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The Honorable Alberto R. Gonzalez, Counsel to the President

February 24, 2004

Detention Issues in the War on Terrorism

Announcement of Procedure to Determine Enemy Combatant Status of Captured U.S. Citizens and Granting of Right to Counsel:

- The Administration had been silent thus far on this topic due to national security considerations
- This announcement complements Rumsfeld's announcement of the procedures with regard to non-U.S. citizens 11 days ago in Miami.
- Only two instances of U.S. citizens being held as enemy combatants thus far: Yassir Hamdi (sp) and Jose Padilla.
- Hamdi was an easier case because he was captured outside U.S. in zone of combat.

Thorough mechanism in place before a U.S. enemy combatant determination is presented to the president--mechanisms used are not required by law, but are followed to be thorough.

1. Information is developed by the CIA, DOJ and DOD regarding a suspected individual's potential to be a material witness, intelligence source, continuing threat, subject of criminal prosecution, unlawful enemy combatant, etc.
2. If it is in the interest of national security to use this person as an intelligence source and it would threaten national security to reveal him as a source, this will be taken into consideration.
3. As an initial inquiry, based upon facts presented by DOD and CIA, the Office of Legal Counsel of DOJ (OLC) determines if the captive potentially meets the unlawful enemy combatant standard as set forth in the Querin opinion by the Supreme Court. The person must have associated himself with a hostile group, etc. Sometimes, the Office of Legal Counsel determines that this standard has not been met, and the query into status as an unlawful enemy combatant is dropped and the government may then consider this captive through a different legal lense.
4. If OLC determines the standard is initially met, the CIA director makes a written assessment and transmits the recommendation to DOD with a request to take the subject into custody. The Department of Defense then conducts an independent intelligence evaluation and makes a recommendation in the form of a written assessment that goes to the Attorney General who is asked (i) whether the subject can, consistent with the law and supported by the facts presented, be considered an unlawful enemy combatant; (ii) for permission to take the individual (if present in the US) into custody [redacted] and (iii) for the policy views of the Attorney General regarding the determination of the subject as an unlawful enemy combatant.

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5. In addition to the written assessment from the Secretary of Defense, the A.G. relies on a fact memo on the captive from the DOJ Criminal Division as well as the assessment of the CIA.
6. If the A.G. approves of the recommendation, he gives his recommendation back to the Secretary of Defense in the form of three documents (i) the A.G. letter to the Sec. of Defense; (ii) the Criminal Division fact memo; and (iii) the Office of Legal Counsel opinion.
7. The Secretary of Defense then submits the recommendation to the President, accompanied by six documents: (i) the CIA intelligence assessment; (ii) the independent DOD intelligence report; (iii) the assessment and recommendation of the Secretary of Defense; (iv) the A.G. letter to the Sec. of Defense; (v) the Criminal Division fact memo; and (vi) the Office of Legal Counsel opinion. The president's lawyers then review the file and advise the president on what determination he should make. The president may then approve for the DOD to take the captive into their control and makes the determination whether the individual will be considered an unlawful enemy combatant

Once determined to be an unlawful enemy combatant, direct access to counsel is not granted. The status of an unlawful enemy combatant makes these captives outside the domain of the U.S. criminal justice system and their status as unlawful enemy combatants (in contrast to "enemy combatants") puts them beyond the jurisdiction of the Geneva Conventions [REDACTED]

[REDACTED] However, the unlawful enemy combatants have access to the U.S. courts, as the cases regarding the holding of Hamdi and Padilla show. This court access is general in the form of habeas corpus proceedings, although the courts should be deferential to the executive department's determination of the status of the individuals as unlawful enemy combatants.

Direct access to counsel is only granted, as a matter of policy and on a case-by-case basis, to an enemy combatant if two prongs are met:

1. DOD determines that access to counsel poses no threat to the national security; and
2. DOD has completed obtaining intelligence from the unlawful enemy combatant or DOD has determined that access to counsel will not interfere with its intelligence collection.

The DOJ, FBI and CIA may also weigh in on whether access to counsel will interfere with intelligence collection.

The Secretary of Defense makes the final decision as to whether these two prongs have been satisfied.

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