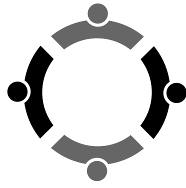

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Attorney General Confirmation Hearings

Background Papers on Alberto Gonzales

Torture, Executive Power, the Geneva Conventions
and Miltary Commissions

December 2004

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Gonzales on Torture

Gonzales helped shape and influence the law and policy of the Bush Administration in quintessentially military matters, yet he consistently refused to acknowledge established military doctrine and heed the opinions of career military officers.

As White House Counsel, Alberto Gonzales played an integral role in formulating Bush Administration policy on coercive interrogations in its "war on terror." First, he advised the President to suspend application of the Geneva Conventions to Al Qaeda members and to categorically deny prisoner-of-war status to all Taliban members. (This is discussed in greater detail in the next section on "Gonzales and the Geneva Conventions," starting on page 9.) Second, Gonzales asked the Justice Department to identify legal authority for harsh interrogation tactics that the intelligence community had misgivings about pursuing.

These two initiatives have had a corrosive effect on military operations from Afghanistan to Guantanamo to Iraq, sowing seeds of confusion, increasing the danger to U.S. troops, and damaging the reputation of the United States in the eyes of the world. As Attorney General, Gonzales would play a pivotal role in prosecuting this "war on terror." Before being confirmed for that post, the Senate should demand that he provide candid, clear explanations regarding his own definitions of torture and his view toward presidential power and immunity from prosecution.

Gonzales on Interrogation

In 2002, Gonzales asked the Office of Legal Counsel to prepare legal opinions on interrogation standards under the Convention Against Torture as implemented by federal statute (18 U.S.C. §§ 2340; 2340A) and binding international law obligations.[1] The memorandum addressed to Gonzales (the "Bybee memorandum") does not appear to have been merely, as Gonzales has characterized it, an exercise in abstract legal reasoning.[2] Rather, Gonzales requested the memorandum with explicit policy ramifications in mind and it served as the direct legal underpinning (both retrospectively and prospectively) for harsh interrogation tactics employed on individuals detained by the United States in Afghanistan, Iraq and Guantanamo. He also disseminated these legal opinions to concerned policymakers.

The Bybee memorandum states: "You have asked for our Office's views regarding the standards of conduct under the Convention

Against Torture . . . As we understand it, this question has arisen in the context of the conduct of interrogations outside of the United States." The CIA had sought advice on the legal limits of interrogation, a request prompted by severe treatment of "high value detainees" such as Abu Zubaydah.[3] The Bybee memorandum served as a basis for interrogation tactics that have reportedly included "waterboarding," denial of pain killer medication, simulated drowning, and threatening to transfer detainees to other countries' interrogators.[4]

The Bybee memorandum also served as the legal basis for another memorandum, authored by Assistant Attorney General John Yoo, that details permissible interrogation methods, including those mentioned above.[5] The Bybee memorandum also figures prominently in the Defense Department's *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations* (April 4, 2003) ("Working Group Report"), with many paragraphs excerpted verbatim. The Working Group Report in turn supported the actual policy implemented by the Defense Department at Guantanamo Bay on April 16, 2003. *See DOD Memorandum for the Commander, U.S. Southern Command: Counter-Resistance Techniques in the War on Terrorism* (April 16, 2003). The International Committee of the Red Cross (ICRC) reportedly informed the U.S. Government, including White House lawyers, that the interrogation techniques employed at Guantanamo Bay constitute "an intentional system of cruel, unusual and degrading treatment and a form of torture."[6]

Thus, Gonzales' request and apparent approval of the Bybee memorandum helped lay the legal foundation for DOD interrogation techniques at Guantanamo, including "Change of Scenery Up," "Change of Scenery Down," "Dietary Manipulation," "Environmental Manipulation," "Sleep Adjustment," "False Flag," and "Isolation." As has been widely documented, interrogation tactics employed at both Guantanamo and Afghanistan then "migrated" to Iraq.

The Bybee Memorandum is Wrong as a Matter of Law and Policy

The Bybee memorandum reads largely like a roadmap to circumvent the law banning torture. Indeed, in a number of instances the memorandum pointedly ignores significant case law that does not support its permissive view on torture and expansive presidential power. Many legal scholars have criticized the analysis as "reckless," "weak," and "embarrassing."[7] In response to the overwhelming criticism of the Bybee memorandum, the Department of Justice saw fit to disavow it.[8] What remains most troubling is that no one, including Gonzales, apparently had any misgivings about this legal opinion until it was publicly disclosed.

The Bybee memorandum makes a number of questionable legal conclusions. We offer a brief critique of each of the central arguments and then provide some further policy analysis.

Bybee memorandum: "We conclude that for an act to constitute torture as defined in Section 2340 [the statutory prohibition against torture], it must inflict pain that is difficult to endure. 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."
(Page 1)

Response: This interpretation of the prohibition against torture ignores the plain meaning of the statute's text and provides only a strained and limited construction of the term "severe pain." Both common sense and moral consciousness suggest that pain that is diffi-

cult to endure may fall well short of organ failure. In addition, the conclusion ignores federal case law discussed elsewhere in the memorandum that a single incident of beatings and kickings to the stomach constituted torture under the same statutory language. (Pages 22-27)[9]

Bybee memorandum: "Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign." (Page 31)

