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On Leadership



LEGAL SCHOLAR

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THE QUESTION

Exhume the Past or Turn the Page?

With the [latest revelations about misconduct of intelligence agencies](#) during the Bush administration, it's becoming increasingly difficult for President Obama to resist calls for official investigations. How should any new leader think about the trade off between wanting to move on with a promise that it won't happen again versus accommodating the desire of followers to clear the air, settle old scores and punish wrongdoing?

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Bipartisan Commission Mandate

Resolving the tension between meeting national security threats posed by terrorism and giving due weight to the constitutional and other legal rights of affected "persons" -- whether citizens or not -- is, of course, one of the great issues of our time.

These issues arise in different settings: surveillance, detention, harsh interrogation, rendition, war tribunals, etc. They are posed for citizens and non-citizens, for "combatants" and "non-combatants," for events in the United States and outside the country. The statutory, constitutional and international law strictures are many and complex. The Congress, Executive and Judiciary all have a role. Many of the issues did not just arise as matters of first impression during the Bush Administration post-9/11 but have historical antecedents, some going back to the founding of the Republic.

Various Congressional, executive and non-governmental entities, including the media, have made (or are making) inquiries. Each day new matters leak out -- a secret counter-terrorism plan, possible U.S. complicity in alleged mass killing of prisoners in Afghanistan -- followed by demands for yet more inquiries.

Because these issues are interrelated and will be with us for the foreseeable future, a bipartisan commission, like the 9/11 commission, is clearly in the public interest:

- To find the essential facts of what happened since 9/11 and explicate the issues they raise;
- To put those facts in historical context;
- To put forward a framework for analyzing how the competing interests should be reconciled and by what branch of government---or at least to clearly compare and contrast competing frameworks;
- To make recommendations about how best to deal with the issues prospectively through legislative, executive or judicial action;
- To prepare a comprehensive public report for the American people on how to think about the issues and where we should go from here (although some of the findings may have to be classified).

The Commission's writ should not be to assess culpability. If it believes that acts were taken in knowing violation of law, it can refer those to appropriate enforcement authorities. But, its task should be primarily prospective -- and it should build on inquiries that have gone before, not reinventing the wheel.

All that may be fine as a policy matter, and variants of such an effort have already been posed by Democratic leaders in the House and the Senate (some, however, with more emphasis on past culpability). But there are, at least, two political obstacles.

As he struggles to deal with a host of hard issues, President Obama does not want to invite a war of recrimination which could poison already contentious debates on major initiatives. But bringing bipartisan fact-finding and analysis to this difficult set of issues is just as much in the national interest as health care or climate change or economic recovery.

A genuinely bipartisan commission of truly outstanding individuals from both sides of the aisle with a mandate to report after the mid-term election and to focus forward, not backward, can minimize, although not eliminate, the political toll.

Similarly, Congressional Republicans have been adamantly opposed to such a review for fear that it will be just a "blame game" exercise directed at the Bush Administration. But, like President Obama, they too must recognize that this set of issues profoundly implicates key values in our society and requires careful, thoughtful, comprehensive and bipartisan public assessment in the context of history where members of both parties have made difficult decisions. (Democrats should read about President Roosevelt's highly questionable personal decisions in the trial by military tribunal, and subsequent execution, of Nazi saboteurs in the early years of World War II.)

Such a commission is fraught with difficulty. It may be hard to find past facts to elucidate future issues (rather than to cast blame). It can, in the end, descend into confusion and bickering and partisan, ideological differences. But that is where we are now -- to the country's detriment. And, if the 9/11 Commission is an example, people of good faith can come together to produce a document of real national value. It is worth taking the chance.

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