

**CONFIRMATION HEARING ON THE NOMINATION
OF ALBERTO R. GONZALES TO BE ATTORNEY
GENERAL OF THE UNITED STATES**

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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JANUARY 6, 2005
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Serial No. J-109-1

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Printed for the use of the Committee on the Judiciary



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**NOMINATION OF ALBERTO R. GONZALES TO
BE ATTORNEY GENERAL OF THE UNITED
STATES**

THURSDAY, JANUARY 6, 2005

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 9:30 a.m., in room SH-216, Hart Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Kyl, DeWine, Sessions, Graham, Cornyn, Brownback, Coburn, Leahy, Kennedy, Biden, Kohl, Feingold, Schumer, and Durbin.

**OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S.
SENATOR FROM THE STATE OF PENNSYLVANIA**

Chairman SPECTER. The hour of 9:30 having arrived, we will proceed with the United States Senate Committee on the Judiciary today, to proceed with the hearing of White House Counsel Alberto Gonzales, whom the President has nominated for the position of Attorney General of the United States. There will be opening statements by Senator Leahy and myself, and then we will call upon Senator John Cornyn and Senator Ken Salazar to introduce the nominee. And then the nominee will introduce his family, and then we will proceed with the opening statement of Judge Gonzales.

Preliminarily, it should be noted that White House Counsel Gonzales had served on the Supreme Court of Texas and is referred to as "Judge Gonzales," and that will be the title which I will use during the course of these proceedings.

Judge Gonzales comes to this nomination with a very distinguished career, really a Horatio Alger story: Hispanic background; of seven siblings, the first to go to college; attended the Air Force Academy for 2 years; and then received degrees from Rice and Harvard Law School; became counsel to then-Governor George Bush of Texas; was appointed to the State Supreme Court and later elected for a full term; and has been President Bush's Counsel for the full 4 years of his term.

Judge Gonzales will take over, if confirmed, the direction of the Department of Justice, which is a Department of enormous importance in the United States, the fourth Department created in 1789, has the responsibility for representing the United States in court, civil cases and criminal cases, has oversight responsibility for the Federal Bureau of Investigation and its enormous responsibilities

on the fight against terrorism, and law enforcement. And while Judge Gonzales is the appointee of the President, he has broader responsibilities representing the people of the United States, a key distinction which I am pleased to say in advance that Judge Gonzales has noted in the statement which he has submitted.

The focus of media attention has been on the issue of Judge Gonzales' roles in analysis and recommendations on the handling of the detainees. Judge Gonzales had issued an opinion to the President that the Geneva Convention did not apply with respect to certain of the combatants. In his memorandum of January 25, 2000, he said, "In my judgment, this new paradigm"—referring to the war on terrorism—"renders obsolete Geneva's strict limitations on questioning of enemy prisoners * * *" The Committee will seek further amplification on a number of substantive issues from that memorandum, including Judge Gonzales' statement that, "In the treatment of detainees, the United States will continue to be constrained by its commitment to treat the detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Convention." This statement raises the question of what is the meaning of military necessity and what extent, if at all, does military necessity impact on the "commitment to treat" a detainee humanely.

Beyond Abu Ghraib and Guantanamo, the Committee will want to know Judge Gonzales' plans and views on a wide range of matters which will command the attention of the Department as we begin a new year and a new Presidential term.

The most important issue facing our Nation today continues to be the threat of terrorism. That is the most important issue facing our country and how we deal with it in the balance of our civil rights. The Department will have a major impact on the implementation of the new legislation for a National Intelligence Director with the very heavy responsibilities of the Federal Bureau of Investigation and the coordination of intelligence, which, if it had been properly implemented, might well have prevented 9/11.

There are a number of other key issues which the Attorney General will deal with. We will be interested to know of any views on enforcement of the antitrust laws. American consumers of oil and gas have been strangled by OPEC and their international cartel. They are not immune under the act of state doctrine, and we will be interested to know what plans the Department of Justice under Judge Gonzales, if confirmed, would have on that important issue.

The Department will have a major role in implementing President Bush's proposals to revise our Nation's immigration laws and to deal with the 10 million aliens who are in this country illegally. The Committee will also be interested to know of any new ideas or programs Judge Gonzales has for fighting organized and violent crime, cracking down on fraud, especially on Federal health programs, and protecting U.S. intellectual property rights.

The Committee will be interested in Judge Gonzales' views on the PATRIOT Act since the Attorney General will obviously be a central figure in consideration of reauthorization of that Act. That Act provided considerable assistance to law enforcement by eliminating the so-called wall between the gathering of intelligence once obtained for intelligence purposes to be used in criminal law en-

forcement. But there are other questions which have been challenged by a wide array of people on all facets of the political spectrum with the issue of probable cause to obtain records, library records, and the so-called sneak-and-peek orders, and we will be interested in what Judge Gonzales has to say about that very important matter.

We will also be interested to know Judge Gonzales' views on the issue of detention and standards of detention. The Attorney General has exercised the authority to overrule conclusions by the immigration judge in the Board of Immigration Appeals, and this is an issue which lingers after considerable questioning of Attorney General Ashcroft as to what standards ought to be used. And Attorney General John Ashcroft conceded before this Committee that it is not sufficient to simply cite national security, and that will be a question which we will want to inquire into.

We will also be looking for commitments from Judge Gonzales to appear before this Committee at least twice a year and to be responsive to our inquiries. And we will seek his commitment on the oversight authority of this Committee as recognized by the Supreme Court of the United States, our constitutional obligation on oversight.

As we begin a new term, I pay tribute to my distinguished colleague, Senator Hatch, who has chaired this Committee for most of the past 10 years and has been responsible for some of the most innovative and far-reaching legislation which has ever come from the Congress of the United States. And he has handled these duties in an atmosphere sometimes contentious, sometimes difficult, but always with good cheer and always with aplomb and always with a balance. And I have admired especially his stamina. We affectionately refer to him as "Iron Pants," as he has chaired this Committee with such great distinction. And it is an honor to receive the gavel from him, if you will make that formal presentation, Senator Hatch.

Senator HATCH. Well, I am very honored to make that presentation to Arlen Specter, who is one of the best lawyers we have ever had serve in the United States Senate, among a whole raft of very fine lawyers. And so I am very proud to have you as our new Chairman, and I appreciate your kind remarks, and I appreciate serving with Senator Leahy and all of our colleagues on this Committee for such a long period of time. I am anxious to serve under you, and I will enjoy sitting beside you.

Chairman SPECTER. Thank you, Senator Hatch.

Senator HATCH. Here is the gavel.

[Applause.]

Chairman SPECTER. I commend Senator Leahy for his very distinguished service as the long-time ranking Democrat on the Committee and Chair of the Committee for most of the 107th Congress. Senator Leahy and I have been colleagues going back to the late 1960s, when we were district attorneys together. Senator Leahy was the district attorney of Burlington, Vermont, and I was district attorney of Philadelphia. And we have worked together for 24 years on the Judiciary Committee, and in the past several weeks, we have talked extensively, we have sat down, we have gone over the agenda of the Committee. We are obviously keenly aware of the dif-

facilities of gridlock, and we are looking for a new beginning with more consultation and an effort to avoid some of the contentiousness of the past, if it is at all possible, and to avoid, if we can, even consideration of the so-called nuclear option.

So it is with pleasure that I work with Senator Leahy, a friend for four decades, and now I yield to you, Senator Leahy, for your opening statement.

**OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S.
SENATOR FROM THE STATE OF VERMONT**

Senator LEAHY. Thank you very much, Mr. Chairman, and I do welcome you as our new Chairman. People sometimes forget that Senator Hatch and I often agree on things, and I absolutely agree with him that you are one of the most experienced lawyers ever to serve. I have served here for 30 years and I am not surprised at the praise. I remember our times together back as prosecutors. When I was a young prosecutor, I first met you in Philadelphia at a national DAs' meeting, and I have followed your career ever since.

I would say also to Senator Hatch, I compliment him and I am glad that he is determined to stay on the Committee. We have many people who have chaired this Committee who have stayed on—Senator Hatch, of course now Senator Specter, Senator Kennedy, Senator Biden—and I think it has helped the Committee and improved the Committee with that experience.

Judge Gonzales, I welcome you to the Senate Judiciary Committee. As has been alluded to, we are entrusted by the American people and by the Senate, even more importantly by the Constitution, to do a thorough and fair job in considering nominations for the executive branch of Government. At the outset, I want to make clear how inspiring your life story is. A recent Washington Post profile of your life's journey in particular touched me as few accounts of your life have. The road you have traveled from being a 12-year-old boy, just about the age of your oldest son, selling soft drinks at football games, all the way to the State House in Texas and now the White House is a tribute to you and your family. I enjoyed meeting with your wife and your sons, your mother—and this has to be a very proud day for her—your brother, your mother-in-law, and the family.

I am sure we are going to hear more about your life story, but also we will learn about Alberto Gonzales, the Counsel to the President. And then we are going to try to glean what kind of a portrait we might have of you if you are confirmed to be Attorney General of the United States. The Attorney General, of course, has to represent the interests of all Americans as the Nation's chief law enforcement officer. As Justice James Iredell wrote in 1792, the person who serves as Attorney General is "not called Attorney General of the President but Attorney General of the United States."

Now, the post is quite distinct from the position Judge Gonzales has performed for the President. There he acted as a spokesman for the administration and appeared as chief defense lawyer for the White House on a range of a number of very important and many times politically sensitive issues. So a key question for this hearing

is whether the nominee shares this view of the crucial role of the Attorney General.

When he was designated for this position by the President, Judge Gonzales said he was looking forward to continuing to work with friends and colleagues in the White House in a different capacity on behalf of our President. But, you know, there are going to be times—there may well be times when the Attorney General of the United States has to enforce the law, and he cannot be worried about friends or colleagues at the White House. His duty is to all Americans—Republicans, Democrats, Independents, all Americans.

At a time when the Republican Party has control of all three branches of the Federal Government, my worry is that our system of checks and balances may become short-circuited by too few checks on assertions of executive branch authority. My concern is that during several high-profile matters in your professional career, you have appeared to serve as a facilitator rather than as an independent force in the policymaking process.

Now, the job of Attorney General is not about crafting rationalizations for ill-conceived ideas. It is a much more vital role than that. The Attorney General is about being a forceful, independent voice in our continuing quest for justice and in defense of the constitutional rights of every single American. We have seen what happens when the rule of law plays second fiddle to a President's policy agenda. Attorney General Ashcroft and with the White House Counsel's office has impulsively facilitated rather than cautiously vetted serious constitutional issues. The administration has taken one untenable legal position after another regarding the rule of law as we fight terrorism. The few times Attorney General Ashcroft consented to appear before this Senate oversight Committee, he brandished intimidation as a weapon, sometimes going so far as to say that questioning the administration's policy somehow gave aid and comfort to the enemy.

By contrast, I think your nomination appears to offer a different era. But as I told Judge Gonzales when we met within days of the announcement of his nomination, these hearings do matter. We need to know more about his judgment and actions in connection with the tragic legal and policy changes formulated in secret by this administration—in secret and still being hidden from proper congressional oversight and public scrutiny. The policies include this nominee's role in developing interpretation of the law to justify harsh treatment of prisoners. Harsh treatment is tantamount to torture.

America's troops and citizens are at greater risk because of those actions, with terrible repercussions throughout so much of the world. The searing photographs from Abu Ghraib have made it harder to create and maintain the alliances we need to prevail against the vicious terrorists who threaten us, and those abuses serve as recruiting posters for the terrorists. The scandal of Abu Ghraib, allegations of mistreatment at Guantanamo, charges from cases in Iraq and Afghanistan are serious matters, and to date we have unresolved accountability.

So these hearings are about a nomination, but they are also about accountability. From the outset of public disclosure of the Abu Ghraib photographs, the Bush administration maintained that

any wrongdoing was simply a case of a few bad apples. But as bits of information have been made public not by the administration but by the press over the last year, it has become clear to all that these incidents at U.S. facilities around the world are not just the actions of a few low-ranking members of the military; rather, in the upper reaches of the executive branch, a process was set in motion that rolled forward to produce scandalous results, almost like somebody opening the floodgates in a dam and the water flowed downstream until it overwhelmed everybody below.

The Army Field Manual reflects our Nation's long-held policy toward prisoners. My young son was in the Marines, and he was called up for Desert Storm, the war that was so quick that he was not in harm's way. He was taught these things even as a Marine. But the Army Field Manual reflects our Nation's long-held policies toward prisoners, and it says, "The goal of any interrogation is to obtain reliable information in a lawful manner. 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 to aid interrogation."

Now, the policy is in place for a very good reason. The Field Manual continues, "The use of torture 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." It also may place U.S. and allied personnel in enemy hands at greater risk. But senior officials in the Bush White House, the Ashcroft Justice Department, and the Rumsfeld Pentagon set in motion a systematic effort to minimize, distort, and even ignore our laws, our policies, our international agreements on torture and the treatment of prisoners. Defense Secretary Rumsfeld and later Lieutenant General Ricardo Sanchez authorized the use of techniques that were contrary to both U.S. military manuals, but also international law. Former CIA Director Tenet requested and Secretary Rumsfeld approved the secret detention of ghost detainees in Iraq. They did that so they could be hidden from the International Committee of the Red Cross. And still unexplained are instances where the U.S. Government delivered prisoners to other countries so they could be tortured.

We have to ask, where is the responsibility and accountability for these abuses? We are the most powerful Nation on Earth—actually, the most powerful Nation Earth has ever known—and a country that has great promise. We are blessed with so much. We are a country that cherishes liberty and human rights. We have been a beacon of hope and freedom to the world. Certainly it was that hope and freedom that brought my grandparents to this country not speaking a word of English, but coming here for that peace and freedom.

We face vicious enemies in the war on terrorism, but we can and will defeat them without sacrificing our values or stooping to their levels. I believe there are several people in the audience who are themselves survivors of torture committed by the armed forces and secret police of other countries, which do not share these values on torture. They continue to struggle to overcome those horrifying experiences. And we are very concerned that we not retreat from the

high standards against torture that we have held up to the world in the past.

So these hearings, if I may conclude, are an opportunity at long last for some accountability for this meltdown of longstanding U.S. policy on torture. White House Counsel Judge Gonzales was at the center of discussions on the applicability of the Geneva Conventions to the wars in Afghanistan and Iraq and the legality of detention and interrogation methods that have been seen as tantamount to torture. He oversaw the formulation of this administration's extreme views of unfettered executive power and unprecedented government secrecy.

I hope that things will be different if you are confirmed, Judge Gonzales. I hope that you will be accessible to members of this Committee and be more responsive than your predecessor. I know that the President has asked our incoming Chairman to proceed expeditiously with these hearings. I have worked with him over the end-of-the-year break. We have had a lot of calls back and forth between your home and my farm in Vermont. We have met several times. And as I told you, we would do everything possible to help you move forward, and I will.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Senator Leahy.

We will now turn to introductions. We will then hear from Judge Gonzales, and then we will, in accordance with the practice of the Committee, with opening statements as customarily limited to the Chairman and Ranking Member, turn in order of seniority for 10-minute rounds of questions. I will observe the 10-minute limitation precisely and will ask other Committee members to do so, and there will be multiple rounds so the Committee members will have a full opportunity to question Judge Gonzales.

We now turn to the Senator from Texas, Senator John Cornyn, a distinguished and valued member of this Committee, for an introduction of the nominee.

PRESENTATION OF ALBERTO R. GONZALES, NOMINEE TO BE ATTORNEY GENERAL OF THE UNITED STATES, BY HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Thank you, Chairman Specter, for convening today's hearing and congratulations on your chairmanship.

Chairman SPECTER. Thank you.

Senator CORNYN. I am pleased to be here today to introduce Judge Alberto Gonzales to this Committee. He is a talented lawyer, a dutiful public servant, and a good man. He is a great Texan and an inspiring American success story, as you, Mr. Chairman, have already alluded, and I am honored to call him my friend.

I should also mention that Senator Hutchison, the senior Senator from Texas, had wanted to be here today to express her strong support for this nominee but is away due to a pre-existing commitment, and I would ask that her statement of support be made part of the record.

Chairman SPECTER. Without objection, it will be made a part of the record.

Senator CORNYN. I have known Judge Gonzales for many years, and I can tell you that the media is absolutely right when they refer to him as the “Man from Humble.” For those of you who are not from Texas, let me explain. He grew up in Humble, Texas, but it also, I think, attests to the fact that he is a modest, self-effacing man. The son of migrant workers, his childhood home, where his mother still lives today, was built by his father and uncle. And as has already been stated, as a young man, as a teenager, he sold soft drinks at Rice University football games and dreamed of one day when he might possibly attend that great institution.

Judge Gonzales is the first person in his family to have gone to college. Because of the love and support of his family and his work and determination, he graduated not just from Rice University but from Harvard University School of Law, and then joined a prestigious international law firm where he became one of its first minority partners. He eventually caught the eye of a Texas Governor who saw a uniquely talented, yet modest man, who then appointed him as his general counsel, his Secretary of State, as a member of the Texas Supreme Court, and then as White House Counsel.

Judge Gonzales is truly an inspiration to everyone who still believes in the American dream. And so his nomination as the Nation’s 80th Attorney General, our first Hispanic Attorney General, should by all accounts have a perfectly happy ending. But that is not necessarily how Washington works. It appears that, at least in anticipation of today’s hearing, we will see once again that this confirmation process can be unnecessarily partisan, even cruel to some who selflessly offer themselves for public service. I know we will get into the details, but let me just say that only in Washington can a good man get raked over the coals for doing his job. This must all be a little disorienting for one whose very life story testifies to the fact that America should always be a place where honesty, diligence, and determination are rewarded, not punished.

Take, for example, the harsh criticism about the Geneva Convention. Judge Gonzales has been harshly attacked for advising the President that all detainees be treated humanely, but that as a legal matter al Qaeda and Taliban fighters are not covered by the Geneva Convention.

Now, I hate to ruin a good story by the President’s political opponents who are attacking him through this nominee, but let me just say there is one important point that needs to be made. Judge Gonzales is absolutely right. You do not have to take my word for it. First of all, al Qaeda never signed the Geneva Conventions, but moreover, the Red Cross’ own guidelines state that to be entitled to Geneva protection as a prisoner of war, combatants must satisfy four conditions: being commanded by a person responsible for his subordinates; secondly, having a fixed, distinctive sign recognizable at a distance; number three, carrying arms openly; and, number four, conducting their operations in accordance with the laws and customs of war.

Does anyone on this Committee, or anywhere else, for that matter, seriously argue that al Qaeda terrorists comply with the law of war?

By the way, it is important to note that Judge Gonzales’ legal advice has also been affirmed by three Federal courts throughout this

country and has also been endorsed by numerous legal scholars and international legal experts across the political spectrum, as well as both the 9/11 Commission, by the way; the final Schlesinger report, an independent report on DOD detention operations; and a brief filed recently in the United States Supreme Court by former Carter administration officials, State Department legal advisers, judge advocates and military commanders, and liberal international law scholars, who concluded that “[t]he President’s conclusion that members of al Qaeda, and the Taliban, are unlawful combatants” is clearly correct. Even Washington advocacy director for the Human Rights Watch, Tom Malinowski, a vocal Bush administration critic, has grudgingly conceded that the administration’s interpretation was “probably correct.”

Now, the administration’s Geneva position is not just right as a legal matter. It is also essential as a matter of national security.

I recently published an op-ed that explained that Geneva Convention protections to al Qaeda would threaten the security of our soldiers, dramatically disable us from obtaining the intelligence needed to prevent further attacks on U.S. civilians and soldiers, and badly undermine international law itself, and I would ask, Mr. Chairman, that that be made a part of the record.

Chairman SPECTER. Without objection it will be made part of the record.

Senator CORNYN. Thank you very much.

Just take a look at all the numerous privileges provided by the Geneva Convention for traditional prisoners of war. For example, questioners could not entice detainees to answer questions by offering them creature comforts or even preferential treatment, even though that is the standard operating procedure in police stations throughout the United States. Because the Convention prohibits the holding of detainees in isolation, al Qaeda fighters would be able to coordinate with each other in a way that would thwart or could thwart effective questioning. POW status, even confers broad combat immunity against current criminal prosecution before civilian and military tribunals alike.

Mr. Chairman, surely, no member of the Committee or anyone else on our side of this conflict actually believes that an al Qaeda terrorist deserves to be treated better than an American citizen accused of a crime. I certainly would not think so. President Reagan did not think so, neither did each of his successors in office. Nearly two decades ago President Reagan and every President since that time has rejected a proposed amendment to the Geneva Convention known as Protocol 1 of 1977 to extend that Convention to protect terrorists. As President Reagan rightly argued we must not and need not give recognition and protection to terrorist groups as a price for progress in humanitarian law. Notably even the New York Times and Washington Post agreed at the time.

All of this support from multiple Federal courts, from the 9/11 Commission, the Schlesinger Report, liberal international legal scholars, Carter administration officials, even the New York Times and Washington Post, yet Judge Gonzales is criticized for taking exactly that same position.

Take one more issue, the Justice Department memos that have been alluded to here construing the Federal torture statute. Judge

Gonzales is being attacked for a memo he did not write, interpreting the law that he did not draft. It was Congress, not Judge Gonzales, that enacted a strict definition of torture. It was Congress, not Judge Gonzales, that specifically provided that only specific intent to inflict severe pain or mental pain or suffering would constitute torture.

As I said, President Bush and Judge Gonzales have both unequivocally, clearly and repeatedly rejected the use of torture. But is there anyone here today who would fail to use every legal means to collect intelligence from terrorists in order to protect American lives? I certainly hope not.