Response: In response to a question whether this was "good law in this administration," Gonzales declined to repudiate the analysis, explaining only that thus far the President "has not exercised his Commander-in-Chief override, he has not determined that torture is, in fact, necessary to protect the national security of this country."[10] But the analysis is legally indefensible. As the Supreme Court just recently made clear in *Hamdi v. Rumsfeld*, "a state of war is not a blank check for the President . . . Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[11] In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court rejected President Truman's claims of inherent domestic authority in wartime and held unconstitutional the President's summary seizure of the steel mills.[12] Particularly where, as here, Congress has directly prohibited certain forms of torture and ill-treatment in ratifying and implementing through legislation the Convention Against Torture, the President's discretion in exercising his Commander-in-Chief powers in this realm is at its minimum. As reflected in the statutory prohibition against torture, and in the Convention Against Torture itself as ratified, Congress has prohibited torture and other cruel treatment; such treatment may not be excused on the basis of emergency or state of war, and superior orders do not excuse it.[13] Finally, whatever powers the President has to act in the short term to repel insurrection or invasion – the subject of most of the case law cited in the Bybee memorandum – such powers have no application to the practice of coercive interrogation the memorandum addresses.

Bybee memorandum: "Any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional." (Page 31)

Response. The Supreme Court has made clear that executive officials who commit unlawful acts pursuant to presidential order are not, solely on that basis, made immune from prosecution in court.[14] Indeed, criminal liability for abuses committed by federal officials against detainees attaches not only to those directly responsible for carrying out such acts, but also those who assisted, abetted, ordered or otherwise caused such offenses to occur. Thus, for example, a military or civilian superior may be held legally responsible not just for unlawful orders he may require troops under his command to carry out, but also for the failure "to take such measures as [a]re within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."[15]

Bybee memorandum: "[E]ven if an interrogation method might violate Section 2340A, necessity or self-defense could provide justifications that would eliminate any criminal liability." (Page 46)

Response: The Bybee memorandum acknowledges that "[t]he [necessity] defense is available 'only in situations wherein the legislature has not itself, in its criminal statute[s], made a determination of values." The memorandum claims that "Congress has not

explicitly made a determination of values vis-à-vis torture." But of course Congress has made such a determination of values; Congress ratified the Convention Against Torture and passed the federal statute banning torture. Significantly, Article 2 of the Convention Against Torture states, in relevant part: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[16] The Convention Against Torture is the supreme law of the land, and as such should be viewed as explicitly precluding any recourse to a necessity defense.

The Bybee self-defense argument is even weaker. Case law and legislation on self-defense require that a person show he was confronted by a serious threat of bodily harm or death, the threat was imminent, and his response was both necessary and proportionate.[17] The general practice of coercive interrogation contemplated by the Bybee memorandum – motivated by a generalized concern of potential terrorist attacks against the nation instead of against the person himself – does not come close to constituting the kind of imminent threat required to justify the use of self-defense. The Bybee memorandum does not cite any cases suggesting that the government might immunize an entire policy by virtue of a self-defense rationale.

The Bybee Memorandum Flies in the Face of Military Regulations

Notably absent from the Bybee memorandum's discussion of the law on torture is any reference to military regulation or U.S. policy regarding torture. The United States Army categorically prohibits torture *and* coercion of detainees in its custody. The Army Field Manual on Intelligence Interrogation (Field Manual 34-52), the Army's primary guidance for the conduct of interrogations, states that international law and U.S. policy expressly prohibits acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation. Such illegal acts are not authorized and will not be condoned by the U.S. Army. Acts in violation of these prohibitions are criminal acts punishable under the UCMJ. If there is doubt as to the legality of a proposed form of interrogation not specifically authorized in this manual, the advice of the command judge advocate should be sought before using the method in question.[18]

The Field Manual further notes the shame and danger brought on by the torture of detainees: "Revelation of use of torture by U.S. personnel will bring discredit upon the U.S. and its armed forces while undermining domestic and international support for the war effort. It also may place U.S. and allied personnel in enemy hands at a greater risk of abuse by their captors. Conversely, knowing the enemy has abused U.S. and allied [prisoners of war] does not justify using methods of interrogation specifically prohibited by [international law] and U.S. policy."[19]

In addition to their illegality, the United States has long known that torture and cruel, inhuman or degrading treatment are ineffective methods for obtaining information. Field Manual 34-52 states, "Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear."[20]

Gonzales helped shape and influence the law and policy of the Bush Administration in quintessentially military matters, yet he consistently refused to acknowledge established military doctrine and heed the opinions

of career military officers. Ignoring these sources on intelligence interrogation was both unwise and imprudent. Sadly, reports of abuse from Abu Ghraib, Bagram and Guantanamo demonstrate the deleterious effect this disregard has had on our military and on detainees.

Gonzales' request for the Bybee and Yoo memoranda and the various reports of coercive interrogations belie his assertions that the Bybee memorandum was one limited to abstract legal questions. News reports indicate that Gonzales understood that the legal opinions on torture and interrogation methods would give license to or limit the severity of the treatment of detainees. At the very least, as the apparent conduit for CIA requests for legal authority to employ certain interrogation techniques, Gonzales' approval of the memoranda would have supported the use of torture as an interrogation tactic on high value detainees from Al Qaeda. In addition, the fact that the CIA often worked with U.S. armed forces or in their facilities provided further opportunities for military personnel to adopt or mimic interrogation techniques authorized for the CIA.

As the recipient of the Bybee memorandum, Gonzales also apparently disseminated the memorandum to other individuals and agencies in the government, thereby expanding the applicability of the legal reasoning to agencies besides the CIA. Given the wholesale adoption of the memorandum's analysis of the law on torture in the Working Group Report, it appears that Gonzales did not express any criticism of the memorandum and that he saw fit to provide the memorandum to those crafting interrogation tactics to be employed on a much wider scale.

