

Congress and the Bush Administration Deepen Assault on International Law

By John Gershman | December 10, 2004

Members of the U.S. Congress who oppose the International Criminal Court (ICC) continue to use every opportunity to weaken the institution. The Nethercutt Amendment (sponsored by Rep. George Nethercutt, R-Wash) attached to a recent omnibus spending bill signed into law in early December prohibits aid from the Economic Support Fund (ESF) for countries that have refused to sign a "bilateral immunity agreement" to protect U.S. citizens and certain foreign nationals from transfer to the ICC for investigation or prosecution. This attack on the ICC is merely the latest in a series of efforts to weaken the norms and institutions of international human rights and humanitarian law, an assault likely to deepen in a second Bush administration.

The funds affected by the amendment include support for anti-terrorism activities, peace building, democratization, and counter-narcotics operations. There is an exemption for countries covered under another foreign aid program known as the Millennium Challenge Account, as well as an option for the president to waive the Amendment's restrictions for members of NATO and major non-NATO allies. However, these waivers are not guarantees and would still leave many countries open to arm-twisting on the part of the U.S. According to the Coalition for an International Criminal Court, the U.S. has already signed over 80 bilateral agreements granting immunity from prosecution by the ICC. The use of these bullying tactics to demand immunity from prosecution by the ICC in the face of continuing revelations of human rights abuses by U.S. personnel in Afghanistan, Iraq, and Guantanamo Bay raises hypocrisy to a new level.

These efforts reinforce the Bush administration's efforts to weaken international humanitarian and

human rights law in the name of fighting the "war on terror." International law faces challenges from transnational terrorist networks, tyrannical regimes, and most critically, from the most powerful country in the world, a country that was one of the original architects of the international legal framework that has shaped world politics since the end of World War II.

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The disdain with which terrorists and tyrants hold international law is a common staple of political commentary and analysis. It is more frightening when the most powerful country in the world strives to weaken the architecture of international law as an explicit policy. While this assault does not begin with the Bush administration, the scale

and scope of the assault has increased markedly under its tenure, justified as part of the war on terrorism, but part of a broader effort to free the United States from the constraints of international law, including human rights law.

In addition to the assaults on international law from the Congress, the Bush administration has



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heightened its efforts to subvert international legal constraints on U.S. policy. These efforts are likely to deepen as the Bush administration's proposed nominee for Attorney General, Alberto Gonzales, was the author of a now infamous memo which argued that the prosecution of the "war on terrorism," including the treatment of detainees, should be exempt from the guidelines of the Geneva Conventions. It's important to recall that Gonzales' infamous memo was not merely a response to the Geneva Conventions, but to a U.S. law, the 1996 War Crimes Act, that prohibited any Americans from committing war crimes—defined in part as "grave breaches" of the Geneva Conventions. This illustrates that the Bush administration's presumptive nominee for Attorney General, does not merely have disdain for the entire edifice of international law, but is willing to subvert U.S. law that constrains the executive branch's exercise of military force.

Since the Abu Ghraib violations came to light, no senior member of the military or the Pentagon has been held accountable. Recent reports suggest that violations have continued to take place even after the Abu Ghraib violations came to light. Most recently, reports from the International Committee of the Red Cross (ICRC) and the FBI have raised new concerns about U.S. interrogation practices at its detention center in Guantanamo Bay, Cuba. According to the *New York Times* (November 30, 2004) the ICRC reported that U.S. practices were "tantamount to torture." The FBI has raised similar concerns in a recent report, and continues to argue that the tactics have failed in their primary objective—the extraction of actionable intelligence.

