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Bush seeks retroactive immunity for violating War Crimes Act

September 23, 2006

BY ELIZABETH HOLTZMAN

Thirty-two years ago, President Gerald Ford created a political firestorm by pardoning former President Richard Nixon of all crimes he may have committed in Watergate -- and lost his election as a result. Now, President Bush, to avoid a similar public outcry, is quietly trying to pardon himself of any crimes connected with the torture and mistreatment of U.S. detainees.

The "pardon" is buried in Bush's proposed legislation to create a new kind of military tribunal for cases involving top al-Qaida operatives. The "pardon" provision has nothing to do with the tribunals. Instead, it guts the War Crimes Act of 1996, a federal law that makes it a crime, in some cases punishable by death, to mistreat detainees in violation of the Geneva Conventions and makes the new, weaker terms of the War Crimes Act retroactive to 9/11.

Press accounts of the provision have described it as providing immunity for CIA interrogators. But its terms cover the president and other top officials because the act applies to any U.S. national.

Avoiding prosecution under the War Crimes Act has been an obsession of this administration since shortly after 9/11. In a January 2002 memorandum to the president, then-White House Counsel Alberto Gonzales pointed out the problem of prosecution for detainee mistreatment under the War Crimes Act. He notes that given the vague language of the statute, no one could predict what future "prosecutors and independent counsels" might do if they decided to bring charges under the act. As an author of the 1978 special prosecutor statute, I know that independent counsels (who used to be called "special prosecutors" prior to the statute's reauthorization in 1994) aren't for low-level government officials such as CIA interrogators, but for the president and his Cabinet. It is clear that Gonzales was concerned about top administration officials.

Gonzales also understood that the specter of prosecution could hang over top administration officials involved in detainee mistreatment throughout their lives. Because there is no statute of limitations in cases where death resulted from the mistreatment, prosecutors far into the future, not appointed by Bush or beholden to him, would be making the decisions whether to prosecute.

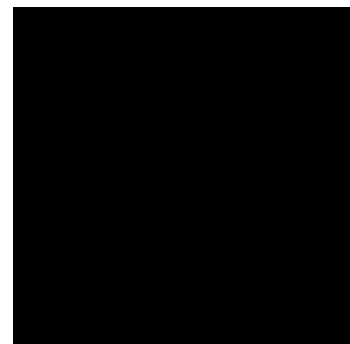
To "reduce the threat of domestic criminal prosecution under the War Crimes Act," Gonzales recommended that Bush not apply the Geneva Conventions to al-Qaida and the Taliban. Since the War Crimes Act carried out the Geneva Conventions, Gonzales reasoned that if the Conventions didn't apply, neither did the War Crimes Act. Bush implemented the recommendation on Feb. 7, 2002.

When the Supreme Court recently decided that the Conventions did apply to al-Qaida and Taliban detainees, the possibility of criminal liability for high-level administration officials reared its ugly head again.

What to do? The administration has apparently decided to secure immunity from prosecution through legislation. Under cover of the controversy involving the military tribunals and whether they could use hearsay or coerced evidence, the administration is trying to pardon itself, hoping that no one will notice. The urgent timetable has to do



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more than anything with the possibility that the next Congress may be controlled by Democrats, who will not permit such a provision to be adopted.

Creating immunity retroactively for violating the law sets a terrible precedent. The president takes an oath of office to uphold the Constitution; that document requires him to obey the laws, not violate them. A president who knowingly and deliberately violates U.S. criminal laws should not be able to use stealth tactics to immunize himself from liability, and Congress should not go along.

Elizabeth Holtzman, a former New York congresswoman, is co-author with Cynthia L. Cooper of The Impeachment of George W. Bush: A Practical Guide for Concerned Citizens.

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