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The New Gonzales Standard for Torture

Col. DAN SMITH | August 5 2006

Ten years ago, Representative Walter Jones (R-NC) introduced The War Crimes Act of 1996. This statute was one of many in the mid-1990s devoted to the principle of extraterritoriality: the extension of U.S. laws to other countries. When applied, such laws subject foreign nationals to prosecution if they treat a U.S. citizen or U.S. property in a way that violates U.S. laws.

Behind the spate of extraterritorial laws was congressional frustration that the "world's only remaining superpower" could not extend its writ around the globe. Mayhem ranging from genocides and acts of terror to massacres and sheer brutality against prisoners and non-combatants regularly occurred in the era's many civil wars-with the perpetrators often escaping accountability for their actions.

Back in 1996, few anticipated that The War Crimes Act, which entered law as 18 USC Sec. 2441, would have the potential to boomerang and hit the United States itself.

Holes in International Law

In the 1990s, while international law such as the Geneva Conventions forbade torture and other crimes against humanity, no permanent judicial system or court existed to bring war criminals to justice. (The International Criminal Court did not come into being until 2002.) Under the War Crimes Act, however, those who mistreated a U.S. national could face trial within the United States-if subsequently found and transferred to U.S. custody, presumably by extradition, but not excluding "rendition" or covert operations by the CIA or U.S. Special Forces.

At the Pentagon, senior uniformed lawyers proposed changing the law to apply to U.S. nationals who committed war crimes as well as those who were victims of such crimes. The military lawyers argued that by setting a high standard for the humane treatment of detainees held by the United States, the Pentagon could demand reciprocal humane treatment for captured U.S. soldiers and other U.S. nationals held by an enemy. This change was enacted in 1997.

Four years later, Walter Jones was among the overwhelming majority in both houses of Congress who voted for the post-September 11, 2001 "Authorization to Use Military Force" legislation that the Bush White House has used to justify its abuse of executive power. As a result of the recent Supreme Court decision in Hamdan vs. Rumsfeld, the attempts to circumvent international treaties on treatment of combatants and other detainees arguably may have violated 18 USC Sec. 2441-especially if a link can be made between policy formulation and actual abuses of international norms.

The law itself, one page long, seems quite definitive. The first paragraph lists potential punishments, which include the death penalty if the victim dies. The second describes the "circumstances" of the offense: the perpetrator or victim must be a U.S. national.

The third paragraph states that "war crimes" are any conduct that constitutes a "grave breach" of the Geneva Conventions or its protocols; is prohibited by Articles 23, 25, 27, or 28 of the Fourth Hague Convention Annex dealing with the law of land warfare; violates Common Article 3 of the Geneva Conventions regarding non-international armed conflict; or causes death or serious injury to civilians through violating restrictions on the use of mines and other devices.

Had any U.S. government official entertained the thought that the Geneva Conventions could be jettisoned because the "war on terror was unlike any war ever fought before," the War Crimes Act as amended in 1997 should have been a red flag. But the administration's top lawyers thought they could circumvent both



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red flag. But the administration's top lawyers thought they could circumvent both the law and Common Article 3 by using the U.S. military base at Guantanamo Bay, Cuba as the primary site for holding prisoners identified or thought to be al-Qaida adherents.

Gonzales Anticipates

Then White House Counsel and now Attorney General of the United States Alberto Gonzales was one who recognized the potential for prosecution under 18 USC Sec. 2441-a view he expressed in a January 25, 2002 memo to President Bush, one of many on this subject that went between the White House, the Justice Department, the CIA, and the civilian leadership of the Pentagon. These memos attempted to establish a rationale permitting abusive and degrading treatment, including torture, by creating "exempt" categories for detainees and "exempt" areas in which prisons could be built and unregulated interrogations conducted.

By affirming in its June 30, 2006 decision (Hamdan v. Rumsfeld) that Common Article 3 of the Geneva Conventions applied to detainees in the "war on terror" and the jurisdiction of the federal courts to hear cases involving detainee rights, the Supreme Court invalidated most of the administration's "no-standards" interrogation policy. But rather than bring policy-and practice-into line with the international conventions that the United States had observed up to September 11, 2001, the administration is now trying to absolve itself ex post facto. It is pressuring Congress to pass legislation that retroactively shields from possible prosecution anyone who authorized or encouraged the use of coercion during interrogations.

The new "standard" for interrogation, according to media reports, would allow methods that do not "shock the conscience." Such a standard is not conducive to the rule of law. One wonders if this is the equivalent of the military's "shock and awe" bombing campaign against Iraq in March 2003. That, too, was an attempt to short-circuit proven procedures and operational standards. Its aftermath has been equally devastating to the principle of accountability so vital to democracies.

So far, the administration is stubbornly "staying the course" on its designation of Guantanamo prisoners as "unlawful combatants" and therefore not entitled to the protections of the Geneva Conventions. However, under fire from allies and U.S. civil rights groups, President Bush has directed that prisoners be accorded the same rights and humane treatment specified in the Conventions. Should the White House ever comply fully with the Supreme Court's decision, the abuses committed by U.S. personnel during interrogation may become fewer and less severe.

Prisoners finally charged with a war crime will have to wait for another Supreme Court decision, one that compels the administration to restore procedural rights that it does not want to accord to men who violate international standards of conduct.

Until then, those who are charged with violating international standards of conduct will remain in the hands of those who don't recognize international standards of conduct.



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