Finally, I know we are going to hear some about Abu Ghraib today, we already have, and I think it is safe to say that everyone agrees that Abu Ghraib represents a shameful episode in this Nation's history, yet some people actually want to exploit that tragedy for their own purposes. Abu Ghraib should be treated seriously, not politically. The Defense Department has been vigorously investigating the misconduct and prosecuting the violators. The independent Schlesinger Report that I alluded to earlier, concluded that, "No approved procedures called for or allowed the kinds of abuse that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials or military authorities." So if there is no evidence whatsoever that Judge Gonzales was any way responsible for the criminal acts that occurred at Abu Ghraib by a few, why are we talking about this in Judge Gonzales' confirmation hearing? This after all is a confirmation hearing to head the Department of Justice, not an oversight hearing of the Department of Defense.

In conclusion, let me just say, Mr. Chairman, that I am proud of my friend, Judge Alberto Gonzales. He is the source of great inspiration and pride to his family and his friends, and all of us who call the great State of Texas home. Time and time again Judge Gonzales has done his duty on the war on terrorism. It disheartens me to see him held up to ridicule, distortions and outright lies for being the patriot that he is.

So, Mr. Chairman, let me say to you and my colleagues, let us confirm this good man from Humble. Thank you very much.

[The prepared statement of Senator Cornyn appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Senator Cornyn.

We now turn to newly elected Senator Ken Salazar. Congratulations, Senator Salazar from Colorado, and we look forward to your introduction of Judge Gonzales.

PRESENTATION OF ALBERTO R. GONZALES, NOMINEE TO BE ATTORNEY GENERAL OF THE UNITED STATES, BY HON. KEN SALAZAR, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator SALAZAR. Thank you, Chairman Specter, and Ranking Member Leahy, and Members of the Committee. It is an honor and a privilege for me to appear before you this morning.

It is also an honor and privilege for me to appear before you this morning to make an introduction of Judge Alberto Gonzales. I do so at the invitation of Judge Gonzales. He and I come from very similar backgrounds. We both understand the struggles of people

as they try to build better lives for themselves and for their families in America.

In a speech at Rice University, Judge Gonzales recently recalled his upbringing, and he said, I quote, "During my years in high school I never once asked my friends once over to our home. You see, even though my father pored his heart into that house, I was embarrassed that 10 of us lived in a cramped space with no hot running water or telephone."

In another statement, Judge Gonzales said, "My father did not have opportunities because he had only two years of formal schooling, and so my memories are of a man who had to work six days a week to support his family. He worked harder than any person I have ever known."

From those humble beginnings, Judge Gonzales has excelled academically and professionally. In my view, Judge Gonzales is better qualified than many recent Attorneys General. He served as a member of the Texas Supreme Court, Secretary of State for the State of Texas, Chief Counsel to the Governor of Texas, and for the last four years as White House Counsel to the President. I have known Judge Gonzales from my days as Colorado's Attorney General. In addition, over the last several weeks I have met and had several discussions with Judge Gonzales about his nomination to serve as this Nation's Attorney General. I believe his decision to reach out to me, someone who is from a different political party, is an indication of his interest in working with all of us in making our homeland more secure, and at the same time protecting our citizens' rights and liberties.

I have shared with Judge Gonzales my views on a few priority items I would like to work on with the Justice Department and with this important Committee under your leadership. Judge Gonzales has pledged to me his willingness to work on these issues. Among the issues we discussed are the following. One, homeland security at the local and State level. For those of us, such as Senator Sessions and Senator Cornyn, who have served as Attorneys General, we know the importance of this issue at the local level. I believe we must do more to support our State and local law enforcement officials and other first responders as we take on the most significant national security challenge of the 21st century, and that is, providing security for our homeland against the threats of terrorism.

I am pleased that if confirmed as Attorney General, Judge Gonzales has indicated his willingness to work on this matter, and will come to Colorado to meet with local and State law enforcement officials and other first responders, to listen to their experiences, needs and concerns, and I am certain that he will do that in other states as well.

Secondly, on the PATRIOT Act, I support the PATRIOT Act and the necessary reasons for its enactment. I have also expressed my support for changes to the Act, as have been discussed and proposed by a bipartisan group of leaders in the Congress. Judge Gonzales has indicated his willingness to work on this important matter so that we might better balance out the needs for national security, while at the same time maintaining the important fundamental civil liberties of our Nation.

I know that there are other serious questions that this Committee will explore and ask of Judge Gonzales in these proceedings. It is appropriate to do so in these confirmation proceedings. I am hopeful that Judge Gonzales will satisfactorily address the concerns of the Senate, and I am hopeful that he will become the next United States Attorney General for our Nation.

Thank you.

Chairman SPECTER. Thank you very much, Senator Salazar.

Judge Gonzales, would you now stand for the administration of the oath? Raise your right hand. Do you solemnly swear that the testimony you will give before the Senate Judiciary Committee will be the truth, the whole truth and nothing but the truth, so help you God?

Judge GONZALES. I swear.

Chairman SPECTER. Would you begin, Judge Gonzales, by introducing your beautiful family?

Judge GONZALES. Mr. Chairman, Senator Leahy, distinguished Members of the Committee.

Chairman SPECTER. Judge Gonzales, a request is pending for you to introduce your family before you begin your testimony.

Judge GONZALES. With me here this morning is my beautiful wife, Rebecca.

Chairman SPECTER. Ms. Gonzales, would you stand, please?

Judge GONZALES. As well as our three sons, Jared, Graham and Gabriel.

Chairman SPECTER. Would you gentlemen please stand? Thank you.

Judge GONZALES. Also here is my mother, Maria.

Chairman SPECTER. Thank you.

Judge GONZALES. My brother Tony, who is a 26-year veteran of the Houston Police Department and a SWAT officer, and my mother-in-law, Lorinda Turner.

Chairman SPECTER. Thank you all for standing, and welcome to these proceedings. Thank you.

Now, Judge Gonzales, we would be very pleased to hear your opening statement.

**STATEMENT OF ALBERTO R. GONZALES, NOMINEE TO BE
ATTORNEY GENERAL OF THE UNITED STATES**

Judge GONZALES. Mr. Chairman, Senator Leahy, and distinguished Members of the Committee, it is the highest honor of my professional career to appear before you today as the President's nominee to be Attorney General of the United States. I owe a debt of deep gratitude to the President for the trust he has placed in me.

I also want to thank Senator Cornyn for his kind introduction and for his many years of friendship. Ken Salazar was sworn in as a United States Senator just two days ago. I want to thank the Senator for his willingness to extend the hand of friendship across the political aisle to introduce me today. Although Senator Hutchison could not be with us today, I appreciate her many years of support as well.

Mr. Chairman, the highest objective of the Department of Justice is the pursuit of justice. This noble objective, justice, is reflected in human terms in the hopeful eyes of a new citizen voting for the

first time; in the quiet gratitude of a victim of crime whose rights have been vindicated in the courts; and in the pride of a person given the opportunity to succeed no matter their skin color or gender or disability. For justice, properly understood, cannot in my view be divorced from the individual. It always has a human dimension, and if confirmed as Attorney General, I pledge that I will always remember that.

With the consent of the Senate, I will no longer represent only the White House; I will represent the United States of America and its people. I understand the differences between the two roles. In the former I have been privileged to advise the President and his staff. In the latter I would have a far broader responsibility: to pursue justice for all the people of our great Nation, to see that the laws are enforced in a fair and impartial manner for all Americans.

Wherever we pursue justice, from the war on terror, to corporate fraud, to civil rights, we must always be faithful to the rule of law. And I want to make very clear that I am deeply committed to the rule of law. I have a deep and abiding commitment to the fundamental American principle that we are a Nation of laws and not of men. I would not have the audacity to appear before this Committee today if that commitment were not the core principle that has guided all of my professional endeavors.

Our Government's most basic obligation is to protect its citizens from enemies who would destroy their lives and our Nation's way of life, and the Department of Justice's top priority is to prevent terror attacks against our Nation.

As we fight the war on terror, we must always honor and observe the principles that make our society so unique and worthy of protection. We must be committed to preserving civil rights and civil liberties. I look forward, if I am confirmed, to working with this Committee, the Congress and the public to ensure that we are doing all we can do so. Although we may have differences from time to time, we all love our country and want to protect it, while remaining true to our Nation's highest ideals, and working together, we can accomplish that goal.

While I look forward to answering your specific questions concerning my actions and my views, I think it is important to stress at the outset that I am and will remain deeply committed to ensuring the United States Government complies with all of its legal obligations as it fights the war on terror, whether those obligations arise from domestic or international law. These obligations include, of course, honoring the Geneva Conventions whenever they apply. Honoring our Geneva obligations provide critical protection for our fighting men and women, and advances norms for the community of nations to follow in times of conflict. Contrary to reports, I consider the Geneva Conventions neither obsolete nor quaint.

After the attacks of 9/11, our Government had fundamental decisions to make concerning how to apply treaties and U.S. law to an enemy that does not wear a uniform, owes no allegiance to any country, is not a party to any treaties, and most importantly, does not fight according to the laws of war.

As we have debated these questions, the President has made clear that he is prepared to protect and defend the United States and its citizens and will do so vigorously, but always in a manner

consistent with our Nation's values and applicable law, including our treaty obligations.

Having said that, like all of you, I have been deeply troubled and offended by reports of abuse. The photos from Abu Ghraib sickened and outraged me, and left a stain on our Nation's reputation. And the President has made clear that he condemns this conduct, and that these activities are inconsistent with his policies. He has also made clear that America stands against and will not tolerate torture under any circumstances.

I share his resolve that torture and abuse will not be tolerated by this administration, and commit to you today, that if confirmed, I will ensure that the Department of Justice aggressively pursues those responsible for such abhorrent actions.

Chairman Specter, if I may add a personal note, I want to congratulate you for your chairmanship of this important Committee, and I look forward, if confirmed, to the many occasions that we will discuss the important issues facing our country in the months and years ahead.

Senator Hatch, I want to thank you for your dedicated service as Chairman of this Committee, for the good working relationship we have enjoyed, for all the many kindnesses you have shown me personally.

I appreciate the good working relationship I have enjoyed with Senator Leahy during my tenure as Counsel to the President. I know him to be a person of goodwill and dedication, and I have great confidence that if I am fortunate enough to be confirmed, we will build upon that as we reach across the aisle to work together to serve the American people.

Mr. Chairman, it is a distinct honor to appear before the Committee today. I appreciate the time and attention that Members of the Committee and their staffs have dedicated to this hearing and to consideration of my nomination, and I look forward to answering your questions, not just at this hearing, but if I am fortunate enough to be confirmed, in the months and years ahead as we work together in the noble and high calling of the pursuit of justice.

Thank you, Mr. Chairman.

[The prepared statement of Judge Gonzales appears as a submission for the record.]

[The biographical information of Judge Gonzales follows.]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).
Alberto R. Gonzales (Albert Gonzales, Al Gonzales)
2. Address: List current place of residence and office address(es).
Vienna, Virginia 1600 Pennsylvania Ave, NW
Washington, DC 20502
3. Date and place of birth.
August 4, 1955, San Antonio, Texas
4. Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).
Married to Rebecca Turner Gonzales (formerly Rebecca Turner), Director of Development, National Endowment for the Arts

Nancy Hanks Center
1100 Pennsylvania Ave, NW
Suite 528
Washington, DC 20506
5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Alaska Methodist University (by correspondence), 6/1974-8/1974
United States Air Force Academy, 6/1975-5/1977 (est.)
Rice University, 8/1977-5/1979, B.A. 1979
Harvard Law School, 9/1979-5/1982, J.D. 1982
6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Executive Office of the President, 2001-present
Presidential Transition Team, 2000-2001
State of Texas, 1995-2000
Justice, Supreme Court of Texas, 1/1999-12/2000
Secretary of State, 12/1997-1/1999
General Counsel to the Governor 1/1995-12/1997
Vinson & Elkins L.L.P., 1981, 1982-1995

University of Houston, 1986-1989 (various periods)
 Fulbright & Jaworski, 1981
 United States Environmental Protection Agency, 1980-1981
 Hutcheson & Grundy, 1979

7. Military Service: Have you had any military service: If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

United States Air Force, Service Number 456060599, Airman First Class,
 8/24/1973-01/1975
 USAF Academy Preparatory School, 01/1975-6/30/1975
 USAF Academy Cadet, 7/1/1975-8/2/1977
 Honorably Discharged, 8/23/1979

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

To the best of my recollection, this list includes the awards and honors I have received that may be of interest to the Committee. This list may not be comprehensive.

Exemplary Leader Award, 2004, American Leadership Forum
 Keepers of the Dream Award, 2004, US Department of Housing and Urban
 Development
 Gary L. McPherson Distinguished Alumni Award, 2003, American Council of
 Young Political Leaders
 28th Annual Convention and Business Expo Chairman's Leadership Award, 2003,
 Texas Association of Mexican American Chambers of Commerce
 Exceptional Service Award, 2003, US Department of Health and Human Services
 Triunfador Award, 2003, Hispanic Scholarship Fund
 Hispanic Hero, 2003, Association for the Advancement of Mexican Americans
 Good Neighbor Award, 2003, United States-Mexico Chamber of Commerce
 Honorary Degree in Arts & Letters, 2003, Miami-Dade Community College
 Lifetime Achievement Award, 2003, Travis County Republican Party
 President's Award, 2003, United States Hispanic Chamber of Commerce
 President's Award, 2003, League of United Latin American Citizens
 Outstanding Texas Leader Award, 2002, John Ben Shepperd Public Leadership
 Forum
 Harvard Law School Association Award, 2002, Harvard Law School Association
 Distinguished Alumnus of Rice University, 2002, The Association of Rice
 Alumni
 Doctor of Laws, *honoris causa*, 2002, The Catholic University of America
 Hispanic Achiever, 2001, Hispanic President's Summit Committee
 Outstanding Achievement Award, 2000, Texas League of United Latin American
 Citizens
 Texas Leader, 1999, Leadership Houston

Latino Lawyer of the Year, 1999, Hispanic National Bar Association
 100 Most Influential Hispanics, 1999 and 2001, *Hispanic Business*
 Recognition Award, 1998, Mexican American Bar Association of Houston
 Presidential Citation, 1997, State Bar of Texas
 One of Five Outstanding Young Texans, 1994, Texas Junior Chamber of
 Commerce
 One of Five Outstanding Young Houstonians, 1994, Houston Junior Chamber of
 Commerce
 Commitment to Leadership Award, 1993, United Way of the Texas Gulf Coast
 Outstanding Young Lawyer of Texas, 1992, Texas Young Lawyers Association
 Woodrow Seals Outstanding Young Lawyer, 1992, Houston Young Lawyers
 Association
 Hispanic Salute, 1989, Houston Metro Ford Dealers and Ford Division, Ford
 Motor Company
 President's Award, 1989, Houston Bar Association
 Charles Park Hill Scholar, Rice University

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices you have held in such groups.

American Bar Association
 Member of the House of Delegates, 1994

Texas Bar Foundation
 Trustee, 1996-1999

Houston Bar Association
 Ex-Officio Member of the Board of Directors and HBA Representative to
 the House of Delegates of the American Bar Association, 1994
 Member, Community Affairs Committee, 1993-1994
 Member, Long-Range Planning Committee, 1992-1994
 Member, Task Force on Committees, 1992-1993
 Director, Corporate Counsel Section, 1991-1992
 Board Member, Houston Volunteer Lawyers Program, 1991-1993
 Fellow of the Houston Bar Foundation, 1992
 Chair, Law Internship Approval Committee, 1990-1991
 Member, Membership Committee, 1990-1991
 Member, Law Internship Approval Committee, 1989-1990

Houston Hispanic Bar Association
 President, 1990-1991
 President-Elect, 1989-1990
 Secretary, 1988-1989
 Director, 1988-1993
 Liaison to Houston Bar Association and Mexican-American Bar
 Association, 1990-1991
 Liaison to American Bar Association, 1989-1990

State Bar of Texas

Board of Directors, District 4, Place 6, 1991-1994
Fellow of the Texas Bar Foundation, 1992-1994
Member, Texas Disciplinary Rules of Professional Conduct Committee,
1993-1995
Vice Chair, Combat Hunger and Homelessness Committee, 1990-1992
Member, Opportunities for Minorities in the Profession Committee,
1991-1992
Member, Annual Meeting Committee, 1991-1992
Member, President's Task Force on Thurgood Marshall School of Law,
1990-1991

Texas Young Lawyers Association

Member, Outstanding Young Lawyer Committee, 1994
Member, Minority Involvement Committee, 1989

Harris County Judicial Qualifications Committee

Member, 1984-1988
Subcommittee on Civil Court Candidates, 1986

Mexican American Bar Association

Chair, Advisory Committee on *Ross v. Eckels* Settlement Agreement with
the Houston Independent School District, 1987
Member, Judicial Screening Committee, 1986

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I am currently a member of four organizations – the American Law Institute, the State Bar of Texas, the Wolf Trap Woods Homes Association, and the American Leadership Forum – that may engage in lobbying activity, although I am not aware of whether, or to what extent, these organizations are engaged in such activity. I am not aware of any other organizations of which I am currently a member, whether or not engaged in lobbying activity, although given that I have been involved with a number of organizations in the past, I cannot guarantee that there are no other organizations that currently consider me a member.

It is possible that I am currently considered a member of one or more organizations by virtue of a contribution made to that organization, but I am not aware of any such memberships.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of the United States, admitted on 12/1/1997
Texas State Bar, licensed on 5/13/1983

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

The following is a list of published writings and speeches that I was able to locate after a diligent review of my records. I am confident that there are additional writings or speeches, particularly (but not exclusively) from the time prior to my appointment as Counsel to the President, to which I no longer have access or for which I did not prepare formal remarks.

Although there may be press reports about these and other speeches that I have given, such reports are not readily available to me.

Please note that dates on the copies of speeches provided with this questionnaire may reflect the dates on which those speeches were written or modified, rather than the dates on which they were delivered. The dates provided in the list that follows are, to the best of my knowledge, the dates on which the speeches were delivered. Also, please be aware that the speeches submitted with this questionnaire are the copies of my remarks that I currently have on file. It is possible that the actual remarks I gave on any particular occasion differed from the versions of the speeches that I now have on record.

Articles

Alberto R. Gonzales, Terrorists are different, USA Today, June 10, 2004, at 14A.

Alberto R. Gonzales, The rule of law and the rules of war; Guantanamo and Iraq, Int'l Herald Trib., May 18, 2004, at 9.

Alberto R. Gonzales, The Rule of Law and the Rules of War, N.Y. Times, May 15, 2004, at A17.

Alberto R. Gonzales, President supports inquiry, USA Today, July 11, 2003, at 10A.

Alberto R. Gonzales, Double Standard Filibuster, Wash. Post, June 2, 2003, at A17.

Alberto Gonzales, Time to Vote, Senators, Wall St. J., May 19, 2003, at A16.

Alberto R. Gonzales, No More Stalling: It's time for the Senate to confirm Miguel Estrada, Wash. Post, Sep. 26, 2002, at A33.

Alberto R. Gonzales, The Crisis in Our Courts, Wall St. J., Jan. 25, 2002, at A18.

Alberto R. Gonzales, A president's privilege, Milwaukee J. Sentinel, Dec. 21, 2001, at 23A.

Alberto R. Gonzales, Freedom, Openness and Presidential Papers, Wash. Post, Dec. 20, 2001, at A43.

Alberto R. Gonzales, Marital Justice, Full and Fair, N.Y. Times, Nov. 30, 2001, at A27.

Alberto R. Gonzales, Justice for terrorists is goal, USA Today, Nov. 16, 2001, at 14A.

Alberto R. Gonzales, Protect sensitive documents, USA Today, Nov. 12, 2001, at 16A.

Alberto R. Gonzales, "ID, Please?" New INS entry-exit control system could have adverse economic effects on communities on both sides of the border, Ethnic NewsWatch, Sep. 30, 1998, at 69.

Alberto Gonzales, Mexico's health is important to Texas, Dallas Morning News, June 25, 1998, at 23A.

Alberto R. Gonzales, Viewpoints: Extend NAFTA to Chile, Houston Chron., Mar. 30, 1998, at A17.

Alberto R. Gonzales, INS pilot program unfair to Eagle Pass residents, San Antonio Express-News, Mar. 2, 1998, at A9.

Alberto Gonzales, Mexico-Europe trade is no threat to Texas, Dallas Morning News, Jan. 18, 1998, at 6J.

Other Published Materials

Interviews/Internet Materials

President Nominates Judge Al Gonzales as Next Attorney General; Remarks by the President and Attorney General Nominee Judge Alberto Gonzales (Nov. 10, 2004), at <http://www.whitehouse.gov/news/releases/2004/11/20041110-8.html>.

Judge Gonzales Discusses Records Management (Nov. 4, 2004), at <http://www.whitehouse.gov/results/tools/gonzalestranscript.html>.

Interview with Judge Alberto Gonzales, Nos Conocemos (Oct. 15, 2004), at <http://www.georgewbush.com/Chat/transcript.aspx?ID=43>.

Interview with Judge Al Gonzales, White House Interactive (Oct. 1, 2004), at <http://www.whitehouse.gov/interactive/oct04.html>.

Interview with Judge Al Gonzales, White House Interactive (Aug. 13, 2004), at <http://www.whitehouse.gov/interactive/August04.html>.

