

By Jeremy Scahill

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**Anti-torture lawyers argue that any investigation must target the whole torture system, including its legal architects and those who gave the orders.**

Lawyers from the American Civil Liberties Union have just been notified that there will be a hearing on Wednesday morning in the group's lawsuit to have a much-anticipated 2004 CIA Inspector General's report on "enhanced interrogation" publicly released. The report is believed to contain some key information on the nature of what others call the "Bush torture program." The Obama White House has been fighting to have the report suppressed with CIA Director Leon Panetta [telling](#) federal Judge Alvin Hellerstein in June that the release of the report would result in "exceptionally grave damage to the national security." At present, the Obama administration has stalled the release until August 31, a delay the ACLU is protesting. Today, Judge Hellerstein notified the lawyers from the administration and the ACLU of Wednesday's meeting.

As this battle (one of many being waged by the ACLU) continues, a spot light is once again being focused on the issue of potential prosecutions stemming from the Bush administration's torture program.

In the 48 hours since *Newsweek* [published](#) a story asserting that Attorney General Eric Holder is now "leaning toward appointing a prosecutor to investigate the Bush administration's brutal interrogation practices," the internet and Capitol Hill have buzzed with reaction. While Obama has spoken quite strongly against prosecutions, he has made a point of saying that the final decision is Holder's.

For months, Republican politicians and their media proxies (and, as noted above, some Obama officials) have [lambasted](#) the possible prosecutions as unnecessary, irresponsible and a threat to U.S. national security. Meanwhile, the recent reports on Holder have some anti-torture activists wondering whether Holder will be the new "[Anti-Torture Hero](#)".

But, a closer examination of the type of investigation Holder is reportedly considering may come as a disappointment to those pressing for accountability -- particularly for prosecuting those at the high levels of power -- for the crimes of the Bush administration.

As has been noted over the past two days by [The New York Times](#) , [The Washington Post](#) , the

[Wall Street Journal](#)

(and most of the elite, connected media), any investigation authorized by the Justice Department is likely to be very narrowly focused on those CIA interrogators who went beyond the torture methods explicitly approved in Justice Department legal memos. "The actions of higher-level Bush policymakers are not under consideration for possible investigation," reports the

*Washington Post*

. "Attorney General Eric Holder may order a criminal probe into whether treatment of terrorism detainees exceeded guidelines set by the Justice Department," administration officials told the *Wall Street Journal*

. "Holder's potential order would likely be limited in scope, focusing only on any interrogation practices that may have gone beyond the bounds set by Justice Department memos, according to a person familiar with the attorney general's thinking."

*The New York Times*, meanwhile, [reported](#) today, "The attorney general would prefer to keep such an inquiry narrowly focused and assign it to a line prosecutor, if possible, rather than appoint a special prosecutor."

In interviews today, two of the leading lawyers working on confronting the Bush administration's torture program expressed serious concerns about the reported approach being considered by Holder. "It is utterly limiting and means that the lawyers and the higher-ups -- assuming they just had these 'torture rules' on paper—are not going to be implicated, but only some lower-level persons who went beyond what was supposedly 'authorized' by the Office of Legal Counsel, [by] William Haynes [General Counsel of the DoD under Bush], John Rizzo [General Counsel at the CIA] and the [Bush administration] leadership," says Michael Ratner, president of the [Center for Constitutional Rights](#)

. "So, that's very very limiting because it's in essence accepting the 'golden shield' defense that you can somehow get away with legally authorizing waterboarding." Ratner said waterboarding and some of the other tactics and actions employed under Bush are "so outside of anything that could be a lawful order that anyone who authorized or obeyed it should be prosecuted."

Jameel Jaffer, who is Director of the ACLU's [National Security Program](#) said the report that Holder may appoint a prosecutor "is very encouraging," but cautioned: "If the prosecutor has a mandate only to look at the actions of interrogators who exceeded their authority, that's a very narrow mandate and its one that's going to result in the misimpression that, as with the Department of Defense, the problem in the CIA was with rogue interrogators. In fact, the problem with the CIA torture program was the program itself, which was authorized at the highest levels and the most senior Justice Department lawyers sought to provide a legal basis

for that torture program. That's where the real problem is."

Jaffer adds: "We want to make sure that the prosecutor's mandate is broad enough to cover not just the actions of rogue interrogators, but also the actions of senior Bush administration officials who authorized or endorsed or facilitated torture."

