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International Law and the Torture Memos

by [Pejman Yousefzadeh](#)

The Obama Administration [has released](#) the so-called “torture memos” that were written during the Bush Administration for public examination. The memos are largely unredacted, except for what appears to be certain proper names and bits of information. In releasing the memos, the President stated that CIA officials who relied on the legal advice contained in the memos [would not be prosecuted](#).

This latter stance is a good one on the part of the President and he deserves credit for having taken it. He should go another step forward and declare that the lawyers who wrote the memos would not be prosecuted either, and that the Obama Administration would fight efforts on the part of foreign countries to employ “universal jurisdiction” to arrest and try members of the Bush Administration. Doing so would demonstrate that the Administration favors justice over vindictiveness.

My *New Ledger* colleague, Christopher Badeaux, [has already written](#) on the absurdity of indicting Bush Administration attorneys for the advice that they gave on interrogation policy. His points are well taken; it is plainly not a war crime to research the law behind interrogation policy and write about it. Lawyers do not do anything illegal or unethical in the course of answering a question. The *advice* given by a lawyer differs from the *actions* taken by a client in implementing—or not implementing—that advice. And, of course, it is easy to imagine the chilling effect that would take place if attorneys were to become the targets of criminal investigations for *advice* that they give and legal research that they conduct; in his splendid article, Chris reels off a panoply of issues that will require legal advice to deal with. How intelligently do we expect that those issues *will* be dealt with if the lawyers tasked to research them and provide a discussion concerning the legal implications raised in dealing with those issues are forced to fear prosecution for stating “the wrong thing”?

There is another issue involved in this story, however. The reason that the Bush Administration lawyers may face legal jeopardy is because [a Spanish judge, Baltasar Garzón](#), is looking to potentially indict those lawyers for having offered legal advice that Judge Garzón believes may have led to torture. It is worth noting that in light of [recent developments](#), it may be that we have less to worry about on this front than we thought we would, but the Bush Administration lawyers [are not yet out of the woods](#), and Judge Garzón's potential application of "universal jurisdiction" has not yet been laughed out of polite society, as it should be.

Universal jurisdiction rests on the curious precept that a judge in a foreign country, never elected by the American populace, never nominated by an American President, and never confirmed by the United State Senate, should be able to exercise the right to try Americans for supposed crimes and offenses. To accept the jurisdiction of a magistrate, to believe that this jurisdiction is fair, and to think that there is a check against the abuse of power on the part of the magistrate in question, we have to be assured that the magistrate is subject to the rigors and demands of the American elective and appointive process. We make judges run personnel gauntlets—either on the campaign trail for certain state and local judicial candidates, or in the United States Senate for federal judicial nominees—that have the effect of making those judges answerable to the American political process, before we entrust to them the awesome power that they will wield as judges.

Baltasar Garzón, however, has never been through the personnel gauntlet. No act has taken place that has made him answerable to the American political process, or the people that process is supposed to serve. And yet, Judge Garzón contemplates increasing his power by establishing universal jurisdiction over the Bush Administration lawyers, *even though he has completely bypassed the personnel gauntlet that would remind him that with great power, comes great responsibility*. If you style yourself a fan of good government and responsible jurisprudence, and this doesn't scare you, then I got news for you: You *aren't* a fan of good government or responsible jurisprudence.

Agreeing to subject ourselves to the jurisdiction of foreign magistrates like Judge Garzón means that not only have we, as Americans, played no role whatsoever in approving either the magistrate or the laws in question, we are also invited to wreak havoc upon our legal deliberations by going forum-shopping. Forum-shopping, for those lucky enough to have avoided law school, entails seeking out the legal forum most amenable to one's claims and/or defenses if one finds oneself entangled in a legal dispute. As a society, we want to avoid this kind of cherry-picking, so we are fairly strict with our formulation of the rules of procedure—whether on the state or the federal level—but those rules go straight out the window under the concept of universal jurisdiction.