Interview with Alberto Gonzales, Ask the White House (July 7, 2004), at <http://www.whitehouse.gov/ask/20040707.html>.

Interview with Judge Al Gonzales, White House Interactive (May 4, 2004), at <http://www.whitehouse.gov/interactive/may04.html>.

Interview with Al Gonzales, Ask the White House (Oct. 30, 2003), at <http://www.whitehouse.gov/ask/20031030.html>.

Interview with Alberto Gonzales, Ask the White House (Sep. 9, 2003), at <http://www.whitehouse.gov/ask/20030905-2.html>.

Interview with Judge Alberto Gonzales, Ask the White House (May 8, 2003), at <http://www.whitehouse.gov/ask/20030508.html>.

Interview with White House Counsel Alberto R. Gonzales, The Third Branch (May 2002), at <http://www.uscourts.gov/ttb/may02ttb/interview.html>.

Interview with Alberto R. Gonzales, The Newshour with Jim Lehrer (Nov. 28, 2001), at http://www.pbs.org/newshour/bb/white_house/July-dec01/gonzales_11-28.html.

Letters/Memoranda

Letter from Alberto R. Gonzales, Counsel to the President, to Chairman Thomas H. Kean and Vice Chairman Lee H. Hamilton, National Commission on Terrorist Attacks Upon the United States (Mar. 30, 2004), at <http://www.whitehouse.gov/news/releases/2004/03/20040330-3.html>.

Letter from Alberto R. Gonzales, Counsel to the President, to Senator Charles Schumer (May 6, 2003), at <http://www.usdoj.gov/olp/judgesschumerletter5603-2.pdf>.

Letter from Alberto R. Gonzales, Counsel to the President, to Senators Patrick J. Leahy, Edward M. Kennedy, Joseph R. Biden, Herb Kohl, Dianne Feinstein, Russell D. Feingold, Charles E. Schumer, Richard J. Durbin, and Maria Cantwell (May 2, 2001), at <http://www.whitehouse.gov/news/releases/2001/05/20010507.html>.

Letter from Alberto R. Gonzales, Counsel to the President, to Martha W. Barnett, President of American Bar Association (Mar. 22, 2001), at <http://www.whitehouse.gov/news/releases/2001/03/20010322-5.html>.

Letter from Alberto R. Gonzales, Counsel to the President, to Senators Patrick J. Leahy and Charles Schumer (Mar. 22, 2001), at <http://www.whitehouse.gov/news/releases/2001/03/20010322-4.html>.

Memorandum from Alberto R. Gonzales, General Counsel, to Governor George W. Bush (Feb. 14, 1995), at <http://www.theatlantic.com/doc/prem/200307/berlow-documents>.

Press Briefings

Press Briefing by White House Counsel Judge Alberto Gonzales, U.S. Department of Defense General Counsel William Haynes, U.S. Department of Defense Deputy General Counsel Daniel Dell'Orto, and U.S. Army Deputy Chief of Staff for Intelligence General Keith Alexander (June 22, 2004), at <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html>.

Press Briefing by Dr. Richard Tubb (June 29, 2002), at <http://www.whitehouse.gov/news/releases/2002/06/20020629-7.html>.

Press Briefing by Dr. Richard Tubb (June 28, 2002), at <http://www.whitehouse.gov/news/releases/2002/06/20020628-10.html>.

Judicial Opinions

Pustejovsky v. Rapid-American Corp., 35 S.W.3d 643 (Tex. 2000).

Texas Dep't of Transp. v. Able, 35 S.W.3d 608 (Tex. 2000).

Grapevine Excavation, Inc. v. Maryland Lloyds, 35 S.W.3d 1 (Tex. 2000) (Gonzales, J., concurring).

Prudential Ins. Co. v. Financial Rev. Servs., Inc., 29 S.W.3d 74 (Tex. 2000).

City of Fort Worth v. Zimlich, 29 S.W.3d 62 (Tex. 2000).

Golden Eagle Archery, Inc. v. Jackson, 24 S.W.3d 362 (Tex. 2000).

Lopez v. Munoz, Hockema & Reed, 22 S.W.3d 857 (Tex. 2000) (Gonzales, J., concurring in part and dissenting in part).

Southwestern Refining Co. v. Bernal, 22 S.W.3d 425 (Tex. 2000).

Gulf Ins. Co. v. Burns Motors, Inc., 22 S.W.3d 417 (Tex. 2000).

In re Doe, 19 S.W.3d 346 (Tex. 2000) (Gonzales, J., concurring).

In re Doe 3, 19 S.W.3d 300 (Tex. 2000) (Gonzales, J., concurring in the judgment).

Osterberg v. Peca, 12 S.W.3d 31 (Tex. 2000) (Gonzales, J., concurring).

Mallios v. Baker, 11 S.W.3d 157 (Tex. 2000).

In re The Dallas Morning News, Inc., 10 S.W.3d 298 (Tex. 1999) (Gonzales, J., concurring).

In re Missouri Pacific Railroad Co., 998 S.W.2d 212 (Tex. 1999).

General Motors Corp. v. Sanchez, 997 S.W.2d 584 (Tex. 1999).

Mid-Century Ins. Co. v. Kidd, 997 S.W.2d 265 (Tex. 1999).

Texas Farmers Ins. Co. v. Murphy, 996 S.W.2d 873 (Tex. 1999).

Fitzgerald v. Advanced Spine Fixation Sys., Inc., 996 S.W.2d 864 (Tex. 1999).

Speeches

Alberto R. Gonzales, Speech at the Union League Power Lunch with Latino Leaders (Oct. 27, 2004).

Alberto R. Gonzales, Speech at St. Joseph's University (Oct 27, 2004, copy of remarks not available).

Alberto R. Gonzales, Speech at the U.S. Department of Housing and Urban Development (Oct. 19, 2004).

Alberto R. Gonzales, Speech at the National Latino Peace Officers Association (Oct. 16, 2004).

Alberto R. Gonzales, Speech in Las Vegas, Nevada "Nos Conocemos" Tour (Oct. 12, 2004).

Alberto R. Gonzales, Speech in Denver, Colorado "Nos Conocemos" Tour (Oct. 12, 2004).

Alberto R. Gonzales, Speech in Las Cruces, New Mexico "Nos Conocemos" Tour (Oct. 11, 2004).

Alberto R. Gonzales, Speech in Albuquerque, New Mexico "Nos Conocemos" Tour (Oct. 11, 2004).

Alberto R. Gonzales, Speech to the Louisville Latino Community (Oct. 4, 2004).

Alberto R. Gonzales, Speech at the U.S. Hispanic Contractors Association 2004 National Conference (Sep. 25, 2004).

Alberto R. Gonzales, Speech at the National Hispanic Leadership Summit (July 12, 2004).

Alberto R. Gonzales, Speech at the Mount St. Mary's College Commencement (May 23, 2004).

Alberto R. Gonzales, Speech at the Latin American Association Companeros Awards Luncheon (May 19, 2004).

Alberto R. Gonzales, Speech at the Pepperdine University Law School Dinner (Feb. 28, 2004).

Alberto R. Gonzales, Speech at the American Bar Association Standing Committee on Law and National Security (Feb. 24, 2004).

Alberto R. Gonzales, Speech at the Belle Haven Country Club Introducing General Richard B. Myers (Feb. 21, 2004).

Alberto R. Gonzales, Speech at the Hispanic Bar Association (Nov. 12, 2003).

Alberto R. Gonzales, Speech at the Lawyers for Literacy (Oct. 24, 2003).

Alberto R. Gonzales, Speech at the American Bar Association (Oct. 23, 2003).

Alberto R. Gonzales, Speech at the Hispanic College Fund (Oct. 22, 2003).

Alberto R. Gonzales, Speech at the Association for the Advancement of Mexican Americans (Oct. 16, 2003).

Alberto R. Gonzales, Speech at the Central Intelligence Agency (Oct. 15, 2003).

Alberto R. Gonzales, Speech at the U.S. Department of the Air Force 11th Wing Bolling Air Force Base (Oct. 9, 2003).

Alberto R. Gonzales, Speech at the Connecticut Latino and Puerto Rican Affairs Commission (Oct. 4, 2003).

Alberto R. Gonzales, Speech at the White House Communications Agency (Sep. 30, 2003).

Alberto R. Gonzales, Speech at the U.S. Coast Guard (Sep. 17, 2003).

Alberto R. Gonzales, Speech at the U.S. Department of Labor (Sep. 17, 2003).

Alberto R. Gonzales, Speech at the American GI Forum (Aug. 15, 2003).

Alberto R. Gonzales, Speech at the San Diego Regional Chamber of Commerce (Aug. 7, 2003).

Alberto R. Gonzales, Speech at the Lincoln-Juarez Opportunity Center (Aug. 7, 2003).

Alberto R. Gonzales, Speech at the New Majority Reception (Aug. 6, 2003).

Alberto R. Gonzales, Speech at Town Hall Los Angeles (Aug. 6, 2003).

Alberto R. Gonzales, Speech at the College Republican National Committee Convention (July 26, 2003).

Alberto R. Gonzales, Speech at the Texas Association of Mexican Chambers of Commerce (July 19, 2003).

Alberto R. Gonzales, Speech at the National Association of Latino Elected and Appointed Officials (June 27, 2003).

Alberto R. Gonzales, Speech at the Arizona Republican Party (June 27, 2003).

Alberto R. Gonzales, Speech at the California Newspaper Publisher's Association (June 26, 2003).

Alberto R. Gonzales, Speech at the U.S. Chamber of Commerce Minority Business Roundtable (June 18, 2003).

Alberto R. Gonzales, Speech at the U.S. Marine Corps Sunset Parade Reception (June 17, 2003).

Alberto R. Gonzales, Speech at the South Texas College of Law Commencement (May 24, 2003).

Alberto R. Gonzales, Speech at the Rutgers University School of Law Commencement (May 23, 2003).

Alberto R. Gonzales, Speech at the State Department Hispanic Business Conference (May 19, 2003).

Alberto R. Gonzales, Speech at the National Archives and Records Administration (May 13, 2003).

Alberto R. Gonzales, Speech at the Rose Garden Introducing President George W. Bush (May 9, 2003).

Alberto R. Gonzales, Speech at Miami-Dade Community College (May 3, 2003).

Alberto R. Gonzales, Speech at the National Security Agency Law Day (May 2, 2003).

Alberto R. Gonzales, Speech at the U.S. Navy JAG (Apr. 30, 2003).

Alberto R. Gonzales, Speech at the Travis County Lincoln-Reagan Day Dinner (Apr. 25, 2003).

Alberto R. Gonzales, Speech at the Hispanic Leadership Luncheon (Apr. 25, 2003).

Alberto R. Gonzales, Speech at the Denver Hispanic Chamber of Commerce (Apr. 11, 2003).

Alberto R. Gonzales, Speech at Washington & Lee University (Mar. 31, 2003).

Alberto R. Gonzales, Speech at the U.S. Hispanic Chamber of Commerce (Mar. 13, 2003).

Alberto R. Gonzales, Speech at the League of United Latin American Citizens (Mar. 11, 2003).

Alberto R. Gonzales, Speech at O'Melveny & Myers (Mar. 1, 2003).

Alberto R. Gonzales, Speech at the Latino Business Coalition (Feb. 26, 2003).

Alberto R. Gonzales, Speech at the Texas Tactical Police Officers Association (Jan. 21, 2003).

Alberto R. Gonzales, Speech at the United States Military Academy (Nov. 8, 2002).

Alberto R. Gonzales, Speech at the Blank Rome Comisky & McCauley Retreat (Oct. 25, 2002).

Alberto R. Gonzales, Speech at the Associated Press Managing Editors Annual Awards Luncheon (Oct. 24, 2002).

Alberto R. Gonzales, Speech at the Hispanic National Bar Association (Oct. 19, 2002).

Alberto R. Gonzales, Speech at the National Defense University (Oct. 7, 2002).

Alberto R. Gonzales, Speech at the Hispanic Scholarship Fund (Oct. 2, 2002).

Alberto R. Gonzales, Speech at the Federal Bar Association (Sep. 28, 2002).

Alberto R. Gonzales, Speech at the Southern Methodist University Law School (Sep. 27, 2002).

Alberto R. Gonzales, Speech at the National Hispanic Publication Association (Sep. 26, 2002).

Alberto R. Gonzales, Speech at the Defense CEETA (Sep. 24, 2002).

Alberto R. Gonzales, Speech at the National Hispanic Leadership Summit (Sep. 18, 2002).

Alberto R. Gonzales, Speech at the National Hispanic Foundation for the Arts Dinner (Sep. 17, 2002).

Alberto R. Gonzales, Speech at the Naval Postgraduate School (Aug. 27, 2002).

Alberto R. Gonzales, Speech at the Federal Dispute Resolution Conference (Aug. 22, 2002).

Alberto R. Gonzales, Speech at the Parsky Luncheon (Aug. 22, 2002).

Alberto R. Gonzales, Speech at the Orange County Republican Party Meeting (Aug. 22, 2002).

Alberto R. Gonzales, Speech at the League of United Latin American Citizens (June 27, 2002).

Alberto R. Gonzales, Speech at the Texas Supreme Court Historical Society (June 7, 2002).

Alberto R. Gonzales, Speech at the Mexican American Legal Defense and Educational Fund (June 6, 2002).

Alberto R. Gonzales, Speech at the Harvard Law School Distinguished Alumni Award Ceremony (June 5, 2002).

Alberto R. Gonzales, Speech at Catholic University of America School of Law Commencement (May 25, 2002).

Alberto R. Gonzales, Speech at the America Law Institute (May 15, 2002).

Alberto R. Gonzales, Speech at the Houston Hispanic Bar Association (May 10, 2002).

Alberto R. Gonzales, Speech at the American Bar Association (May 7, 2002).

Alberto R. Gonzales, Speech at the Council for National Policy (May 3, 2002).

Alberto R. Gonzales, Speech at the Bar Association of Montgomery County (May 3, 2002).

Alberto R. Gonzales, Speech at the Tulane Latin American Law Institute (May 3, 2002).

Alberto R. Gonzales, Speech at the Business Roundtable (Apr. 29, 2002).

Alberto R. Gonzales, Speech at the U.S. Air Force JAG (Apr. 24, 2002).

Alberto R. Gonzales, Speech at the Association of Hispanic Advertising Agencies (Apr. 19, 2002).

Alberto R. Gonzales, Speech at the Republican National Lawyers Association (Apr. 19, 2002).

Alberto R. Gonzales, Speech at the Presidential Distinguished Rank Award Banquet (Apr. 18, 2002).

Alberto R. Gonzales, Speech at the Brookings Institution Interagency Seminar Group (Apr. 9, 2002).

Alberto R. Gonzales, Speech at the Texas General Counsel Group (Apr. 5, 2002).

Alberto R. Gonzales, Speech at the Texas Defense Council (Apr. 4, 2002).

Alberto R. Gonzales, Speech at the Young Hispanic Republicans Association (Mar. 21, 2002).

Alberto R. Gonzales, Speech at the Indian Treaty Room Introducing President George W. Bush (Mar. 20, 2002).

Alberto R. Gonzales, Speech at the American Tort Reform Association (Mar. 14, 2002).

Alberto R. Gonzales, Speech at the New Jersey Hispanic Bar Association (Feb. 23, 2002).

Alberto R. Gonzales, Speech at Howard University (Feb. 13, 2002).

Alberto R. Gonzales, Speech at the Colorado Hispanic Bar Association (Feb. 2, 2002).

Alberto R. Gonzales, Speech at the National Association of Hispanic Federal Executives Summit (Jan. 24, 2002).

Alberto R. Gonzales, Speech at the Republican National Committee Legal Eagles (Jan. 11, 2002).

Alberto R. Gonzales, Speech at the Federal Bar Association (Jan. 4, 2002).

Alberto R. Gonzales, Speech at the Federalist Society (Dec. 13, 2001).

Alberto R. Gonzales, Speech at the American Bar Association National Security Conference (Nov. 30, 2001).

Alberto R. Gonzales, Speech at the American Bar Association Business Section (Nov. 14, 2001).

Alberto R. Gonzales, Speech at the Council of Chief Legal Officers (Oct. 22, 2001).

Alberto R. Gonzales, Speech at the White House Introducing President George W. Bush (Oct. 12, 2001).

Alberto R. Gonzales, Speech at the Federal Deposit Insurance Corporation (Sept 27, 2001).

Alberto R. Gonzales, Speech at the U.S. Department of Agriculture (Sep. 26, 2001).

Alberto R. Gonzales, Speech at the U.S. Department of Justice (Sep. 19, 2001).

Alberto R. Gonzales, Speech at the Office of Government Ethics 2001 Conference (Sep. 11, 2001).

Alberto R. Gonzales, Speech at the Baker Institute (Sep. 7, 2001).

Alberto R. Gonzales, Speech at the Houston Forum and Houston Bar Association (Sep. 7, 2001).

Alberto R. Gonzales, Speech at the Conference of Chief Justices and National Center for State Courts (July 31, 2001).

Alberto R. Gonzales, Speech at the Minority Corporate Counsel Association Diversity Dinner (June 21, 2001).

Alberto R. Gonzales, Speech at the Hispanic Corporate Achievers (June 1, 2001).

Alberto R. Gonzales, Speech at the National District Attorneys Association (May 21, 2001).

Alberto R. Gonzales, Speech at the Texas Supreme Court (May 10, 2001).

Alberto R. Gonzales, Speech at the Heritage Foundation (Apr. 18, 2001).

Alberto R. Gonzales, Speech at the Mexican American Legal Defense and Educational Fund (Apr. 3, 2001).

Alberto R. Gonzales, Speech at the Hispanic Association of Colleges and Universities (Apr. 3, 2001).

Alberto R. Gonzales, Speech at the Mexican American Bar Association of Houston (Feb. 22, 2001).

Alberto R. Gonzales, Speech at the Asian Bar Association (Oct. 18, 2000).

Alberto R. Gonzales, Speech at the Dallas Bar Association Appellate Section (Oct. 15, 2000).

Alberto R. Gonzales, Speech at the Red Mass (Oct. 12, 2000).

Alberto R. Gonzales, Speech at the Texas Association of Civil Trial and Appellate Specialists (Sep. 21, 2000).

Alberto R. Gonzales, Speech at the Commitment to Leadership Award Ceremony (June 8, 2000).

Alberto R. Gonzales, Speech at the Hispanic Contractors Association (Nov. 5, 1999).

Alberto R. Gonzales, Speech at the American Association of Hispanic CPAs (Oct. 22, 1999).

Alberto R. Gonzales, Speech at the Southwestern Insurance Information Service (Oct. 19, 1999).

Alberto R. Gonzales, Speech at the Hispanic National Bar Association (Oct. 17, 1999).

Alberto R. Gonzales, Speech at the Sixth Annual Conference of the Texas/Mexico Bar Association (Oct. 16, 1999).

Alberto R. Gonzales, Speech at the Hispanic Bar Association of Austin and the Hispanic Chamber of Commerce (Oct. 5, 1999).

Alberto R. Gonzales, Speech at the Houston Hispanic Professionals' Leadership Day (Aug. 5, 1999).

Alberto R. Gonzales, Speech at the LULAC State Convention (June 5, 1999).

Alberto R. Gonzales, Speech at the Valley Bar Association (Apr. 30, 1999).

Alberto R. Gonzales, Speech at the Texas General Counsel Group (Apr. 10, 1999).

Alberto R. Gonzales, Speech at the Texarkana Bar Association (Feb. 17, 1999).

13. Health: What is the present state of your health? List the date of your last physical.

I am in good health. My last physical was on August 13, 2003.

14. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Counsel to the President, 1/20/2001-present; appointed by President George W. Bush
 Justice, Supreme Court of Texas, 1/1999-12/2000; appointed by Governor George W. Bush in 1999, elected in 2000
 Secretary of State, State of Texas, 12/1997-1/1999; appointed by Governor George W. Bush
 Member, Texas Judicial Districts Board, 1996-1997; appointed by Governor George W. Bush
 General Counsel to the Governor, State of Texas, 1/1995-12/1997; appointed by Governor George W. Bush
 Member, Mayor's Land Use Strategy Committee, 1990; appointed by Houston Mayor Kathy Whitmire

Member, Real Estate Research Advisory Committee, 7/1987; appointed by Governor William P. Clements

15. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as a clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I did not serve as a clerk to a judge.

2. whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

1/2001-present
Executive Office of the President
The White House
1600 Pennsylvania Ave, NW
Washington, DC 20502
Counsel to the President

12/2000-1/2001
Presidential Transition Team
1800 G Street, NW
Washington, DC 20502
White House Counsel Designee

1/1999-12/2000
Supreme Court of Texas
201 West 14th Street, 3rd Floor
Austin, Texas 78701
Justice

12/1997-1/1999
Office of the Secretary of State
State of Texas
1900 Congress, Room 1E.8
Austin, Texas 78711
Secretary of State

1/1995-12/1997
Office of the General Counsel
State of Texas
1100 San Jacinto, 4th Floor
Austin, Texas 78701
General Counsel to the Governor

6/1982-1/1995
Vinson & Elkins L.L.P.
First City Tower
1001 Fannin St, Suite 2300
Houston, Texas 77002
Associate/Partner

1/1986-5/1986, 1/1987-5/1987
University of Houston
4800 Calhoun Street
Houston, Texas 77204
Adjunct Professor

- b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

From 1982 to 1995, I maintained a corporate practice in the private sector. I provided general business advice on matters including acquisitions and mergers, the structuring of financial arrangements, contract negotiations, and venture capital financing. I also provided counsel on matters related to the oil and gas industries, primarily related to the acquisition and leasing of properties. In addition, I supervised real estate transactional work, dealing with property acquisition, leasing, and development.

