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Obama's Prosecutions by Proxy

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By John R. Bolton
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President Obama's passivity before the threatened foreign prosecution of Bush administration officials achieves by inaction what he fears doing directly. This may be smart politics within the Democratic Party, but it risks grave long-term damage to the United States. Ironically, it could also come back to bite future Obama administration alumni, including the president, for their current policies in Iraq, Afghanistan and elsewhere.

Obama has taken ambiguous, and flatly contradictory, positions on whether to prosecute Bush administration advisers and decision makers involved in "harsh interrogation techniques." Although he immunized intelligence operatives who conducted the interrogations, morale at the CIA is at record lows. The president has played to the crowd politically, but the principles underlying his policies are opaque and continually subject to change. This hardly constitutes leadership.

Despite uncertainties here, developments overseas proceed apace. Spanish Magistrate Baltasar Garzón opened a formal [investigation](#) last week of six Bush administration lawyers for their roles in advising on interrogation techniques. Garzón did so over the objections of Spain's attorney general, as he did in 1998 in proceeding against former Chilean president Augusto Pinochet. Under Spain's inquisitorial judicial system, Garzón is essentially unaccountable, whatever the views of Spain's elected government.

Asked repeatedly about Garzón's investigation, the State Department has said only that it is a matter for the Spanish judicial system. Last week, Attorney General Eric Holder went further, implying that the Obama administration could cooperate. "Obviously, we would look at any request that would come from a court in any country and see how and whether we should comply with it," Holder said. This is deeply troubling. Obama appears to be following the John Ehrlichman approach, letting the U.S. lawyers "twist slowly, slowly in the wind." Garzón's is far from a run-of-the-mill police investigation in which an American tourist abroad runs afoul of some local ordinance. Indeed, from what appears publicly, U.S. consular officials would do more for the tourist than Obama is doing for the former Bush officials. If Obama is attempting to end the Garzón investigation, it is one of our best-kept secrets in decades.

Although the six lawyers are in a precarious position, they are only intermediate targets. The real targets are President Bush and his most senior advisers, and the real aim is to intimidate U.S. officials into refraining from making hard but necessary decisions to protect our national security. There is

never a shortage of second-guessers about U.S. foreign policy. For example, former U.N. high commissioner for human rights Mary Robinson said during the NATO-Serbia war over Kosovo that "civilian casualties are human rights victims." She [asked](#), "If it is not possible to ascertain whether civilian buses are on bridges, should those bridges be blown?"

The question here is not whether one agrees or disagrees with the advice the lawyers gave, or with their superiors' operative decisions concerning interrogation techniques. Nor is it even whether one believes our Justice Department should launch criminal investigations into their actions. (I believe strongly that criminalizing policy disagreements is both inappropriate and destructive.)

Instead, the critical question is who judges the official actions that U.S. personnel took while holding government office. Is it our own executive and judicial branches, within our constitutional structures and protections, or some unaccountable foreign or international magistrate in some unaccountable distant court? The proper U.S. position is to insist that our Constitution alone governs any review of our officials' conduct.

This issue is not abstract. For the six lawyers, it has immediate effects on their lives, careers and families. Moreover, whether or not Obama has decided against prosecuting CIA agents, his decision in no way binds the creative mind of Señor Garzón, a man who has never shied from spotlights. Indeed, U.N. Special Rapporteur Manfred Nowak has already [said](#) that the other 145 states party to the [Convention Against Torture](#) must launch their own criminal investigations if the United States does not.

Behind-the-scenes diplomacy is often the best, and sometimes the only, way to accomplish important policy objectives, and one hopes that such efforts are underway. But in this case, firm and public statements are necessary to stop the pending Spanish inquisition and to dissuade others from proceeding. The president must abandon his Ehrlichman-like policy and pronounce unequivocally that Spain should take whatever steps are necessary to stop Garzón.

Otherwise, in four or eight years, like Mary Robinson before them, future second-guessers will decide, say, that U.S. drone attacks in Pakistan constitute war crimes, and that former commander in chief Obama must be hauled before the bar of some mini-state to stand trial. After all, his decisions involve risking civilian deaths, not just shoving terrorists into a wall (and no protective neck braces, either).

Will President Obama's successor vigorously dispute the legitimacy of foreign prosecutions, or will she follow the current Obama policy and let the foreign investigation proceed, perhaps even to trial? Obama and his advisers should think carefully about that second scenario -- now.

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