Gonzales' request for a legal opinion on torture was not an academic exercise. The repercussions were felt in Afghanistan, Guantanamo, and Iraq. Gonzales must answer for both his actions and omissions.

Questions for Gonzales on Torture

1 According to a *USA Today* article on June 28, 2004, you requested a memorandum detailing the legality of specific interrogation techniques. Will you provide this document to us?

2 Which interrogation tactics were deemed acceptable under the laws prohibiting torture and cruel, inhuman or degrading treatment or punishment? (*See also* Letter to Alberto R. Gonzales, Counsel to the President, from John C. Yoo, Deputy Asst. Attorney General, Office of Legal Counsel (August 1, 2002).)

3 Press reports indicate that you requested the August 1, 2002 memorandum from Assistant Attorney General Jay Bybee (the "Bybee memorandum") on standards of conduct for interrogation under the federal law banning torture, 18 U.S.C. §§ 2340-2340A, to provide legal authority for harsh interrogation techniques employed on high-ranking Al Qaeda members. The memorandum itself reads: "You have asked for our Office's views regarding the standards of conduct under the Convention Against Torture . . . As we understand it, this question has arisen in the context of the conduct of interrogations outside of the United States." Did you suggest or encourage the Office of Legal Counsel to tailor its legal analysis to justify the techniques the CIA wished to use? Which techniques were these?

4 What did you do with the August 1, 2002 Bybee memorandum when you received it? With whom did you share it? With whom did you discuss its legal analysis? Did you approve its analysis?

5 The Bybee memorandum served as the basis for much of the legal analysis in the Pentagon Working Group Report (April 4, 2003), which in turn supported newly author-

ized interrogation techniques for use at Guantanamo (April 16, 2004)? How did the DOD Working Group come to employ so much of the language of the Bybee memorandum? Who transmitted the Bybee memorandum to the Working Group?

6 In June 2004, the Justice Department disavowed the Bybee memorandum's legal analysis. Why did the Justice Department disavow the contents of the memorandum? Did you support the disavowal? Had you previously raised any concerns about its contents between August 2002 and June 2004? Are there parts of the Bybee memorandum that you find objectionable? Are there any portions of the legal argument with which you disagree?

7 Do you agree with the Bybee memorandum's claim that "even if an interrogation method might violate Section 2340A, necessity or self-defense could provide justifications that would eliminate any criminal liability?" Do you agree with its claim that the torture statute does not preclude the forced administration of all drugs, but rather prohibits only the use of drugs that "disrupt profoundly the senses or the personality . . . manifested by "dementia," "brief psychotic disorder[s]," "obsessive-compulsive disorder behaviors," and "pushing someone to the brink of suicide?" Finally, must an interrogation technique cause, as the Bybee memorandum argues, "severe pain" at least as great as that associated with organ failure in order to constitute torture?

8 Is it your opinion that a person following Presidential orders to commit acts of torture is immune from prosecution under Section 2340 of the federal torture statute? Do you agree with the theory of executive power – that Congress' torture statute unconstitutionally infringes on presidential power – that the Bybee memorandum advances? As Attorney General would you prosecute such an individual?

9 In releasing a number of memoranda regarding torture and interrogation tactics on June 22, 2004, you stated: "What [the President] has done is ordered a standard of conduct that is clearly lawful. He has not had to – as I indicated, in terms of what he has done or has not done, he has not exercised his Commander-in-Chief override, he has not determined that torture is, in fact, necessary to protect the national security of this country." Were you saying there, and do you believe, that the President may *choose* to override the statutory prohibition against torture?

10 Article 2 of the Convention Against Torture states, in relevant part: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." Do you believe any "exceptional circumstances" exist that would justify torture? Would you authorize the use of torture as Attorney General in any circumstances?

11 To your knowledge has this President ordered the use of interrogation techniques that rise to the level of cruel, inhuman or degrading treatment or punishment? Have you advised the use of any interrogation techniques that rise to the level of cruel, inhuman or degrading treatment or punishment?

12 As Attorney General you would oversee the Office of Legal Counsel. As the office primarily responsible for rendering legal advice to all government agencies, OLC has exerted significant influence over interrogation policy. From as early as January 2002 to as late as March 2004, OLC has issued a series of memoranda, variously determining that the United States was not bound by the Geneva Conventions with respect to certain groups in Afghanistan and Iraq, and that particular interrogation methods rising to the level of extreme violence and degradation did not violate U.S. or international law. Many of the arguments are inconsistent with binding do-

mestic and international law. These memoranda have served as the basis for many policies reflected in DOD Orders, and military agency authorizations of interrogation techniques. Military investigations have attributed many of the incidents of torture to, in part, confusion over appropriate treatment because of abdication of the existing interrogation regime in Army Field Manual 34-52, Intelligence Interrogation, and the proliferation of varied legal opinions. Will you as Attorney General order the revocation of all such OLC-generated memoranda and reaffirm FM 34-52 as defining the limits of United States' interrogation techniques and the applicability of the Geneva Conventions to all detainees, thereby bringing clarity and removing any ambiguity for interrogators in the theater of operations, be it at Guantanamo, Afghanistan, Iraq, or elsewhere?

