the past six years, because there is a method to how things have changed and adapted."

This plea for understanding for the Bush-Cheney era did not go down well with the Obamasphere - the network of bloggers who helped build momentum for Obama's victory. The influential blogger Glenn Greenwald exploded in anger; the centrist Democratic blogger Scott Horton urged Brennan to clarify, and then urged Obama to reject him.

On my own blog The Daily Dish, I wrote that if Brennan were picked, Obama supporters "will, in fact, have to go to war with Obama before he even takes office. And if Obama doubts our seriousness, I have three words for him. Yes we can".

Brennan, facing more protests, withdrew his name from consideration last week. In the first skirmish over the issue in the Obama era, the antitorture forces won.

But the question remains: what is to be done? It is not Obama's style to launch into a prosecutorial investigation of intelligence officials or to open new partisan wounds by subjecting Bush, Cheney, Tenet, Donald Rumsfeld and others to war crime charges. He is intent on unifying the country, not further dividing it. He needs the professionals running the antiterror effort and, after eight years of

Bush-Cheney, it is hard to find people not tainted by torture.

There is also the possibility that Bush himself might make a preemptive strike and, upon his departure from Washington, issue a blanket pardon for all his aides and underlings who aided and abetted war crimes in the past seven years. Leaving those pardons in place while prosecuting low-level officials or CIA agents would be deeply unfair.

That was the rationale behind the 2006 Military Commissions Act, which gave retroactive immunity for war crimes to civilians in the administration, but not to the military grunts who enforced the policy, and which carved out a continuing exception for torture to CIA agents.

So perhaps the sanest way forward is a truth commission, modelled on those in Chile and South Africa that maintained governmental continuity for a while but set up a process that allowed for a maximal gathering of the relevant facts and names. The president could appoint a powerful and respected prosecutor to begin the process. The commission would focus not just on the military and CIA but also on the Bush justice department and Office of Legal Counsel, and the abuse of the law and its interpretation that gave Bush and Cheney transparently phoney legal cover for war crimes.

At the end of the second world war, US officials prosecuted Nazi lawyers and civilians who tortured no one themselves but came up with legal flimflam to turn war crimes into legal policy. Why not apply the same logic to Bush's legal architects – the men who declared the president was bound by no law and no treaty in subjecting prisoners to torture up to the very edge of death?

The commission would need strong subpoena powers and the full backing of the president. Only once the commission has reported, the decision on whether to prosecute or not could be made, with much wider public awareness, and much deeper examination of the facts and documents now hidden. There is much, after all, we still do not know – and that information may make the war crimes seem less or more defensible.

There are some limits on transparency, of course, because of the sensitive intelligence matters that are involved. But when war crimes are at issue, it is more important for a democracy to seek transparency from its highest officials than to engage in anything but the most pressing concealment of the most vital secrets. In international law, there are no pardons for war crimes. And if America is going to regain moral authority in the world, it has to demonstrate it lives by the same standards it expects from everyone else.

Bush has even signalled that he will pardon no one because he does not believe they have committed any crimes. But the transparent way in which laughably sourced legal “cover” was provided by Bush's own legal counsel proves the Bush administration knew full well it was breaking the law, and was willing to force the justice department to put its imprimatur on such illegality.

And the evidence we now have, undisputed evidence, proves already that war crimes were indeed committed – by the president and vice-president on down. I mean: why else Guantanamo Bay and secret black sites if the president believed he was obeying domestic American law?

There is, in the end, a simple and sobering truth: these people have to be brought to justice if the rule of law is to survive in America. In his constitutional soul, Obama knows this. He also knows, however, the political exigencies of taking over a national security apparatus where continuity and lawful vigilance against terrorism remain vital.

How he bridges the demands of the law with the pressures of politics will tell us much about him.

And because every act performed by the CIA will soon become his responsibility as much as President Bush's, he has no time to dither.

The constitutional crisis is in some ways deeper than the financial one. We will find out soon enough if this really is change we can believe in rather than merely hope for.

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