

# Torture Cases Would Face Legal Hurdles

BY JOHN D. MCKINNON

WASHINGTON—Legal barriers to prosecuting Bush-era officials over alleged torture would be substantial, legal experts said Wednesday. But Democrats were seizing on the issue to score political points anyway, while some Republicans warned against opening a Pandora's box of recrimination, and a new congressional report suggested widespread involvement in the matter.

A day after President Barack Obama refused to rule out prosecutions of Bush officials involved in approval of certain interrogation techniques, the Democratic National Committee sought to use the debate to link the current Republican Party with unpopular Bush-era leaders, particularly former Vice President Dick Cheney. He has repeatedly criticized the Obama administration over national-security issues. He did so again last week, when the Obama administration released redacted versions of several memos related to the Bush-era interrogation policy.

If Republican leaders in Congress "are content to allow the architects of the disastrous policies and poisonous politics of the past to remain the face of the new Republican Party, it's fine with us," the Democratic National Committee said in a news release.

Meanwhile, in a new report, congressional investigators concluded that the interrogation policies involved key legal officials across the administration, not just a handful of lawyers currently being investigated by the Justice Department. Top administration officials including then-Vice President Cheney and then-National Security Adviser Condoleezza Rice were "at the center

of the discussions," Sen. Jay Rockefeller (D., W.Va.) said in a statement. That suggests that any criminal probe might quickly grow very large in scale.

Several Republicans also noted that top lawmakers were briefed on the tactics early on. In deciding which officials to investigate, "where do you draw the line?" one ex-Bush official said.

Former Bush adviser Karl Rove said the Obama administration risks looking like a "Third World regime where the incoming junta of colonels" conducts "show trials of their predecessors over policy differences."

Experts said the path to prosecution is littered with potential legal problems. There is international precedent for prosecuting officials accused of enabling war crimes. But the two main statutes that could form the basis of a U.S. prosecution have shortcomings for prosecutors.

The antitorture statute sets a relatively high standard for prosecutors to meet, particularly when it comes to proving intent. Top officials could argue they relied on the legal memos that authorized the tactics and outlined how specific techniques in question wouldn't cause severe pain and suffering.

The other law, the U.S. statute against war crimes, was narrowed in the Military Commissions Act of 2006, as legal scrutiny of the U.S. antiterrorism effort mounted, to give officials more protection against prosecution. The changes also were made retroactive.

In addition, congressional hearings or a truth commission might involve grants of immunity to witnesses, complicating their future criminal prosecution.

"You start setting up a truth commission ... it complicates it," said Michael Ratner, president of the Center for Constitutional Rights, a nonprofit human-rights organization. He believes a special prosecutor is needed.

Although senior U.S. officials have on occasion been tried for personal corruption, there is little precedent for prosecutions alleging that official policies amounted to criminal acts. After losing his re-election bid to Bill Clinton, President George H.W. Bush pardoned former Defense Secretary Caspar Weinberger ahead of trial for allegations related to the Iran-Contra affair during the Reagan administration. President George W. Bush, however, left office without providing such protection to officials who served under him, leaving them potentially vulnerable.

Defenders of the Justice Department lawyers who wrote the memos argue that a legal opinion, even if incorrect, shouldn't be a basis for prosecution.

However, civil libertarians said there is precedent for prosecuting lawyers who construct a case for illegal behavior, from Nazi lawyers tried after World War II to the Justice Department indictment last year of a prominent Miami lawyer whose opinions allegedly buttressed drug traffickers. The cases generally turn on whether the lawyer's opinion was objectively reasonable, and whether the lawyer exercised good faith in rendering the opinion.

Mr. Obama has said it is up to Attorney General Eric Holder to decide whether prosecutions are warranted.

Amid calls by several Democrats in Congress for more rounds of hearings, Mr. Obama this week has hinted that Congress should create an independent bipartisan review commission—but avoided proposing it himself. White House officials apparently hope that a truth commission would satisfy Bush administration critics, while also preserving a degree of bipartisanship that Mr. Obama needs on some major policy initiatives this year, such as a health-care overhaul.

—*Jess Bravin*  
 contributed to this article.