There are no procedural rules when it comes to determining just which part of the universe will be able to exercise universal jurisdiction in a particular case, which means that the universal legal system will resemble the Wild West, except with more anarchy. One party will try to get a magistrate like Judge Garzón to rule on a particular case. Another will seek the jurisdiction of a friendly French judge, perhaps. Heaven help us if there are more than two parties; things could *really* get ridiculous then. Universal jurisdiction not only blurs the line against forum-shopping, it *obliterates* it altogether. The result is pure, procedural chaos that will serve no interest of justice.

Universal jurisdiction asks that a magistrate be sensitive to, and knowledgeable of the sociopolitical and legal environment of the country from which the defendants hail. Judge Garzón has manifestly

failed to demonstrate any knowledge and sensitivity when it came to adjudicating the most famous case (thus far) that has come to his courtroom:

. . . Sr. Garzón's real, prior claim to fame is working to undermine the post-Pinochet settlement into which Chile entered when the old dictator voluntarily stepped down, a settlement that returned control of the government to civilian rule, placed the military in a subordinate role, and in return, made Pinochet into a Senator for life who was immune to prosecution. For anyone who believes this criminally unfair, it might be helpful to remember that the alternative to one man's freedom was the massacre of thousands or tens of thousands in what would have, at best, been a vicious civil war, and at worse, a slaughter. When Garzón indicted Pinochet — who made the mistake of believing other countries would respect Chile's end-run around bloodshed — he told dictators and tyrants (especially right-leaning ones) across the globe that they must hold on to power with their dying breaths, killing anyone who would depose them, at whatever cost, for fear of being tried by men who had no stake in any of the events that so aggrieved them.

Public policy interests in the United States would suffer just as much if the Bush lawyers find themselves in Judge Garzón's court as public policy interests *around the world* will continue to suffer thanks to Judge Garzón's handling of the Pinochet case. No one seriously believes that the Bush lawyers did anything unethical when it came to writing the interrogation memos. One can disagree with their findings—and many do—but there is no evidence whatsoever that they sought to flim-flam their superiors in writing about the legal ramifications concerning interrogation policy. Even if we assume that there *was* dishonesty afoot concerning the research and writing behind the interrogation memos, American courts and the relevant bar organizations are entirely equipped to handle claims of malpractice or unethical conduct.

Does Judge Garzón realize this? After considering the way in which he handled the Pinochet case and the undesirable policy ramifications that stem from the way in which the Pinochet case was disposed of, do you trust him to? Does anyone, for example, trust Judge Garzón to understand that one of the more prominent Bush lawyers threatened with an appearance before Judge Garzón's bench—the former Undersecretary of Defense for Policy, Douglas Feith—*did not in fact act as a lawyer during his time in the Bush Administration*? As Ron Kampeas—who is no fan of Feith's—[discusses](#), Feith did not act as a lawyer for the Bush Administration. He was a policymaker. Moreover, as Kampeas writes, Feith “did not participate in the authorization of interrogation techniques.” Indeed, Feith sought to apply Geneva Convention rules *even in situations where he believed there was no legal obligation whatsoever to apply them*.

How Feith ends up on the hit list of someone like Judge Garzón, in light of these facts, is anyone's guess. As I see it, either Judge Garzón (a) does not understand Feith's role or the facts concerning his actions, or (b) Judge Garzón does not care what the facts are; Feith is a target no matter what. In either case, this does not speak well for the concept of universal jurisdiction.

I am sure that Judge Garzón has a full docket with the *Spanish* cases that may soon be adjudicated in his courtroom. He should focus on those cases and forgo the application of universal jurisdiction concerning Bush Administration officials and their actions in researching and implementing interrogation policy. Judge Garzón doubtless sees himself as an agent of justice. But if he stays on this

case any longer, justice will find herself taking a back seat to capriciousness.

Read more at [Pejman Yousefzadeh's blog](#).

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