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Behind the `torture memos'

AS CONFIRMATION HEARINGS NEAR, LAWYER DEFENDS WARTIME POLICY

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This week, the Senate Judiciary Committee will hold hearings on the nomination of Alberto Gonzales to be attorney general. It comes as no surprise that he is likely to face hard questions.

As counsel to the president for the past four years, Gonzales helped develop the United States' policies in the war on terror. He demonstrated leadership and, as is often the case in perilous times, generated controversy.

He will encounter questions about the decision to deny prisoner-of-war status under the Geneva Conventions to Al-Qaida and Taliban fighters and about his role in what have come to be known as ``torture memos." As a Justice Department lawyer, I dealt with both issues -- I worked on and signed the department's memo on the Geneva Conventions and helped draft the main memo defining torture. I can explain why the administration decided that aggressive measures, though sometimes unpopular, are necessary to protect America from another terrorist attack.

Sept. 11, 2001, proved that the war against Al-Qaida cannot be won solely within the framework of the criminal law. The attacks were more than crimes -- they were acts of war. Responding to the attacks and protecting the United States from another requires a military approach to the conflict. But Al-Qaida, without regular armed forces, territory or citizens to defend, also presents unprecedented military challenges.

One of the first policy decisions in this new war concerned the Geneva Conventions -- four 1949 treaties ratified by the United States that codify many of the rules for war. After seeking the views of the Justice, State, and Defense departments, Gonzales concluded in a draft January 2002 memo to the president that Al-Qaida and the Taliban were not legally entitled to POW status. He also advised that following every provision of the conventions could hurt the United States' ability to protect itself against ruthless enemies.

Gonzales' memo agreed with the Justice Department and disagreed with the State Department, which felt the Taliban (though not Al-Qaida) qualified as POWs.

The Justice Department's Office of Legal Counsel -- where I worked at the time -- determined that the Geneva Conventions legally do not apply to the war on terrorism because Al-Qaida is not a nation-state and has not signed the treaties. Al-Qaida members also do not qualify as legal combatants because they hide among peaceful populations and launch surprise attacks on civilians -- violating the fundamental principle that war is waged only against combatants. Consistent American policy since at least the Reagan administration has denied terrorists the legal privileges reserved for regular armed forces.

The Taliban raised different questions because Afghanistan is a party to the Geneva Conventions, and the Taliban arguably operated as its de facto government. But the Justice Department found that the president had reasonable grounds to deny Taliban members POW status because they did not meet the conventions' requirements that lawful combatants operate under responsible command, wear distinctive insignia, and obey the laws of war. The Taliban flagrantly violated those rules, at times deliberately using civilians as human shields.

According to Gonzales' memo, the State Department argued that denying POW status to the Taliban would damage U.S. standing in the world and could undermine the standards of treatment for captured American soldiers. Gonzales also passed on the department's worry that denying POW status "could undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat, and could introduce an element of uncertainty in the status of adversaries."

The press has consistently misrepresented Gonzales' views and latched onto a sexy sound bite used out of context. When Gonzales said in the memo that this new war made some provisions of the Geneva Conventions "quaint," he referred to the requirement that POWs be given commissary privileges, monthly pay, athletic uniforms and scientific instruments. Many stories cut the quotation short, making it seem as if he had deemed the conventions themselves "quaint."

'Obsolete' limitations

Gonzales' memo did, however, say that the terrorist threat rendered "obsolete Geneva's strict limitations on questioning of enemy prisoners." Why? Because the United States needed to be able "to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians." Information remains the primary weapon to prevent a future Al-Qaida attack on the United States.

Gonzales also observed that denying POW status would limit the prosecution of U.S. officials under a federal law criminalizing a grave breach of the Geneva Conventions. He was concerned that some of the conventions' terms were so vague (prohibiting, for example, "outrages upon personal dignity") that officials would be wary of taking actions necessary to respond to unpredictable developments in this new war.

The president took Gonzales' advice and denied POW status to suspected Al-Qaida and Taliban members.

Gonzales' advice raised legal and policy questions. Legally, could the president determine by himself that Al-Qaida or the Taliban were not entitled to POW status? No one doubted that he had the constitutional authority. Presidents have long been the primary interpreters of treaties on behalf of the United States, especially in the area of warfare. Federal judges have since split on the POW issue.

