

# **“NOTWITHSTANDING”: HOW CONGRESS ENABLED CHUCK HAGEL AND ASH CARTER TO KEEP CHILD RAPE AND TORTURE FROM DISRUPTING FOREVER WAR**

Back in September of 2015, the New York Times published sickening details on widespread child rape in the Afghan military. The Times’ investigation was centered in part on a victim of child rape who had served as a “tea boy” to Afghan officers and subsequently acquired a weapon. He opened fire inside a base, killing three US Marines.

I had noted at the time that one of the victims, Gregory Buckley, Jr. had told his father just before he was killed that reporting Afghan soldiers for child rape was discouraged because “it’s their culture”. This stood out to me because I had been reporting on the retroactive classification of a DoD report that stated many green on blue killings could be explained by cultural incompatibilities between US troops and the Afghans they were training.

The reports of child rape were so disgusting that Congress commissioned a study by the Special Inspector General for Afghanistan Reconstruction to look into how such widespread abuses were allowed to happen. After all, the “Leahy laws” were aimed at preventing funding of foreign entities known to be committing gross violations of human rights. SIGAR finished their report in June of 2017, but it has only now been declassified and released.

While the report “found no evidence that US

forces were told to ignore human rights abuses or child sexual assault”, the end result of actions by Secretaries of Defense Chuck Hagel and Ash Carter leading up to the September 2015 incident are damning in how they result in just that outcome, at least when it comes to using funding that Congress provided.

Here is how SIGAR places the investigation into perspective:

### **(U) WHAT SIGAR REVIEWED**

(U) Since fiscal year (FY) 2002, the United States has appropriated more than \$71.2 billion in assistance for the Afghan security forces. Since FY 2005, appropriations have been made available to the Secretary of Defense for the Afghanistan Security Forces Fund (ASFF) to provide assistance to the Afghan security forces “notwithstanding any other provision of law” (referred to as the “notwithstanding clause”). At the same time, provisions of federal laws 10 U.S.C. § 362 and 22 U.S.C. § 2378d, commonly referred to as the “Leahy laws” generally prohibit the Department of Defense (DOD) and Department of State (State), respectively, from providing assistance to a unit of a foreign security force if they have credible information that the unit has committed a gross violation of human rights until the behavior has been remediated.

You are excused if, like me, you need to go off and curse a while over the outrageous sums of money we have “invested” in a security force that is failing at this very moment.

But now we have yet another outrage. Congress, in its infinite wisdom, decided in 2005 that no other law could be used to get in the way of the funding of our sacred war in Afghanistan. Recall that the torture memos were released in late 2004, so Congress rightly feared that much of what we were funding in Afghanistan was illegal

and they didn't want to let those measly laws get in the way of their war.

Just look what DoD had to go through to ignore what the Afghans were doing. Here is Chuck Hagel trying to provide cover in 2014:

On August 18, 2014, in a memo on the implementation of the DOD Leahy law, the Secretary of Defense issued guidance on how to report gross violations of human rights by units of foreign security forces worldwide, including in Afghanistan.

This of course looks just fine. We all need a written protocol on how to report human rights abuses. But what happens when abuses are found? Oh, that's bad. And even though DoD still redacts much of Hagel's action, it's clear he was told of abuses but he freed up funds anyway by relying on the "notwithstanding" clause:

(U//FOUO) DOD HAS USED THE NOTWITHSTANDING CLAUSE TO EXEMPT THE AFGHANISTAN SECURITY FORCES FUND FROM THE LEAHY LAW

(S//NF) Although DOD and State have confirmed that some units of the Afghan security forces have committed gross violations of human rights, the Secretary of Defense has used the notwithstanding clause in the DOD Appropriations Act to continue providing ASFF funding for select training, equipment, and other assistance to some of the implicated units.

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It gets even worse. Ash Carter did the same thing, just a few short months before the tea boy attack that killed Buckley and two others:

(S//NF) On May 1, 2015, Secretary of Defense Ash Carter issued similar policy guidance regarding the application of the DOD Leahy law to assistance provided through ASFF.<sup>41</sup> Secretary Carter exercised the notwithstanding clause for the same categories of ASFF-funded assistance that Secretary Hagel did in 2014. Under the 2015 guidance, the Commander of USFOR-A is authorized to "petition" for expanded application of the notwithstanding clause to provide funding to Afghan security forces units for which there are credible allegations of a gross violation of human rights under the following circumstances:

1. (U//FOUO) Where withholding assistance from a specific implicated unit would present significant risks to U.S. or coalition forces.
2. (U//FOUO) Where withholding assistance from a specific implicated unit would significantly undermine or damage the U.S. mission or national security objectives.
3. (U//FOUO) Consulting with appropriate Afghan officials would reveal DOD's sources and methods for obtaining the credible information.
4. (U//FOUO) The assistance is for human rights and/or law of war training for any Afghan security forces unit, separate from formal training events.

Chuck Hagel and Ash Carter were fully aware of gross human rights abuses, including both child rape and torture, but elected to use the blunt tool that Congress had given them to ignore these human rights abuses and continue funding the same units within the Afghan military that carried out the abuses. So while official policy was that abuses are to be reported, they then are completely ignored at the Congressional and Cabinet level in order to continue a forever war that is forever failing.