



The New Spanish Inquisition
Judge Garzón launches a crusade.
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The Spanish Inquisition was established in the late 15th century to stamp out heretical deviations from Catholicism. By the time it petered out in the early 19th century, the Inquisition had expanded to cover political deviants. It is this latter tradition that Spanish judge Baltasar Garzón--scourge of dictators, Basque terrorists, and democratic politicians everywhere--has made a career of reviving.

Garzón won fame in 1998 when he issued an arrest warrant for the aging Chilean ex-dictator Augusto Pinochet, then still holding office as senator-for-life, and on travel in Britain. The British government refused the extradition, but not before the House of Lords decided to sanction it. People wondered how soon it would be before such a prosecution was turned on American officials. The answer came in the summer of 2003, when the Belgian government was embarrassed to discover that one of its courts might indict General Tommy Franks on crimes against humanity for leading the invasion of Iraq. The squirming Belgians quickly repealed the enabling statute, but the genie was out of the bottle, and a rash of sham proceedings followed in the wonderland of Europe.

The latest chapter in this fantastical tale began last week when Judge Garzón decided to forward a complaint against former Bush officials to the prosecutor of Spain's national trial court. The prosecutor is said not to care much for Garzón, and given the diplomatic embarrassment for the Spanish government, the case is not likely to proceed much farther--but a dangerous precedent has already been set.

The complaint alleges that the defendants--six former administration officials, all lawyers, including former attorney general Alberto González and former undersecretary of defense Douglas Feith--were instrumental in creating the "legal framework" used to establish the Guantánamo detention facility as well as the allegedly illegal interrogation practices used there. With all the hyperbole and vagueness of a typical Spanish legal document, the complaint strings together a bunch of familiar myths into a conspiracy theory: The Bush administration's lawyers indispensably facilitated its supposed crimes against humanity.

The complaint, nearly 100 pages long, is a sloppy and systematic distortion of the public record. Among its key misstatements is the following: "On February 7, 2002, the President signed a new memorandum in which it is established that no Taliban or Al Qaeda prisoner can be considered a prisoner of war, and therefore, to them would not be applied the guarantees contained in common article 3 of the four Geneva Conventions."

But the White House memorandum's finding as to prisoner-of-war status was based on the fact that both the Taliban and al Qaeda flagrantly ignore the laws of war, and the Supreme Court has turned down every opportunity to disagree. But in any case the memorandum's finding as to Article 3 had nothing to do with

this: By its terms Article 3 applies only to conflicts "not of an international character," which the White House reasonably interpreted as a reference to things like civil war.

The complaint further accuses Douglas Feith of authoring the "juridical analysis" used as a basis for denying *all* detainees *all* the protections of the Geneva Conventions. This propagates one of the many false claims advanced by Philippe Sands in his book *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (2008). These claims have been debunked as fraudulent on the basis of the very documents and interview transcripts that Sands used in his "research." It is a particularly sad charge, because--as the Garzón complaint itself acknowledges elsewhere--Feith in fact had argued *in favor* of applying the Geneva Conventions to the Taliban generally, a recommendation that Bush accepted.

The complaint, then, is a naked attempt to criminalize the legal advice given within the Bush administration, but the complaint's drafters can't even manage to explain what that advice was without one mistake after another. No matter. That advice is held to be the source of "all errors and crimes," as the bishop of Almería said of the Freemasons in 1815.

There is a comical aspect to Garzón's conceit. The phenomenon of European courts crusading to enforce international norms arose partly to fill the vacuum created in countries where legal systems had been gutted by war, dictatorship, or corruption. It should be enough to point out that the American legal system functions adequately--but to put things in full perspective, it functions much better than the Spanish one. The Spanish system carries long-term case backlogs that would be a political embarrassment in the United States. American legal education is also vastly better than Spain's. And as for rigorous legal reasoning--let's just say that the Inquisition is not what it used to be.

This case portends a ticklish problem for America's Democrats. During the 2008 campaign, Barack Obama abetted the impression that torture and other crimes had been committed during the Bush years. But if he thinks that waterboarding is torture, why isn't he launching prosecutions now? Because he wants to look forward and not backward? Is that a sufficient justification for casting aside his constitutional duty to see that the laws are faithfully executed? Is it a sufficient basis for casting aside international norms where crimes against humanity have been committed? Spanish courts are not likely to think so--and their interpretation of "aiding and abetting" is very expansive.

If Spain's recent moves against Bush officials are problematic for Obama, Spain's current proceedings against Israeli officials are even more so. In January of this year, another Spanish judge, Fernando Abreu, accepted a complaint alleging crimes against humanity for the targeted assassination by Israel of a Hamas terrorist leader in his home in Gaza in 2002--an attack in which 14 other Gazans were killed. The implicated Israeli officials have been warned not to travel to Europe.

The problem for Obama is that the United States under his administration has been conducting identical attacks against terrorists in Afghanistan and Pakistan with no more concern for collateral casualties. Now he has to worry that his own advisers and officials might be unpleasantly surprised by sudden arrest warrants when they travel to Europe.

Democrats have in recent years grown fond of using the legal arguments of foreigners, even foreign enemies, to increase their leverage against domestic political opponents. The Democrats' reflexive use of international law for short-term political gain is resulting in a steady erosion of America's acknowledged sovereign rights. And if Obama does not put his foot down on this new foreign intrusion into our system, a new front in the conflict with terrorists will open--in antagonistic courtroom proceedings around the world.

Alas, Obama has decided to appoint as the State Department's new legal adviser Yale law school dean Harold Koh, who champions transnational law-enforcement because, as he puts it, "sovereignty has declined in importance." But that's tantamount to saying that democracy has declined in importance: Only sovereign nations can be self-governing.

In the end what the Garzón case highlights is the need for bipartisan vindication of U.S. sovereignty. The Spanish courts are not trying to punish Bush officials for personal or even partisan misconduct. They are seeking to punish official U.S. government conduct in the course of public duties carried out within the world's most legalistic and transparent system. Worst of all, those officials are being targeted not for decisions they made themselves, but only for what they are alleged to have *believed* at the time. If Spanish courts start treating heresy as an international crime, Republican officials won't be the only ones facing indictment.

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