From January of 1995 to December of 2000, I served in the government of the State of Texas. I served as General Counsel to Texas Governor George W. Bush, and then as the Secretary of State of the State of Texas.

From January 1999 through December 2000, I served as a Justice on the Supreme Court of Texas. I heard cases on a wide range of civil matters. Reported opinions that I authored are listed in my response to Question 12, above.

From January 2001 to the present, I have served as Counsel to President George W. Bush. In that role, I serve as chief legal advisor to the President and to the White House, and provide counsel on matters ranging from litigation involving the United States, to the legal implications of various programs, policies, and legislation under consideration by the Administration. In addition, I chair the White House Judicial Selection Committee.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Prior to entering public service, I specialized in corporate and real estate law. My typical clients during this time were large and mid-sized corporations, partnerships, joint ventures, and individuals.

- c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

My most significant courtroom experience came in my nearly two years as a state Supreme Court Justice. As Counsel to the President and General Counsel to the Governor, I provided extensive advice on litigation matters involving the United States and Texas, respectively, although, with one exception, I did not personally appear in court on those matters. My private practice was transactional in nature; it was not litigation-based.

2. What percentage of these appearances was in

- (a) federal court;
 (b) state courts of record;
 (c) other courts.

Not applicable.

3. What percentage of your litigation was:

- (a) civil;
 (b) criminal.

Not applicable.

2. Joe Dilg 713-758-2062 (o)
First City Tower
1001 Fannin Street, Suite 2300
Houston, TX 77002-6760
 3. Larry Dreyfuss 713-646-4143 (o)
333 Clay Street
Suite 1600
Houston, Texas 77210
 4. Pat Oxford 713-221-1432 (o)
711 Louisiana Street
Suite 2900
Houston, Texas 77002-2781
 5. Roland Garcia 713-226-1348 (o)
3400 JP Morgan Chase Tower
Houston, Texas 77002
 6. Harriet O'Neill 512-463-1312 (o)
Supreme Court of Texas
201 W 14th Street
Austin, Texas 78701
 7. Ewing Werlein 713-250-5920 (o)
515 Rusk Avenue
Houston, Texas 77002
 8. Larry Thompson 914-253-2000 (o)
PepsiCo, Inc.
700 Anderson Hill Road
Purchase, NY 10577
 9. Tim Flanigan 202-350-6908 (o)
607 14th Street NW, Suite 550
Washington, DC 20005
 10. John Cornyn 202-224-8402 (o)
517 Hart Senate Office Bldg
Washington, DC 20510
17. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

- a. As Counsel to the President (1/2001-present), I have served as the chief legal advisor to President George W. Bush and to the White House. I provide advice on matters ranging from litigation (both civil and criminal, including pardons) involving the United States, to the scope of the President's powers under the Constitution. My office provides advice on ethical questions that arise as the Administration carries out its functions. I also chair the White House Judicial Selection Committee, which makes recommendations to the President regarding nominations for federal judgeships.
- b. As a Justice on the Supreme Court of Texas (1/1999-12/2000), I heard arguments, voted, and wrote opinions on a wide variety of civil matters, including constitutional and statutory questions. Nineteen reported opinions that I authored are listed in my response to question 12.
- c. As Secretary of State of the State of Texas (12/1997-1/1999), I supervised a department of approximately 240 employees, and managed a biennial budget of approximately \$37 million. Among my duties as Secretary of State, I served as a senior advisor to Governor Bush, as Chief Election Officer for the State, and as the Governor's lead liaison on Mexico and border issues.
- d. As Counsel to Governor George W. Bush (1/1995-12/1997), I served as the Governor's principal legal advisor. In particular, I provided advice on criminal and civil litigation matters in which the state of Texas was a party, pardons, and issues relating to the authorities of the Governor under Texas law.
- e. During my time in the private sector at Vinson & Elkins L.L.P. (6/1982-1/1995), I maintained a commercial, real estate, and oil and gas law practice. The following are some of the most significant transactions I worked on during that time. This listing is not meant to be comprehensive. Rather, it is meant to illustrate the sort of work I did in the private sector.
 - 1) On behalf of Texas Eastern Corporation, I provided advice on the negotiation and documentation of acquisition, development, financing, leasing, and joint venture arrangements for the Houston Center Project, a multi-block real estate development project undertaken in the 1980s and 1990s in downtown Houston. The development included office buildings, hotels, and retail space.
 - 2) I represented the Weir Group of Scotland in its acquisition of Baker Hughes, Inc.'s Envirotech Industrial Pump and Valve Division. I worked on the negotiation and documentation of the acquisition of assets and companies located in multiple jurisdictions, including Australia, the Netherlands, South Africa, Chile, Brazil, and the United States.

- 3) I provided counsel to American General Corporation in its acquisition of Genstar Development Group. This acquisition involved multi-use planned real estate development projects in California, Texas, and Florida. Also involved was the restructuring of contractual arrangements between my client and the development company that managed the projects.
- 4) On behalf of Abercrombie Interests, Inc., I provided counsel on a Houston inner-city redevelopment project that included the renovation of commercial buildings, financing, and the leasing of space in those buildings to commercial tenants.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

I have a non-vested financial interest in two defined benefit pension plans under the State of Texas Employee Retirement System. These plans are the state employee and the judicial plans, both of which require five years of service for purposes of vesting. Currently, I am a non-contributing participant in each plan, and can only withdraw the contributions I have made to each plan. My contributions and earnings to date total about \$17,000 in the judicial plan, and \$35,000 in the state employee plan.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

In the event of a potential conflict of interest I would consult with the Department of Justice Ethics Official. My financial disclosure report discloses no actual or potential financial conflicts of interest that I need to resolve.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? If so, explain.

None.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached.

5. Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached net worth statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

In the fall of 2000, I ran as a candidate for a full-term as Supreme Court Justice and was elected. I served in this position through December 2000. I also spoke at several political events in support of President George W. Bush's recent re-election campaign, including the "Nos Conocemos" tour in New Mexico, Nevada, and Colorado (10/10/2004-10/12/2004), and a trip to Philadelphia, Pennsylvania (10/27/2004), where I gave two speeches.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have been actively involved in community service organizations throughout my adult life. Please see the list below, noting that this list reflects the most significant of my many civic activities:

Board Trustee, Texas Bar Foundation, 1996-1999
 Board Director, State Bar of Texas, 1991-1994
 Board Director, INROADS/Houston, Inc., 1994
 Board Director, United Way of the Texas Gulf Coast, 1993-1994
 President, Leadership Houston, 1993-1994
 Board Director, Association for the Advancement of Mexican-Americans, 1991-1992
 President, Houston Hispanic Bar Association, 1990-1991
 President, Houston Hispanic Forum, 1990-1991
 Director, Big Brothers Big Sisters, Houston, Texas, 1985-1991
 Director, Catholic Charities, Houston, Texas, 1989-1993

Additionally, during my time in private practice, I provided pro bono legal advice to the Association for the Advancement of Mexican Americans with regard to its acquisition of a new building. I also provided pro bono counsel to the Houston Bar Association in 1989 in its efforts to lease office space. In 1990, I provided pro bono counsel to the Houston Summit Committee in connection with the 1990 Summit of Industrialized Nations. In 1992, I provided pro bono services to the Houston Host Committee in connection with the 1992 Republican National Convention.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion – through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies.

To the best of my knowledge, I have not been involved with any such organizations.

AFFIDAVIT

I, ALBERTO R. GONZALES, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

Dec 14, 2004
(DATE)

A. R. Gonzales
(NAME)



Washington, District of Columbia
The foregoing instrument was subscribed and sworn before me this 14th day of December
by Alberto R. Gonzales
Alberto R. Gonzales Notary Public
My commission expires 12-14-04

Alberto R. Gonzales
(NOTARY)



U.S. Department of Justice

Washington, D.C. 20530

November 18, 2004

Ms. Marilyn L. Glynn
Acting Director
Office of Government Ethics
Suite 500
1201 New York Avenue, NW
Washington, DC 20005-3919

Dear Ms. Glynn:

In accordance with the provisions of Title I of the Ethics in Government Act of 1978 as amended, I am forwarding the financial disclosure report of Alberto R. Gonzales, who has been nominated by the President to serve as Attorney General, Department of Justice. We have conducted a thorough review of the enclosed report.

Mr. Gonzales, the current White House Designated Ethics Official, will continue to maintain the highest standards of government ethics and will comply with all applicable ethics laws and rules.

Based on the above agreements and counseling, I am satisfied that the report presents no conflicts of interest under applicable laws and regulations and that you can so certify to the Senate Judiciary Committee.

Sincerely,

A handwritten signature in cursive script that reads "Michael H. Allen".

Michael H. Allen
Deputy Assistant Attorney General
Alternate Designated Agency Ethics Official

Enclosure

Executive Branch Personnel PUBLIC FINANCIAL DISCLOSURE REPORT

Date of Appointment, Candidacy, Election or Nomination (Month, Day, Year) 11/16/2004-nomination date		Calendar Year Covered by Report <input checked="" type="checkbox"/> New Entrant, Nominee, or Candidate <input type="checkbox"/> Incumbent		Termination Filer <input type="checkbox"/>		Reporting Period (Month, Day, Year) to (Month, Day, Year)	
Reporting Individual's Name Gonzales		First Name and Middle Initial Alberto		R.		Reason for Late Filing Any individual who is required to file this report and does so more than 30 days after the date the report is required to be filed, or, if an extension is granted, more than 30 days after the last day of the filing extension period shall be subject to a \$200 fee.	
Position for Which Filing Attorney General of the United States		Department or Agency (If Applicable) Department of Justice		Telephone No. (include Area Code) 202-455-2632		Incumbents: The reporting period is the preceding calendar year except Part II of Schedule C and Part I of Schedule D where you must also indicate the filing period for the applicable Part of Schedule D is not applicable.	
Location of Present Office (or forwarding address) 1600 Pennsylvania Avenue, NW, Washington, DC 20502		Title of Position(s) and District Held Counsel to the President, January 20, 2001 - Present		Do You Intend to Create a Qualified Disinterested Trust? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Termination Filers: The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination, or, if of Schedule D is not applicable.	
Presidential Nominee Subject to Senate Confirmation		Signature of Reporting Individual [Signature]		Date (Month, Day, Year) 11/18/04		Nominees, New Entrants and Candidates for President and Vice President: Schedule A--The reporting period for income (BLOCK C) is the preceding calendar year up to the date of filing. Value assets as of any date you choose that is within 31 days of the date of filing. Schedule B--Not applicable.	
Other Review (If desired by agency)		Signature of Designated Agency Ethics Official/Reviewing Official [Signature]		Date (Month, Day, Year) 11/18/04		Schedule C, Part I (Lobbies)--The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing. Schedule C, Part II (Agreements or Arrangements)--Show any agreements or arrangements as of the date of filing.	
Agency Ethics Official's Opinion On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations with respect to any comments in the box below.		Signature [Signature]		Date (Month, Day, Year) 11/18/04		Schedule D--The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.	
Office of Government Ethics Use Only		Comments of Reviewing Official (If additional space is required, use the reverse side of this sheet) (Check box if filing extension granted & indicate number of days) <input type="checkbox"/>				Agency Use Only	

SCHEDULE A

Page Number **2 of 8**

8774 (Rev. 01/2009)
 U.S. Office of Government Ethics
 Reporting Individual Name
 Gonzales, Alberto R.

Assets and Income	Valuation of Assets at close of reporting period										Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.										Date (M, D, Yr.) Only if Honorary		
	BLOCK B										BLOCK C												
BLOCK A For you, your spouse, and dependent children, report each asset held for investment on the production of income which had a fair market value exceeding \$1,000 at the close of the reporting period, and the amount of earned income in income during the reporting period, together with such income. For yourself, also report the source and actual amount of earned income exceeding \$200 (other than from the U.S. Government). For your spouse, report the source and amount of earned income exceeding \$1,000 (other than from the actual amount of any bonuses over \$200 of your spouse). None <input type="checkbox"/> None (or less than \$1,001)	None (or less than \$1,001)	\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	\$500,001 - \$1,000,000	Over \$1,000,000 *	Over \$500,000,000	\$5,000,001 - \$25,000,000	Over \$25,000,000	None (or less than \$201)	\$201 - \$1,000	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$1,000,000	Over \$1,000,000	Over \$5,000,000	Other Income (Specify Type & Actual Amount)	
	Type	Dividends	Rent and Royalties	Interest	Capital Gains	None (or less than \$201)	\$201 - \$1,000	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$1,000,000	Over \$1,000,000	Over \$5,000,000	Other Income (Specify Type & Actual Amount)							
Examples Central Airlines Common Doe Invest & Sinc, Hometown, State Kempower Equity Fund IRA, Heartland 500 Intern Fund																							
1 Alberto R. Gonzales IRA (underlying assets listed individually below)																							
2 JP Morgan Short Term Bond Fund Select Share Class																							
3 JP Morgan Bond Fund Select Share Class																							
4 JP Morgan Disciplined Equity Fund Select Share Class																							
5 JP Morgan U.S. Equity Fund Select Share Class																							
6 JP Morgan Multi-Manager Small Cap Growth																							

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.
 Prior Editions Cannot Be Used.

3-C.F.R. Part 854 -
 U.S. Office of Government Ethics
 Reporting Individuals' Name
Gonzales, Alberto R.

SCHEDULE A continued
 (Use only if needed)

Page Number **3 of 8**

Assets and Income	BLOCK A		BLOCK B													BLOCK C					Other Income (Type & Amount)	Date (Mo., Day, Year)	Other (If Honorary)									
	Type	Amount	Valuation of Assets at close of reporting period													Type	Amount															
			None for less than \$1,000	\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	\$500,001 - \$1,000,000	Over \$1,000,000 *	Over \$500,000,000	Over \$50,000,000	\$25,000,001 - \$50,000,000	\$5,000,001 - \$25,000,000	Over \$500,000,000	Over \$50,000,000	None for less than \$201	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$1,000,000	Over \$1,000,000	Over \$5,000,000							
7 JP Morgan Multi-Manager Small Cap Value				X													X															
8 JP Morgan Fleming International Equity Fund Select			X														X															
9 Blank																																
10 Rebecca Turner Consoles Regular IRA: (underlying assets listed individually below)																																
11 Oppenheimer Discovery Fund Class A (OPOCX)																																
12 Oppenheimer Main Street Fund (MSNCX) (previously Main Street Growth and Income Fund)																																
13 OPOGX (previously Global Growth and Income Fund)																																
14 Blank																																
15 Blank																																

* This category applies only if the asset/income is solely held by the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, track the other higher categories of value, as appropriate.

Prior Edition Cannot be Used.

SEPM (Rev. 03/2000)
 4-C.F.R. Part 5014
 U.S. Office of Government Ethics
 Reporting Individual's Name
Gonzales, Alberto R.

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SCHEDULE A continued (Use only if needed)

Assets and Income BLOCK A	Valuation of Assets as of the reporting period BLOCK B		Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item. BLOCK C													
	None (or less than \$1,001)	\$1,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	\$500,001 - \$1,000,000	Over \$1,000,000	Over \$50,000,000	Over \$100,000,000	Over \$250,000,000	Over \$500,000,000	Over \$1,000,000,000	Over \$5,000,000,000	Other Income Specify Type & Actual Amount	Date (Mo., Day, Yr.) Only if Honorary
None <input type="checkbox"/>																
16 Rebecca Turner Gonzales Rollover IRA* (underlying assets listed individually below)																
17 Blank																
18 Oppenheimer Discovery Fund Class A (OPOCX)																
19 Oppenheimer Main Street Fund (MS(GX)) (previously Main Street Growth and Income Fund)																
20 Oppenheimer Global Opportunities Fund (OP(GW) (previously Global Growth and Income Fund))																
21 Blank																
22 Blank																
23 Blank																
24 Blank																

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.
 Prior Editions Cannot be Used.

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SCHEDULE A continued (Use only if needed)

	Valuation of Assets reported on Form BLOCK B	BLOCK C Amount	
BLOCK A	BLOCK B	BLOCK C	BLOCK D
Assets and Income	None (or less than \$1,001) \$1,001 - \$15,000 \$15,001 - \$100,000 \$100,001 - \$250,000 \$250,001 - \$500,000 \$500,001 - \$1,000,000 Over \$1,000,000 \$1,000,001 - \$5,000,000 \$5,000,001 - \$25,000,000 \$25,000,001 - \$50,000,000 Over \$50,000,000	None (or less than \$201) \$201 - \$1,000 \$1,001 - \$1,500 \$1,501 - \$2,500 \$2,501 - \$5,000 \$5,001 - \$15,000 \$15,001 - \$50,000 \$50,001 - \$100,000 \$100,001 - \$1,000,000 Over \$1,000,000 Over \$5,000,000	None Other Income (Specify Type & Amount) Date (Mo., Day, Yr.) Only if Honorary
BLOCK A	BLOCK B	BLOCK C	BLOCK D
Type	None (or less than \$201) Capital Gains Interest Dividends Rents and Royalties Qualified Trust Excepted Trust Excluded Investment Fund	None (or less than \$201) Capital Gains Interest Dividends Rents and Royalties Qualified Trust Excepted Trust Excluded Investment Fund	None Other Income (Specify Type & Amount) Date (Mo., Day, Yr.) Only if Honorary
25 <input type="checkbox"/> None Employees Retirement System of Texas (Judicial Employees DBPP Unvested Benefit)	X		
26 <input type="checkbox"/> None Employee Contribution Value (APG)		X	
27 <input type="checkbox"/> None Employees Retirement System of Texas (State Employees DBPP Unvested Benefit)	X		
28 <input type="checkbox"/> None Employee Contribution Value (ARG)		X	
29 <input type="checkbox"/> None Employees Retirement System of Texas (State Employees DBPP Unvested Benefit)	X		
30 <input type="checkbox"/> None Employee Contribution Value (RTG)		X	
31 <input type="checkbox"/> None JP Morgan Money Market Investment Account		X	
32 <input type="checkbox"/> None Blank			
33 <input type="checkbox"/> None Blank			

* This category applies only if the asset/income is solely that of the filer's spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher category.

Form 1041-SS (2009) U.S. Department of the Treasury U.S. Office of Governmental Ethics Reporting Individual's Name Gonzalez, Alberto R.

Do not Complete Schedule B if you are a new entrant, nominee, Vice Presidential or Presidential Candidate

SF 278 (Rev. 03/2003)
 5 C.F.R. Part 2634
 U.S. Office of Government Ethics
 Reporting Entrant's Name
 Gonzales, Alberto R.

Page Number
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SCHEDULE B

Part I: Transactions

Report any purchase, sale, or exchange by you, your spouse, or dependent children during the reporting period of any real property, stocks, bonds, commodity futures, and other investments. Do not report transactions that are not reportable under 5 U.S.C. 2634. Do not report transactions that resulted in a loss. Do not report a transaction involving property used solely as your personal residence, or a transaction solely between you, your spouse, or dependent child. Check the "Certificate of Signature" block to indicate sales made pursuant to a certificate of acceptance from OGE.

None

1 Example: Central Airlines Common	2 Date (MM/DD/YYYY)	3 Transaction Type (S, B, X)	4 Exchange	5 Date (MM/DD/YYYY)	6 Amount of Transaction (\$)	7 Certificate of Signature (Yes/No)
		X		2/7/99		

* This category applies only if the underlying asset is solely that of the filer's spouse or dependent children. If the underlying asset is either held by the filer or jointly held by the filer with the spouse or dependent children, use the other higher categories of value, as appropriate.

Part II: Gifts, Reimbursements, and Travel Expenses

Report any gift, reimbursement, or travel expense received by you, your spouse, or dependent child during the reporting period that exceeds the limits set forth in 5 U.S.C. 2634. Do not report gifts, reimbursements, or travel expenses that are not reportable under 5 U.S.C. 2634. Do not report gifts, reimbursements, or travel expenses that are not reportable under 5 U.S.C. 2634. Do not report gifts, reimbursements, or travel expenses that are not reportable under 5 U.S.C. 2634. Do not report gifts, reimbursements, or travel expenses that are not reportable under 5 U.S.C. 2634.

the U.S. Government, either in connection with official travel; received from relatives (as defined by your dependent child) or any independent of their relationship to you; or provided as personal hospitality at the donor's residence. Also, for purposes of aggregating gifts to determine the reporting threshold, include gifts received from the same source, exclude items worth \$104 or less. See instructions for other exclusions.

None

1 Example: 1000 Shares of General Motors Common	2 Date (MM/DD/YYYY)	3 Source (Name and Address)	4 Amount (Value)	5 Brief Description

SF 278 (Rev. 07/2000)
 U.S. Government Printing Office
 Reporting Individual's Name

Page Number
 7 of 8

SCHEDULE C

Gonzales, Alberto R.

Part I: Liabilities

Report liabilities over \$10,000 owed to any one creditor at any time during the reporting period by you, your spouse, or dependent children, including liabilities for which you are during the reporting period. Exclude a mortgage on your personal residence unless it is rented out, loans secured by automobiles, household furniture or appliances, and credit cards. See instructions for revolving charge accounts.

None
 Date Insured
 Interest Rate
 Term if applicable
 Category of Amount or Value (C)

Creditor Name and Address

1 First Direct Bank, Washington, DC

2 Wells Fargo Bank

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Part II: Agreements or Arrangements

Report your agreements or arrangements for continuing participation in an employee benefit plan (e.g., deferred compensation), (2) continuation of a pension plan, or (3) a loan to you or your spouse or dependent child, with the spouse or dependent child, mark the other higher suspense, as appropriate.