13 Do you support the 9/11 Commission's recommendation to order all U.S. Armed Forces and other U.S. government agencies engaged in detention and interrogation to observe Geneva Convention protections for all combatants and civilians, and publicly affirm the United States' binding obligation to (in the language of Geneva Common Article 3) prohibit violence, cruel treatment, torture, or any outrages upon personal dignity, including humiliating and degrading treatment, of those in U.S. custody?

Section Notes

[1] *See* Memorandum for Alberto R. Gonzales, Counsel to the President, from: Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (August 1, 2002) ("Bybee memorandum"); Letter to Alberto R. Gonzales, Counsel to the President, from: John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel (August 1, 2002) ("Yoo Letter").

[2] *See* Press Briefing by White House Counsel Alberto Gonzales, et al, (June 22, 2004), available at http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html (accessed Nov. 23, 2004).

[3] *See* Michael Hirsh, John Barry and Daniel Klaidman, "A Tortured Debate," NEWSWEEK, June 21, 2004; *see also* David Johnston and James Risen, "Aides Say Memorandum backed Coercion Already in Use," N.Y. TIMES, June 26, at A1; Dana Priest, "CIA Puts Harsh Tactics on Hold," WASH. POST, June 27, 2004, at A1.

[4] *Id*.

[5] Toni Locy and John Diamond, "Memorandum Lists Acceptable 'Aggressive' Interrogation Methods," USA TODAY, June 28, 2004; *see also* Yoo Letter, *supra* note 1 (The Yoo Letter and various news reports refer to the Yoo memorandum on the legality of specific interrogation techniques, but it has not been released to the public).

[6] Neil A. Lewis, "Red Cross Finds Detainee Abuse in Guantanamo," N.Y. TIMES, Nov. 30, 2004, A1. Government lawyers were reportedly informed of the ICRC's findings in July 2004, which included interrogation techniques involving shared medical information, "'humiliating acts, solitary confinement, temperature extremes, [and] use of forced positions." *Id*.

[7] *See* Adam Liptak, 'Legal Scholars Criticize Memos on Torture," N.Y. TIMES, June 25, 2004; Edward Alden, FINANCIAL TIMES, June 10, 2004, at 7 (quoting Yale Law School Dean Harold Koh) ("Lawyers who are employed by the U.S. government have a responsibility to uphold and enforce the laws of the United States.").

[8] Richard W. Stevenson, "White House Says Prisoner Policy Set Humane Tone," N.Y. TIMES, June 23, 2004.

[9] *See, e.g.*, Mehinovich v. Vuckovic, 198 F. Supp. 2d 1322, at 1346 (N.D. Ga. 2002); Torture Victim Protection Act, 28 U.S.C. § 1350 note (2000).

[10] *See* Gonzales Press Briefing *supra* note 2.

[11] 124 S. Ct. 2633, 2650 (2004).

[12] 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[13] *See* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, [hereinafter CAT] art. 2.3, opened for signature February 4, 1985, S. Treaty Doc. 100-20 (1988) 1465 U,N.T.S. 85 ("An order from a superior officer or a public authority may not be invoked as a justification of torture."); Little v. Barreme, 6 U.S. (2 Cranch) 170, 177-78 (1804) (holding President's order to naval officer could not legalize what would otherwise have been a trespass).

[14] *Cf.* United States v. Nixon, 418 U.S. 683 (1974).

[15] In re Application of Yamashita, 357 U.S. 1, 16 (1946).

[16]CAT, *supra*, note 12, art. 2.2.

[17] *See* WAYNE R. LAFAVE ET AL., CRIMINAL LAW 495 (3d ed. 2000) (footnote omitted).

[18] Field Manual 34-52, 1-8.

[19] *Id*.

[20] *Id*.

Gonzales and the Geneva Conventions

The January 25 memorandum by Gonzales laid the foundation for subsequent Administration policy that the Geneva Conventions did not apply to those detainees – and that therefore the Conventions' restrictions on cruel treatment did not afford such persons any legal protections.

As White House Counsel, Alberto Gonzales was at the center of policy discussions after September 11, 2001 about the applicability of the Geneva Conventions to the wars in Afghanistan, Iraq, and in what the Administration termed "the war on terror." His views on executive power and U.S. treaty obligations led to significant departures by the Bush Administration from rules and procedures of the Geneva Conventions governing the detention and treatment of people captured in Afghanistan, Iraq and elsewhere. As Attorney General, Gonzales will be charged with ensuring that the fight against terrorism is conducted in compliance with the laws of the land. The burden should be on Gonzales to explain his views on whether U.S. treaty obligations – including those under the Geneva Conventions – constitute part of this law and must be upheld.

The Geneva Conventions of 1949, signed and ratified by the United States, codify the laws of war and apply to all international armed conflicts; they serve as the main instruments of international humanitarian law to protect those caught up in war. Under the Conventions, there are two broad categories of persons who can be detained lawfully by an occupying power: (1) prisoners of war, and (2) civilians. The Conventions that cover these two categories – commonly known as the Third and Fourth Geneva Conventions, respectively – set out the terms of detention of each category of individuals, the protections to be accorded during their detention, and the circumstances under which they are to be released.[1]

Gonzales' Legal Opinions on the Applicability of the Geneva Conventions Raise Serious Concerns

At the heart of the analysis below is Gonzales' advice in a memorandum to the President dated January 25, 2002 that the Geneva Conventions are inapplicable to captured members of Al Qaeda, and that members of the Taliban could be denied prisoner-of-war

status under the Third Convention. Although the January 25 memorandum is marked "draft," we are unaware of any subsequent version of the memorandum refining – or in any way repudiating – its core findings. As the central legal statement of the White House on the Conventions, it had a significant impact on much that followed, including with regard to detainees transferred to Guantanamo Bay and those captured and detained in Iraq.

