

Gonzales on Executive Detention Powers and the Role of Courts

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Since 2001, White House Counsel Alberto Gonzales has played a central role in formulating and implementing broad executive powers to detain suspected “combatants” in the “war on terror.” Based on a legal theory articulated by Gonzales, the President asserted the power to declare any U.S. citizen or foreign national an “enemy combatant,” purporting to strip such persons of the human rights and due process protections of both the Geneva Conventions (often called the “laws of war”) and the U.S. criminal justice system. Under this theory, U.S. citizens can be held incommunicado, deprived of their right to counsel, and denied substantive judicial review of their detention for as long as the President deems necessary. Moreover this theory of inherent executive power conceives a President as Commander-in-Chief unaccountable to Congress or the Judiciary.

Gonzales’ theory of executive power has now been firmly rejected by the federal courts. But Gonzales bears the burden of explaining whether he has moderated his own view of executive power, and the role of the courts in checking that power and in holding terrorists accountable.

Gonzales Advanced Unorthodox Views on Executive Power

Gonzales has claimed sweeping authority for the President as Commander-in-Chief to unilaterally determine who is an “enemy combatant” and to detain any such person indefinitely and incommunicado – without any established legal rights and subject only to such procedural protections as the President

deems prudent in the individual case. This “no rights” approach was based on Gonzales’ views set forth in his January 25, 2002, memorandum to President Bush. In that memorandum, Gonzales wrote that the President has “constitutional authority to make the determination...that the GPW [the Third Geneva Convention on Prisoners of War] does not apply to Al Qaeda and the Taliban.”¹ Gonzales recommended that suspected Al Qaeda or Taliban adherents (whether held there or sent to Guantanamo Bay) be summarily denied prisoner-of-war status. The denial was to be based not on an individual determination of their combatant or non-combatant status, as the law of war requires,² but by general presidential order.³ (Human Rights First analyzes, starting on page 9 of this booklet, how the January 25 Gonzales’ memorandum departed from well-established views of the applicability of the Geneva Conventions.)

Gonzales also advocated the view that the President’s broad authority to arrest and detain suspected Al Qaeda members was not limited to the battlefield, but could be applied – with a similar lack of accompanying procedural checks – to U.S. citizens detained by civilian authorities in the United States as well. Since September 11, 2001, the President has designated three individuals as “enemy combatants” and detained them in military prisons inside the continental United States: Jose Padilla (U.S. citizen); Yaser Hamdi (U.S. citizen); and Ali Saleh Kahlah al-Marri (Qatari national). Both Padilla and al-Marri were arrested by civilian authorities in the United States and then abruptly removed from the criminal justice system and transferred to military custody upon presidential designation.

Shortly before the U.S. Supreme Court heard oral arguments in the cases of Padilla and Hamdi, Gonzales defended the claim of presidential power in their cases in a speech before the ABA’s Standing Committee on Law and National Security: “[T]here is no rigid process for making such determinations [of who is an

enemy combatant] – and certainly no particular mechanism required by law. Rather, these are the steps that we have taken in our discretion.”⁴

The effect of Gonzales’ positions on the laws of war (that the Geneva Conventions need not apply) and the U.S. criminal justice system (that the President may override it at his discretion) has been to establish a zone of presidential authority in which no law would constrain presidential conduct toward certain individuals (both U.S. citizens and not) under U.S. control. Indeed, in light of his January 25, 2002 memorandum on the applicability of the Geneva Conventions, it was disingenuous for Gonzales to suggest in February and March 2004 that Padilla and Hamdi were simply being treated according to the laws of war *instead of* domestic criminal law.⁵ The laws of war would have required, among other things, that Padilla and Hamdi be afforded individualized hearings on whether they should be designated prisoners of war or instead civilians who unlawfully engaged directly in combat.⁶

Based on Gonzales’ prior public statements, along with his written legal advice to the President, it is unclear what constraints, if any, he believes govern executive powers to detain suspects in the “war on terror.” In his view, it seems, neither the laws of the criminal justice system nor the laws of war should apply to the Executive branch.

