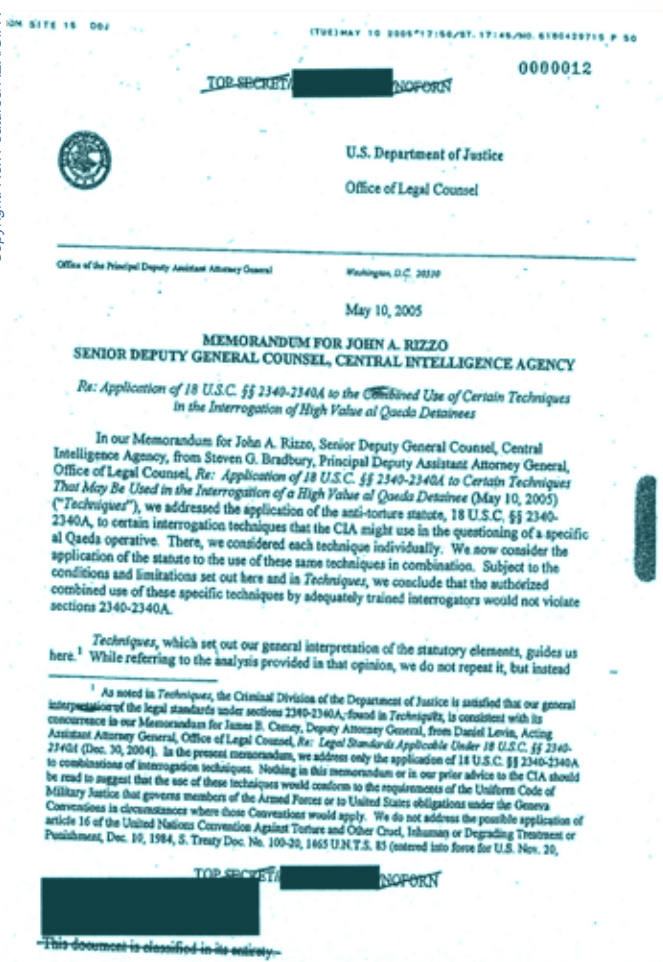


‘THE PAST IS A FOREIGN COUNTRY’? OBAMA AND THE TORTURE FILES

On 15 April, citing the need to get past ‘a dark and painful chapter in our history,’ President Obama announced his decision to release government documents about the interrogation techniques used by the CIA in the context of the ‘war on terror.’ The decision serves both symbolic and practical purposes. At the symbolic level, it is about marking a normative break with the past. It sends the message – intended for both domestic and international consumption – that the US will no longer tolerate the legitimisation of torture in the name of national security. At the practical level, it is about ‘setting the record straight.’ Not releasing the documents, Obama claimed, ‘could contribute to an inaccurate accounting of the past, and fuel erroneous and inflammatory assumptions about actions taken by the United States.’ Thus, to the extent that the facts become clear, speculation about the extent of the use of torture and other ‘secret’ methods such as extraordinary rendition may be replaced by sober analysis.

With this, and other recent steps, the US has joined the ranks of countries dealing with legacies of state violence against its own and/or foreign citizens, most recently as a part of the process of making the transition from authoritarian to democratic rule. This is an issue that invariably generates deep tensions, and some governments have opted for amnesty or forgetting. But experience shows that the past does not easily ‘go away,’ and the legacies of past abuse often return to the political agenda even when efforts are made to ignore them.

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Secret CIA and Department of Justice documents related to the interrogation and torture techniques used on ‘high value al Qaeda detainees’, 21 April 2009.

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The most famous novel by British writer LP Hartley, *The Go-Between*, starts with the phrase: 'the past is a foreign country: they do things differently there.' But the torture files recently released by the Obama administration show that the past is as much a foreign country as it is familiar territory. If CIA files revealing the role of the US in the torture regimes of South America and elsewhere indicate that this is not a new phenomenon, President Obama's willingness to reveal the files of shame does set a hopeful new precedent in terms of executive openness. Can this serve as a starting point for Americans to examine their own 'foreign country,' engaging in a broad debate about how the US went wrong, which is the right balance between rights and security, and what should be the proper goals for US foreign policy?

Telling the truth: marking a break with the past

Because of the 'politics of denial,' one of the demands made by societies dealing with legacies of abuse is for the 'truth to be told.' To that end, more than 30 countries world-wide have established 'truth commissions,' and others have opened police files.