None
 Status and Terms of any Agreement or Arrangement
 Date
 Place

1 I continue to participate in two defined benefit pension plans sponsored by the State of Texas. I am not vested in either plan. My employee contributions remain with the State.

2 Neither the State of Texas nor I have made contributions to either plan since I terminated my employment.

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Print Editions Cannot Be Used.

SCHEDULE D

Page Number 8 of 8

SP 278 (Rev. 03/2000)
 1 C.F.R. Part 2854
 U.S. Office of Government Ethics

Reporting Individual's Name
 Gonzales, Alberto R.

Part I: Positions Held Outside U.S. Government
 Report any positions held during the applicable reporting period, whether full-time or part-time, as an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any other organization, including but not limited to labor unions, fraternal societies, social, fraternal, or political entities and those solely of an honorary nature.

	Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)	None
1	Ex: Nati Assn. of Park College, NY, NY Ex: Doe Jones & Smith, Hometown, State	Non-profit educational Law firm	President Partner	6/92 7/85	Present 1/00	<input checked="" type="checkbox"/> <input type="checkbox"/>
2						
3						
4						
5						
6						

Part II: Compensation In Excess Of \$5,000 Paid by One Source
 Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other non-profit organization when you directly provided the services generating a fee or payment of more than \$5,000. You need not report the U.S. Government as a source.

	Source (Name and Address)	Brief Description of Duties	None
1	Ex: Doe Jones & Smith, Hometown, State Ex: Natio University, client of Doe Jones & Smith, Hometown, State	Legal services Legal services in connection with university construction	<input checked="" type="checkbox"/> <input type="checkbox"/>
2			
3			
4			
5			
6			

Do not complete this part if you are an incumbent, Termination Filer, or Vice Presidential Candidate or Presidential Candidate

Prior Editions Cannot Be Used.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			LIABILITIES				
Cash on hand and in banks	45	500	Notes payable to banks-secured	99	965		
U.S. Government securities-add schedule		0	Notes payable to banks-unsecured	43	638		
Listed securities-add schedule	148	390	Notes payable to relatives		0		
Unlisted securities--add schedule		0	Notes payable to others		0		
Accounts and notes receivable:		0	Accounts and bills due	11	211		
Due from relatives and friends		0	Unpaid income tax		0		
Due from others		0	Other unpaid income and interest		0		
Doubtful		0	Real estate mortgages payable-add schedule	381	336		
Real estate owned-add schedule	750	000	Chattel mortgages and other liens payable		0		
Real estate mortgages receivable		0	Other debts-itemize:		0		
Autos and other personal property	34	735					
Cash value-life insurance		0					
Other assets itemize:							
Household belongings	350	000					
Jewelry and Personal Property	25	000					
			Total liabilities	536	150		
			Net Worth	817	475		
Total Assets	1	353	625	Total liabilities and net worth	1	353	625
CONTINGENT LIABILITIES			GENERAL INFORMATION				
As endorser, comaker or guarantor		0	Are any assets pledged? (Add schedule)	NO			
On leases or contracts		0	Are you defendant in any suits or legal actions?	NO*			
Legal Claims		0	Have you ever taken bankruptcy?	NO			
Provision for Federal Income Tax		0					
Other special debt		0	* Not in my personal capacity				

LISTED SECURITIES SCHEDULE

JP Morgan Bond Fund Select Share Class	\$30,747
JP Morgan Short Term Bond Fund Select Share Class	9,995
JPMorgan Disciplined Equity Fund Select Share Class	23,456
JP Morgan U.S. Equity Fund Select Share Class	35,108
JP Morgan Multi-Manager Small Cap Growth	3,047
JP Morgan Multi-Manager Small Cap Value	3,546
JP Morgan Fleming International Equity Fund Select	6,406
Oppenheimer Discovery Fund Class A	9,803
Oppenheimer Main Street Fund	14,239
Oppenheimer Global Opportunities Fund	<u>12,043</u>
Total	\$148,390

REAL ESTATE OWNED SCHEDULE

Vienna, Virginia 22182 (personal residence)	\$750,000
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NOTES PAYABLE TO BANKS-SECURED SCHEDULE

Chase Manhattan Mortgage Corporation	\$99,965
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NOTES PAYABLE TO BANKS-UNSECURED SCHEDULE

Wells Fargo Bank	\$43,638
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REAL ESTATE MORTGAGES PAYABLE SCHEDULE

Chase Manhattan Mortgage Corporation (for personal residence in Vienna, Virginia)	\$381,336
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Chairman SPECTER. Thank you very much, Judge Gonzales.

We will now begin, as stated earlier, 10-minute rounds, and I will observe my time limit meticulously, and will ask others to do the same. Senators necessarily have other obligations, and will have to move in and out of the hearing room, so that if it is possible to gage the timing, knowing how long it will be before their turn is up, it is very useful in arranging schedules, and there will be ample time, as I have said earlier, on multiple rounds.

I am advised that there may be some photos used, and obviously Senators have full latitude on the range of questioning, but I would ask my colleagues to be sensitive to photos. There are children present in the room today, and we are being televised, so that while we want to have all of the facts and give full latitude to Senators on their rights to question, we may want to be in Executive Session or we may want to give children a chance to leave, or take whatever other precautionary measures that seem appropriate by all concerned on a consensus of what the Committee thinks ought to be done on that sensitive subject.

And now, if lights will show to limit my 10 minutes, I will begin. At the outset of your testimony, Judge Gonzales, you have already covered the matter, but I think it is important to have an unequivocal statement and really a repeat of an unequivocal statement of the position of the administration and your personal views. Do you approve of torture?

Judge GONZALES. Absolutely not, Senator.

Chairman SPECTER. Do you condemn the interrogators—and you already answered this in part—at Abu Ghraib and Guantanamo, but again, for the record, do you condemn the interrogators' techniques at Abu Ghraib shown on the widely publicized photographs?

Judge GONZALES. Let me say, Senator, that as a human being I am sickened and outraged by those photos. But as someone who may be head of the Department, I obviously don't want to provide any kind of legal opinion as to whether or not that conduct might be criminal, and obviously, if anyone is involved in any kind of conduct that is subject to prosecution, I would not want to do anything today to prejudge that prosecution and jeopardize that prosecution. But obviously, if that conduct falls within the jurisdiction of the Department of Justice, I will pursue it aggressively, and you have my word on that.

Chairman SPECTER. Having some experience in the prosecution of criminal cases, I do not believe a condemnation of that conduct would impact on what happens at a later date, but thank you for your statement of rejection of that and condemnation of those practices. Do you similarly condemn any similar interrogation techniques at Guantanamo?

Judge GONZALES. I am not sure of which specific techniques you're referring to, Senator, but obviously, there is a range of conduct that would be in clear violation of our legal obligations, and those I would absolutely condemn, yes, sir.

Chairman SPECTER. There will obviously be a good bit of questioning on this subject, and I intend to turn to other matters and we will come back to the subject in later rounds to the extent that as Chairman I think further amplification is necessary, but I do want to move on to what I consider to be the number one issue fac-

ing the country, and that is the issue of the fight on terrorism and the balancing of civil rights with some focus on the PATRIOT Act, which we enacted shortly after 9/11. Starting with the PATRIOT Act, that I had already commented that we had this wall which precluded law enforcement from using evidence of crime which had been obtained through search and seizure warrants under the Foreign Intelligence Surveillance Act, and now that evidence may be used in a criminal prosecution. To what extent has that provision and the other provisions of the PATRIOT Act been of real importance in our fight against terrorism?

Judge GONZALES. Well, of course, Mr. Chairman, I have not been at the Department, so I may not know all of the details of specific successes that the United States and the Department of Justice have enjoyed as a result of the tools given to us by the PATRIOT Act, but I am told that they have been very significant, and that for our career prosecutors, for the U.S. Attorneys out in the field, they have been very, very beneficial in allowing our law enforcement personnel to defend this country.

I believe that in part because of the PATRIOT Act, there has not been a domestic attack on United States soil since 9/11.

Chairman SPECTER. The PATRIOT Act has stimulated the National Counterterrorism Center, and that is now part of the new legislation formalized on the National Intelligence Director, and I will not go into any detail at this time, but I would urge you to be very diligent there. And this Committee is going to exercise oversight on that issue because it is my own view that had we had proper coordination of all the information prior to 9/11, 9/11 might well have been prevented, and the FBI has the guiding hand on the National Counterterrorism Center, and that comes under your purview.

Let me turn now to the issue of the PATRIOT Act aspects which have been the subject of concern, and legislation is pending where we have people on both ends of the political spectrum, those on the right and those on the left on concern. The Act requires the Court to issue an ex parte order, that is, on the application of law enforcement for an administrative subpoena on a showing which is less than the traditional judicial determination of probable cause, and there has been concern expressed about access to many records, private records, illustrated by the concern over library records. Is there any reason in your judgment, Judge Gonzales, why the production of those records might not be subjected to the traditional standard of probable cause before the issuance of the warrant?

Judge GONZALES. Let me just say, Senator, I am also aware of a great deal of debate about the provisions of the PATRIOT Act, and there are concerns about possible infringement of civil liberties. I welcome that debate. I think that we should always question the exercise of the power of our Government. The Founders of this country, that is what motivated, in connection with the framing of the Constitution, concerns about the exercise of Government power, and so I am one of those people that is likewise concerned.

With respect to access to library records, to take a specific point, obviously you're referring to Section 215 of the PATRIOT Act. 215 relates to obtaining business records. It never mentions library

records. 215 allows the Government to obtain certain types of business records, hotel records, credit card records, rental records, transportation records, in connection with—it's got to be related to a foreign intelligence operation. And the Government cannot do that without first going to a judge. The Government goes to the FISA Court and obtains a warrant to do that.

Chairman SPECTER. But there is no requirement for a showing of probable cause before that judicial order is entered, Judge Gonzales. And the question is, why can we not have that traditional probable cause requirement on the obtaining of those records?

Judge GONZALES. Certainly, Senator, you could do that, but right now today, a prosecutor could obtain a grand jury subpoena if it was relevant to a criminal investigation without meeting that standard, and obtain access to those very same library records and—

Chairman SPECTER. But when the prosecutor obtains those records on a grand jury subpoena—and I have some familiarity with that—it is subject to judicial supervision. There can be a motion to quash. I do not want to take up all of our time there, but we also have the sneak-and-peek issue, and you will be here to take a look at that when we have hearings on renewal of the PATRIOT Act, but that is a matter which I think has to be weighed very carefully in the balance.

Let me turn now to the standards of detention on aliens. Immediately after 9/11, as the Inspector General's report showed, some 702 aliens were detained without any showing of cause, concerned that they might be terrorists, but no real evidence or indications that they were terrorists. We have seen the Department of Justice exercise authority after an immigration judge has ordered the release of an alien, and that has been upheld by the Board of Review for the Department of Justice to overrule those two levels of judicial review and maintain detention. The issue of standards is really of critical importance, and there has never been a delineation by the Department of Justice of those standards. At one point Attorney General Ashcroft testified that it was not sufficient simply to say "national security," but there had to be some relationship to the individual on the likelihood of flight or on the problem of a criminal record or something relating to the individual.

My yellow light is on now, so I will stop the questioning before my red light appears, and give you an opportunity to respond as to your views as to what kind of a standard is appropriate for the detention of aliens.

Judge GONZALES. Let me just say, by answering the question, Senator, that I do not support or favor the mistreatment, not only of aliens, but anyone by the Department of Justice. My understanding—you have to recall that these actions taken by the Department were shortly after 9/11. There was a great deal of concerns that there may be a second wave of attacks. People didn't know. And so there were undocumented aliens that were rounded up. I am told is that everyone who was rounded up was either out of status with respect to their immigration status, or had criminal charges pending against them. There was an independent basis to hold these people.

I am aware of the report by the Inspector General. I haven't reviewed it in great detail. I understand that the Department has made most of the changes recommended by the IG. Obviously, it's something that I am concerned about. As to the specific two cases you mentioned, I'm not aware of the details of those cases, and as to the standard, quite frankly, Senator, that would be something I would have to look at and be happy to get back to you in the event that I am confirmed.

Chairman SPECTER. Thank you.

Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

First off, I wanted to thank both Senator Salazar and Senator Cornyn for their introduction. Senator Salazar, a Democrat, is showing bipartisanship here similar to Senator Carnahan coming to introduce Attorney General Ashcroft, even though he is the man who had run against her husband.

I would also note that while al Qaeda does not have POW protection, Geneva still applies, as Secretary Colin Powell has stated very emphatically. I do not want to leave the impression that somehow Geneva does not apply just because it involves al Qaeda.

I would like to ask you a few questions about the torture memo that is dated back in August 1st, 2002, signed by Assistant Attorney General Jay Bybee, and he is now a Federal Appellate Court Judge. The memo is addressed to you, written at your request. It is a fairly lengthy memo, and addresses a memorandum from Alberto Gonzales, Counsel to the President. It concludes—this is actually the memo here—for an act to violate the torture statute it must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function, or even death. In August 2002, did you agree with that conclusion?

Judge GONZALES. Senator, in connection with that opinion, I did my job as the Counsel to the President to ask the question.

Senator LEAHY. I just want to know, did you agree—I mean we could spend an hour with that answer, but I am trying to keep it very simple. Did you agree with that interpretation of the torture statute back in August 2002?

Judge GONZALES. If I may, sir, let me try to—I'm going to give you a very quick answer, but I'd like to put a little bit of context. Obviously, we were interpreting a statute that had never been reviewed in the courts, a statute drafted by Congress. We were trying the interpretation of a standard by Congress. There was discussion between the White House and the Department of Justice as well as other agencies about what does this statute mean? It was very, very difficult. I don't recall today whether or not I was in agreement with all of the analysis, but I don't have a disagreement with the conclusions then reached by the Department.

Ultimately, it is the responsibility of the Department to tell us what the law means, Senator.

Senator LEAHY. Do you agree today that for an act to violate the torture statute it must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function or even death?

Judge GONZALES. I do not, Senator. That does not represent the position of the executive branch. As you know—

Senator LEAHY. But—

Chairman SPECTER. Let him finish his answer.

Senator LEAHY. But it was the position in 2002—

Chairman SPECTER. Wait a minute, Senator Leahy. Let him finish his answer.

Judge GONZALES. Senator, what you're asking the counsel to do is to interject himself and direct the Department of Justice, who is supposed to be free of any kind of political influence, in reaching a legal interpretation of a law passed by Congress. I certainly give my views. There was of course conversation and a give and take discussion about what does the law mean, but ultimately, ultimately by statute the Department of Justice is charged by Congress to provide legal advice on behalf of the President. We asked the question. That memo represented the position of the executive branch at the time it was issued.

Senator LEAHY. Well, let me then ask you, if you are going to be confirmed as Attorney General—and I will accept what you said—the Bybee memo concludes the President has authority as Commander in Chief to override domestic and international laws prohibiting torture, and can immunize from prosecution anyone, anyone, who commits torture under his act. Whether legal or not he can immunize them. Now, as Attorney General, would you believe the President has authority to exercise a Commander in Chief override and immunize acts of torture?

Judge GONZALES. First of all, Senator, the President has said we are not going to engage in torture under any circumstances. And so you're asking me to answer a hypothetical that is never going to occur. This President has said we're not going to engage in torture under any circumstances, and therefore, that portion of the opinion was unnecessary and was the reason that we asked that that portion be withdrawn.

Senator LEAHY. I am trying to think what type of opinions you might give as Attorney General. Do you agree with that conclusion?

Judge GONZALES. Sir, I—

Senator LEAHY. You are a lawyer, and you have held a position as a justice of the Texas Supreme Court. You have been the President's Counsel. You have studied this issue deeply. Do you agree with that conclusion?

Judge GONZALES. Senator, I do believe there may come an occasion when the Congress might pass a statute that the President may view as unconstitutional, and that is a position and a view not just of this President but many, many Presidents from both sides of the aisle. Obviously, a decision as to whether or not to ignore a statute passed by Congress is a very, very serious one, and it would be one that I would spend a great deal of time and attention before arriving at a conclusion that in fact a President had the authority under the Constitution to—

Senator LEAHY. Mr. Gonzales, I would almost think that you had served in the Senate because you have learned how to filibuster so well. I asked a specific question. Does the President have the authority, in your judgment, to exercise a Commander in Chief override and immunize acts of torture?

Judge GONZALES. With all due respect, Senator, the President has said we're not going to engage in torture. That is a hypothetical question that would involve an analysis of a great number of factors, and the President simply—

Senator LEAHY. How about putting it this way: do you think that other world leaders would have authority to authorize the torture of U.S. citizens if they deemed it necessary for their national security?

Judge GONZALES. Senator, I don't know what laws other world leaders would be bound by. I think it would—I'm not in a position to answer that question.

Senator LEAHY. The only reason I ask this is this memo was DOJ policy for a couple years. It sat there from sometime in 2002, until just a couple weeks before 2005, late on a Thursday afternoon, it seems to be somewhat overridden. Of course, that may just be coincidental since your confirmation hearing was coming up. Do you think if the Bybee memo had not been leaked to the press, it would still be—because it had never been shown to Congress even though we had asked for it—do you think it would still be the overriding legal opinion?

Judge GONZALES. Sir, that I do not know. I do know that when it became—it was leaked, we had concerns about the fact that people assumed that the President was somehow exercising that authority to engage in torture, and we wanted to clarify the record that the President had not authorized or condoned torture, nor had directed any actions or excused any actions under the Commander in Chief override that might otherwise constitute torture, and that was the reason that the decision was made to delete that portion of the opinion.

Senator LEAHY. Do you think there is any connection whatsoever between the policies which actually you had to formulate regarding treatment and interrogation of prisoners—policies that were sent out to the Department of Defense and elsewhere—and the widespread abuses that have occurred? Do you acknowledge any accountability for such things, any connection?

Judge GONZALES. Senator, as I said in my remarks, I categorically condemn the conduct that we see reflected in these pictures at Abu Ghraib. I would refer you to the eight completed investigations of what happened at Abu Ghraib and in Guantanamo, and there are still three ongoing. I'm talking about the Taguba report, the Fay-Jones-Kern Report, the Schlesinger report, the Navy IG, the Army IG, Jacob, Ryder, Miller, all of these reports. And if you listened to the press briefings given in connection with the roll-out of these reports, they do conclude that with respect to the conduct not reflected in the photos, not the conduct that we find the most offensive, but conduct related to pure interrogations, that there was some confusion—

Senator LEAHY. The same reports you talk about say the Department of Defense relied on the memo. It is quoted extensively in the DOD Working Group report on interrogations. That report has never been repudiated. So apparently they did rely on the memo. Then we find out about the abuses through the press rather than the administration. Is there any accountability here anywhere?

You know, as I mentioned earlier, my son was in the military. He was held to very, very strict standards. He is trained for combat, held to very, very strict standards. The vast majority of the men and women in the military are held to those same strict standards. I am just trying to find out where the accountability is for this terrible blot that you and I both agree is a terrible blot on the United States.

Judge GONZALES. I believe that is a very good question, Senator, and that is why we have these eight completed investigations and these three pending investigations, while we've had four hearings involving the Secretary of Defense and you've had 18 hearings involving the Deputy Secretary, Under Secretary of Defense, you've had over 40 briefings with the Congress, because we care very much about finding out what happened and holding people accountable. Unlike other countries that simply talk about Geneva, if there is an allegation that we've done something wrong, we investigate it. We're very serious about our commitments, our legal obligations in Iraq, and if people have done things that they shouldn't have done in violation of our legal obligations, they are going to be held accountable.

Chairman SPECTER. Senator Hatch.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman.

Welcome to the Committee, Judge Gonzales, and your family. We welcome your family, your wonderful wife, your tremendous mother, brother, mother-in-law. We are really happy to have all of you here, and I hope that this will be not too unpleasant a hearing for you.

You have acted, I think, with the highest honor as the White House Counsel. I know that because I have worked very, very closely with you all these years, and I have tremendous respect for you, not only as a human being, and for your ethics and high standards, but also as an attorney and as someone who I believe has tried to give the President the best advice you and your staff have been able to give.

This is one of the highest positions in our country's cabinet, in the President's Cabinet. It does require a person of deep commitment to the principle of equal justice under the law, and I know that you have that commitment and you will make it. I have worked so closely with you, I know firsthand the competency of Judge Gonzales, and that he does believe in equal justice for all. I also know that you have the ability to make a very outstanding Attorney General of the United States. Your whole life has been a success story. You have already had a distinguished career as an attorney, judge and civil servant. You made much of the opportunities that you have had by your education at Rice University and of course the Harvard Law School.

I think your background and experience enables you to bring an important set of perspectives to the administration of justice and the Department of Justice. So I stand ready and willing to help you, Judge Gonzales, in carrying out your new responsibilities, and

I think the American people would expect nothing less than equal justice for all people and fair justice at that.

I see eye-to-eye with you on many issues. We have had our differences, but in every case where we have had differences, you have always spoken in a forthright and decent manner, and you have been willing to discuss the issues with me and I think others on this Committee. You are going to be asked some tough questions today, and that is as it should be I suspect.

