

Memos Reveal War Crimes Warnings

Could Bush Administration Officials Be Prosecuted For 'War Crimes' As A Result Of New Measures Used In The War On Terror? The White House's Top Lawyer Thought So

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The White House's top lawyer warned more than two years ago that U.S. officials could be prosecuted for "war crimes" as a result of new and unorthodox measures used by the Bush administration in the war on terrorism, according to an internal White House memo and interviews with participants in the debate over the issue.

The concern about possible future prosecution for war crimes--and that it might even apply to Bush administration officials themselves--is contained in a crucial portion of an internal January 25, 2002, memo by White House counsel Alberto Gonzales obtained by NEWSWEEK. It urges President George Bush declare the war in Afghanistan, including the detention of Taliban and Al Qaeda fighters, exempt from the provisions of the Geneva Convention.

In the memo, the White House lawyer focused on a little known 1996 law passed by Congress, known as the War Crimes Act, that banned any Americans from committing war crimes--defined in part as "grave breaches" of the Geneva Conventions. Noting that the law applies to "U.S. officials" and that punishments for violators "include the death penalty," Gonzales told Bush that "it was difficult to predict with confidence" how Justice Department prosecutors might apply the law in the future. This was especially the case given that some of the language in the Geneva Conventions--such as that outlawing "outrages upon personal dignity" and "inhuman treatment" of prisoners--was "undefined."

One key advantage of declaring that Taliban and Al Qaeda fighters did not have Geneva Convention protections is that it "substantially reduces the threat of domestic criminal prosecution under the War Crimes Act," Gonzales wrote.

"It is difficult to predict the motives of prosecutors and independent counsels who may in the future decide to pursue unwarranted charges based on Section 2441 [the War Crimes Act]," Gonzales wrote.

The best way to guard against such "unwarranted charges," the White House lawyer concluded, would be for President Bush to stick to his decision--then being strongly challenged by Secretary of State Powell-- to exempt the treatment of captured Al Qaeda and Taliban fighters from Geneva convention provisions.

"Your determination would create a reasonable basis in law that (the War Crimes Act) does not apply which would provide a solid defense to any future prosecution," Gonzales wrote.

The memo--and strong dissents by Secretary of State Colin Powell and his chief legal advisor, William Howard Taft IV--are among hundreds of pages of internal administration documents on the Geneva Convention and related issues that have been obtained by NEWSWEEK and are reported for the first time in this week's magazine. Newsweek made some of them available online today.

The memos provide fresh insights into a fierce internal administration debate over whether the United States should conform to international treaty obligations in pursuing the war on terror. Administration critics have charged that key legal decisions made in the months after September 11, 2001 including the White House's February 2002 declaration not to grant any Al Qaeda and Taliban fighters prisoners of war status under the Geneva Convention, laid the

groundwork for the interrogation abuses that have recently been revealed in the Abu Ghraib prison in Iraq.

As reported in this week's magazine edition, the Gonzales memo urged Bush to declare all aspects of the war in Afghanistan--including the detention of both Al Qaeda and Taliban fighters--exempt from the strictures of the Geneva Convention. In the memo, Gonzales described the war against terrorism as a "new kind of war" and then added: "The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians, and the need to try terrorists for war crimes such as wantonly killing civilians."

But while top White House officials publicly talked about trying Al Qaeda leaders for war crimes, the internal memos show that administration lawyers were privately concerned that they could be tried for war crimes themselves based on actions the administration were taking, and might have to take in the future, to combat the terrorist threat.

The issue first arises in a January 9, 2002, draft memorandum written by the Justice Department's Office of Legal Counsel (OLC) concluding that "neither the War Crimes Act nor the Geneva Conventions" would apply to the detention conditions of Al Qaeda or Taliban prisoners at Guantanamo Bay, Cuba. The memo includes a lengthy discussion of the War Crimes Act, which it concludes has no binding effect on the president because it would interfere with his Commander in Chief powers to determine "how best to deploy troops in the field." (The memo, by Justice lawyers John Yoo and Robert Delahunty, also concludes--in response to a question by the Pentagon--that U.S. soldiers could not be tried for violations of the laws of war in Afghanistan because such international laws have "no binding legal effect on either the President or the military.")

But while the discussion in the Justice memo revolves around the possible application of the War Crimes Act to members of the U.S. military, there is some reason to believe that administration lawyers were worried that the law could even be used in the future against senior administration officials.

One lawyer involved in the interagency debates over the Geneva Conventions issue recalled a meeting in early 2002 in which participants challenged Yoo, a primary architect of the administration's legal strategy, when he raised the possibility of Justice Department war crimes prosecutions unless there was a clear presidential direction proclaiming the Geneva Conventions did not apply to the war in Afghanistan. The concern seemed misplaced, Yoo was told, given that loyal Bush appointees were in charge of the Justice Department.

"Well, the political climate could change," Yoo replied, according to the lawyer who attended the meeting. "The implication was that a new president would come into office and start potential prosecutions of a bunch of ex-Bush officials," the lawyer said. (Yoo declined comment.)

This appears to be precisely the concern in Gonzales's memo dated January 25, 2002, in which he strongly urges Bush to stick to his decision to exempt the treatment of Taliban and Al Qaeda fighters from the provisions of the Geneva Conventions. (Powell and the State Department had wanted the U.S. to at least have individual reviews of Taliban fighters before concluding that they did not qualify for Geneva Convention provisions.)

One reason to do so, Gonzales wrote, is that it "substantially reduces the threat of domestic criminal prosecution under the War Crimes Act." He added that "it is difficult to predict with confidence what actions might be deemed to constitute violations" of the War Crimes Act just as it was "difficult to predict the needs and circumstances that could arise in the course of the war on terrorism." Such uncertainties, Gonzales wrote, argued for the President to uphold his exclusion of Geneva Convention provisions to the Taliban and Al Qaeda detainees who, he concluded, would still be treated "humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles" of the Geneva Convention on the treatment of prisoners of war.

In the end, after strong protests from Powell, the White House retreated slightly. In February 2002, it proclaimed that, while the United States would adhere to the Geneva Conventions in the conduct of the war in Afghanistan, captured Taliban and Qaeda fighters would not be given prisoner of war status under the conventions. It is a rendering that Administration lawyers believed would protect U.S. interrogators or their superiors in Washington from being subjected to prosecutions under the War Crimes Act based on their treatment of the

prisoners.

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