The other question was what standards the United States should follow as a matter of policy if the Geneva Conventions did not legally apply. Gonzales recommended that the United States should continue "its commitment to treat the detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles" of the Geneva Conventions. Prisoners would receive adequate food, housing and medical care, and could practice their religion. Gonzales advised that as long as the president ordered humane treatment, the military would follow his orders.

Gonzales has also received criticism for a memo he requested from the Justice Department to provide the legal definition of torture. According to press reports, Gonzales made the request after the CIA had captured high-level Al-Qaida leaders and wanted clarification of the standards for interrogation under U.S. law.

Congress' role

While the definition of torture in the August 2002 memo is narrow, that was Congress' choice. When the Senate approved the U.N. Convention Against Torture in 1994, it stated its understanding of torture as an act "specifically intended to inflict severe physical or mental pain or suffering." The Senate defined mental pain and suffering as "prolonged mental harm" caused by threats of severe physical harm or death to a detainee or third person, the administration of

mind-altering drugs or other procedures ``calculated to disrupt profoundly the senses or the personality." Congress adopted this definition in a 1994 law criminalizing torture committed abroad.

The Senate also made clear that it believed the treaty's requirement that nations undertake to prevent ``cruel, inhuman or degrading treatment or punishment" was too vague. The Senate declared its understanding that the United States would follow only the Constitution's prohibition of cruel and unusual punishment.

The Senate and Congress' decisions provided the basis for the Justice Department's definition of torture:

``Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture (under U.S. law), it must result in significant psychological harm of significant duration, e.g., lasting for months or even years. . . . We conclude that the statute, taken as a whole, makes plain that it prohibits only extreme acts."

Under this definition, interrogation methods that go beyond polite questioning but fall short of torture could include shouted questions, reduced sleep, stress positions (like standing for long periods of time), and isolation from other prisoners. The purpose of these techniques is not to inflict pain or harm, but simply to disorient.

On Thursday, the Justice Department responded to criticism from the summer, when the opinion leaked to the press. The department issued a new memo that superseded the August 2002 memo. Among other things, the new memo withdrew the statement that only pain equivalent to such harm as serious physical injury or organ failure constitutes torture and said, instead, that torture may consist of acts that fall short of provoking excruciating and agonizing pain.

Although some have called this a repudiation, the Justice Department's new opinion still generally relies on Congress' restrictive reasoning on what constitutes torture. Among other things, it reiterates that there is a difference between ``cruel, inhuman and degrading treatment" and torture -- a distinction that many critics of the administration have ignored or misunderstood.

For example, according to press reports, the International Committee for the Red Cross has charged that interrogations at Guantánamo Bay, which included solitary confinement and exposing prisoners to temperature extremes and loud music, were ``tantamount to torture." This expands torture beyond the United States' understanding when it ratified the U.N. Convention Against Torture and enacted the 1994 statute. Not only does the very text of the convention recognize the difference between cruel, inhuman and degrading treatment and torture, but the United States clearly chose to criminalize only torture.

Abu Ghurayb abuses

Criticism of the Bush administration's legal approach to interrogation first arose in the summer after the Abu Ghurayb prison scandal, and has continued with more recent stories of FBI memos showing concern about abuse of prisoners in Iraq and Guantánamo Bay. No one condones the abuses witnessed in the Abu Ghurayb photos that are being properly handled through the military justice system. But those abuses had nothing to do with the memos defining torture -- which did not discuss the pros and cons of any interrogation tactic -- nor the decision to deny POW protections to Al-Qaida and the Taliban. Gonzales, among others, has made clear that the administration never ordered the torture of any prisoner. And as multiple investigatory commissions have now found, these incidents did not result from any official orders.

At the urging of human rights groups and other opponents of the administration's policies in the war on terrorism, Senate Democrats have promised to closely question Gonzales on these

issues. I believe the hearings will show that Gonzales, who never sought to pressure or influence the Justice Department's work, appropriately sought answers to ensure compliance with the applicable law.

Asking those questions is important because we are in the midst of an unconventional war. Our only means for preventing future terrorist attacks, which could someday involve weapons of mass destruction, is to rely on intelligence that permits pre-emptive action. An American leader would be derelict if he did not seek to understand all available options in such perilous circumstances.

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