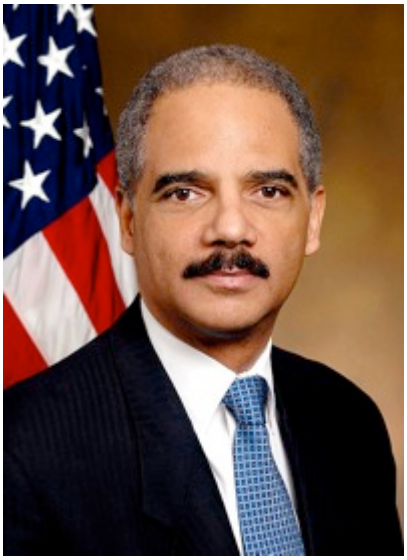
Written by **Thomas R. Eddlem** on August 25, 2009

Holder Appoints Torture Prosecutor, Rejects Nuremberg Principle



U.S. Attorney General Eric Holder appointed Assistant United States Attorney John Durham to investigate torture by U.S. officials since President Bush commenced the "war on terror," but in the same act also gave political cover from that prosecutor to anyone who actually committed torture.

Holder announced the August 24 appointment with the proviso that anyone who engaged in torture at the urging of senior Bush administration officials would be exempted from prosecution. Holder said torturers "need to be protected from legal jeopardy when they act in good faith and within the scope of legal guidance. That is why I have made it clear in the past that the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees. I want to reiterate that point today, and to underscore the fact that this preliminary review will not focus on those individuals."

"I was only following orders" is now apparently a complete defense under the Holder Justice Department. But this was precisely the defense rejected at the Nuremberg trials after the Second World War from German soldiers who had committed war crimes. The accused claimed they should be held innocent from punishment for killing Jews and others because they were only following the Führer's legal orders. Although there were numerous problems with the Nuremberg trials, the one truly worthwhile precedent to come out of the tribunals was the principle that men are always responsible for their own actions.

If Holder is serious that "the Department of Justice will not prosecute anyone who acted … within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees," then it will be impossible to prosecute anyone. The "legal guidance" — so called — by the Bush-era Office of Legal Council (OLC) essentially said that U.S. Interrogators could perform any kind of torture upon detainees with prosecutorial immunity. The OLC under Deputy Assistant Attorney General John C. Yoo and Jay S. Bybee explicitly stated that interrogators were above the law in a 2002 legal memorandum:

> As we explained above, the application of these [torture] statutes to the President's conduct of the war would potentially infringe upon his power as Commander in Chief. Furthermore, the conduct

> here at issue — interrogations — is a core element of the military's ability to prosecute a war. As a general matter, we do not construe generally applicable criminal statutes to reach the conduct of the military during a war….Moreover, we conclude that different canons of construction indicate that generally applicable criminal laws do not apply to the military interrogation of alien unlawful combatants held abroad. Were it otherwise, the application of these statutes to the interrogation of enemy combatants undertaken by military personnel would conflict with the President's Commander-in-Chief power…. Finally, even if the criminal prohibitions outlines above applied, and an interrogation method might violate those prohibitions, necessity or self-defense could provide justifications for any criminal liability.

Yoo went on in that 2002 memorandum to make a number of legally spurious arguments that would justify actual torture within the confines of the felony torture statute under so-called "necessity" or "self-defense" justifications:

> In the current conflict, we believe that a defendant accusing of violating the criminal prohibitions described above [the torture law] might, in certain circumstances, have grounds to properly claim the defense of another. The threat of an impending attack threatens the lives of hundreds if not thousands of American citizens…. [T]he defendant could claim that he was fulfilling the Executive Branch's authority to protect the federal government and the nation from attack after the events of September 11, which triggered the nation's right of self-defense.

It's more than likely that Holder's appointment is designed to consign the torture scandal to investigation oblivion, to investigate it to death until the American people tire of hearing about it — or forget about it entirely. Despite the fact that legal memoranda and statements by the President, Vice President and his attorneys general justifying terrorism have long been on the public record, Holder is only undergoing a "preliminary review" of the evidence for a dozen lower-level CIA officials. A full investigation may or may not follow, Holder said:

> I have concluded that the information known to me warrants opening a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations. The Department regularly uses preliminary reviews to gather information to determine whether there is sufficient predication to warrant a full investigation of a matter. I want to emphasize that neither the opening of a preliminary review nor, if evidence warrants it, the commencement of a full investigation, means that charges will necessarily follow.

If Durham does come up with indictments against lower-level CIA interrogators — i.e., the pawns — it's almost inevitable that they will be citing the Yoo-Bybee memorandum as their defense. They could credibly argue any kind of torture was justified by the memorandum. "I was only following orders," they'll reply, "and President Obama and Attorney General Holder agree that I shouldn't be prosecuted for following orders." That won't have any legal standing. But the result will be a press spectacle, followed by a wave of "I told you so" media appearances from pro-torture neo-con pundits.

The rejection of the Nuremberg principle and embrace of the "I was only following orders" defense would result in an implosion of the whole Obama administration if Durham tries to prosecute CIA torturers while Obama and Holder are upholding the "I was only following orders" defense. Yet, Holder says he remains wedded to Obama's idea that past crimes are not particularly important to prosecute. As he appointed Durham, Holder stated that "I share the President's conviction that as a nation, we must, to the extent possible, look forward and not backward when it comes to issues such as these."

Of course, if we do "look forward" to a time where torturers — along with those who ordered the torture — are not punished for their crimes, then we'll eventually have a lot more government torture. There will simply be no disincentive for government to torture. And history records that most governments often engage in torture even when strong disincentives are in place.

The ACLU sent out an e-mail blast after the appointment, stating that "As anyone who has seen the details of this appalling report can tell you, this investigation is necessary and long overdue, and Attorney General Holder should be commended for taking this important step. However, the very limited scope of the investigation he launched today is nowhere near as thorough and broad as the torture investigation America really needs." And that's about right.

Durham's particular experience is prosecuting organized crime, which should be particularly apropos in an investigation of Bush-era torture. And he should know from experience that unless you take out the top criminals, the criminal syndicate continues on with little interruption. A torture investigation with meaning has to begin at the top, directly examining the criminal role of top officials in orchestrating the torture of detainees. Otherwise, the criminal enterprise of torture will continue on with little interruption.