

Mr. White House Counsel, meet the Constitution

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I teach at the Naval Postgraduate School in Monterey, meaning that I instruct young military officers who are generally smart, hard working and curious.

On Aug. 27, I realized that I might well have one of the best jobs in America. That afternoon, the school's guest speaker was President Bush's White House counsel, Alberto Gonzalez, widely believed to be on the short list for the next Supreme Court appointment. What happened spoke volumes, not just about Gonzalez and his likely positions on the Constitution, but also about the students at the Naval Postgraduate School.

Let me explain. I went to the talk prepared to ask Gonzalez how he could justify the president's making war without a congressional declaration, and took my pocket copy of the U.S. Constitution in case he needed reminding of its words. Unfortunately, he did. Fortunately, I didn't need to be the one to remind him: The students did the job and much more.

In his speech, Gonzalez tried to justify not just war without a congressional declaration, but also the government's decision to imprison U.S. citizens such as Jose Padilla, the alleged "dirty bomber," without charging them with a crime or allowing them a lawyer. Padilla is now in a military prison in South Carolina.

Bush needed power to make quick decisions, Gonzalez said, and Congress would take too long. Among the examples he cited was the Sept. 11 decision to close down U.S. airspace and force commercial and private planes to land or remain grounded. But that example was, to put it mildly, a reach. The person who made that decision, and who didn't need even Bush's consent to do so, was Ben Sliney, the FAA's national operations manager.

In the question-and-answer period after Gonzalez's speech, I counted about 13 questions from young military officers and one faculty colleague. Of those, 12 were hardball questions that challenged Gonzalez's expansive claims for

presidential power.

One officer asked how Bush could legally attack Iraq without a congressional declaration of war. Gonzalez's answer: Bush is commander in chief. Yes, replied the student, but that makes him commander of the armed forces, not the person who decides against whom we wage war. Gonzalez replied that we had used our military in more than 100 actions without a congressional declaration of war and so the precedent was well established.

I reminded him of Article I, Section 8 of the Constitution, which gives Congress the power to declare war. "Nowhere in the Constitution," I said, "is the president's power to declare war even mentioned." Gonzalez replied that presidents in the past have often made war without a declaration and that Congress has appropriated money for wars it hasn't declared. In other words, Congress has given up its powers granted by the Constitution.

But Congress's failure to defend its powers, and the courts' unwillingness to enforce Congress's powers, don't change the words and meaning of the Constitution. "We can get away with it" is hardly a strong argument, whether used by an aspiring Supreme Court justice or by his boss, who took a sacred oath to defend the Constitution.

Another military officer reminded Gonzalez that during the Civil War, President Abraham Lincoln had suspended habeas corpus and imprisoned many U.S. citizens without charging them with a crime. "If you suspend habeas corpus for some U.S. citizens," the student asked, "what's the logical stopping point so that you don't suspend it for everyone?"

Gonzalez didn't name a stopping point. Instead he answered, "We haven't discussed suspending it more generally," concluding with, "We don't see the need for suspending habeas corpus at this time."

After his speech, a faculty colleague and I spoke to Gonzalez. We brought the discussion back to presidential power. Gonzalez tried to reassure us, saying, "Condi Rice and others and I are looking out for how the president will play in history. We don't want him to look like some monster who destroyed our

freedom. Trust us."

"The Constitution is not based on trust, but on distrust," I answered.

Mr. Gonzalez could use a little primer on that Constitution. And, I'm proud to say, some students at the Naval Postgraduate School gave him his first lesson.