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No looking back on Guantánamo

Obama is moving to close Guantánamo, but he won't prosecute Bush administration officials for the crimes committed there



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guardian.co.uk, Wednesday 21 January 2009 20.00 GMT

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Even before the last champagne of the inaugural balls had been downed, Barack Obama moved forward with his plans for Guantánamo Bay, halting the military tribunals and drafting an executive order to close the base. These bold and striking moves may overshadow the other surprise of the week: that George Bush, in his last hours in the Oval Office, didn't pardon his cronies.

Under the US constitution, a sitting president has near-unlimited power to pardon any past offence, even before an indictment is filed or a conviction handed down. But Bush put pen to paper for none of his colleagues in the administration in his waning hours.

At first blush this seems odd. Down to the wire, vice-president Cheney has made it a point of honour to emphasise his endorsement of waterboarding, an interrogation tactic that even Bush administration allies have conceded is unquestionably criminal. The vice-president's admission on national television would seem to make criminal prosecution a cakewalk. And to allow someone to confess to a serious felony to CNN's Wolf Blitzer and then to do nothing about it would seem somewhat in tension with basic ideas of the rule of law.

Nor is Bush without notice of the risk of prosecutions. Respected legal observers, in the Guardian and elsewhere, have made powerful cases for pursuing indictment, especially where specific evidence links cabinet officials such as Donald Rumsfeld to particular human rights violations.

The moral case for prosecutions, indeed, is overwhelming. The crimes are heinous. Despite the protestations of hard men like Cheney, the evidence of any exculpating necessity is thin, at best. The pain and suffering inflicted by the crimes lives on in the nerves and bones of those who have been released from Guantánamo without recognition or recompense, and in the agony of families who still do not know the fates of their loved ones.

Yet it seems to me that Bush's prediction, made in his decision not to issue any pardons for Cheney et al, will likely prove correct: The chance of criminal prosecutions is regrettably small. This is not because of any political weakness in the incoming Obama administration. Rather, the difficulty of prosecuting torture is an indictment of the American justice system as a whole.

Start with the most important and most difficult-to-change problem – a design flaw embedded in the constitution. Under the constitution, the power to prosecute is wholly in the hands of the executive branch. Courts have proved reluctant to constrain its use, even when there is a spectre of bias. While the department of justice has developed some bureaucratic checks, these are hardly fail-safes. There is nothing akin to the UK's Crown Prosecution Service, which was created in 1986 precisely to insulate decisions

about criminal proceedings from political control and manipulation. At the end of the day, the constitution leaves the power of prosecution in political hands and therefore subject to only political controls.

If the shape of criminal justice flows directly from political pressures, it should come as no surprise that the kinds of crimes that get prosecuted, and the quality of justice therein, depend on the raw power that different defendants bring to the table.

In the US, most defendants never see a trial. They plea bargain out rather than risk the wrath of prosecutors, who are able to lard up indictments with escalating charges. Those who do see a trial and depend on a public defender are taking a grave risks. Public defenders are underfunded and overworked, unable to resist undue prosecutorial pressure even when they wish to do so. The net result is a justice system well-designed to churn lots of low-level drug offenders – a disproportionate number of people of colour – into long-term incarceration that turns them into hardened criminals while bankrupting the state. While yielding massive over-incarceration and hollowing out urban communities of colour, it's unclear whether this justice system has done much to resolve basic crime control problems.

By contrast, for those defendants who have money or power, the criminal justice system looks quite different. If, like OJ Simpson, you have the cash to assemble a dream team, or like former justice department employee Bradley Schlozman, have high-reaching contacts, the tables are turned on prosecutors. These defendants can avoid prosecution altogether, turn prosecutions into media circuses or even escape the consequences of prosecution through political connections.

Some defendants bring both money and political capital to the table. After the Iran-Contra scandal, Colonel Oliver North, who had been instrumental in violating federal law and then lying to Congress, was able to turn his criminal trial into a soapbox, appealing to the public over the prosecution's heads and turning the courtroom into a launching pad for his far-right political career.

Like North, torture defendants would bring both money and political capital to the table. Like North, they would have powerful allies in both the Congress and federal agencies to bear on their behalf.

Torture trials would unite the current Republican opposition, who will be searching for wedge issues to persevere in their exploitation of post-9/11 fears, and the national security agencies themselves, who have already demonstrated resistance to change top pushing against Leon Panetta as a new chief of the CIA.

These opponents of torture prosecutions would try to exercise what is in effect a "hecklers' veto" against prosecution. They would try to raise the political price of prosecution for the Obama administration to intolerable levels. Just like in post-war transitions from dictatorial rule the world over, these opponents of accountability will hold progress on economic and political reconstruction hostage to their narrow

agendas. The cost of progress will be assuaging their sordid maws

To blame the Obama administration for being reluctant to move forward aggressively with prosecutions under these circumstances, then, is to misunderstand profoundly the way that criminal justice in the US works, and to miss the responsibility that the hecklers have for blocking prosecutions.

A criminal justice system that is resilient to demands of social justice and all-too-responsive to the siren call of political power is hardly likely to deliver easy accountability against politically connected and powerful men. This is especially so when their victims – the detainees – barely figure as ripples on the national political consciousness. If the justice system cannot do right by African-American communities generally, what prospect for a fair accounting is there when the disparity between criminal and victim is exponentially larger?

Obama's critics should not be surprised if no prosecutions unfold. Nor should they blame the heckled, as opposed to the hecklers. The campaign's promise, after all, was "change we can believe in". As needed as it might be, change to the constitution's decision to make prosecution political, with its widening ripple of inequality and unfairness, is a tall order even for this president.

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