

Gonzales on Military Commissions

Gonzales was at the center of policy discussions leading to the issuance of the President's November 13, 2001 Military Order authorizing military commission trials. The Order represents an unconstitutional expansion of executive power, ignores decades of legal developments, including the Geneva Conventions and the Uniform Code of Military Justice, and has failed utterly as a policy to bring terrorists to justice.

As White House Counsel, Alberto Gonzales was at the center of a “secretive and contentious process,” which led to the decision to create military commissions.¹ On November 13, 2001, President George W. Bush issued a Military Order permitting trial by military commission of those suspected of being members of Al Qaeda, or conspiring with, aiding and abetting, or harboring, those that were.² There has been little public discussion of the procedure by which the Military Order was developed, but numerous reports indicate that White House Counsel Alberto Gonzales played a central role in developing the idea of using military commissions and in drafting the Order itself.

The Military Order and the commissions it authorized are deeply flawed as a matter of law, and have failed as a matter of policy. As Attorney General, Gonzales will be a key player in continuing to develop the Administration's legal strategies to counter terrorism. His

views on the wisdom and legality of forsaking both the civilian criminal justice system and the established military justice system in favor of military commissions should be probed extensively.

Flawed Process Excluded Government's Military and International Law Experts

As set out in detail below, the Military Order relies on antiquated legal standards, caught in a kind of time warp – in which the 1949 Geneva Conventions, the 1951 Uniform Code of Military Justice, and myriad developments in international human rights law – never happened.

Though troubling, this is not surprising, since it appears that military and international law experts were largely excluded from the process that resulted in the Military Order.³ In the

weeks following the September 11 attacks, Gonzales created an interagency working group to consider “justice options” for captured terrorists, but when the group failed to advance military commissions as a viable option, it was disbanded and the White House Counsel’s office took charge.⁴ According to press reports, key Pentagon experts with decades of experience on military justice issues, including both the Navy and Army JAGs, were kept out of the loop.⁵ Gonzales disregarded recommendations of a group of army lawyers who suggested changes to the Order to ensure greater accord with military justice standards.⁶ When the Order was issued on November 13, neither Secretary of State Colin Powell nor National Security Advisor and Secretary of State-Designate Condoleezza Rice had seen it.

Widespread Criticism and Ultimate Failure

The Military Order engendered immediate and fierce criticism: from Members of Congress, none of whom had been informed that the order was coming; from columnists ranging from Anthony Lewis to William Safire, who saw it as an unconstitutional usurpation of executive power; from 500 law professors, who called the commissions contemplated by the Order “legally deficient, unnecessary, and unwise;” and from military law experts, many of whom believed the Order would lead to a degradation of the well-developed and highly-respected American military justice system.⁷

Seventeen months later, the Pentagon issued final commission rules that, while ameliorating some of the most egregious aspects of the initial Order, construct a system that ignores decades of developments in military law and the laws of war. The rules raise significant concerns about a defendant’s right to a fair trial, including the lack of independent judicial oversight, lack of attorney-client confidentiality, lower standards of evidence, and restrictions

on the defendant gaining access to civilian counsel.⁸

In a November 30, 2001 *New York Times* opinion piece defending the Military Order, Gonzales argued that one of the main “advantages” of military commissions over civilian trials would be their ability to “dispense justice swiftly, close to where our forces may be fighting, without years of pretrial proceedings or post-trial appeals.”⁹ But three years after the Military Order was issued, the policy of trying suspected terrorist captives by military commission has been a failure. Of the nearly 600 prisoners held at Guantanamo Naval Base — far from the battlefield — only four have been formally charged to stand trial before the commissions; the cases of two Britons initially designated by the President as eligible for trial were shelved in response to demands by U.K. Attorney General Lord Goldsmith that any verdict against the men be reviewable by civilian courts. Other U.S. allies have likewise raised concerns about the fairness of the commissions. And the proceedings so far in the four live cases have reinforced initial concerns about the capacity of the process to produce a fair trial. Appointed military counsel have publicly questioned the fairness of the military commissions, and on November 8 a federal judge ordered that commission proceedings in one of the cases be halted because the Administration failed to comply with the Geneva Conventions and the commission rules violate the defendant’s right to confront witnesses and be present at trial.¹⁰