Adopting Gonzales’ position “would be effecting a sea change in the constitutional life of this country, and . . . would be making changes that have been unprecedented in civilized society.”⁷ Gonzales believes “criminal charges, lawyers, and trials are neither ‘necessary or appropriate’ when the Executive Branch decides to detain a U.S. citizen as an enemy combatant; ‘different rules,’ which only the Executive may determine, ‘have to apply’ when the threat of terrorism arises.”⁸

In any case, Gonzales' position was rejected overwhelmingly by the U.S. Supreme Court in decisions issued in June 2004. In *Hamdi v. Rumsfeld*, the Court ruled 8-1 that a U.S. citizen captured in Afghanistan and labeled an "enemy combatant" could not be held indefinitely at a U.S. military prison without the assistance of a lawyer, and without an opportunity to contest the allegations against him before a neutral arbiter.⁹ Justice Sandra Day O'Connor in *Hamdi* made clear that the executive's power is constrained by the Bill of Rights, finding that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker."¹⁰ (The second key June decision, concerning detainees at Guantanamo Bay, is discussed below.)

Gonzales Advocated Extreme Limits on the Role of the Courts

Coincident with his expansive view of presidential power, Gonzales has also advocated sharp limits on the role of the judiciary to inquire into the legal status of those held in federal custody. In public statements, he has argued that the judiciary must exercise extreme deference in reviewing presidential detention decisions related to terrorist suspects, leaving little room for substantive judicial review or enforcement of individual rights in U.S. courts.

For example, Gonzales lauded the Fourth Circuit's decision in *Hamdi v. Rumsfeld* (the decision later overturned by the U.S. Supreme Court) in support of this theory of extreme judicial deference as "brilliant," its reasoning "incisive and unimpeachable."¹¹ He reasserted this view as Hamdi's case was being briefed to the U.S. Supreme Court, urging that "any searching judicial inquiry into the factual underpinnings of the President's judgment... can extend no further than ensuring it has eviden-

tiary support" – that is, that the executive merely has "some evidence supporting its determination."¹²

Gonzales also advocated against judicial involvement in the President's decision to designate hundreds of foreign national detainees as "enemy combatants" at Guantanamo Bay, arguing that "the judicial branch has no role in that determination."¹³ He emphasized that the United States "need not provide" the Guantanamo detainees "access to counsel" or "the ability to challenge their detention in criminal court."¹⁴ And he argued that providing "enemy combatants" access to counsel would frustrate U.S. national security.¹⁵

Throughout this country's history, including times of war and conflict, the Judiciary has ruled on the President's compliance with the Constitution, laws and treaties.¹⁶ "However untrained the federal judiciary may be 'in executing war plans,' it is fully capable of interpreting the Constitution, domestic and international law, and articulating the legal principles that restrain executive overreaching in times of security threat."¹⁷

The U.S. Supreme Court also rejected Gonzales' view in June 2004, holding 6-3 in *Rasul v. Bush* that those detained at Guantanamo Bay were entitled to challenge the legality of their prolonged detention there in U.S. federal court.¹⁸

Whether Gonzales continues to hold this very narrow view on the role of the courts in checking presidential power is a question of immediate importance in consideration of his nomination to be Attorney General. Since the *Rasul* decision, the Justice Department has sought to dismiss *habeas* petitions filed by Guantanamo detainees, monitor attorney-client communications, demand that courts defer to all government actions, and refuse to address the merits of the detainees' claims.¹⁹ As one of the detainees' lawyers put it, the Justice Department's actions are "akin to the

actions taken decades ago by several states in massive resistance to the Supreme Court's desegregation ruling in *Brown v. Board of Education*.²⁰

Furthermore, despite the Supreme Court's ruling in *Hamdi*, the Justice Department has continued to assert discretionary executive power to restrict Jose Padilla's and Ali Saleh Kahlah al-Marri's communications with their lawyers.²¹ In the case of Padilla, although the parties have been litigating the fundamental legal issues presented by the case for more than two years, the Justice Department has continued to oppose Padilla's efforts to expedite consideration of his petition.²² Under the current schedule, Padilla's request for relief at the trial court level will not be resolved until January 2005.²³

Conclusion

Gonzales' views that the President may exercise complete discretion in deciding whether to observe provisions of U.S. and international law, and that "enemy combatants" are not entitled to legal counsel or meaningful judicial review of their detention, have now been rejected by the federal courts – including, most notably, by the Supreme Court in the *Hamdi* and *Rasul* decisions issued in June. The question remains whether, if confirmed to serve as Attorney General, Gonzales will abide by the letter and spirit of these decisions, or strive to circumvent them.

