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Expand torture inquiry

Holder should investigate policy-makers, not just the CIA.

By Doug Bandow

Attorney General Eric H. Holder Jr. has appointed a special prosecutor to review CIA interrogations of terrorist suspects, but the investigation shouldn't stop with the agency. No one should be above the law - least of all top policy-makers.

Investigating officials from the past administration is bound to be controversial. President George W. Bush and his aides undoubtedly did what they thought was right. There was no need, though, to sacrifice the Constitution and civil liberties to protect the American people from terrorism. As President Obama observed in his inaugural address, "We reject as false the choice between our safety and our ideals."

Those ideals require an impartial investigation of any Bush administration officials who may have violated the law. There is ample evidence that torture occurred, and that its use was debated and decided at the upper reaches of the White House. Policy-makers bear the principal responsibility.

Policy disagreements are not at issue; liberal democracy requires political conflict. Arrest and prison are appropriate only when those in authority break the basic rules.

In the same light, there should also be an investigation of Bush administration warrantless wiretapping in violation of the Foreign Intelligence Surveillance Act. The administration made a number of extravagant claims to justify ignoring FISA. The most serious was that, as the military commander in chief, the president had the authority to ignore an express congressional enactment in this area.

Being commander in chief gives the president extensive discretion when it comes to operational issues. However, the Constitution tasks Congress with creating the broad legal and administrative frameworks within which military and intelligence operations occur.

Indeed, the Constitution gives Congress almost all war powers other than operational command. The legislature raises the military, declares war, and has the power "To define and punish ... offenses against the law of nations"; "make rules concerning captures on land and water"; "make rules for the government and regulation of the land and naval forces"; and "make all laws which

shall be necessary and proper for carrying into execution the foregoing powers."

In the area of war-related surveillance, if Congress does not legislate, the president may act. However, if Congress chooses, for example, to require a warrant before the executive branch is allowed to spy on Americans, the president has the responsibility to "take care that the laws be faithfully executed."

If Bush and those around him thought that the congressionally prescribed procedures were inadequate, they should have requested additional legal authority from Congress. It seems likely that it would have been granted. Even the Democratic Congress elected in 2006 acquiesced to administration pressure to weaken FISA.

The Obama administration has been nervous about prosecuting Bush officials, lest it be accused of conducting a partisan witch-hunt. But Obama has an obligation to hold accountable any government official who broke the law. A democratic republic requires public accountability to survive.

At the very least, executive lawbreaking requires an investigation. The people should know what was done in their name. Moreover, policies and procedures should be adopted to make it harder for future officials to follow suit.

The administration also must consider prosecution. If high-level government officials can violate the law simply by claiming to believe that their actions are legal, then the law is meaningless.

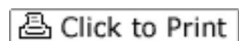
The U.S. government has prosecuted foreign officials and soldiers for war crimes, including torture. It must hold its own citizens to the same standard.

In his opening address at the Nuremberg trials, chief American prosecutor Robert Jackson said the law must "not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power." And so it must in America today.

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