Military Order based on Flawed Understanding of the History of Military Commissions

In defending the propriety of the Military Order, Gonzales often cites to the many instances in American history in which military commissions have been used. But despite this reference to history, Gonzales seems to have missed the key fact present throughout the

historical exercise of military commission jurisdiction: that military commissions have been used as a jurisdictional supplement to – not a substitute for – courts-martial.¹¹

Military Order Usurps Congressional Authority

Military officers and legal experts have long agreed that military commissions interstitially exercise constitutional powers committed to Congress, which goes a long way towards explaining why military commissions have traditionally followed the procedures statutorily mandated for courts-martial. But President Bush's Military Order takes a completely different view. It is based on an assertion of executive power rarely, if ever, present in past military commissions. Recent press reports indicate that this claim of executive power was part of the attraction of using military commissions, as opposed to other "justice options" such as civilian criminal trials or military courts martial, which derive their authority and rules from Congress.

But this view conflicts with Congress' historical role in military commissions. In 1916, Congress expanded court-martial jurisdiction to cover "any other person who by the law of war is subject to trial by military tribunals."¹² At the same time it elected to preserve concurrent jurisdiction for the military commission, but only after the author of the legislation, Army Judge Advocate General Enoch Crowder, specifically testified that "*Both classes of courts have the same procedure.*"¹³

UCMJ Article 36 authorizes the President to prescribe "Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter and triable in courts-martial, *military commissions*, and other military tribunals . . . *but which may not be contrary to or inconsistent with this chapter.*"¹⁴

The District Court for the District of Columbia found the military commission's evidentiary

procedures so lacking that they failed to satisfy Article 36 and rendered the whole process unlawful.¹⁵

President Bush's Military Order not only makes suspected terrorists *eligible* for trial by military commission, it purports to *require* that any such persons be turned over to Department of Defense custody and forecloses their trial by any other court.¹⁶

Military Order Relies on Antiquated Legal Standards

Gonzales often cites President Franklin Delano Roosevelt's military order and proclamation for the trial of eight Nazi U-boat saboteurs in arguing that President Bush's Military Order is well within the mainstream of presidential authority and military law.¹⁷ But the November 13 Military Order incorporates procedural measures from President Roosevelt's order that are no longer considered acceptable under contemporary U.S. military justice standards. These include:

- A presiding officer who is part of the voting trial panel. The presiding "law member" was removed from the trial panel by the Uniform Code of Military Justice which took effect in 1951.¹⁸ The Military Justice Act of 1968 subsequently established formal military judges independent of the convening authority.¹⁹
- Allowing the trial panel to determine questions of law and rule on the admissibility of evidence. These have been the exclusive province of the military trial judge since 1968.
- Sentencing for even the most serious offenses by a 2/3 vote of the trial panel. This was actually out-of-date even in President Roosevelt's day; the Articles of War (forerunner of today's Uniform Code of Military Justice) were amended in 1920 to require a unanimous vote for

a death sentence and concurrence of at least 3/4 of the trial panel for any sentence greater than 10 years.²⁰

- No pretrial charging process is specified although Article 32 of the UCMJ calls for a formal hearing process allowing the accused to present evidence and question witnesses.

Military Order Fails to Provide Post-Trial Review Typical of Past Military Commissions

Historically, military commission trials have been subject to exactly the same post-trial review as the court-martial.²¹ With the adoption of the UCMJ, direct post-trial review was further expanded with the creation of the Court of Military Appeals (now the Court of Appeals for the Armed Forces). But, despite the fact that every war crimes trial process instituted since 1950 has provided for a formal appellate process,²² President Bush's Military Order turns back the clock on these developments by excluding all review other than by him, or at his discretion, the Secretary of Defense.