Sovereignty Resurgent

These recent efforts to argue that the U.S. should not be subject to the proscriptions of international law fall within a historical and broader effort to reinforce and reaffirm U.S. sovereignty in the face of efforts to expand the jurisdiction of international law. Legal scholar Peter Spiro in a 2000 *Foreign Affairs* article labeled this movement the "new sovereignists." Paralleling what the head of the Council on Foreign Relations Richard Haas has described as "multilateralism a la carte," Spiro argues that the new sovereignists advocate international law "a la carte," and

At the center of their thinking stands the edifice of sovereignty. Sovereignty, in this conception, calls for America to resist the incorporation of international norms and drapes the power to do so in the mantle of constitutional legitimacy. "Because the United States is fully sovereign," claims Jeremy Rabkin, a professor of political science at Cornell University, "it can determine for itself what its Constitution will require.

And the Constitution necessarily requires that sovereignty be safeguarded so that the Constitution itself can be secure."

This broad effort to "defend" an American sovereignty under assault is better viewed as an effort to oppose social reforms at home and U.S. freedom to maneuver abroad. Dismissing international law except when it is pragmatically useful is a strategy for maintaining double standards, when there is one law for everyone else and one law for the U.S. It is a strategy for institutionalizing U.S. primacy. It is a strategy for empire.

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Against Our Nature

An often-used companion argument to the exceptionalism argument above is that international law somehow goes against the grain of contemporary American political culture and political realities. Neoconservative analyst Robert Kagan argues that the United States believes the world to be one where “international laws and rules are unreliable and where true security and the defense and promotion of a liberal order still depend on the possession and use of military might.” He acknowledges that earlier the U.S. did advocate a greater reliance on international law, but that was because it was a rising power, and that international law is ultimately a resource for the weak, not the strong.

But Kagan ignores crucial details in the construction of international law in the aftermath of World War II, when the United States was also a hegemonic power. The Universal Declaration of Human Rights can trace part of its heritage to the Democratic president that President George W. Bush is most fond of comparing himself to—Franklin Delano Roosevelt. In his State of the Union address

on January 11, 1944, in the midst of a great war, Roosevelt presented a list of economic and social rights that should be seen as equal in importance to the original Bill of Rights. As Cass Sunstein discusses in *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need It More Than Ever* (Basic Books), this speech was influential in shaping the negotiations over the content of the Universal Declaration of Human Rights, negotiations in which Eleanor Roosevelt played a critical role. It’s not power *per se* that dictates a country’s approach to

international law; it’s the choices of political leaders and in a democracy (hopefully) the pressure of the citizens that make a difference. When our leaders oppose international law as a framework for foreign policy, the only hope is for the citizens to step forward and demand accountability.

This year represents the 60th anniversary of Roosevelt’s declaration of the second bill of rights, and the 56th anniversary of the Universal Declaration of Human Rights. It is time to renew the struggle for respect for human rights and international law in the most powerful country in the world. Reclaiming that legacy renews the commitment to an American and a human tradition. It represents an opportunity to construct a new cosmopolitan patriotism, one that sees human rights and international law as integral to our security, not an obstacle to it. And it’s a fight that needs to begin right here, at home.

As Eleanor Roosevelt noted at the tenth anniversary of the Universal Declaration:

“Where, after all, do universal human rights begin? In small places, close to home—so close and so

small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.”

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FOR MORE READING:

Status of U.S. Bilateral Immunity Agreements (BIAS) Coalition for an International Criminal Court
(December 1, 2004)
http://www.iccnw.org/documents/otherissues/impunit-yart98/BIAsByRegion_current.pdf

FOR MORE ANALYSIS FROM FOREIGN POLICY IN FOCUS:

Pentagon Report Argues Torture is Legal in War on Terror
By Jim Lobe (June 10, 2004)
<http://www.fpif.org/commentary/2004/0406torturelegal.html>

Outsourcing Torture and the Problems of "Quality Control"
By Charles Knight (May 18, 2004)
<http://www.fpif.org/commentary/2004/0405torture.html>

Bait and Switch? Human Rights and U.S. Foreign Policy
By Julie A. Mertus (March 2004)
<http://www.fpif.org/papers/2004rights.html>

Dreams of Empire, Eulogies for International Law
By John Gershman (March 25, 2003)
<http://www.presentdanger.org/frontier/2003/0325empire.html>

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