Gonzales' legal advice to the President on the Geneva Conventions:

- Reverses longstanding U.S. policy and practice supporting application of the 1949 Conventions (and their predecessors);
- Undermines the Conventions' protections for our own soldiers – a point central to the critique by Secretary of State Powell and his top legal officer – and undermines international cooperation on the laws of war;
- Implies that the United States may "need" to commit – and countenance – war crimes in its counterterrorism efforts, and so should avoid application of the Geneva Conventions to its actions because "grave breaches" of the Conventions would subject perpetrators to prosecution under U.S. law (Section 2441 of the War Crimes Act of 1996). Stating that "it is difficult to predict the needs and circumstances that could arise in the course of a "war on terror"ism," Gonzales' memorandum suggests that a motive for concluding that the Conventions are inapplicable was to insulate U.S. personnel and leadership from criminal liability;
- Dismisses the risk that a determination of non-applicability of the Conventions to Afghanistan "could undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat";
- Ignores the fact that the Third Geneva Convention permits detention in international armed conflict without filing criminal charges;[2] and
- Opens the door to broader departures from the Geneva Conventions by arguing that Convention parties that become "failed states" (the memorandum argues that Afghanistan under the Taliban is a "failed state") are neither obligated nor protected by the Conventions during war. This view misstates and undermines the structure of humanitarian law protections, which are triggered by the application of either treaty or customary law to the territory of conflict, not on the basis of whether groups or individuals have signed or ratified Conventions that can only be signed and ratified by states.

Gonzales' Views on Geneva Conventions Led to Policy Confusion and Illegal Treatment of Detainees

Afghanistan

U.S. detention policies relating to the war in Afghanistan have been shrouded in secrecy, prompting unclear and, at times, conflicting information about detainees' legal status and rights.[3] Many of those captured in Afghanistan were removed to the U.S. Naval Base at Guantanamo Bay beginning in early 2002. By the time of those transfers, the Administration had already distanced itself from a policy of applying the Geneva Conventions to detainees captured in Afghanistan.

In early January 2002, Secretary of Defense Rumsfeld stated that the United States, as a matter of policy but not any legal obligation, would treat detainees from Afghanistan in a

manner "reasonably consistent with the Geneva Conventions" – without providing specifics; he also described an intent to "generally" follow the Conventions but only to "the extent they are appropriate." The President, Secretary Rumsfeld, and other senior Administration officials early on cited those detained at Guantanamo Bay as "enemy combatants" or "unlawful combatants" – terms with unclear legal meanings and not used in either the Third or Fourth Geneva Convention;[4] indeed, Secretary Rumsfeld was explicit in stating on January 11 that "technically unlawful combatants do not have any rights under the Geneva Conventions."[5]

At some point the Justice Department weighed in with what Gonzales in his January 25 memorandum termed a "formal legal opinion" concluding that the Third Geneva Convention on prisoners of war (GPW) did not apply to "the conflict with Al Qaeda," and that there were "reasonable grounds" to conclude it also did not apply to the conflict with the Taliban. The Senate should uncover what role Gonzales, as the President's chief legal advisor, played in this morass of policy and practice which the Schlesinger Report earlier this year described as "vague and lacking."[6]

The exact sequence of developments in January 2002 remains unclear. In his January 25 memorandum, Gonzales states that a week before – on January 18 – he had advised the President about the Justice Department legal opinion with respect to both Al Qaeda and the Taliban, and that "I understand that you decided that that the GPW does not apply and, accordingly, that Al Qaeda and Taliban detainees are not prisoners of war under the GPW." It adds that Secretary of State Powell "has requested that you reconsider that decision" and was of the view that the Convention applied to both Al Qaeda and Taliban detainees – or at least that they be afforded case-by-case review before being denied prisoner of war status.

The January 25 memorandum perhaps has become best known – and certainly most widely-quoted – for its language that the global "war on terrorism" "is a new kind of war" and that this "new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions."[7] But the language of the memorandum should not obscure Gonzales' ultimate conclusion: that the Geneva Conventions do not apply to the war in Afghanistan

Gonzales' conclusion that the two Geneva Conventions did not apply to Al Qaeda detainees, and that captured Taliban also did not merit POW status under the Third Geneva Convention, had direct, practical impact for U.S. detention policies and practices. The January 25 memorandum by Gonzales laid the foundation for subsequent Administration policy that the Geneva Conventions did not apply to those detainees – and that therefore the Conventions' restrictions on cruel treatment did not afford such persons any legal protections.[8]

Gonzales' memorandum provoked a quick and strong response – and call for an internal review – from the Department of State, with Secretary Colin Powell and the Department's Legal Adviser William H. Taft IV raising concerns about the implications for U.S. forces of such a broad departure from the Conventions. (The memorandum indicates that Powell had sought reconsideration earlier – sometime between January 18 and 25; in any event, his concerns were laid out clearly in response to the Gonzales' memorandum itself.) Powell responded to the January 25 memorandum with one of his own the following day, warning that "[i]t will reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and will undermine the protections of the rule of law for our troops, both in this specific conflict and in general" – while also provoking a hostile international reaction "making military cooperation more difficult to sustain." Taft set out his legal and policy con-

cerns in a February 2 memorandum directed to Gonzales, which stated in part: “A decision that the Conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged deprives our troops there of any claim to the protection of the Conventions in the event they are captured and weakens the protections afforded by the Conventions to our troops in future conflicts.”[9]