Questions for Gonzales on Presidential and Judicial Power

1 In light of the U.S. Supreme Court's ruling in *Hamdi v. Rumsfeld*, what limitations do you now believe exist on the President's powers to detain those he deems "enemy combatants" in the "war on terror"? Has the Court's decision in *Hamdi* prompted you to reconsider any of the views you had expressed beforehand on the breadth of executive powers – such as in your remarks before the American Bar Association last February?

2 You have stated that the laws of war apply to all enemy combatants. Yet at the same time, the Administration has not followed key provisions of the Geneva Conventions – particularly the use of Article 5 hearings – to those it has detained. Can you clarify just which aspects of the law of war you believe *do* apply to U.S.-held detainees – and which do not?

3 In light of the U.S. Supreme Court's ruling in *Rasul v. Bush*, do you now accept that those individuals detained at Guantanamo Bay have the right to challenge the legal and factual basis of their detention in U.S. courts? As Attorney General, how will you advise that right be implemented?

4 What do you consider to be the appropriate level of deference the judiciary should give to the executive's finding that an individual is an "enemy combatant?"

5 Do you believe the Combatant Status Review Tribunal process implemented at Guantanamo Bay provides sufficient process so as to render federal court review unnecessary?

6 As Attorney General what criteria would you use in determining whether you would recommend prosecution in federal court of an individual belonging to Al Qaeda arrested on suspicion of planning a bomb attack?

7 You have stated that “[t]o suggest that an Al Qaeda member must be tried in a civilian court because he happens to be an American citizen . . . is to apply the wrong legal paradigm.” Could you explain why this is necessarily the case and what are the inadequacies of our present criminal justice system for dealing with Al Qaeda and other suspected terrorists?

8 You are also on the record stating that the “war on terrorism” presents a “new paradigm,” which “renders obsolete” much of the Geneva Conventions’ provisions. Would you please articulate what legal structure does in fact operate with respect to suspected terrorists and what roles you envision the Attorney General, the President, the Congress and courts might play in this new paradigm?

9 Given Justice O’Connor’s clear statement in *Hamdi v. Rumsfeld* that enemy combatants have a right to legal counsel, are Jose Padilla and Ali Saleh Kahlah Al-Marri legally entitled to full access to their legal counsel? Are those detained at Guantanamo Bay who are represented by counsel legally entitled to full access to their counsel? If not, what limits would you seek to apply as Attorney General?

Section Notes

¹ See Memorandum of Alberto Gonzales, White House General Counsel to President George W. Bush (January 25, 2002) [hereinafter Gonzales Memorandum], at 1.

² Convention (III) Relative to the Treatment of Prisoners of War, Geneva, August 12, 1949, 75 U.N.T.S. 135, art. 5 [hereinafter Third Geneva Convention], available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68> (accessed Nov. 27, 2004).

³ See Gonzales Memorandum, *supra* note 1, at 1.

⁴ Alberto R. Gonzales, Speech to American Bar Association Standing Committee on Law and National Security (February 24, 2004) [hereinafter ABA Speech], available at http://www.abanet.org/natsecurity/judge_gonzales.pdf (accessed Nov. 27, 2004).

⁵ In his ABA speech, Gonzales invoked the Geneva Conventions, stating “[t]he law applicable in this context is the law of war – those conventions and customs that govern armed conflicts.” *Id.* He further added: “To suggest that an Al Qaeda member must be tried in a civilian court because he happens to be an American citizen – or to suggest that hundreds of individuals captured in battle in Afghanistan should be extradited, given lawyers, and tried in civilian courts – is to apply the wrong legal paradigm.” *Id.* See also Radio Interview by Juan Williams, National Public Radio with Judge Alberto Gonzales, White House Counsel (March 15, 2004) [hereinafter Radio Interview], available at <http://www.npr.org/templates/story/story.php?storyId=1766507> (accessed Nov. 24, 2004).

⁶ Third Geneva Convention, *supra* note 2, art. 5; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, August 12, 1949, 75 U.N.T.S. 287, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5?OpenDocument> (accessed Nov. 27, 2004); Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-6 (1997); Hamdan v. Rumsfeld, No. 04-1519, (JR) (D.D.C. Nov. 8, 2004), at 17-27, available at http://www.humanrightsfirst.org/us_law/PDF/detainees/hamdan-order-110804.pdf (accessed Nov. 27, 2004).

