

Torture: The Risks of a Partial Prosecution

By [David Swanson](#)

Global Research, July 24, 2009

afterdowningstreet.org 24 July 2009

Theme: [Crimes against Humanity](#), [Law and Justice](#)

If Attorney General Eric Holder creates a special prosecutor for torture but forbids him or her to prosecute the lawyers who facilitated torture or the top officials who ordered it, proposing to go after only torturers who exceeded the limitations outlined in the lawyers' memos, what are the risks?

The risks for Holder could, for all we know, include being fired immediately, being asked to "resign" in three-and-a-half years, not being appointed to the Supreme Court, being called names by TV loudmouths, and not being invited to dinner parties. But these risks would be much greater if Holder obeyed the law and authorized a complete prosecution of all crimes. President Obama has publicly forbidden Holder from fully enforcing the law, but said that partially doing so is a decision for the attorney general. And failure to act carries its own risks, of embarrassing prosecutions by foreign and international courts, and of a shameful legacy and bitter and regret-filled retirement.

The risks to the rest of us are far more serious. If Holder does nothing, then almost everyone involved could walk away unpenalized, thus encouraging the continued use of torture. But if Holder creates a partial prosecution based on the idea that crazy insane OLC memos are law, the outcome could be better or worse.

It could be better because torturers would be prosecuted. After all, we know of torture that preceded the memos, and we know of torture that exceeded the memos. To my knowledge we don't know of any torture that, in fact, complied with the memos. And such prosecutions could easily lead to the publicizing of evidence against higher officials (not that it's currently in short supply), making it difficult not to expand the prosecution in additional stages. Prosecuting some could lead to prosecuting the rest of those responsible.

The potentially worse-than-nothing outcome is due to the following concerns. If you do nothing, the lesson for future governments is that criminal activity requires intimidating the succeeding governments into inaction. If, on the other hand, you treat the crazy insane OLC memos as law, the lesson for future governments is that criminal activity is guaranteed safe if you order your lawyers to write memos "legalizing" it. This would mean that anything at all could be "legalized." And it would mean that any existing memos that have not been retracted are law. And that would mean, among other things, that, as Jay Bybee obligingly declared in a memo, any president has the right to launch a war of aggression on a whim.

So, we're back to the shameful legacy and bitter regret-filled retirement for Holder despite his having risked being mocked, fired, shunned, and not appointed. A partial prosecution, unless later expanded, could be the worst of both worlds for him. This would seem to open up at least the possibility of Holder choosing to obey our laws and treaties in full, thus

guaranteeing self respect, public respect, the gratitude of billions of people around the world, and the knowledge later in life of having done the right thing when he had it in his power.

But, even a complete prosecution of torture, even one that put Bush and Cheney away for life, would fall far short of having done the right thing. What Holder has to do, either at once or in stages, if he truly wants to comply with the law, is to prosecute much worse crimes than torture, crimes everyone used to talk about before the possibility of prosecuting torture came to dominate. Many instances of torture have amounted to murder, and in some instances torture has been used to generate war lies. But the Iraq War itself has left 1.3 million human beings dead, millions more wounded, traumatized, displaced, and impoverished. If Holder really wanted to do his job he would prosecute a lot more crimes, including the misspending of funds on war that were not appropriated for it, lying to Congress about the grounds for war (among other things), using false propaganda domestically, invading Iraq in violation of the Constitution and the UN Charter and H.J. Res 114, imprisoning children, employing assassination squads, using the U.S. military domestically, spying without warrant, exposing an undercover agent, and obstructing justice. And an attorney general who would do all of that (or even most attorneys general who wouldn't) would also overturn the prosecutions of political prisoners like Don Siegelman, Paul Minor, and so many others, and hold accountable those who used the Justice Department to target state and local elected officials, 85 percent of those prosecuted being Democrats and the other 15 percent consisting largely of moderate Republicans.

Now, all of this may scare Mr. Holder into doing nothing at all. The most strategic approach for advocates of justice may be to pressure him into beginning at least a partial prosecution of one relatively minor crime, planning to expand from there, while at the same time focusing much of our energy on demanding action from Congress, action that could begin with the impeachment of Jay Bybee, the sitting federal judge who signed his name, not only to torture memos, but to a memo purporting to legalize illegal wars, a memo that will have done that if we do not act. Our energy can also go into local and state prosecutions, foreign prosecutions, structural reforms, and so on. But it is critical that, whatever we attempt to prod Holder into at the moment, we ourselves not forget the larger picture, that we ourselves not begin thinking that exceeding crazy insane memos is the chief offense, or that writing those memos is the chief offense, or that ordering those memos written and used is the chief offense. If we do not deter wars of aggression, millions more will die, and many will be tortured regardless of what else has changed. Wars of aggression inevitably use torture, and worse. Our job is to stay focused, even if it takes decades, never be distracted or deterred, and never lose confidence that we will put an end to war.

David Swanson is the author of the upcoming book *“Daybreak: Undoing the Imperial Presidency and Forming a More Perfect Union”* by Seven Stories Press. You can pre-order it and find out when tour will be in your town: <http://davidswanson.org/book>. Arrange to review it on your blog and Seven Stories will get you a free copy. Contact crystal at [sevenstories dot com](http://sevenstories.com).

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