There is no public record of any subsequent memorandum issued in Gonzales’ name that superseded the January 25 “draft;” the upcoming confirmation hearings afford an opportunity to finally clarify what happened next. What *is* clear is that there soon followed a slight, but ultimately inconsequential, modification of position: the President (through his Press Secretary) announced on February 7 that the Conventions applied to captured members of the Taliban but not to Al Qaeda fighters, whether the latter were captured “in Afghanistan or elsewhere throughout the world.” While the President – based on the Gonzales’ analysis – affirmed his constitutional authority to suspend application of the Geneva Conventions with regard to Afghanistan, he added that “I decline to exercise that authority at this time.”[10] The President further concluded that the Taliban were not entitled to POW status under the Third Geneva Convention, based on Gonzales’ flawed argument about “failed states” and in contravention of U.S. Army regulations requiring individualized determinations of the status of prisoners.

Gonzales’ arguments drew heavily from a memorandum by Jay S. Bybee, head of the Justice Department’s Office of Legal Counsel, addressed to Gonzales and Defense Department General Counsel William Haynes. (This 37-page OLC memorandum is dated January 22, though Gonzales says he told President Bush about the OLC’s legal opinion on January 18 and that the President made his determination of non-applicability of the Third Convention that same day – four days before the date of the Bybee memorandum that has been made publicly available.) The argument detailed in the Bybee memorandum, and in turn the Gonzales’ “draft” to the President, was that the Taliban did not exercise full control over the territory and people of Afghanistan, was not recognized by the international community, and had not fulfilled its own international obligations – and that it was not a government but rather a “militant, terrorist group.”

This multi-part standard for what constitutes a “failed state” drew from both the Restatement (Third) on Foreign Relations Law and a State Department document. But neither of those was intended to be used to determine the applicability of the Geneva Conventions to a particular conflict. Gonzales, drawing on Bybee, applied the standard for whether Afghanistan was a “normal” functioning state to impose a sweeping constraint on application of the Geneva Conventions to individuals associated with the Taliban, not just those who were part of Al Qaeda.

Iraq

Unlike Afghanistan, from the launch of the war in Iraq in March 2003 through the continuing occupation phase, the Bush Administration regularly stated that the Geneva Conventions apply to the conflict there.[11] So clear was the judgment that the Conventions would apply in Iraq that Gonzales noted the reason President Bush had not made a formal determination invoking the Conventions pre-invasion was “because it was automatic that Geneva would apply.”[12]

Yet despite the clarity in public statements about the Conventions’ applicability to Iraq, the Administration has created considerable uncertainty on the ground. Much of this confusion emanated from statements by Defense Department officials and memoranda generated by the Justice Department, but as White House Counsel, Gonzales played a role in creating uncertainty about whether the Con-

ventions' legal protections apply to detainees held in Iraq.

In April 2003, soon after the invasion, the Defense Department stated that it was holding detainees either as prisoners of war under the Third Geneva Convention, or as civilian internees under the Fourth Convention. One month later, the Department used the term "unlawful combatants" apparently as a new category of detainees; then in September 2003 it used the term "security detainees" to describe a separate category for Iraqi prisoners suspected of being involved in attacks on U.S. forces there.[13]

Gonzales later weighed in on the application of the Geneva Conventions to Iraq in another significant way, when he requested that the Justice Department prepare a memorandum concerning the meaning of Article 49 of the Fourth Geneva Convention – which broadly prohibits transfers of "protected persons from occupied territory" – as applied to Iraq. Jack Goldsmith III, successor to Bybee as head of the Office of Legal Counsel, responded with a "draft" memorandum dated March 19, 2004 to Gonzales and also sent to the top legal officials at the Departments of State and Defense, National Security Counsel, and Central Intelligence Agency.

The March 19 Goldsmith memorandum – made public in late 2004 – stated that it was elaborating on an October 2003 "interim guidance" about the permissibility under the Fourth Convention of such relocation of "protected persons." The Goldsmith memorandum concluded that the United States would be acting consistently with Article 49 were it to remove one set of "protected persons" – illegal aliens – from Iraq pursuant to local immigration law, and that in addition it could relocate both illegal aliens and other "protected persons" from Iraq to another country to "facilitate interrogation" – as long as (1) that was for a "brief but not indefinite period", and (2) adjudicative proceedings had not been brought against such individuals.

Goldsmith's memorandum to Gonzales sheds light on his involvement in the "ghost detainee" program of secret detentions, described by Army Maj. Gen. Antonio Taguba in his report as "deceptive, contrary to Army doctrine and in violation of international law." The *Washington Post* has reported that Gonzales asked the Office of Legal Counsel in October 2003 to address the legality of the removal of at least one detainee, Hiwa Abdul Rahman Rashul (known as "Triple X" by government officials). Unhappy with the narrowness of that opinion, the CIA then urged Gonzales to obtain a broader legal opinion that would expand the number of people who could be moved secretly out of Iraq.[14] The March 2004 Goldsmith memorandum followed. [15]

The Goldsmith memorandum argues that the Fourth Convention, which the U.S. ratified and became the law of the United States in 1955, does not prohibit the removal of "protected persons" who are illegal aliens. Article 49 of the Fourth Convention, however, clearly states: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive." The Goldsmith memorandum goes to great lengths to deprive the article of any substantive meaning, contending that the provision only contemplates the deportation of inhabitants. Yet the International Committee of the Red Cross – the authoritative commentator on the Convention – views the prohibition as absolute and allowing for no exceptions.

