GlobalResearch
Center for Research on Globalization

Departing Attorney General Alberto Gonzales. Favorite Memory: Gonzo on Habeas

By Robert Parry
Global Research, August 29, 2007
consortiumnews.com 29 August 2007

Region: USA
Theme: Law and Justice

Everyone has their favorite memory of departing Attorney General Alberto Gonzales: his endless "do not recalls"; his quibbling definitions of torture; his dismissive attitude toward the "quaint" and "obsolete" Geneva Conventions.

But my personal favorite was his insistence that the U.S. Constitution doesn't expressly recognize *habeas corpus*, the great fair-trial principle of English law that dates back to the Magna Carta in 1215.

"There is no expressed grant of *habeas* in the Constitution," Gonzales told the Senate Judiciary Committee on Jan. 18. He did acknowledge, however, that there was "a prohibition against taking it away."

Gonzales's bizarre remark left Sen. Arlen Specter of Pennsylvania, a former federal prosecutor and the panel's ranking Republican, sputtering in disbelief.

"Wait a minute," Specter interjected. "The Constitution says you can't take it away except in case of rebellion or invasion. Doesn't that mean you have the right of *habeas corpus* unless there's a rebellion or invasion?"

Gonzales continued, "The Constitution doesn't say every individual in the United States or citizen is hereby granted or assured the right of *habeas corpus*. It doesn't say that. It simply says the right shall not be suspended" except in cases of rebellion or invasion.

"You may be treading on your interdiction of violating common sense," Specter responded, as if confronting the sophomoric comments of a first-year law student who would never make it to a second year.

While the exchange drew little or no attention in the major news media, I found it revealing in several ways:

First, it exposed the narrow, ideological thinking that has pervaded the legal analysis of Gonzales and other Bush administration lawyers.

Neoconservative and right-wing legal operatives have long functioned with the notion that if they could conjure up a clever legal argument – no matter how flimsy – that their argument must be accepted as sound or at least treated with the utmost seriousness. If we can devine a rationale, we must be right.

That self-absorbed thinking has been at the core of the legal theories behind George W.

Bush's treatment of profound issues such as presidential power, government secrecy, and limitations on the inalienable rights of individuals who are not in Bush's inner circle.

So, no matter how established *habeas corpus* might be in American legal traditions, Gonzales felt he could put it in question simply with the nit-picking observation that the Founders didn't explicitly spell out the Great Writ when writing the Constitution.

Negative Rights

Article I, Section 9, of the Constitution states that "the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

The clear meaning of the clause, as interpreted for more than two centuries, is that the Founders recognized the long-established English principle of *habeas corpus,* which guarantees people the right of due process, such as formal charges and a fair trial.

However, under Gonzales's constitutional theory not only would *habeas corpus* not be guaranteed, the American people also would have no assurances about freedom of religion, speech or the press. In the Bill of Rights, all those rights are defined in negative language: "Congress shall make no law …"

Gonzales was wrong in another way, when he cited the lack of specificity in the Constitution's granting of *habeas corpus* rights. Many of the legal features attributed to *habeas corpus* are delineated in positive language in the Sixth Amendment, which reads:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed … and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses."

But Gonzales's knock on *habeas corpus* was indicative of the Bush administration's overall attitudes. Presumably, during White House "bull sessions," the principle of *habeas corpus* routinely gets disparaged.

The Gonzales comment exposed the Bush administration's continued hostility toward some of the fundamental rights that traditionally define the American Republic. Gonzales was treating *habeas corpus* as an optional right, subordinate to President Bush's executive powers during "a time of war."

Denying Habeas

Just months earlier, the Republican-controlled Congress had pushed through the Military Commissions Act of 2006 that effectively eliminated *habeas corpus* for non-citizens, including legal resident aliens.

Under the new law, Bush gets to declare any non-citizen an "unlawful enemy combatant," putting the person into a system of military tribunals which offer defendants only limited rights. Critics have called the tribunals "kangaroo courts" because the rules are heavily weighted in favor of the prosecution.

Some language in the new law also suggested that "any person," presumably including American citizens, could be swept up into indefinite detention if they are suspected of having aided and abetted terrorists.

"Any person is punishable as a principal under this chapter who commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission," according to the law, signed by Bush on Oct. 17, 2006.

Another provision in the law even seems to target American citizens by stating that "any person subject to this chapter who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States … shall be punished as a military commission … may direct."

Besides allowing "any person" to be swallowed up by Bush's system, the law prohibits detainees once inside from appealing to the traditional American courts until after prosecution and sentencing, which could translate into an indefinite imprisonment since there are no timetables for Bush's tribunal process to play out.

The law states that once a person is detained, "no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever … relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions."

That court-stripping provision – barring "any claim or cause of action whatsoever" – would seem to deny American citizens *habeas corpus* rights just as it does for non-citizens. If a person can't file a motion with a court, he can't assert any constitutional rights, including *habeas corpus*.

Other constitutional protections in the Bill of Rights – such as a speedy trial, the right to reasonable bail and the ban on "cruel and unusual punishment" – would seem to be beyond a detainee's reach as well. [For more on the Military Commissions Act, see our new book, *Neck Deep: The Disastrous Presidency of George W. Bush*.]

Stretching Language

Gonzales's *habeas* comment was noteworthy, too, because it demonstrated how far Bush administration lawyers will go in stretching legal language to benefit their positions.

If Bush's Attorney General can construct an argument that the Founders didn't mean to grant the right of *habeas corpus* (because they phrased it in a negative way), what does that portend for the loose language in recent laws passed regarding the "war on terror"?

Besides the Military Commission Act and the earlier Patriot Act, what about the Protect America Act of 2007, which appears to grant the administration broad powers to engage in warrantless wiretapping and other domestic spying.

Though the administration claims it only wants to intercept calls of foreign terror suspects, the language of the Protect America Act applies to anyone who is "reasonably believed to be outside the United States" and who might possess "foreign intelligence information," defined as anything useful to U.S. foreign policy.

That means that almost any American engaged in international commerce or dealing with

foreign issues – say, a businessman in touch with a foreign subsidiary or a U.S. reporter sending an overseas story back to his newspaper – is vulnerable to warrantless intercepts approved on the say-so of two Bush appointees, the Attorney General and the Director of National Intelligence. [See Consortiumnews.com's "New Spy Law Broader Than Thought."]

The reassurances from government officials and some commentators that the Bush administration would never abuse these new powers might wisely be viewed in the context of Gonzales's strange opinions about *habeas corpus* and the Constitution.

After all, the flexible approach to law and the Constitution – demonstrated by Alberto Gonzales – is sure to outlive his last days at the Justice Department.

Robert Parry broke many of the Iran-Contra stories in the 1980s for the Associated Press and Newsweek. His latest book, Neck Deep: The Disastrous Presidency of George W. Bush, can be ordered at neckdeepbook.com. His two previous books, Secrecy & Privilege: The Rise of the Bush Dynasty from Watergate to Iraq and Lost History: Contras, Cocaine, the Press & 'Project Truth' are also available there.

To comment at Consortiumblog, click here. (To make a blog comment about this or other stories, you can use your normal e-mail address and password. Ignore the prompt for a Google account.) To comment to us by e-mail, click here. To donate so we can continue reporting and publishing stories like the one you just read, click here.

Articles by: Robert Parry