Military Order Ignores Developments in International Law

Since the last use of military commissions after World War II, international law has seen substantial codification of individual rights and minimum fair trial standards through treaties to which the United States is a party. During that period, the United States has routinely criticized the use by other nations of special military tribunals to conduct trials of non-servicemembers, even including suspected terrorists.²³

The Administration asserts that terror suspects covered by the Military Order are unlawful combatants outside the protections of the Third Geneva Convention. But the Order does

not specify any international standard that is applicable, even though minimum fair trial standards are included in several other accords which might be applicable even if the Third Convention is not, including:

- The Fourth Geneva Convention on the protection of civilian populations
- The First Additional Geneva Protocol of 1979
- The International Covenant on Civil and Political Rights

This is a dangerous, even reckless, position. Currently, the United States Government employs tens of thousands of civilians, including CIA officers and defense contractors, in key roles in the "war on terror" and in the conflict in Iraq. Many of these individuals have been, or are likely to be, engaged in actual fighting, yet all would qualify as "unlawful combatants" by the Administration's definition. The standardless approach adopted by the Administration, under Gonzales' counsel, puts these loyal Americans essentially at the mercy of whatever standards any foreign nation or organization which might capture them chooses to justify.

Conclusion

Gonzales was at the center of policy discussions leading to the issuance of the President's November 13, 2001 Military Order authorizing military commission trials. The Order represents an unconstitutional expansion of executive power, ignores decades of legal developments, including the Geneva Conventions and the Uniform Code of Military Justice, and has failed utterly as a policy to bring terrorists to justice. The Senate should question closely Gonzales' views on the legal foundations for the Order and the wisdom of the policy it represents.

Questions for Gonzales on Military Commissions

- 1 Why were JAGs and other experts on military and international law – not to mention the Secretary of State and the President’s National Security Advisor – excluded from discussions and debate as the policy on military commissions was being formulated?
- 2 For what reasons did you support authorizing military commissions using antiquated military justice standards? Why did you not endorse the court-martial as a means for trying suspected terrorists?
- 3 If the United States persists in employing standards from a past epoch, on what basis will we be able to criticize other nations seeking to try Americans (or their own citizens) using procedures we deem obsolete?
- 4 How do you justify failing to provide the same post-trial review provided by the court-martial when with only a single exception (the 1942 saboteurs’ trial), this has been the consistent practice since the inception of the military commission during the Mexican American War?
- 5 As White House Counsel, on what basis did you advise the President of the United States to promulgate an order purporting to unilaterally bar judicial review when the U.S. Supreme Court had already flatly rejected that very approach in 1942?
- 6 Given the constitutional commitment of key authority relative to military commissions to Congress, and that branch’s adoption of the UCMJ articles cited as authority in the President’s military commission order only after testimony that military commissions followed the same procedure as courts-martial, how do you justify the departures from statutory court-martial procedure contained in the President’s order?
- 7 What is the legal basis for the President to foreclose prosecution in other fora for violations of specific offenses which Congress has specifically defined by statute and made subject to the personal and subject matter jurisdiction of statutorily constituted courts?
- 8 Doesn’t the President’s inherent responsibility to protect our citizens abroad, as well as a sense of loyalty to those employed in support of our national security, call for the United States to explicitly define what international standards are applicable to the trials of individuals not qualifying as lawful combatants?
- 9 Isn’t it essential that we faithfully adhere to such standards ourselves so that we can consistently demand the same of others?

Section Notes

¹ See Tim Golden, “After Terror, A Secret Rewriting of Military Law,” N.Y. TIMES, Oct. 24, 2004, at A1; Tim Golden, “Administration Officials Split Over Stalled Military Tribunals,” N.Y. TIMES, Oct. 25, 2004, at A1.

² Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (“Military Order”) (Nov. 13, 2001).

³ Golden, *supra* note 1.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ See December 5, 2001 letter from 500 law professors and lawyers to Senator Patrick Leahy, on file with Human Rights First.

⁸ See Human Rights First, Military Commissions Background, available at http://www.humanrightsfirst.org/us_law/detainees/militarytribunals.htm. (accessed Nov. 29, 2004).

⁹ Alberto R. Gonzales, “Martial Justice, Full and Fair,” N.Y. TIMES, Nov. 30, 2001, at A27.

¹⁰ *Hamdan v. Rumsfeld*, No. 04-1519 (JR) (D.D.C. Nov. 8, 2004), available at http://www.humanrightsfirst.org/us_law/PDF/detainees/hamdan-order-110804.pdf (accessed Nov. 29, 2004).

¹¹ Military commissions were first developed by General Winfield Scott during the Mexican War of 1846-48 to permit the trial – of U.S. military personnel as well as Mexicans – for offenses falling outside existing statutory military jurisdiction, based on common law application of the laws of war. Military commissions were also used extensively for that purpose during and after the Civil War, the Philippine Insurrection and the Second World War. See David Glazier, *Kangaroo Court of Competent Tribunal?: Judging the 21st Century Military Commission*, 89 Va. L. Rev. 2005, 2027-73 (2003).

¹² An Act Making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes, 39 Stat. Part I, 619, 650-70, Art. 12 at 652 (1916).

¹³ S. Rep 64-582 at 40 (1916) (testimony of Brig. Gen. Crowder) (emphasis added).

¹⁴ UCMJ Art. 36, 10 U.S.C. § 836 (emphasis added). “This chapter” means the entire UCMJ, codified as Chapter 47 of Title 10, U.S.C.

¹⁵ *Hamdan*, *supra* note 10, at 31-42.

¹⁶ Military Order, *supra* note 2, § 2 (b).

¹⁷ Proclamation No. 2561, 7 Fed. Reg. 5101 (July 2, 1942); Military Commission Order, 7 Fed. Reg. 5103 (July 2, 1942).

¹⁸ 10 U.S.C. §§ 801-946 (2000).

¹⁹ Military Justice Act of 1968, Pub. L. 90-634, 82 Stat. 1335, 1336 (1968).

²⁰ An Act to amend an Act entitled “An Act for making further and more effectual provision for the national de-

fense, and for other purposes,” approved June 3, 1916, 41 Stat. Part I, 759, 787-812 (1920)

²¹ President Roosevelt’s 1942 order reflected a one-time departure from this practice in calling for the record to be forwarded directly to him, bypassing the three-officer review panel mandated by Articles of War Article 50 ½ adopted in 1920. But FDR himself restored this commonality following a second Nazi landing in America in 1944, directing that two would-be spies be tried by a second military commission with the results then forwarded for review exactly as required by statute. The U.S. Supreme Court categorically rejected this limitation in *Ex parte Quirin* after meeting in a special July term just to review the constitutionality of the military tribunal before the commission had issued its verdicts. 317 U.S. 1 (1942). President Bush’s Military Order is actually more restrictive than FDR’s 1942 attempt to preclude judicial review that was overturned by the Supreme Court, as it adopts the first portion of FDR’s restrictive language but omits the “except under such regulations . . .” provision. See also Louis Fischer, *NAZI SABOTEURS ON TRIAL* 138-44 (2003); Glazier, *supra* note 11, at 2059-61.

²² See discussion in Glazier, *supra* note 11, at 2081-83.

²³ See, e.g., Human Rights Watch, *Fact Sheet: Past U.S. Criticism of Military Tribunals*, available at <http://www.hrw.org/press/2001/11/tribunals1128.htm> (accessed Nov. 29, 2001).