I think today's hearing is certainly going to dwell to a large degree on ongoing public policy on that debate on how a democratic society with a long tradition of protecting civil liberties should conduct itself when it finds itself threatened and attacked by terrorist groups and individuals who will stop at literally nothing to destroy our way of life, and who do not represent a particular country, do not wear uniforms, do not abide by international principles, and who really are rogue in every sense of that term. It is my hope that in addition to providing an adequate record about Judge Gonzales' qualifications to serve as Attorney General, one of the outcomes of today's hearing will be to educate the Committee and the public about the facts of what actions were taken and were not taken with respect to the treatment and interrogations of various classes of individuals who have been detained and taken into custody by the United States as part of our response to the horrific 9/11 terrorist attacks on America. You have a big job ahead, and I personally know that you are capable and you are up to doing that job very well.

Let me just say, before I ask some questions of Judge Gonzales, I would just like to take this opportunity to once again recognize the hard work, the dedication and many accomplishments of our current Attorney General, John Ashcroft. He has been a terrific Attorney General. He has done a terrific job down there, and I think the way crime has come down, and a lot of other things have happened for the betterment of the country, frankly, because of his leadership. Frankly, it has not been lost on me that many of those who are posing here today are people who have in many respect unfairly vilified the current Attorney General over the last four years.

[The prepared statement of Senator Hatch appears as a submission for the record.]

Let me just ask some questions by reviewing some of the key points with respect to the treatment of detainees. Like most Americans, I was appalled by the abuses at Abu Ghraib. Some have stated that the President's February 7th, 2002 memorandum is somehow responsible for the abuses at Abu Ghraib, at that prison facility in Iraq. But is it not true that the February 7th, 2002 memorandum actually makes clear that the Geneva Conventions do apply in both Afghanistan and Iraq?

Judge GONZALES. Senator, I don't recall that the memo actually talked about Iraq. The President—there was a decision by the President that Geneva would apply with respect to our conflict with the Taliban. However, and I believe there's little disagreement about this as a legal matter, because of the way the Taliban have fought against the United States, that they forfeited their right to enjoy prisoner of war legal protections. There was never any ques-

tion about whether Geneva would apply in Iraq. There was no decision for the President to make. Iraq was a signatory to the Geneva Convention, so there was no decision for the President to make. There was no decision by the Department of Justice as to what kind of techniques should be approved with respect to interrogations in Iraq, because the understanding throughout the administration was the Geneva Conventions apply in Iraq.

Senator HATCH. Is it not also true that the President's February 7th, 2002 memorandum, which is entitled "Humane Treatment of al Qaeda and Taliban Detainees," also requires American forces to treat all detainees humanely, regardless of whether the Geneva Conventions apply; is that not true?

Judge GONZALES. That is correct. The President gave a directive to the military that despite the fact that Geneva may not apply with respect to the conflict and the war on terrorism, it is that everyone should be treated humanely.

Senator HATCH. That was more than two years ago.

Judge GONZALES. That is correct.

Senator HATCH. Am I correct in my understanding that at no time did the President authorize the use of torture against detainees regardless of any of the legal memoranda produced by various entities of the U.S. Government, including the August 2002 Department of Justice memo, the so-called Bybee memo?

Judge GONZALES. Senator, the position of the President on torture is very, very clear, and there is a clear record of this. He does not believe in torture, condone torture, has never ordered torture, and anyone engaged in conduct that constitutes torture is going to be held accountable.

Senator HATCH. And that has never been a problem with regard to the President or you as his adviser?

Judge GONZALES. Absolutely not, Senator.

Senator HATCH. As Counsel to the President of the United States, is it your responsibility to approve opinions issued by the Department of Justice?

Judge GONZALES. No, sir, I don't believe it is my responsibility, because it really would politicize the work of the career professionals at the Department of Justice. I know that some have been critical of my actions in not trying to force the opinion a certain way, people that are concerned about certain sections of that opinion, but we have to be very, very careful here. When you use the White House as a shield, it can also be used as a sword. It can be used as a sword to force an opinion, to reach an outcome that would be politically advantageous to the White House, and we don't want that to happen. And so I take my responsibilities very seriously in respecting the role of the Department of Justice given to the Department by Congress to decide for the executive branch what the law requires.

Senator HATCH. In fact, the Bybee memo was actually withdrawn by the Department of Justice in June of 2004; am I right on that?

Judge GONZALES. The opinion was withdrawn, yes, sir.

Senator HATCH. The Bybee memo was issued, I believe, six months after the President issued his February 7th, 2002 memo requiring all detainees to be treated humanely; is that correct?

Judge GONZALES. That is correct. It has always been the case that everyone should be—that the military would treat detainees humanely, consistent with the President's February order.

Senator HATCH. So that memo did not overrule what the President's 2002 memo actually said?

Judge GONZALES. Of course not.

Senator HATCH. I think my time is up as well, and I just want to compliment you. Knowing you personally, and having served with you, and having worked intimately with you over the last four years, I want to compliment you for the professional manner in which you have conducted yourself, and your staff as well. You have done a terrific job and I just want to let everybody know how I feel about the job you have done.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you.

Senator Kennedy.

**STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR
FROM THE STATE OF MASSACHUSETTS**

Senator KENNEDY. Thank you very much, Mr. Chairman.

Welcome, Mr. Gonzales, and welcome to your family. I will include, if I could, Mr. Chairman, my opening statement and comment that recognizes the extraordinary achievements and accomplishments of the nominee, which are incredibly impressive.

[The prepared statement of Senator Kennedy appears as a submission for the record.]

Chairman SPECTER. Without objection, they will be made a part of the record.

Senator KENNEDY. In that I said, as I mentioned to the nominee, that he understands full well our responsibilities in the points of inquiry that we are going to make.

I sit on the Judiciary Committee and also on the Armed Services Committee, and I was a member of the Armed Services Committee in the time that all America saw the Abu Ghraib photos. And just subsequent to that, we, in the Armed Services Committee, had General Taguba, who did the Taguba report that was leaked, and we read the report before a copy was actually provided to the Congress. And immediately the administration claimed during the hearings that we had with General Taguba, that the Abu Ghraib was just a few bad apples, there was no higher level of support or encouragement for the mistreatment of detainees.

Then we learned that the Defense Department's Working Group report of April 2003 had provided the broad legal support for the harsh interrogation tactics, and it dramatically narrowed the definition of torture, and it recognized the novel defenses for those who committed the torture. Then we learned that the legal basis for the Working Group report had been provided by the Justice Department in the Bybee memo.

Now, that is what has come up from the administration. That is what has come up, including the President of the United States. This Committee, the Armed Services Committee has asked for these memos. We have depended upon what has been leaked, what has been put on the Internet, and what has been obtained in the Freedom of Information and by various attorneys. So there is a cer-

tain kind of sense by many of us here that the administration—and you are the point person on the administration—has not been forthcoming on the whole issues of torture, which not just committed at Abu Ghraib, but is happening today.

The Bybee torture memorandum, written at your request—and I would be interested in your reactions to this—made abuse of interrogation easier. It sharply narrowed the definition of torture and recognized it as new defense for officials who commit torture. For two years, for two years, from August 2002 to June 2004 you never repudiated it. That is the record, you never repudiated it. It was written by the CIA's bidding, and you can clarify that if that is false. We can assume it was probably provided to the CIA as written. Its principles were adopted in the Defense Department's Working Group report. I have it right here, and I will read the identical provisions in the Bybee report that were put in the Defense Department Working Group report that has been the document which has been made available to the Defense Department about how they ought to view torture. This person assumes that the Bybee report has already gone to the CIA in his complacency.

Now, according to the Defense Department's own investigation—you referred to Senator Leahy earlier—as to the Defense Department, the Working Group report was used to justify—this is DOD—was used to justify the many abuses that occurred in Afghanistan and Guantanamo. And according to Fay and Schlesinger, who testified in the Armed Services Committee, the abuse of policies and practice in Afghanistan and Guantanamo migrated to Iraq. You have never repudiated the Bybee assertion that presidential power overrides all the prohibitions against torture enacted and ratified. The President's directive to act humanely was hollow. It was vague. It allowed for military necessity exception and did not even apply to the CIA, did not even apply to the CIA. Abuses are still being reported. And you were warned by Secretary Powell and other top military leaders that ignoring our longstanding traditions and rules would lead to abuse and undermine military culture, and that is what has happened.

I am going to get to how the Bybee amendment was first written. As I understand, there is the report in the Washington Post that the CIA asked you for a legal opinion about how much pain and suffering an intelligence officer could inflict on a detainee without violating the '94 anti-torture statute, which I might point out was strongly supported by Ronald Reagan and Bush I, and passed the Foreign Relations Committee unanimously. Republicans have been as concerned about torture as Democrats, and we will get into the various statutes that have been passed in recent times which would indicate that.

Now, the Post article states you chaired several meetings at which various interrogation techniques were discussed. These techniques included the threat of live burial and water-boarding, whereby the detainee is strapped to a board, forcibly pushed under water, wrapped in a wet towel and made to believe he might drown. The article states that you raised no objections, and without consulting military and State Department experts. They were not consulted. They were not invited to important meetings. They might have been important to some, but we know what Secretary

Taft has said about his exclusion from these. Experts in laws of torture and war prove the resulting memo gave CIA interrogators the legal blessings they sought.

Now, was it the CIA that asked you?

Judge GONZALES. Sir, I don't have specific recollection. I read the same article. I don't know whether or not it was the CIA. What I can say is that after this war began, against this new kind of threat, this new kind of enemy, we realized that there was a premium on receiving information. In many ways this war on terror is a war about information. If we have information we can defeat the enemy. We had captured some really bad people who we were concerned had information that might prevent the loss of American lives in the future. It was important to receive that information, and people at the agencies wanted to be sure that they would not do anything that would violate our legal obligations, and so they did the right thing. They asked questions. What is lawful conduct? Because we don't want to do anything that violates the law.

Senator KENNEDY. You asked, at their request—if this is incorrect, then correct me. I am not attempting, or if there are provisions in that comment here that are inaccurate, I want to be corrected. I want to be fair on this. But it is my understanding, certainly it was in the report, that the CIA came to you, asked for the clarification. You went to the OLC. Now, I want to ask you, did you ever talk to any members of the OLC while they were drafting the memorandum? Did you ever suggest to them that they ought to lean forward on this issue about supporting the extreme uses of torture, as reported in the newspaper?

Judge GONZALES. Sir, I don't ever recall using the term "leaning forward" in terms of stretching what the law is.

Senator KENNEDY. You talked to the OLC during the drafting of it?

Judge GONZALES. There is always discussions—not always discussions, but there often is discussions between the Department of Justice and OLC and the Counsel's office regarding legal issues. I think that's perfectly appropriate. This is an issue that the White House cared very much about to ensure that the agencies were not engaged in conduct—

Senator KENNEDY. What were you urging them? What were you urging? They are, as I understand, charged to interpret the law. We have the series of six or seven different laws and conventions on torture and on the rest of it. They are charged to develop and say what the statute is. Now, what did you believe your role was in talking with the OLC and recommending—

Judge GONZALES. To understand their views about the interpretation—

Senator KENNEDY. Weren't you going to get the document? Weren't you going to get their document? Why did you have to talk to them during the time of the drafting? It suggests in here that you were urging them to go as far as they possibly could. That is what the newspaper reported. Your testimony is that you did talk to them but you cannot remember what you told them.

Judge GONZALES. Sir, I'm sure there was discussion about the analysis about a very tough statute, a new statute, as I've said repeatedly, that had never been interpreted by our courts, and we

wanted to make sure that we got it right. So we were engaged in interpreting a very tough statute, and I think it is perfectly reasonable and customary for lawyers at the Department of Justice to talk with lawyers at the White House. Again, it was not my role to direct that we should use certain kinds of methods of receiving information from terrorists. That was a decision made by the operational agencies, and they said we need to try to get this information. What is lawful? And we look to the Department of Justice to tell us what would, in fact, be within the law.

Senator KENNEDY. Mr. Chairman, I see my time is going to be up. What I would like to do is include in the record the Bybee memorandum and the Defense Department working group report, the analysis where they use virtually word by word the Bybee memorandum in the key aspects of the working group report, which was the basic document which has been the guide to our military about how they should treat prisoners.

Chairman SPECTER. Without objection, they will be made part of the record.

Senator DeWine?

**STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM
THE STATE OF OHIO**

Senator DEWINE. Thank you, Mr. Chairman.

Judge Gonzales, thank you very much for being with us today. Judge, every Attorney General is or most Attorneys General are known for something. Robert Kennedy was known for his crusade in regard to organized crime, and then, of course, later on we remember him for civil rights; Attorney General Barr for his efforts in regard to guns and gangs; Attorney General Reno, her efforts in regard to children, domestic violence; Attorney General Thornburgh, internationalization of crime in the area of drugs, organized crime. We could go on and on.

Four years from now, what do you want to be remembered for?

Judge GONZALES. Well, Senator—

Senator DEWINE. Excluding, if I could, excluding the war on terrorism.

Judge GONZALES. Senator, I think the Department of Justice is somewhat unique from other agencies. I'm not sure that an Attorney General can afford to focus in providing or dispensing justice in one area to the exclusion of the other. And so I would hope that certainly at the end of 4 years it would be said that Al Gonzales did the very best he could, and hopefully was successful in ensuring that there was justice provided to Americans all across the spectrum on a wide variety of issues.

It also is my sincere hope that I would be remembered, if I am confirmed today, as someone who renewed the vitality, the importance of the work that goes on at the Department of Justice. I know that there are some—there are wonderful people who come to work every day, and they come to work with one goal in mind, and that is the pursuit of justice for all Americans. And I feel a special obligation, maybe a special, an additional burden, coming from the White House, to reassure the career people at the Department and to reassure the American people that I'm not going to politicize the Department of Justice.

But with respect to specific areas that I probably would like to have special emphasis on, of course, the first one is the war on terror. I also, because of my background, believe very much in the protection of civil rights, the protection of our voting rights, and the protection of our civil liberties. I continue to believe that we have far too many drugs in our society and that should be a focus.

I am concerned about violent crime in our society, and I am concerned about the use of certain kinds of weapons in connection with those crimes. I think obscenity is something else that very much concerns me. I've got two young sons, and it really bothers me about how easy it is to have access to pornography.

And so those are a few things that I would be focused on, but, again, I think the Department of Justice is unique and that my goal, as impossible as it may be or may seem, is to try to ensure that justice is administered across the spectrum.

Senator DEWINE. Judge, there are never enough resources for any prosecutor. I was a county prosecutor. We never had enough resources, or we did not think we did, anyway. You pick and choose. You make decisions.

The Attorney General has that problem. U.S. Attorneys have that problem every day. Congress really has not helped; we have not helped. We have increased the number of Federal crimes. We keep doing it every Congress. We have mandatory minimums. Most U.S. Attorneys in recent years have said that the U.S. Attorneys must charge—most Attorneys General have said that the U.S. Attorneys must charge the highest possible offenses. So the local U.S. Attorneys are overworked. They have to, frankly, pick and choose their cases.

Then we had September 11th, and we had a whole new emphasis—an emphasis on the war on terrorism. From previous conversations with your predecessor and with the FBI and with published documents from the Attorney General's office, it is clear that the Attorney General and the Justice Department is not doing some things, not prosecuting certain cases that you were prosecuting in the past.

How are you going to set your priorities? And how are you going to deal with the fact that you are not prosecuting some things that you were prosecuting in the past? For example, you are not putting the emphasis on drug cases that you were able to do in the past. And this is not a criticism. I am not saying if I was Attorney General I would be doing it any differently. But to be Attorney General is to choose. To be Attorney General is to make policy. To be Attorney General is to tell every U.S. Attorney in this country this is what is important and this is what is not so important.

That is what I am trying to get from you today, and I need a little more specifics from you, if I could.

Judge GONZALES. Senator, I wouldn't be so arrogant as to assume today that I have all the information that I would need to make that kind of—

Senator DEWINE. No, but, Judge, you have been in the White House in a very high position for 4 years. You have been involved in the justice system for 4 years, and prior to that at the State level you were intimately involved as well. So you have a great background for this, and I would like your comments, sir.

Judge GONZALES. Well, an initial comment I would make is you talked about the Attorney General being in the role of sort of a policymaker. As a member of the President's Cabinet, I am a member of the President's team so that he will have certain priorities, and obviously his priorities will become my priorities in terms of policy-making—not in the area of law enforcement or in prosecutions, but in the area of making policy.

I think that once again we will have to call upon our continued cooperation with State and locals in order to maximize those relationships to ensure that we have sufficient resources. And I understand that they have the same problem in terms of lack of adequate resources to prosecute all kinds of crimes. But I think cooperation not just with State and locals, I think there needs to be greater cooperation within the Department itself. There need to be more sharing of information in order to maximize efficiencies that are possibly there. But, Senator, I do not have specific ideas today about what kinds of priorities would exist for me. I spoke earlier about the types of issues that would have special attraction and appeal to me, and I suspect that those would be issues that will ultimately become priorities in a Gonzales Department of Justice, if confirmed.

Senator DEWINE. Well, Judge, I think one of the things that certainly we look for and certainly I look for from the next Attorney General is candor. And I think what would be very helpful is candor to the American people in explaining as the war on terrorism continues, to explain to the American people what the Justice Department is not doing and what you do not have the ability to do anymore so that we can make policy choices. The Congress and the administration and the American people can make policy choices and come to Congress and say we are not doing this anymore, this is an area we cannot do anymore because of the war on terrorism. And you do not have to even get into specifics today. I am just asking if you agree with that and if you will make a commitment to us today that when you come to this Committee and testify, will you be honest with us and tell us, Senators, we are not doing this because we are doing something else?

Judge GONZALES. Absolutely, Senator. I will make that commitment. Let me tell you that it would be a priority of mine to not only inform but educate, not only this Committee but the American people about what the Department is doing and why we are doing it. There is a great deal of misinformation and fiction out there about what the Department is doing, and I think that one of my goals should be to educate and inform this Committee and the American people about what the Department is doing and why we are doing it and why what we are doing is, in fact, lawful.

Senator DEWINE. You talked about policy. I understand the President sets the policy, and that is absolutely true. But ultimately, you know, whether you call it policy or whatever you want to call it, the Attorney General and the President, you are making choices about what the emphasis is.

One final question. I see the light is on. The area of technology is something that is very near and dear to my heart. You and I have talked privately about this. I wonder if you could just give us your commitment that the updating of the FBI's technology, which

we all have heard so much about as being such a problem, will be one of your priorities and something that when you come in front of this Committee you will report to us and that you will give us an accurate description of how that updating of the FBI's computer systems and its entire technology is coming. It is something that I think every member of this panel is very, very concerned about and every Member of Congress is concerned about.

Judge GONZALES. Absolutely, you have my commitment on that. Senator, I do know that it is the highest priority for Director Mueller. I said earlier that the war on terror really is a war about information. We have to have the most updated technology in order to gather up that information, to analyze that information. So you do have my commitment, Senator.

Senator DEWINE. I appreciate it, and we need to know when you don't have the resources to get it done. And, again, in regard to candor, you have to be candid with us and say we do not have enough money, we do not have the resources, when you do not in that area.

Thank you, Mr. Chairman.

Judge GONZALES. I won't be shy about that, Senator.

Chairman SPECTER. Senator Biden?

**STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR
FROM THE STATE OF DELAWARE**

Senator BIDEN. Thank you, Mr. Chairman.

In 10 minutes, the core questions I want to ask will probably occur in the second round, Judge. Let me begin, though, by saying I congratulate and welcome the new Chairman. I think that if anyone was made for this job, it is the Senator from Pennsylvania, who I think is the finest constitutional lawyer in the country—maybe not the country but in the Senate. And I welcome his—

[Laughter.]

Senator BIDEN. Seriously, I think it befits his background to chair this very difficult Committee, and I wish him well, and he has my cooperation.

Chairman SPECTER. Thank you very much, Senator Biden.

Senator BIDEN. Judge, we sort of got off—I think we got off on sort of an unusual footing here, and I think that our colleague in the Committee sort of fired a gun that had not been shot yet in terming—I do not know anybody who has announced they are against your being the next Attorney General. Even those who have doubts say you are going to be confirmed. And so this is not about the President and his judgment. It is appropriate for us to understand the President is not a lawyer. He does not know from shinola about the treaty. By the way, nor do previous Presidents. Nor do previous Presidents. That is why they have legal advisers. That is why they hire brilliant graduates from Harvard Law School and former judges to advise them. I am being deady earnest here. It is not a joke.

So I do not judge the President on whether or not he supports or did not support torture, he signed off on a memo that may, in fact, in the minds of many, in fact, constitute torture, and he says he does not—that is irrelevant here.

And, Judge, this is not about your intelligence. This hearing is not about your competence. It is not about your integrity. It is about your judgment, your candor, because you are going to be making some very difficult decisions as Attorney General, as every Attorney General has, decisions on matters we cannot even contemplate now.

When I got here in 1972, the idea that anybody would be making judgments about cloning was bizarre. Within 4 years, you are going to make judgments on issues we have not even contemplated. So I want to know about your judgment. It is your judgment. And you are going to be the AG. You are not going to be legal counsel anymore. You are no longer the President's lawyer. You are the people's lawyer. Your oath is to the people of the United States. I know you know that.

Judge GONZALES. Yes, sir.

Senator BIDEN. And, therefore—and this is not a Supreme Court hearing, although some suggest it foreshadows that. As a Supreme Court nominee, you could sit there and say, “I do not want to comment on that law or interpret it because I may have to judge it.” As Attorney General, you are responsible to tell us now what your judgment is on what the law means. It is your obligation now for us to be able to assess your judgment, your legal judgment. You are in no way, as you implied to two other questioners, you are in no way jeopardizing a future case. That is malarkey, pure malarkey.