President Obama's decision to release the torture files is part of a broader commitment to greater openness. In his memorandum of 21 January 2009 to government agencies regarding the administration of the Freedom of Information Act (FOIA), he stated that 'in the face of doubt, openness' should prevail. In a follow-up memorandum of 19 March 2009, the US Attorney General pointed out that 'the Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.'¹

Obama's position marks a break with the past. Since the FOIA was enacted in 1966, rights of freedom of information usually have been gained despite the efforts of sitting presidents. Its passage was resisted by Johnson, its broadening was resisted by Ford in 1974, and its effects were limited by Bush in 2002. The history of the FOIA also shows that such rights as have been gained have been won because of active civil society demands (and with the vital support of Congress). The recently released torture documents were made public in response to a court order emerging from a suit filed by the American Civil Liberties Union. It was also in response to public pressure that the CIA released

¹ See: <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>.

in 2007 what then CIA Director General Hayden described as the 'family jewels', documents relating to spying, assassination plots and other CIA misdeeds in the 1960s and early 1970s. Indeed, if the US is a top performer globally in terms of 'setting the standard for what such a law can achieve,'² this is largely because US citizens and non-governmental organisations such as the National Security Archive (NSA) have actively pressed and even litigated to gain access to public records.

It remains to be seen whether greater openness with government files will be complemented by efforts to establish a 'truth commission'. Senator (D) Patrick Leahy has called on Congress to convene an independent, blue-ribbon commission to investigate rights abuse under the Bush administration.³ Thus far, it is unclear what President Obama intends to do about this: he obviously favours openness but he may reject a truth commission because of the potential for partisan warfare when other issues require bipartisanship, and because of fears of the impact this may have on the intelligence community.

Rights versus security

One of the great advantages of establishing a truth commission would be to permit broad debate about the question of whether torture is admissible in a rule of law democracy, and what the relationship should be between rights and security. Further, it might contribute to introduce a greater dose of realism (and modesty) about the appropriate and feasible role of the US as a global rights and democracy promoter.

The war on terror is not the first time that citizens of democratic states have been presented with the apparently stark choice of preserving their ideals or guaranteeing their own security. During the McCarthy era, there were those willing to denounce friends and colleagues to 'stem the tide of communist infiltration' that allegedly threatened the foundations of American liberty and national security; later in the Cold War, the argument proposed by Jeanne Kirkpatrick that we had to support 'friendly' authoritarian regimes of torture in order to stop the spread of 'unfriendly' rights-violating totalitarian regimes gained much traction; and after 9/11 the 'politics of fear' led many people around the world to accept that torturing suspects was a necessary evil that democracies under fire have to accept

² See Eric Green, *Freedom of Information Laws Burgeoning Worldwide*, USIFNO, 29 August 2007 (citing Seven Aftergood, head of the Federation of American Scientists' Project on Government Secrecy).

³ See: <http://www.bushtruthcommission.com>.

in the name of self-preservation. And lest we think of this as a predominantly American problem, we can call to mind the 'dirty wars' by British forces against the IRA (buttressed by the British justice system), and Spanish security forces against Basque separatism in the 1970s and 1980s.

In the 1970s and 1980s, the use of torture was justified by Latin America's generals in the name of 'saving democracy' or 'saving the nation from communist totalitarianism.' In the 2000s, such justifications have been made not by 'tin pot' generals or officials of states that have yet to ratify human rights laws prohibiting torture and disappearance, but by state agents of the country that considers itself the world's leading global promoter of democracy in rights. We have heard US officials say – Alan Dershowitz's 'ticking bomb' scenario – that 'torture works' and that while we may not like it, it saves lives. When Obama ordered the release of the documents, Dick Cheney and others welcomed Obama's decision because, they claimed, the files would finally prove that torture works (and thus silence 'bleeding-heart' critics).

This debate cannot be resolved with a truth commission; and this drama will be played out again in the US and elsewhere. For the foreseeable future, the politics of fear – and one of its concomitants, torture – remains a structural feature of the life of the Aristotelian 'political animal.' But what a truth commission could help to do is to show that the US and other liberal democracies are not immune to such difficulties, that their citizens might benefit from engaging in a broad debate about issues that are usually regarded as having been

'solved' long ago in western liberal democracies, that such countries should be more careful about making self-regarding global political-engineering claims.

During the 1990s, many concurred with Fukuyama's notion that western liberal democracies marked the 'end of history.' With all other political and economic projects defeated, liberal market democracy emerged as the victorious model that all societies could aspire to and emulate. The 'war on terror' brought us all back into the 'fold of history' with a jolt. With his determination to make a break with the recent past, Obama may open the way for the US to become a new protagonist of the 'politics of memory,' the cyclical process of interpreting and appropriating the past that societies go through, particularly after periods when the fundamental norms governing a polity break down and state violence is justified in the name of some greater good.

Until now, the US has been an observer or active contributor to truth-telling efforts elsewhere – it contributed to the work of truth commissions in El Salvador and Guatemala, for instance – but it may now become involved in its own drama of reckoning, albeit in different circumstances (the context is not of transition to democracy, but of the betrayal of fundamental norms by a previous administration; and it is predominantly the rights of non-nationals that are at stake). Insofar as it must deal with the legacies of state-sanctioned abuse and the violation of basic rights that it has, historically, held to be 'self-evident', the US may gain from looking at how this issue has played out in other countries around the globe as it struggles to work out where it went wrong.

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