

White House Has Resisted Inquiry

By Carrie Johnson

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Attorney General Eric H. Holder Jr. is leaning toward appointing a criminal prosecutor to investigate whether CIA personnel tortured terrorism suspects after Sept. 11, 2001, setting the stage for a conflict with administration officials who would prefer the issues remain in the past, according to three sources familiar with his thinking.

Naming a prosecutor to probe alleged abuses during the darkest period in the Bush era would run counter to President Obama's oft-repeated desire to be "looking forward and not backwards." Top political aides have expressed concern that such an investigation might spawn partisan debates that could overtake Obama's ambitious legislative agenda.

The White House successfully resisted efforts by congressional Democrats to establish a "truth and reconciliation" panel. But fresh disclosures have continued to emerge about detainee mistreatment, including a secret CIA watchdog report, recently reviewed by Holder, highlighting several episodes that could be likened to torture.

Holder's decision could come within weeks, around the same time the Justice Department releases an ethics report about Bush lawyers who drafted memos supporting harsh interrogation practices, the sources said. The legal documents spell out in sometimes painstaking detail how interrogators were allowed to subject detainees to simulated drowning, sleep deprivation, wall slamming and confinement in small, dark spaces.

Any criminal inquiry could face challenges, including potent legal defenses by CIA employees

who could argue that attorneys in the Bush Justice Department authorized a wide range of harsh conduct. But the sources said an inquiry would apply only to activities by interrogators, working in bad faith, that fell outside the "four corners" of the legal memos. Some incidents that might go beyond interrogation techniques that were permitted involve detainees in Iraq and Afghanistan, and are described in the secret 2004 CIA inspector general report, set for release Aug. 31.

Among the unauthorized techniques allegedly used, as described in the report and Red Cross accounts, were shackling, punching and beating of suspects, as well as the waterboarding of at least two detainees using more liquid and for longer periods than the Justice Department had approved. That conduct could violate ordinary criminal laws, as well as the U.N. Convention Against Torture, which the United States signed more than a decade ago.

Former government officials, led by former vice president Richard B. Cheney, have publicly decried efforts to dig into the past. In a speech to the American Enterprise Institute in May, Cheney described the harsh interrogation program as "legal, essential, justified" and said, "The intelligence officers who questioned the terrorists can be proud of their work and proud of the results."

He added: "The danger here is a loss of focus on national security and what it requires. I would advise the administration to think very carefully about the course ahead."

The young White House has struggled to find solid ground in its approach to national security, particularly in its relations with the CIA. The president has sought to reach out to agency employees who fear they could be unfairly faulted in an effort to allocate blame for past counterterrorism strategy.

CIA spokesman Paul Gimigliano said the Justice Department has long known the details of the agency's past interrogation practices. Previous referrals to the Justice Department from the CIA's former inspector general did not result in criminal charges.

"What the president, the attorney general and [CIA] Director [Leon] Panetta have said consistently is that no one who followed Department of Justice guidance should be punished," he said.

The sources, who spoke on the condition of anonymity because of the ongoing process, said Holder has been open to naming a prosecutor to investigate the allegations since he took office in February. The sources said the inspector general report has advanced his thinking in the direction of doing so.

Holder has secured support for the idea from at least some key players, one of the sources said. If he does name a prosecutor to conduct an investigation, he will probably select a career prosecutor from inside the Justice Department rather than a lawyer from outside, the sources said.

Holder's inclination to appoint a prosecutor to investigate torture allegations was first reported yesterday on the Web site of Newsweek magazine.

His predecessor, Michael B. Mukasey, followed a similar path by reaching out to veteran federal prosecutors from Connecticut to investigate some of the most sensitive allegations in the Bush years.

Those prosecutors continue to examine the firing of nine U.S. attorneys in 2006 and the destruction of CIA videotapes that depicted waterboarding of terrorism suspects. The latter investigation is proceeding in the Eastern District of Virginia under the guidance of Assistant U.S. Attorney John Durham. A source said Durham may be under consideration for an expanded mandate, given that he already has reviewed hundreds of sensitive CIA cables and other documents related to treatment of detainees.

Other challenges an inquiry into alleged torture might face could include the difficulty of gathering evidence of improper conduct in war zones and questions about the reliability of witnesses who may have been held by the U.S. government for years, legal analysts said yesterday. The actions of higher-level Bush policymakers are not under consideration for possible investigation.

"As the attorney general has stated on numerous occasions, the Department of Justice will follow the facts and the law with respect to any matter," spokesman Matthew Miller said. "We

have made no decisions on investigations or prosecutions, including whether to appoint a prosecutor to conduct further inquiry. As the attorney general has made clear, it would be unfair to prosecute any official who acted in good faith based on legal guidance from the Justice Department."

Benjamin LaBolt, a White House spokesman, declined to comment on the prospect of a prosecutor investigating alleged torture.