The Goldsmith memorandum also argues that any protected person under the Convention, whether an Iraqi or not, may be transferred out of the country, so long as the military has not accused the individual of wrongdoing. Article 76 of the Fourth Convention provides that "protected persons accused of offenses shall

be detained in the occupied country." The Goldsmith memorandum tries to evade this prohibition by concluding that the United States may remove a person from Iraq where the intent is only to interrogate that person for something short of an "indefinite" period – an approach that permits the U.S. military to simply designate all protected persons for interrogation and remove them from Iraq, and out of the sight of the ICRC, and any accountability.

Finally, the Goldsmith memorandum also ignores numerous provisions in the Fourth Convention and U.S. military regulations requiring a system that ensures an accounting of the detainees, including a system to notify families of those interned of the fact of their internment, their address, their state of health, and of changes to their condition. This applies to both combatant and civilian internees of any legal status, and applies both during international armed conflict and during periods of occupation. As both U.S. military and ICRC reports have made clear, the United States has failed to meet its obligations in this respect. Given that the Goldsmith memorandum has only recently come to light and not been scrutinized to date publicly, Gonzales should be asked about it – and his role in seeking OLC's analysis.

Questions for Gonzales on the Geneva Conventions

1 What is the status of the memorandum dated January 25, 2002 from you as White House Counsel to the President concerning the "Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban?" It is marked "Draft;" was there a later, final version of the memorandum?

2 Do you stand by the legal conclusions in your January 25 memorandum? Do they remain the views of the Administration today? Do the Geneva Conventions, in your view, apply to *any* of those detained in the Afghanistan conflict?

3 What is your view of the concerns raised by Secretary of State Powell and State Department Legal Adviser Taft – both before you prepared your January 25 memorandum and in the days immediately afterwards? Your memorandum suggests that "on balance" you found them "unpersuasive" at the time, but were they reflected in any final analysis that you provided to the President? If not, why not?

4 As Attorney General you would oversee the Office of Legal Counsel. Your January 25 memorandum states that "OLC's interpretation of this legal issue is definitive." But that interpretation does not prevent the President from reaching a different conclusion, does it? And in any event, OLC's views are not definitive with respect to factual questions about whether a particular detainee should be entitled to prisoner of war status, are they?

5 If the Administration's overarching goal was to not have Taliban or Al Qaeda treated across the board as prisoners of war, couldn't that have been accomplished in a more focused manner, through individualized Article 5 status review hearings – something that Secretary Powell had proposed, as you

note in your January 25 memorandum? Do you still believe it was necessary to broadly repudiate the Geneva Conventions' applicability to those captured in Afghanistan? What would have been wrong with individual hearings to determine whether POW status was appropriate – as had been done in numerous earlier conflicts?

6 You spent a considerable portion of your January 25 memorandum noting how the conclusion that the Geneva Conventions did not apply to Al Qaeda or the Taliban "substantially reduces the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441)." Could you explain why you were so concerned about application of a provision enacted in 1996 by the Congress to cover "grave breaches" of the Geneva Conventions? What did you mean there by the "needs and circumstances that could arise in the course of the war on terrorism" – would those be a justification for excusing any punishment for the most serious violations of the Conventions?

7 Your memorandum, while disavowing application of the Third Geneva Convention to Taliban detainees, apparently tries to provide some reassurance about U.S. treatment of detainees more broadly – saying that the U.S. will still be "constrained" by applicable military regulations as well as "applicable treaty obligations." Which obligations does this include? The Fourth Geneva Convention? Common Article 3? The Convention Against Torture? The International Covenant on Civil and Political Rights? Could you elaborate on what you meant there, as well as by "minimum standards of treatment universally recognized by the nations of the world?"

8 You close your memorandum by noting that "our military remains bound to apply the principles of GPW [the Third Geneva Convention] because that is what you have directed them to do." What "principles" were you referring to here? Wouldn't you concede that a decision to explicitly not apply the Conventions to detainees from Afghanistan might at least create some confusion about whether its "principles" nevertheless applied?

9 Late last year, you requested that the Justice Department's Office of Legal Counsel prepare a memorandum on the applicability of Article 49 of the Fourth Geneva Convention – and specifically whether that provision barred the removal of certain detainees from Iraq to other locations. As you know, concerns have been raised – including by Army Maj. Gen. Taguba in his report on Abu Ghraib – about the policy of holding so-called "ghost detainees" in secret locations, and denying the Red Cross access to them. On October 24 the *Washington Post* reported that a U.S. intelligence official said that the CIA has used the Justice Department's memorandum "as legal support for secretly transporting as many as a dozen detainees out of Iraq in the last six months" – concealing them from the Red Cross and others. Can you discuss the rationale for asking OLC for that memorandum – what was the reason their advice was sought at that time? And how was that advice utilized?

10 Do you agree with the legal analysis in the memorandum that Assistant Attorney General Jack Goldsmith sent to you in March of this year on Article 49? How does it square with the explicit language of that provision indicating that transfers from occupied territory to any other country "are prohibited, regardless of their motive?" In light of the concerns raised by Maj. Gen. Taguba and many others about a program of secretly transferring "ghost detainees" from Iraq, would you now be prepared to reevaluate the conclusions reached in that March 19 memorandum?

11 Do you support the 9/11 Commission's recommendation that all U.S. Armed Forces and other government agencies engaged in detention and interrogation should observe Geneva Convention protections for all combatants and civilians? Do you support the further recommendation that the United States should publicly affirm our binding obligation to prohibit violence, cruel treatment, torture, or any other outrages upon personal dignity, including humiliating and degrading treatment, of those in U.S. custody – citing the language of Geneva Common Article 3?

