

by Marjorie Cohn

From [San Francisco Chronicle](#) | Original Article

A Spanish court has initiated criminal proceedings against six former officials of the Bush administration. John Yoo, Jay Bybee, David Addington, Alberto Gonzales, William Haynes and Douglas Feith may face charges in Spain for authorizing torture at Guantánamo Bay.

If arrest warrants are issued, Spain and any of the other 24 countries that are parties to European extradition conventions could arrest these six men when they travel abroad.

Does Spain have the authority to prosecute Americans for crimes that didn't take place on Spanish soil?

The answer is yes. It's called "universal jurisdiction." Universal jurisdiction is a well-established theory that countries, including the United States, have used for many years to investigate and prosecute foreign nationals for crimes that shock the conscience of the global community. It provides a critical legal tool to hold accountable those who commit crimes against the law of nations, including war crimes and crimes against humanity. Without universal jurisdiction, many of the most notorious criminals would go free. Countries that have used this as a basis to prosecute the most serious of crimes should be commended for their courage. They help to create a just world in which we all seek to live.

Israel used universal jurisdiction to prosecute, convict and execute Adolph Eichmann for his crimes during the Holocaust, even they had no direct relationship with Israel.

A federal court in Miami recently convicted Chuckie Taylor, son of the former Liberian president, of torture that occurred in Liberia. A U.S. court sentenced Taylor to 97 years in prison in January.

Universal jurisdiction complements, but doesn't supersede, national prosecutions. So if the United States were investigating the Bush officials, other countries would refrain from doing so.

When the United States ratified the Convention Against Torture, it promised to extradite or prosecute those who commit, or are complicit in, the commission of torture.

President Obama, when asked whether he favored criminal investigations of Bush officials, replied, "My view is also that nobody's above the law and, if there are clear instances of wrongdoing, that people should be prosecuted just like any ordinary citizen."

"But," he added, "generally speaking, I'm more interested in looking forward than I am in looking backward." Preoccupied with the economy and two wars, Obama reportedly wants to wait before considering prosecutions that would invariably anger the GOP.

Evidence that Bush officials set a policy that led to the torture of prisoners at Guantánamo continues to emerge.

According to ABC News, Gonzales met with other officials in the White House and authorized torture, including waterboarding.

The Office of Professional Responsibility, which reports to the U.S. attorney general, drafted a report that excoriates Yoo and Bybee for writing the infamous torture memos. Haynes, Addington and Feith participated in decisions that led to torture. The release of additional graphic torture memos by the U.S. Department of Justice is imminent.

It is the responsibility of the United States to investigate allegations of torture. Almost two-thirds of respondents to a USA Today/Gallup Poll favor investigations of the Bush team for torture and warrantless wiretapping. Nearly four in 10 support criminal investigations.

Former Navy General Counsel Alberto Mora told Congress, "There are serving U.S. flag-rank officers who maintain that the first and second identifiable causes of U.S. combat deaths in Iraq - as judged by their effectiveness in recruiting insurgent fighters into combat - are, respectively the symbols of Abu Ghraib and Guantánamo." Providing impunity to those who ordered the torture will be the third recruiting tool.

If the United States refuses to investigate now, it will be more likely that some future administration will repeat this scenario. The use of torture should be purged from our system, much like we eradicated slavery.

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