So we are looking for candor, old buddy. We are looking for you, when we ask you a question, to give us an answer, which you have not done yet. I love you, but you are not very candid so far.

[Laughter.]

Senator BIDEN. And so please do not use this straw man, “Well, as a future Attorney General, I may not be able to comment on what that law”—you are obliged to comment. It is your job to make a judgment before a case is taken. That is your judgment we are looking at.

And so it seems to me that—and the other point I would like to raise, because I am only going to get to the questions in my second round really, is that my good friend from Texas, he held up three reports that did not say what he said they said. The three reports he held up that I am aware of, maybe four, asserting essentially that they confirmed the judgment that you made in your recommendations to the President of the United States of America relating to torture and other matters.

Now, the reason why it is appropriate to ask you about Abu Ghraib is not to go back and rehash Abu Ghraib, but it is relevant as to whether or not what occurred at Abu Ghraib came as a consequence of the judgments made and embraced by the President that were then essentially sent out to the field. The Schlesinger report that was cited, it finds, “Lieutenant General Sanchez signed a memo authorizing a dozen interrogation techniques beyond standard Army practice, including five beyond those applied at Guantanamo.” He did so “using reasoning from the President’s memo of February 7, 2002.” So I say to my friend from Texas, that is why this is relevant.

The very reports cited say that—and I will not go through them all. The Red Cross report, the Red Cross did not sign off and say

that, you know, the conduct or the recommendations or the memorandum were, in fact, appropriate. And so I will not go through it all now, but I will, if we need to, in further questioning.

So, again, I want to sort of clarify here. This is about the judgment you have exercised and whether or not the next 4 years the judgment you are going to give a President, which he understandably should rely upon—this is not a man who has your legal credentials. That is why he has you, to make a recommendation to him. And it is appropriate for him to accept that recommendation unless on its face an average citizen or an informed President who is not a lawyer would say, no, that cannot make any sense.

So that is why we are worried about this. That is what this is about. And there is sort of—there is a split here in the Congress, there is a split in the country about what is appropriate in this time of dire concern about terror.

You know, there is that play we have all seen, “A Man for All Seasons,” and there is an exchange in there where Sir Thomas More is engaging Roper, and Roper says—a young man came to seek a job, and he said, “Arrest him. He means you harm.” And he said, “He has broken no law.” And Roper said, “But he means you harm.” And if my recollection is correct, you have Thomas More turning to Roper and saying, “This country is planted thick with laws, coast to coast, man’s laws not God’s, and if you cut them down, Roper, as you would, what will you do when the devil turns ’round on you? Yes, I give the devil benefit of law for my own safety’s sake.”

That is the fundamental principle we debate among ourselves here, no matter how you cut it. And that is what the debate that took place on these torture memos between Taft and Yoo. I have a copy of the report, the memo sent by the Secretary of State to you all on February 7th, which I am not going to make public. But in that memo, he takes significant issue with the recommendations coming out of your shop, and Mr. Yoo’s. And he ends by saying, “Let’s talk. We need to talk.” And he goes into great detail, as other reports do. Powell contemporaneously on the 7th says basically—and I have the report right here. He says basically, look, you go forward with the line of reasoning you guys are using, and you are going to put my troops, my former troops, in jeopardy. This is about the safety and security of American forces. And he says in here, “What you are doing is putting that in jeopardy.” You have the former head of JAG, the top lawyer in the United States military, saying, Hey, man, this is way beyond the interrogation techniques you are signing off, way beyond what the manual, the military manual for guidance of how to deal with prisoners says.

And so the point I am trying to make here—and I will come back with questions, if I have any time—well, I do not have any time. This is important stuff because there was a fundamental disagreement within the administration. And based on the record, it seems to me, although it may not be totally—it may not be dispositive, your judgment was not as good as the judgment of the Secretary of State. Your judgment was not as good or as sound as the chief lawyer from the JAG. Your judgment was not as sound. And the question I want to debate about is the judgment. How did you arrive at this, different than these serious people like you who

thought what you were doing, recommending to the President in the various memos, was jeopardizing the security of American troops? And that is what I want to get back to, but I want to explain to the public and anybody listening. This is not about your integrity. This is not a witch hunt. This is about your judgment. That is all we are trying to do.

And so when I get to ask my questions, I hope you will be candid about it because—not that it is relevant—I like you. I like you. You are the real deal.

Chairman SPECTER. Senator Biden, your red light is on.

Senator BIDEN. My red light is on.

[Laughter.]

Senator BIDEN. Thank you.

Chairman SPECTER. Judge Gonzales, while Senator Biden is awaiting round two to formulate a question—

[Laughter.]

Chairman SPECTER. —I think you ought to be given an opportunity to respond to Senator Biden's observations and implicit, perhaps, two dozen questions. So the floor is yours.

Judge GONZALES. Senator Biden, when you are referring to the Powell memo, I'm not sure which memo you're referring to. And I presume you're referring—

Senator BIDEN. Let me give you a copy of it. For the record, Mr. Chairman, it is dated January 11, 2002, to John Yoo from William Taft, Legal Adviser, and there is overwhelming evidence that you saw it. There was discussion about it, and that is what I am referring to.

Judge GONZALES. There was a great deal of debate within the administration, as that memo partly reflects, about what was legally required and perhaps a policy judgment to be made by the President. And the fact that there was disagreement about something so significant I think should not be surprising to anyone.

Senator BIDEN. Of course not.

Judge GONZALES. Of course not. And reasonable people can differ.

In the end, it is the Department of Justice who is charged by statute to provide the definitive legal advice on behalf of the executive branch to the President of the United States. What I can tell you—

Senator BIDEN. With due respect, that does not matter. I do not care about their judgment. I am looking at yours.

Judge GONZALES. Sir, of course, I convey to the President my own views about what the law requires, often informed by what the Department of Justice says the law is, because, again, by statute you have conferred upon them that responsibility.

I can tell you that with respect to the decision the President ultimately made, everyone involved, including the Secretary of State, including the Chairman of the Joint Chiefs, all of the principals who had equities in the decision about the application of Geneva had an opportunity to present their views and their concerns directly to the President of the United States, and he made a decision.

Chairman SPECTER. Thank you, Judge Gonzales.

Senator Kyl had to depart earlier this morning for his leadership role on a congressional delegation going to Israel, so he will not be with us today and I wanted to put that explanatory note in the record.

Senator Sessions?

**STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM
THE STATE OF ALABAMA**

Senator SESSIONS. Thank you, Mr. Chairman. I would like to join in congratulating you on this office, and you are uniquely qualified and capable of handling this docile Committee which you inherited.

Chairman SPECTER. Thank you.

Senator SESSIONS. Judge Gonzales, I would like to get a few things straight here. I spent 15 years in the Department of Justice and several years as an Attorney General of the State of Alabama, and I have some appreciation for the different roles that are involved here.

You are Counsel to the President of the United States. Is that correct?

Judge GONZALES. That is correct, Senator.

Senator SESSIONS. You did not supervise the Department of Justice, did you?

Judge GONZALES. That is correct, Senator.

Senator SESSIONS. You were not senatorially confirmed.

Judge GONZALES. That is correct, Senator.

Senator SESSIONS. And you just work for the President and give him advice whenever he asks for it and help provide him assistance whenever he asks you to do so.

Judge GONZALES. And I will just add—that is correct, Senator. I will also add that with respect to significant legal decisions that the President has to pass judgment on, my advice is always influenced and it always is—well, it is informed by the advice given to me by the Department of Justice.

Senator SESSIONS. Now, the Department of Justice under the Judiciary Act of 1789 is empowered by statute to issue opinions on various questions of law.

Judge GONZALES. That is correct, Senator.

Senator SESSIONS. And they have an Office of Legal Counsel.

Judge GONZALES. Yes, sir.

Senator SESSIONS. That really specializes in that on behalf of the Attorney General.

Judge GONZALES. The Office of Legal Counsel has been delegated by regulation the authority of the Attorney General to provide legal advice to the executive branch.

Senator SESSIONS. Now, the President of the United States is executing a war on terrorism after 3,000 of our people have been killed by what can only be described as unlawful combatants. And it is a difficult, tough time, and you were concerned and the President was deeply concerned that there may be other groups of unlawful combatants, saboteurs that were in the United States planning further attacks to kill more American citizens. And that is the way it was, isn't it?

Judge GONZALES. The President was very concerned about protecting this country from future attacks and doing everything that

we could do within the law to protect this country from future attacks.

Senator SESSIONS. And in the course of all of that, agencies that we had out there, their lives at risk—the military and other agencies—to serve our people, to protect our people, asked the President what the law was with regard to their rights and duties and responsibilities of interrogating people they have apprehended. That came to your attention, I guess, as Counsel to the President.

Judge GONZALES. My understanding is that people in the agencies were very concerned about—they understood that they had a direction from the President to do what they could to protect this country within the limits of the law, and they wanted to clearly understand what those limits were.

Senator SESSIONS. And so you did not undertake to give them an off-the-cuff opinion, as Senator Biden suggests you ought to be able to do today on any question he would desire to ask you, I suppose.

Judge GONZALES. I hope not, Senator. I have been criticized, quite frankly, for going too much to the Department of Justice and making sure that the legal advice we give to the President is the right advice. That is very important to me. I understand that the Office of Legal Counsel, they have the expertise, the institutional history, the institutional knowledge about what the law is. And so I have a great deal of respect for that office and rely upon that office in the advice that I give to the President of the United States.

Senator SESSIONS. And it is staffed with career people who have dealt with these issues for many, many years, certainly, and when this issue arose, I think you did the absolutely proper thing. You asked the entity of the United States Government that is charged with the responsibility of making those opinions, you asked them to render an opinion.

Judge GONZALES. Absolutely, Senator. We want to get it right. It also provides, quite candidly, as the lawyer for the President, protection for the President. We want to make sure the President does not authorize or somehow suggest conduct that is unlawful. And so I felt that I had an obligation as a prudent lawyer to check with the professionals at the Department of Justice.

Senator SESSIONS. Well, I think you did, and I think that was the first step.

Now, it has been suggested that this was your opinion, that it is your opinion, you asked for this opinion, as if you asked for them to say precisely what they said. You asked for them to give an opinion on the legal question involved. You did not ask them to give an opinion that you wanted. Is that correct?

Judge GONZALES. As I said in my earlier testimony, there was give-and-take. There were discussions about the opinion, but ultimately the opinion represents the position of the Department of Justice. And as such it's a position that I supported at the time.

Senator SESSIONS. And there is no doubt in anyone's mind, the Office of Legal Counsel or the Attorney General, that that opinion was one that they worked on, that they debated internally, and when they put their name on it, it was their opinion. Isn't that correct?

Judge GONZALES. It was the work of the Department of Justice and, again, reflected the position of the executive branch.

Senator SESSIONS. The official position. Now, the President of the United States—well, let me follow this up: Having been an Attorney General and been involved in the Department of Justice as a part of the executive branch, as you were part of the executive branch, and lawyers in the Department of Justice have to be very careful, do they not, when they issue an opinion that they are not circumscribing legitimate constitutional powers that belong to the executive branch. And they are going to be careful not to render an opinion that would remove constitutional powers that the President legitimately has.

Judge GONZALES. That is correct. But my view about the Office of Legal Counsel is to call them as they see them, I mean, interpret the law and give us their best judgment about what the law is.

Senator SESSIONS. Well, I agree with that. But once this opinion came in from the Office of Legal Counsel and the President and you, I am sure, reviewed it, he issued some orders, it seemed to me, that were far less expansive than the authority the Legal Counsel said he had.

Judge GONZALES. Well, I am not sure which orders you might be referring to. Let me emphasize for the record that the President was not involved personally in deciding which kinds of methods could be used to question terrorists who might have information that might save American lives. The President was not involved personally in connection with that.

What he expected and what he deserved—and I think what he got—was people within the administration trying to understand what the law was and conforming their conduct to legal requirements.

Senator SESSIONS. And the opinion of the Department of Justice Legal Counsel really isn't policy, is it? It is just the opinion of the Office of Legal Counsel.

Judge GONZALES. At the end of the day, again, as I described to you, I expect the Office of Legal Counsel to give me their best judgment, their best interpretation of what the law is.

Senator SESSIONS. And the President sets the policy based on his judgment after having received that advice?

Judge GONZALES. That is correct.

Senator SESSIONS. Now, with regard to al Qaeda, I do not think there is anyone on this Committee, on either side of the aisle, that would say that al Qaeda represents a lawful combatant that is, therefore, entitled to the full protections of the Geneva Conventions, would they? I mean, that is pretty well undisputed that they are not representatives of an organized state and that they do not carry arms openly and that they do not—and they clearly do not follow the laws of warfare in the surreptitious methods by which they bomb innocent civilians?

Judge GONZALES. Senator, that is correct. Senator Biden spoke earlier about my judgment. My judgment was based on just reading the words of the Geneva Conventions is that it would not apply to al Qaeda. They weren't a signatory to the Convention and, therefore, it didn't seem to me that they could be—our conflict with al Qaeda could be covered. But obviously—

Senator SESSIONS. And that would—

Judge GONZALES. The decision by—if I might just interrupt you, the decision by the President as to the fact that Geneva would not apply was not just based upon my judgment. That was the considered judgment of the Department of Justice.

Senator SESSIONS. And it was clearly correct and clearly consistent with *Ex Parte Quirin*, the Supreme Court case during World War II.

Judge GONZALES. That is correct, sir.

Senator SESSIONS. President Roosevelt captured some German saboteurs inside the United States and had a trial or a hearing in the Department of Justice or the FBI building and executed them. I do not think the public even knew about it until after they had been executed. So an unlawful combatant is a different matter.

Now, in Iraq, you have said the Geneva Conventions would apply, basically, as I understand it.

Chairman SPECTER. Senator Sessions, your red light is on, but if you would go ahead and finish your sentence.

Senator SESSIONS. And truth be known, a number of those people involved in Iraq really should not qualify, but the President has really gone further than the law requires, it seems to me, in granting them privileges that he did not necessarily have to do as a matter of effecting his policy of humane treatment.

Judge GONZALES. Senator, I think the administration—it is more accurate to say that the administration policy is and always has been that in our conflict with Iraq, Geneva does apply and we are bound by the requirements of the Geneva Convention. Iraq is a signatory to the Geneva Conventions, and there were never any question, any debate that I'm aware of as to whether or not Geneva would apply with respect to our conflict in Iraq.

Senator SESSIONS. But the Zarqawi people do not strictly qualify, in my opinion, as a lawful combatant.

Chairman SPECTER. Senator Kohl?

STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Thank you very much, Mr. Chairman, and I too want to congratulate you on your ascension to the chairmanship of this Committee.

I have had the privilege of working with Senator Specter now for well over a dozen years, and I can attest to his skill and his perspective that I believe will enable us to proceed in an orderly and in a collaborative fashion.

Chairman SPECTER. Thank you.

Senator KOHL. I also would like to welcome you to this Committee, Mr. Gonzales. As you know, we have had an opportunity to work together on several different issues over the years, and I have come to respect you also. And I believe if you are confirmed that you will do a good job as Attorney General of the United States.

Judge GONZALES. Thank you, Senator.

Senator KOHL. Judge Gonzales, the 9/11 Commission's report recognized that winning the hearts and the minds of the Arab world is vital to our success in the war on terror. Photographs that have come out of Abu Ghraib have undoubtedly hurt those efforts and contributed to a rising tide of anti-Americanism in that part of the

world. Secretary of State Colin Powell and others raised concerns about the decision not to apply the Geneva Conventions, some even suggesting that it could well undermine U.S. military culture. And we now know that those concerns in large part or significantly were well founded.

When drafting your recommendations for the President on the application of Geneva Conventions, did you ever consider the impact that this could have on winning the hearts and minds of the Arab world in the war on terror? And in light of what has happened, if you could make the recommendation all over again, would you do something different than what you did?

Judge GONZALES. Senator, that is a very good question and thank you for asking that. I think the decision not to apply Geneva in our conflict with al Qaeda was absolutely the right decision for a variety of reasons. First of all, it really would be a dishonor to the Geneva Convention. It would honor and reward bad conduct. It would actually make it more difficult, in my judgment, for our troops to win in our conflict against al Qaeda. It would limit our ability to solicit information from detainees. It would require us to keep detainees housed together where they could share information, they could coordinate their stories, they could plan attacks against guards. It would mean that they would enjoy combat immunity from prosecutions of certain war crimes. And so for a variety of reasons, it makes absolutely no sense.

In addition to that, Senator, it is contrary to decades of executive branch position. There was an attempt in 1977, Protocol 1, to provide prisoner of war legal status to terrorists. Now, that protocol included some wonderful humanitarian provisions dealing with extraditions and hostages and things of that nature. But the United States, and many other countries, never ratified that protocol, and the reason is because the protocol arguably provided prisoner of war legal status to terrorists. And so it has been the consistent executive branch position since then that we are not going to do that because it hurts our soldiers. It is contrary to the spirit of Geneva to do so. And so I do believe the decision by the President was absolutely the right thing to do.

Now, that's not to say that we don't—that we are not—that we don't operate without legal limitations and that we don't treat people consistent with our values as Americans. The President was very clear in providing directives that even though Geneva would not apply as a matter of law, we would treat detainees humanely and subject to military necessity and as appropriate, consistent with the principles of Geneva.

In my judgment, there has been a very strong attempt to do so at Guantanamo. There has been never any question, as I said in response to earlier questions, about whether or not Geneva should apply in Iraq. That's always been the case.

Do I regret the abuses at Abu Ghraib? Absolutely. I condemn them. Do I believe that they may have hurt us in winning the hearts and minds of Muslims around the world? Yes. And I do regret that. But one of the ways we address that is to show the world that we do not just talk about Geneva, we enforce Geneva. And so as I said in response to an earlier question, that's why we're doing these investigations. That's why you have these military court

martials. That's why you have these administrative penalties imposed upon those responsible, because we want to find out what happened so it doesn't happen again. And if someone has done something wrong, they're going to be held accountable.

Senator KOHL. Well, let me ask you, do you think that what happened at Abu Ghraib was just spontaneous, or do you think that those relatively low-level perpetrators got some sort of a sign from people above them who got signs from people above them that these things would be tolerated? What is your opinion?

Judge GONZALES. Well, we don't know for sure. First of all, I'm not—I haven't conducted an independent investigation. We know eight have been completed. There are at least three ongoing. We know that the Congress is conducting—you know, through hearings and briefings, they're looking at this as well.

As I listened to the briefings of Schlesinger and Faye and Kearns and people like that about their findings and their reports, they divide up the abuses into two categories. One category is the violent physical abuse and sexual abuse. That is the first category. And the second category are abuses related to interrogations and gathering intelligence, stem from confusion about what the policies and the strictures were.

As to the first category, as I read the briefings, they all seem to conclude that what you see in the pictures, the most horrific of the abuses that we see, the ones that we all, you know, condemn and abhor, those do not relate to confusion about policies. Those were not related to interrogations or confusion about how much you could—what you could do in terms of gathering intelligence. This was simply people who were morally bankrupt trying to—having fun, and I condemn that.

As to the second category, the reports seem to indicate that there was migration. There was migration between what happened in Guantanamo. You had people and standard operating policies that migrated from Guantanamo to Afghanistan and then into Iraq. And so there was some confusion about what were the appropriate standards to use in connection with interrogations and in connection with intelligence gathering.

However, as I read the briefings and the reports, they seem to indicate that the reason that the abuses occurred was not because of some decision back in 2001 or 2002, but because of the fact that you had a prison that was outmanned, under-resourced, and focused on fighting an insurgency, and they didn't pay enough attention to detainee operations. There wasn't adequate supervision. There wasn't adequate training about what the limits were with respect to interrogation. That's how I read the findings and conclusions of some of these reports.

But it's not done yet. Again, there are still ongoing investigations. And so we'll have to wait and see—

Senator KOHL. That would seem to indicate, although we will see what happens, that people above the level of those who committed the atrocities are likely—and we will see what happens—to escape being held accountable. We will see what happens. I know you and I cannot know that right now, but I think I am getting a drift from you that those people who committed the atrocities were acting on their own. There really wasn't anybody at a higher level who un-

derstood and approved or at least condoned, and the accountability should be held at that level.

I think the American people, by and large, Judge Gonzales, believe that accountability should at least be focused on people above the level of those at that level who committed the atrocities. What do you think, Judge Gonzales?

Judge GONZALES. I believe that people should be held accountable. I do think—and perhaps I misspoke in describing how I reviewed the briefings and how I read the reports. The reports seem to indicate that there was a failure, there was a failure of discipline amongst the supervisors of the guards there at Abu Ghraib, and also they found that there was a failure in training and oversight at multiple layers of Command Joint Task Force 7. And so I think there was clearly a failure well above the actions of the individuals who actually were in the prison. At least that's what the reports seem to indicate, as I review them.

Senator KOHL. Finally, Attorney General Ashcroft said that he does not really believe in torture in the sense that it does not produce anything of value. He has said that on the record. Do you agree with that?

Judge GONZALES. Sir, I don't have a way of reaching a conclusion on that. All I know is that the President has said we are not going to torture under any circumstances.

Senator KOHL. Well, do you believe that the policy is a correct one, that we never should have had any torture at Guantanamo or at Abu Ghraib among other reasons because it really does not produce anything of value?

Judge GONZALES. Sir, the United States has never had a policy of torture.

Senator KOHL. I thank you, Mr. Chairman.

Chairman SPECTER. Senator Graham?

