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Spain Has No Right to Try U.S. Officials

What next? Prosecutions for bad advice on global warming?

By DOUGLAS J. FEITH

A lawyer in Spain -- who did his legal studies while serving over seven years in prison for kidnapping and terrorism -- has engineered a complaint accusing the U.S. government of systematically torturing war-on-terrorism detainees. He filed this complaint with Baltasar Garzon, an activist magistrate famous for championing the "universal jurisdiction" of Spanish courts. That magistrate is now asking a Spanish prosecutor to bring criminal charges on this matter against former U.S. Attorney General Alberto Gonzales, four other former Bush administration lawyers, and me.

The allegation is not that any of us tortured anyone. And it is not that any of us even directed anyone to commit torture. The allegation is that, when we advised President George W. Bush on the Geneva Conventions and detainee interrogations, our interpretations were wrong -- in the view of the disapproving Spaniards. According to the complaint, these wrong interpretations encouraged the president to make decisions that led to torture.

The Spanish magistrate apparently believes that it can be a crime for American officials to offer the wrong kind of advice to a president of the United States and, furthermore, it can be a crime punishable by a Spanish court. This is a national insult with harmful implications.

The general sloppiness of the complaint's factual assertions is clear from its discussion of my work. The entire case against me hinges on my alleged role in arguing that the detainees in Guantanamo Bay should not receive protection under Geneva Article 3 relating to humane treatment. I never made any such argument.

On the contrary, the most significant role I played in the debates about Geneva was in early 2002 when I -- together with Chairman of the Joint Chiefs of Staff Gen. Richard Myers -- helped persuade Secretary of Defense Donald Rumsfeld to take a strongly pro-Geneva position in the first National Security Council meeting on the subject on Feb. 4.

Noting in writing that Geneva is part of U.S. law, I argued it is a good treaty and it is "important that the President appreciate DOD's interest in the Convention." I wrote that "U.S. armed forces are trained to treat captured enemy forces according to the Convention," that Geneva is "morally important, crucial to U.S. morale," and that it is also "practically important, for it makes U.S. forces the gold standard in the world, facilitating our winning cooperation from other countries."

In conclusion, I urged "[h]umane treatment for all detainees" and recommended that the president explain that Geneva "does not squarely address circumstances that we are confronting in this new global war against terrorism, but while we work through the legal questions, we are upholding the principle of universal applicability of the Convention."

I briefed these arguments directly to the president at that Feb. 4 NSC meeting, and his decision on Geneva's applicability to the war against the Taliban was consistent with them.

The allegation that I argued against Article 3 protection was invented by a British lawyer named Philippe Sands and published in an angry, wildly inaccurate book called "Torture Team." Mr. Sands asserts that, in our interview, I admitted making the case against Article 3. He was eventually compelled to publish the interview transcript, however, and it shows that nothing I said supports his allegation, that he grossly misquoted me on a number of points, and that he never asked me a single question about Article 3. Mr. Sands has to this day never accounted for how he could charge me with opposing Article 3 based on an interview in which the term "Article 3" was never even mentioned by me or him. I dissected Mr. Sands's misrepresentations in detail in testimony I gave to the House Judiciary Committee last summer.

As bad as the Spanish complaint is for relying expressly on Mr. Sands's discredited book for facts, it is far worse for the principle it is trying to establish -- that a foreign court should punish former U.S. officials criminally if the judge thinks their official advice to the U.S. president violated international law. Whatever advice any of us offered the president on these debatable issues, it would be an unprecedented outrage to make our participation in government policy making a subject for second-guessing in a foreign criminal court.

From the Nuremburg trials of the Nazi leadership forward, none of the cases in which former government officials have been tried for international crimes are actually precedents for what the Spanish officials are now considering. In countries run by officials who rule by force, commit aggression, perpetrate humanitarian outrages and stand above and out of reach of any domestic law, leaders are sometimes tried by international tribunals. Such countries' sovereignty is not respected because their own domestic laws -- let alone their international legal obligations -- do not bind their leaders.

But ours is a country of laws, and no reasonable person doubts that the American legal system has integrity. If President Barack Obama and the prosecutors see a crime to be prosecuted, they can act. It would be hostile for a foreign official to decide that U.S. sovereignty on this matter should not be respected because the U.S. is like Nazi Germany or Serbia under Slobodan Milosevic.

What if a Spanish magistrate doesn't like the legal analyses prepared by U.S. officials on other subjects, such as nuclear weapons, or the death penalty, or atmospheric pollution, or border security with Mexico? Any of these matters could be the basis for a claim by a creative European jurist that a U.S. official is taking a position contrary to international law as interpreted by right-thinking Europeans.

It seems clear that the goal of this judicial exercise is to carry a political disagreement into criminal courts and thereby to intimidate U.S. officials. If Spanish officials decide to carry the prosecution forward, then Americans who know that their views run contrary to those of various Spanish or other European activists would have to think twice about voicing those views -- or stay out of U.S. government service altogether -- if they want to avoid being threatened with arrest in Europe.

The American people can tolerate this only if they are willing to forfeit the right to make their own

laws and policies. This is not a left-versus-right political issue. It is a question of preserving the American constitutional system of government in which U.S. officials are answerable for their opinions and advice to the American people -- but not to foreign criminal courts.

Mr. Feith, a former under secretary of defense for policy (2001-05), is a senior fellow at the Hudson Institute. He is the author of "War and Decision: Inside the Pentagon at the Dawn of the War on Terrorism" (HarperCollins, 2008).

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