⁷ Brief for Louis Henkin et al. as *Amici Curiae* in *Rumsfeld v. Padilla*, O. T. 2003, No. 03-1027, 3 (quoting transcript of Oral Argument in the Court of Appeals, Nov. 17, 2003, at 116:9-12 (Comment of Parker, J.)) [hereinafter Henkin Brief], available at http://www.humanrightsfirst.org/us_law/inthecourts/padilla_briefs/Supreme_Court/Amicus_in_Support_of_Padilla/Padilla_Amicus_Brief.pdf (accessed Dec. 2, 2004).

⁸ *Id.* (quoting ABA Speech and Secretary of Defense Donald H. Rumsfeld, Remarks to Greater Miami Chamber of Commerce (Feb. 13, 2004)).

⁹ Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004).

¹⁰ *Id.*, at 2634.

¹¹ ABA Speech, *supra* note 4.

¹² *Id.*

¹³ Radio Interview, *supra* note 5.

¹⁴ *Id.*

¹⁵ ABA Speech, *supra* note 4.

¹⁶ Henkin Brief, *supra* note 7, at 4.

¹⁷ *Id.* (quoting ABA Speech).

¹⁸ *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

¹⁹ See, e.g., Respondent’s Reply Memorandum in Support of Motion to Dismiss or for Judgment as a Matter of Law at, *In Re Guantanamo Detainees* (No. 02-0299) (CKK) (arguing Guantanamo Bay Naval Base is not part of the United States); Response to Complaint in Accordance with Court’s Order of July 25, 2004, at 2-6, *Al Odah et al. v United States* (No. 02-0828) (CKK) (the Government argued that Petitioners have no “right to relief, including the right of access to counsel...because petitioners as aliens outside the sovereign territory of the United States lack any cognizable Constitutional rights.”) (The Government went further in arguing that legal counsel would be provided to certain detainees, but communications between attorney and client would be monitored.); Response to Petitions for Writ of Habeas Corpus and Motion to Dismiss or for Judgment as a Matter of Law and Memorandum in Support at 6-19, *Hicks et al. v United States* (No. 02-0299) (arguing that the Executive has unilateral authority to detain enemy combatants with extreme judicial deference). These views are in contravention of the U.S. Supreme Court’s decision in *Rasul v Bush* and many have been rejected by the District Court for the District of Columbia. See, e.g., *Al Odah et al. v United States*, No. 02-0299, (CKK) (D.D.C. Oct. 20, 2004) (rejecting Government’s request to monitor attorney client communications and emphasizing the Court’s jurisdiction to hear the Petitioner’s claims), available at <http://www.dcd.uscourts.gov/02-828a.pdf> (accessed Nov. 28, 2004). The District Court has yet to accept the Government’s request for a summary dismissal of Petitioners complaints.

²⁰ Petitioners’ Reply at 2, *Al Odah, et al. v United States* (No. 02-0828) (CKK), available at http://pegc.no-ip.info/archive/Al_Odah_vs_US/al_odah_response_20041020.pdf (accessed Nov. 28, 2004)..

²¹ Petition for Writ of Habeas Corpus, *Padilla v Hanft* (No. 04-2221), July 2, 2004, available at <http://news.findlaw.com/hdocs/docs/padilla/padillahant70204pet.pdf> (accessed Nov. 27, 2004); Memorandum in Support of Motion for Unmonitored Attorney-Client Meetings and Correspondence Between Petitioner and Counsel, *Al Marri et al v Hanft* (No. 04-2257), Oct. 28, 2004, available at <http://www.scd.uscourts.gov/Noteworthy/AlMarri/Images/0000017.pdf> (accessed Nov. 27, 2004).

²² See Motion to Expedite Proceedings, *Padilla v Hanft* (No. 04-2221), Aug. 3, 2004, available at <http://www.scd.uscourts.gov/Padilla/Images/00000017.pdf> (accessed Nov. 27, 2004); Responses to Motions to Vacate Referral to Magistrate Judge and to Expedite Proceedings, *Padilla v Hanft* (No. 04-2221), Aug. 17, 2004, available at <http://www.scd.uscourts.gov/Padilla/Images/00000020.pdf> (accessed Nov. 27, 2004).

²³ Scheduling Order, *Padilla v Hanft* (No. 04-2221), Sept. 27, 2004, available at <http://www.scd.uscourts.gov/Padilla/Images/00000031.pdf> (accessed Nov. 27, 2004).