A Pre-Emptive Pardon for Those Who Tortured Could Backfire

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The Bush Administration's modus operandi in its campaign against the threat of global terrorism has been to pre-empt the normal flow of both domestic and international legal processes. It should come as no surprise then that one of the president's potential final official sovereign acts—a broad pardon of all the individuals involved in the capture, detention and interrogation of suspected terrorists—may cause much long-term damage and costs. Ironically, a presidential pardon stands totally apart. It has no bearing on whether war crimes occurred under international law, it can only remove one bar to other nations examining the proposed pardon, however, would go a long way to neutralize any future prosecution-dodging because it forecloses the possibility for U.S. prosecutions. Nor would the Obama administration's rumored plans to form a commission of inquiry alter the effect of the pardon. The subsidity principle would not longer be a bar. If it has been cited merely as a cover, then that fig leaf would no longer be available. International law does not call for mere investigation of gross violations of international law, but prosecution and punishment. Even with the subsidiarity principle removed as a bar to prosecutions abroad, countries may still refuse to exercise universal jurisdiction in absentia. Though this might preclude trials, there would be consequences, in some ways, poetic consequences.

If the victims' lawyers' strategy of filing dozens of cases in as many countries as possible continues, then at the very least, former Bush administration officials involved in the alleged abuses of the "war on terror" would no longer have complete freedom to travel wherever they wish for fear of being served with court papers or arrested by authorities, thus mirroring the lack of freedom placed on those caught in the Bush administration's interrogation regime. A constant theme of the Bush administration has been its ability to stand apart from the world and from the international legal system that the United States itself built and championed. Over the last eight years, we have seen that a nation can stand apart or even in opposition to the international legal system, but that such a course of action comes with much long-term damage and costs. Ironically, a presidential pardon stands totally apart. It has no bearing on whether war crimes occurred under international law, it can only remove one bar to other nations examining that possibility.

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