

Gonzales Questions Habeas Corpus

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Global Research, January 21, 2007
consortiumnews.com 21 January 2007

Region: [USA](#)

Theme: [Law and Justice](#), [Police State & Civil Rights](#)

In one of the most chilling public statements ever made by a U.S. Attorney General, Alberto Gonzales questioned whether the U.S. Constitution grants habeas corpus rights of a fair trial to every American.

Responding to questions from Sen. Arlen Specter at a Senate Judiciary Committee hearing on Jan. 18, Gonzales argued that the Constitution doesn't explicitly bestow *habeas corpus* rights; it merely says when the so-called Great Writ can be suspended.

"There is no expressed grant of *habeas* in the Constitution; there's a prohibition against taking it away," Gonzales said.

Gonzales's remark left Specter, the committee's ranking Republican, stammering.

"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 said.

While Gonzales's statement has a measure of quibbling precision to it, his logic is troubling because it would suggest that many other fundamental rights that Americans hold dear also don't exist because the Constitution often spells out those rights in the negative.

For instance, the First Amendment declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Applying Gonzales's reasoning, one could argue that the First Amendment doesn't explicitly say Americans have the right to worship as they choose, speak as they wish or assemble peacefully. The amendment simply bars the government, i.e. Congress, from passing laws that would impinge on these rights.

Similarly, 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 law principle of *habeas corpus*, which guarantees people the right of due process, such as formal charges and a fair trial.

That Attorney General Gonzales would express such an extraordinary opinion, doubting the constitutional protection of *habeas corpus*, suggests either a sophomoric mind or an unwillingness to respect this well-established right, one that the Founders considered so important that they embedded it in the original text of the Constitution.

Other cherished rights – including freedom of religion and speech – were added later in the first 10 amendments, known as the Bill of Rights.

Ironically, Gonzales may be wrong in another way about 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 a positive way 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.”

Bush’s Powers

Gonzales’s Jan. 18 statement suggests that he is still seeking reasons to make *habeas corpus* optional, subordinate to President George W. Bush’s executive powers that Bush’s neoconservative legal advisers claim are virtually unlimited during “a time of war,” even one as vaguely defined as the “war on terror” which may last forever.

In the final weeks of the Republican-controlled Congress, the Bush administration 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 can declare any non-citizen an “unlawful enemy combatant” and put the person into a system of military tribunals that give 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 suggests 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, passed by the Republican-controlled Congress in September and signed by Bush on Oct. 17, 2006.

Another provision in the law 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.”

Who has “an allegiance or duty to the United States” if not an American citizen? That provision would not presumably apply to Osama bin Laden or al-Qaeda, nor would it apply generally to foreign citizens. This section of the law appears to be singling out American citizens.

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.

Special Rules

Under the new law, the military judge “may close to the public all or a portion of the proceedings” if he deems that the evidence must be kept secret for national security reasons. Those concerns can be conveyed to the judge through *ex parte* – or one-sided – communications from the prosecutor or a government representative.

The judge also can exclude the accused from the trial if there are safety concerns or if the defendant is disruptive. Plus, the judge can admit evidence obtained through coercion if he determines it “possesses sufficient probative value” and “the interests of justice would best be served by admission of the statement into evidence.”

The law permits, too, the introduction of secret evidence “while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence if the military judge finds that ... the evidence is reliable.”

During trial, the prosecutor would have the additional right to assert a “national security privilege” that could stop “the examination of any witness,” presumably by the defense if the questioning touched on any sensitive matter.

In effect, what the new law appears to do is to create a parallel “star chamber” system for the prosecution, imprisonment and possible execution of enemies of the state, whether those enemies are foreign or domestic.

Under the cloak of setting up military tribunals to try al-Qaeda suspects and other so-called “unlawful enemy combatants,” Bush and the Republican-controlled Congress effectively created a parallel legal system for “any person” – American citizen or otherwise – who crosses some ill-defined line.

There are a multitude of reasons to think that Bush and advisers will interpret every legal ambiguity in the new law in their favor, thus granting Bush the broadest possible powers over people he identifies as enemies.

As further evidence of that, the American people now know that Attorney General Gonzales doesn't even believe that the Constitution grants them *habeas corpus* rights to a fair trial.

Robert Parry broke many of the Iran-Contra stories in the 1980s for the Associated Press and Newsweek. His latest book, Secrecy & Privilege: Rise of the Bush Dynasty from Watergate to Iraq, can be ordered at secrecyandprivilege.com. It's also available at Amazon.com, as is his 1999 book, Lost History: Contras, Cocaine, the Press & 'Project Truth.'

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