Section Notes

[1] Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

[2] Both the Third and Fourth Conventions allow for detention without criminal charge in international armed conflict. As for non-international armed conflict, neither Common Article 3 nor Additional Protocol II, nor applicable customary international law prohibit it, but authorization must come from domestic, not international law.

[3] *See* Human Rights First, *Ending Secret Detentions*, June 2004, at 4-5, 9-10 [hereinafter *Ending Secret Detentions*, *available at* http://humanrightsfirst.org/us_law/PDF/EndingSecretDetentions_web.pdf (accessed Nov. 28, 2004).

[4] Indeed, in the course of the combat in Afghanistan and Iraq the Executive Branch introduced a number of other terms to cover different categories of detainees, including at least two additional sub-categories of "enemy combatants" – thus adding to the confusion about whether, and to whom, the Geneva Conventions might apply. *See* Human Rights First, *Getting to Ground Truth*, Sept. 2004 [hereinafter *Getting to Ground Truth*], at 7 n. 20-21(accompanying text). In stark comparison, in its commentary on the Geneva Conventions the International Committee of the Red Cross has made clear that one is "either a prisoner of war and as such covered by the Third Convention, [or] a civilian covered by the Fourth Convention. There is no intermediate status; nobody in enemy hands can be outside the law." ICRC *Commentary*, Fourth Geneva Convention, p. 51 (1958). All individuals (whether deemed enemy combatants or not) must fall within the protections of the Third or Fourth Geneva Convention or the customary provisions of Article 75 Protocol I. This critical point has been stated on more than one occasion by William H. Taft, IV, legal adviser to the State Department. *See*, *e.g.*, William H. Taft, IV, *Symposium: Current Pressure on International Humanitarian Law: The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 320-23 (2003). Where an individual is found not to be a POW, the Fourth Convention offers numerous avenues for the United States in its treatment of such a detainee. One notable path is prosecution for participation in unlawful hostilities, though such participation does not remove one from the Convention's protection. And Judge James Robertson, in his November 8, 2004 ruling in *Hamdan v. Rumsfeld* concerning the status of detainees at Guantanamo Bay, squarely rejected the effort to create a category outside the reach of the Conventions, finding that they applied "to all persons detained in Afghanistan during the hostilities there." No. 04-1519 (JR) (D.D.C. Nov. 8, 2004), at 16, *available at* http://www.humanrightsfirst.org/us_law/PDF/detainees/hamdan-order-110804.pdf, accessed Nov. 28, 2004.

[5] *See Ending Secret Detentions, supra* note 3, at 20 n. 148.

[6] *Getting to Ground Truth*, *supra* note 4, at 7; final report of the Indep. Panel to review DOD Detention Operations, August 2004 [hereinafter Schlesinger Report], at 14 and 81.]

[7] Memorandum of Alberto Gonzales, White House General Counsel to President George W. Bush, *Re: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban* (January 25, 2002) [hereinafter Gonzales Memorandum], at 2.

[8] One key example of a later document that borrows from the earlier analysis is the Defense Department Working Group Report on Detainee Interrogations in the Global War on Terrorism, a detailed report issued on April 4, 2003 to Secretary of Defense Rumsfeld and recommending a series of interrogation techniques for use with those designated as "unlawful combatants." That report in turn provided a foundation for the order issued by the Secretary of Defense implementing 24 specific interrogation techniques at Guantanamo Bay and in Iraq.

[9] Memorandum from William H. Taft IV, Legal Adviser, Department of State, to Counsel to the President Alberto Gonzales, Feb. 2, 2002. Taft's concerns were enunciated recently by Federal District Court Judge James Robertson in his decision in *Hamdan v. Rumsfeld* concerning a Guantanamo detainee: the Administration's position "can only weaken the United States' own ability to demand application of the Geneva Conventions to Americans captured during armed conflicts abroad." Hamdan, *supra* note 4, at 21.

[10] Memorandum of President Bush, Humane Treatment of Al Qaeda and Taliban Detainees, Feb. 7, 2002.

[11] *Ending Secret Detentions*, *supra* note 3, note 146 and accompanying text.(quoting Defense Department officials on application of Geneva Conventions).

[12] Seymour M. Hersh, CHAIN OF COMMAND, at 5 (2004).

[13] *See Ending Secret Detentions*, supra note 3, at 11-13 (discussing these and other categories used to designate detainees capture in Iraq).

[14] Dana Priest, "Memorandum Lets CIA Take Detainees Out of Iraq," WASH. POST, Oct. 24, 2004, at A1.

[15] Despite the Goldsmith memorandum's distribution in "draft" form, one intelligence official described the memorandum as a "green light" for the CIA's removing people from Iraq. *Id*. Government officials have acknowledged at least a dozen detainees were transferred out of Iraq on the strength of these legal opinions. Douglas Jehl, "U.S. Action Bars Rights of Some Captured in Iraq," N.Y. TIMES, Oct. 25, 2004, at A1.

Gonzales on Executive Detention Powers and the Role of Courts

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.

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 evidentiary 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/padillahanft70204pet.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/00000017.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).

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 Condoleeza 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).

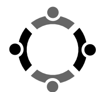
[19] Military Justice Act of 1968, Pub. L. 90-634, 82 Stat. 1335, 1336 (1968).

[20] An Act to amend an Act entitled "An Act for making further and more effectual provision for the national defense, 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).



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