As Constitutional law expert/Salon columnist Glenn Greenwald [pointed out](#) :

It's worth emphasizing here that all of these reports are preliminary and from anonymous DOJ sources, so it's a bit premature to get too worked up over a prosecution approach which Holder hasn't even announced yet. Still, given how many DOJ sources went to multiple newspapers at the same time to disclose Holder's plans, it seems clear that this was a coordinated, approved effort to disseminate Holder's intentions as a "trial balloon" to gauge public reaction. If this is the approach Holder takes -- one that, yet again, shields high-level Bush officials while targeting low-level "rogue" agents -- one can make a strong argument that it is worse than doing nothing, that this will actually further subvert the rule of law rather than strengthen it.

Ratner has consistently criticized President Obama's position that the U.S. should "look forward and not backwards" and Obama's offer of preemptive immunity for CIA torturers with Obama in April [assuring](#) those torturers who were "relying in good faith upon legal advice from the Department of Justice that they will not be subject to prosecution." Ratner says that if Holder only allows a narrowly-focused investigation based on adherence to the torture memos, the Obama Administration is "essentially saying that the entire torture program was OK and people have a legal defense to it:"

It is in essence accepting the legal defense that was engineered for exactly that purpose to give people a golden shield and only go after people who go beyond it. It's like saying, 'You can torture someone by bending their arm behind their back until it breaks only one bone, but not if it breaks two bones. If it breaks two bones, I'm gonna go after you. If you cut off one testicle, I'm not going to go after you, but if you cut off two, I will. If you waterboard someone 150 times, I'm going to go after you, but not if you do it 83 times.' It's a line in the sand, it's ridiculous. It's malleable, it's terrible.

It's not that I think going after these guys for going beyond the legal memos is so bad, but if its leaving intact the structure of the torture program, then it's basically not worth much.

Jaffer echoed Ratner's comments:

We have no problem obviously with investigating and prosecuting interrogators that use torture whether they exceeded guidance or not. But, you have to look at the guidance itself. The memos themselves came from the most senior attorneys in the Justice Department and the authorization for the torture program came from the most senior officials in the Bush administration. To pretend that this is a problem that began and ended with the interrogators who exceeded authority, I think, is indefensible given the evidence that's already in the public domain.

Much of the coverage following the original *Newsweek* report of the possible appointment of a prosecutor by Holder has focused on partisan political questions. On Monday, *The New York Times*

[devoted](#)  
substantial space to this aspect of the story:

It is just the kind of distraction from Mr. Obama's domestic priorities -- repairing the economy, revamping the health care system, and addressing the long-term problems of energy and climate -- that the White House wanted to avoid.

A series of investigations could exacerbate partisan divisions in Congress, just as the Obama administration is trying to push through the president's ambitious domestic plans and needs all the support it can muster.

"He wants to dominate the discussion, and he wants the discussion to be about his domestic agenda -- health care, energy and education," said Martha Joynt Kumar, a professor of political science at Towson University who studies the presidency.

The Bush national security controversies "are certainly a diversion from what he wants to do," Professor Kumar said. "He wants to talk about the present and not the past."

While the *Newsweek* article asserted that “White House officials have complained that Holder and his staff are not sufficiently attuned to their political needs,” it is hard to imagine Obama simply standing by while his Attorney General conducts investigations directly opposed by the president. Ratner criticized the recent coverage, saying that it “only discusses the so-called ‘political costs.’ It doesn’t cover one positive thing that could come out of prosecutions. It’s really off the wall.”

As for the position taken by Republicans and some Democrats, including Obama administration officials, that prosecutions would harm the U.S. reputation globally and threaten national security, Jaffer shoots back:

As damaging as the torture program itself is the perception -- the accurate perception -- that the United States government has thus far declined to hold anybody accountable for it. And I think that that impunity, or the perception that the United States is endorsing impunity is much more damaging to the standing of the United States abroad than any disclosure or further disclosure about the CIA’s torture program could be.

Jaffer’s comments echo [those](#) of Greenwald:

Prosecuting only obscure “rogue” interrogators while immunizing powerful, high-level officials would not be an act of courage but of cowardice. It would not strengthen the rule of law but would pervert it further. And rather than deter future lawbreaking, it would signal -- yet again -- that our most powerful political officials are free to break the law with impunity.