**STATEMENT OF HON. LINDSEY O. GRAHAM, A U.S. SENATOR
FROM THE STATE OF SOUTH CAROLINA**

Senator GRAHAM. Thank you, Mr. Chairman. Congratulations—I think—for chairing this Committee.

Monday morning quarterbacking is part of a democracy, so just bear with us because what we are trying to do is figure out how to correct mistakes. Now, I am a very ardent supporter of the war. I really do believe if you are going to win the war on terror, you take dictatorships like Saddam Hussein, who was part of the problem, and you give people who lived under his oppression a chance to be free. That is not easy, and I believe we made mistakes along the way.

But one of the reasons that we are talking about this has a lot to do with your confirmation, but really not. I think we have dramatically undermined the war effort by getting on a slippery slope in terms of playing cute with the law because it has come back to bite us. Abu Ghraib has hurt us in many ways. I travel throughout the world like the rest of the Members of the Senate, and I can tell you it is a club that our enemies use, and we need to take that club out of their hands.

Guantanamo Bay, the way it has been run, has hurt the war effort. So if we are going to win this war, Judge Gonzales, we need

friends and we need to recapture the moral high ground. And my questions are along that line.

To those who think that you can't win a war with the Geneva Convention applying, I have another role in life, I am a judge advocate. I am a reserve judge in the Air Force. I have never been in combat. I had some clients that probably wanted to kill, but I have never been shot at. But part of my job for the last 20 years, along with other judge advocates, is to advise commanders about the law of armed conflict. And I have never had a more willing group of people to listen to the law, because every Air Force wing commander lives in fear of an air crew being shot down and falling into enemy hands. And we instill in our people as much as possible that you are to follow the law of armed conflict because that is what your Nation stands for, that is what you are fighting for, and you are to follow it because it is there to protect you.

Now, to Secretary Powell, he took a position that I disagreed with legally but in hindsight might have been right. I agree with you, Judge Gonzales, that to give Geneva Convention protection to al Qaeda and other people like al Qaeda would in the long run undermine the purpose of the Geneva Convention. You would be giving a status in the law to people who do not deserve it, which would erode the Convention.

But Secretary Powell had another role in life, too. He was a four-star general and Chairman of the Joint Chiefs. And to those who think that the Geneva Convention is a nicety or that taking torture off the table is naive and a sign of weakness, my answer to them is the following: that Secretary Powell has been in combat, and I think you weaken yourself as a nation when you try to play cute and become more like your enemy instead of like who you want to be. So I want to publicly say that the lawyers in the Secretary of State's office, while I may disagree with them and while I may disagree with Secretary Powell, were advocating the best sense of who we are as people.

Now, having said that, the Department of Justice memo that we are all talking about now was, in my opinion, Judge Gonzales, not a little bit wrong but entirely wrong in its focus because it excluded another body of law called the Uniform Code of Military Justice. And, Mr. Chairman, I have asked since October for memos from the working group by Judge Advocate General representatives that commented on this Department of Justice policy, and I have yet to get those memos. I have read those memos. They are classified, for some bizarre reason. But, generally speaking, those memos talk about that if you go down the road suggested, you are making a U-turn as a nation, that you are going to lose the moral high ground, but more importantly, that some of the techniques and legal reasoning being employed into what torture is, which is an honest thing to talk about—it is okay to ask for legal advice. You should ask for legal advice. But this legal memo I think put our troops in jeopardy because the Uniform Code of Military Justice specifically makes it a crime for a member of our uniformed forces to abuse a detainee. It is a specific article of the Uniform Code of Military Justice for a purpose because we want to show our troops, not just in words but in deeds, that you have an obligation to follow the law.

And I would like for you to comment, if you could, and I would like you to reject, if you would, the reasoning in that memo when it came time to give a tortious view of torture. Will you be willing to do that here today?

Judge GONZALES. Senator, there is a lot to respond to in your statements. I would respectfully disagree with your statement that we're becoming more like our enemy. We are nothing like our enemy, Senator. While we are struggling mightily to try to find out what happened at Abu Ghraib, they are beheading people like Danny Pearl and Nick Berg. We are nothing like our enemy, Senator.

Senator GRAHAM. Can I suggest to you that I did not say that we are like our enemy, that the worst thing we did when you compare it to Saddam Hussein was a good day there. But we are not like who we want to be and who we have been. And that is the point I am trying to make, that when you start looking at torture statutes and you look at ways around the spirit of the law, you are losing the moral high ground. And that was the counsel from the Secretary of State's office, that once you start down this road, it is very hard to come back. So I do believe we have lost our way, and my challenge to you as a leader of this Nation is to help us find our way without giving up our obligation and right to fight our enemy.

And the second question—and then I will shut up—is Guantanamo Bay. The Supreme Court has rejected this administration's legal view of Guantanamo Bay. I believe it is a legal chaos down there and that it is not inconsistent to have due process and aggressively fight the war on terror. Nobody wants to coddle a terrorist, and if you mention giving rights to a terrorist, all of a sudden you are naive and weak. I can assure you, sir, I am not naive and weak.

Judge GONZALES. Thank you, Senator.

With respect to Guantanamo Bay, it is correct that in the *Rasul* decision the Supreme Court did disagree with the administration position. We felt, reading Supreme Court precedent in *Johnson v. Eisentrager*, that a non-American enemy combatant held outside the United States did not have the right to file a habeas challenge.

Senator GRAHAM. It is a correct position to take, but you lost. Now here is my question: What do we do now that you lost?

Judge GONZALES. We have implemented a process to provide the opportunity for people at Guantanamo Bay to know of the reasons they're being detained and to have a meaningful opportunity to contest the factual basis of their detention before a neutral decisionmaker, all in accordance with the decision in *Hamdi*.

Senator GRAHAM. How is that being worked? Who is working on that?

Judge GONZALES. That is being worked through Secretary England, and they have assumed responsibility for—the Navy has assumed responsibility for standing at the combatant status review tribunals, and I can't tell you today where we are in the process, but we are providing a level of process which we believe meets the requirements set out by the Supreme Court.

Senator GRAHAM. Okay. I would like to be informed, if possible, in an appropriate way what the executive department is doing to

fill in that gap. I do not know if we need legislative action. But the reason I am going to vote for you is because I think I have followed this information enough to know that you are a good lawyer, you ask good questions, and it was ultimately the President's decision. And I think he was right. I think Geneva Convention protection should not be applied to terrorists.

I think humane treatment is the way to go, the only way that we can win this war. My problem is that the DOJ memo was out there for two years, and the only people I can find that spoke against it were professional military lawyers who are worried about our own troops. I want you to get that memo, and if we need three rounds, we will do three rounds. But I would like to get you to comment, if you could.

Is my time up?

Chairman SPECTER. Almost.

Senator GRAHAM. Okay. Comment if you could. Do you believe that a professional military lawyer's opinion that this memo may put our troops in jeopardy under the Uniform Code of Military Justice was a correct opinion?

Judge GONZALES. Would you like me to try to answer that now, Mr. Chairman?

Chairman SPECTER. Yes. Judge Gonzales, the question is pending.

Judge GONZALES. And the question is do I believe that the military lawyer's judgment that—

Senator GRAHAM. The techniques being espoused in the memo may put our troops at jeopardy under the Uniform Code of Military Justice. And if you want to take some time, that is fine.

Judge GONZALES. Thank you, Senator.

Senator GRAHAM. I mean I want sometime later for you to answer that question, but you do not have to do it right now.

Chairman SPECTER. Do you want to think it over, Judge Gonzales and respond later?

Judge GONZALES. I do. Thank you, Mr. Chairman.

Chairman SPECTER. Later during the hearing, that is fine.

Senator Feingold.

**STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR
FROM THE STATE OF WISCONSIN**

Senator FEINGOLD. I too want to congratulate you, Mr. Chairman. I have long admired your thoroughness and your independence and your judgment, and I do look forward to working with you and all the members of the Committee again. I particularly appreciate the fact that you kicked off the questioning today by using a lot of your time to talk about the need to carefully look at certain provisions of the USA PATRIOT Act, which of course, I agree we need to do, and I am looking forward to a bipartisan effort to do it.

You were specific about concerns about the so-called library records provision, Section 215, and the sneak-and-peek provisions. Those are some of the ones that need that kind of review. And I want to make it clear in the record, because it sounded like the nominee was suggesting that somehow Section 215 does not apply

to library records. It does in fact apply to library records. Apparently the nominee agrees.

Judge GONZALES. I do agree.

Senator FEINGOLD. I just want to say that the previous Attorney General referred to librarians in this country as being hysterical in their concern with regard to this. They were not hysterical about it, and it does need the kind of review that the Chairman has called for. I think it could be a great moment for the Senate when we take up this legislation and look at the problems with it and come together to fix it, and I thank the Chairman for that.

Welcome, Judge Gonzales, and congratulations on your nomination. In accepting the President's nomination to be Attorney General you said the American people expect and deserve a Department of Justice guided by the rule of law. I could not agree with you more. One of the things we as Senators must decide in considering your nomination is whether as Attorney General you will give the American people what they expect and deserve from their Government, and I have a few questions to follow up on that.

First I want to follow up on your answer to Senator Kennedy and Senator Leahy regarding the OLC memo. You told Senator Leahy that you did not want to politicize the work of career professionals of DOJ, so you could not weigh in against the interpretation of the law that was expressed in that memo. But then you told Senator Kennedy that it was totally appropriate to have discussions with the DOJ while the memo was being prepared because it was a complicated statute that had never before been interpreted. I think there is something of a contradiction there, which I would like you to comment on, but I would like to make two other points first.

First, the authors of the torture memo, in fact, Judge, were political appointees, not career professionals. Second, the issue is whether you disagree with that memo and express that disagreement to the President. You are the President's lawyer. Is it not your job to express your independent view to the President if you disagree with the opinion of the Justice Department, or do you just simply pass on the DOJ's opinion no matter how erroneous or outrageous, and just say to the President, in effect, this is what the DOJ says the law is?

Judge GONZALES. Thank you, Senator, for that question. Let me try to clarify my comments regarding my role in connection with the memo and my role generally as I view it as Counsel to the President.

It is of course customary, and I think to be expected that there would be discussions between the Department of Justice and the Counsel's Office about legal interpretation of, say, a statute that had never been interpreted before, one that would be extremely emotional, say, if you're talking about what are the limits of torture under a domestic criminal statute? And so there was discussion about that. But I understand, and it is my judgment that I don't get to decide for the executive branch what the law is. Ultimately, that is the President, of course. By statute the Department of Justice is giving me authority to provide advice to the executive branch. And so while I certainly participate in discussions about these matters, at the end of the day, that opinion represents the

position of the Department and therefore the position of the executive branch.

Senator FEINGOLD. I am puzzled by that because I think it must be your job as Counsel to the President to give him your opinion about whether the DOJ document was right before he makes a judgment to approve it, and I have always assumed that would be the job of the President's lawyer.

Judge GONZALES. I certainly do of course give the President my own opinions about particular matters, but as I said earlier in response to a question, my own judgment, my own conclusions, very often are informed, and very often influenced by the advice given to me by the Department of Justice, and often I communicate with the President, not only sort of my views, but the views of the Department, which of course, by statute, that's their job to do, and so that the President has that information in hand in weighing a decision.

Senator FEINGOLD. I am still puzzled by that. If you were my lawyer, I would sure want to know your independent opinion about something like that. But let me move on.

I want to now ask you about the role you had when you were counsel to then Governor Bush. You prepared what are referred to as clemency memos, summarizing a particular death row inmate's case and his plea for clemency from the Governor. As I understand it, you and your staff would prepare these memos and then present them to the Governor, who would make a final decision on whether to deny or grant clemency to the inmate with an imminent execution date.

According to my staff's review of the clemency memorandum, it appears that you presented these memos to the Governor almost always on the day of execution. Why is that? On such a grave matter as life and death, why was the decision left until the day of execution?

Judge GONZALES. The ultimate decision may have been left or came close to the time of the execution because that was the desire of the Governor. However, those memos reflect a summary of discussions that often occur between my office and the Governor in connection with every execution. It was not unusual, in fact it was quite common, that I would have numerous discussions with the Governor well in advance of a scheduled execution. We often knew when executions were scheduled. If I were in talking to the Governor about a particular matter and we had an opportunity, I would say, "Governor, we have an execution coming up in three weeks. One of the bases of clemency I'm sure that will be argued is, say, something like mental retardation. These are the issues that have to be considered." And so there would be a rolling series of discussions in connection with every execution. But as to when the ultimate decision was going to be made, it was often the day before or the day of an execution. And an additional very important reason for that, is because a Governor, under Texas law, has very limited authority under the Constitution to grant clemency. He can only grant clemency, he can only grant a pardon, he can only grant a commutation, he can only grant a reprieve, beyond 30 days upon a recommendation of the Board in Pardons and Parole, and often the Board would not meet and would not vote until just prior to

an execution, and of course, the Governor wanted to wait and see what recommendation the Board in Pardons and Parole had with respect to a request for clemency.

Senator FEINGOLD. I recognize that. It is true that the Texas Governor has a more limited clemency power compared to other governors, but the Governor does appoint the members of the Board in Pardons and Parole, and I think his grant of a reprieve could have signaled to the Board that a case deserved closer attention.

I guess I want to know, in the way you have just described the process worked, did you ever seek additional time in order to allow the Governor adequate time to review and understand the case? In other words, after he read the memo that was presented on the day of the scheduled execution, was there ever an occasion when more time was requested?

Judge GONZALES. I don't remember an occasion when more time was requested when we presented that final memo. I do remember many occasions when I would go to the Governor and talk about the facts of a particular case, and the basis of clemency, and the Governor would—if I expressed concerns or questions, the Governor would direct me to go back and find out and to be absolutely sure, because while the Governor believes in the death penalty, he believes that it deters crimes and saves lives, he also believes very firmly that it should be applied fairly and only the guilty should be punished.

Senator FEINGOLD. On that point, one of the cases involved an inmate on death row named Carl Johnson. He was executed in September 1995 during the first year that Governor Bush was in office and you were his counsel on these matters. Mr. Johnson was represented by a lawyer named Joe Cannon, who slept through the major portions of the trial, and was apparently notorious in legal circles for this behavior. In his challenges appealing the trial conviction, Mr. Johnson argued consistently that he had had ineffective assistance of counsel, primarily based on the sleeping lawyer who represented him at trial.

In your memo to the Governor discussing this case, and impending execution, however, you failed to make any mention whatsoever of the basis for Mr. Johnson's appeal. You go to great lengths to describe the underlying facts of the murder, but there is no mention at all of the fact that this lawyer slept through the major portions of the trial. I would like you to in a second explain this omission. I want to know how the Governor could have weighed the clemency memo fully and properly if you had failed to even indicate the basis for the clemency request?

Judge GONZALES. Senator, as I described to you, the process—those memos reflected the end of a process of educating the Governor about the facts of a particular case. And the fact that it may not have been included in the memo, we may have had numerous discussions about it. He may have said, "Has that issue been reviewed in the courts carefully and thoroughly?" And we may have gone back—I don't remember the facts of this particular case, but we may have gone back, our office may have gone back and seen that, yes, in fact this question of ineffective assistance of counsel

had been reviewed numerous times in our courts and had found the allegations frivolous.

Senator FEINGOLD. This is a very famous case. It is hard for me to imagine that you do not know the specifics of it, and it is almost unimaginable to me that a final formal legal memo to the Governor would not have included reference to the fact that this man's lawyer slept during the trial.

Chairman SPECTER. Senator Feingold's time is up, but Judge Gonzales, you may answer the question.

Judge GONZALES. I don't have a response to the Senator, unless there was a question.

Chairman SPECTER. If there has not been a question, postulate the question, Senator Feingold.

Senator FEINGOLD. It was a statement. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman.

Judge Gonzales, has it been your experience as a lawyer that sometimes lawyers disagree?

Judge GONZALES. That has been my experience, yes, sir.

Senator CORNYN. That has been my experience too, and I guess it is best exemplified by the lawyers on this Committee who from time to time will disagree with one another, and certainly that is understandable when we disagree about policy matters, even inferences to be drawn from facts which we all know to be true. But I think perhaps if I heard correctly, the Senator from Delaware was questioning whether my facts were correct when I presented the opening statement referring to a number of acknowledgements of the correctness of your judgment and the President's decision that the Geneva Convention does not formally apply to terrorists. So I would like to just quickly refer specifically to the pages, and I would like to ask unanimous consent that they be made part of the record.

First, page 379 through 380, where the 9/11 Commission says that since the international struggle against Islamic terrorism is not internal, these provisions do not formally apply.

And then the Schlesinger report, which studied the Department of Defense detention policies, which concluded that there were no high level policies or procedures in place that would allow for torture or abuse of detainees. On page 81 they say the panel accepts the proposition that these terrorists are not combatants entitled to the protection of the Geneva Convention.

And then there was the reference I made to the Red Cross Manual on the Geneva Convention, which on page 53 sets out the three-part test on whether the Geneva Convention actually applies under any given circumstances, and I would like to ask unanimous consent that those be made part of the record, and I am confident they will. But let me ask you this. This has also been contested in three separate Federal courts, has it not?

Judge GONZALES. It has.

Senator CORNYN. And what has been the result?

Judge GONZALES. That the President's decision was the correct legal decision.

Senator CORNYN. Even though lawyers can disagree about judgments, legal judgments or opinions—here again, I hope we do not disagree about certain basic facts, and that is the reason I wanted to go over the content of these documents which the Senator from Delaware suggested I was mistaken about. Let me ask you whether you agree with this proposition. Do you agree that the United States Government should use all lawful means to gather intelligence from terrorists in order to save American lives?

Judge GONZALES. I do agree with that. Obviously, that is a policy decision. I think that that is the position of the President of the United States, because as I said earlier, the war on terror is a war about information, and we need information to be successful in winning this war.

Senator CORNYN. You will not be the only witness in this hearing, and here again we are going to hear, I anticipate, since we have had the chance to see their prepared testimony, from other witnesses, who may express different opinions than you have expressed here, as well as the opinions expressed by the 9/11 Commission, the Schlesinger report and those three Federal courts. But I for one do think you have been candid in response to the questions, and I do not suggest I am the only one. I just know there was a suggestion that there had not been complete candor on your part, but I do believe you have been. I think that this Committee is exercising its constitutional responsibility to ask you hard questions, but I trust that those questions will always be good faith questions, they will not be motivated by some improper purpose, partisanship or otherwise.

So I am glad you are here today. I am glad the Committee is asking you hard questions, but I hope that we never cross the line into partisanship or improper motive in asking some questions.

Finally, let me just say that there was some suggestion that you have been less, or the White House has been less than responsive about requests for documents. Let me just hold up here what I believe to be part of the response that the White House has made to the request by Senator Leahy and others on the other side of the aisle with respect to documents of your office. Does that look at least like a—I will not have you go through them page by page—but have you produced voluminous documents? Has the White House produced voluminous documents in response to Committee requests?

Judge GONZALES. Senator, it's hard for me to gage whether or not that reflects our response. Because of my nomination, I have recused myself from any decisions regarding production of documents that this Committee has requested in connection with my nomination. Decisions about production of documents are being made by others at the White House, as it should be.

Senator CORNYN. Thank you for that clarification. It is my understanding, I have been advised, that the White House has complied completely with the request for documents with two exceptions. One is a document which the White House is claiming wherein the President has received confidential and candid advice from senior advisers relating to the memorandum concerning the application of the Geneva Convention to al Qaeda and the Taliban. The second document that the White House has declined to produce is an Of-

office of Legal Counsel opinion dated November 6, 2001, and the reason stated is because that is currently the subject of litigation.

I would just say that this Committee last year had the occasion to revisit the importance of our ability as Senators to receive confidential advice from our own staff, and we learned, unfortunately, that there had been a theft of some staff memos to Senators, and that now has been referred for investigation and possible prosecution.

But do you recognize the importance as a general principle of confidential communications between the President and his senior advisers, or for that matter, between the United States Senate and our staff?

Judge GONZALES. I think it is a very important principle, Senator, that needs to be respected. I think the principals should be able to rely upon candid advice from their advisers. I've seen in four years how it does make a difference in affecting the way you present advice, if not the advice you actually give. And so I think that that is a principle that should be respected, and of course, there is a competing principle as well, and that is, sometimes there is a strong or legitimate Government purpose to try to receive information and to look at that information, either as part of some kind of criminal investigation, or part of the oversight function of a committee, but that always involves a balancing it seems to me. It's sort of a case-by-case analysis in terms of where do you draw the line as to when to produce deliberative information and when not to. But, yes, I think it is a principle that one should always be mindful of, is the fact that you don't want to inhibit candid advice to principals. Otherwise, in my judgment, you do inhibit the decisionmaking of that principal, and I don't think that's good for the American people.

Senator CORNYN. Judge Gonzales, thank you very much for your response to those questions and your appearance here today. My experience, just in the brief time I have been in Washington, is that there are very few secrets because this place leaks prolifically, and if you want to find out what is going on in Washington at the highest levels of Government, all you have to do is pick up the daily newspaper or watch cable news, and you will find out almost as much as you do by sitting in on classified briefings. That has been my experience. It may not be typical.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Cornyn.
Senator Schumer.

**STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR
FROM THE STATE OF NEW YORK**

Senator SCHUMER. Thank you. And let me, Mr. Chairman, join all of my colleagues in congratulating you on achieving chairmanship of the Judiciary Committee.

Chairman SPECTER. Thank you.

Senator SCHUMER. You have all of the good qualifications for it, so thank you.

Thank you, Judge Gonzales. Let me just say that I guess many of us, at least on this side of the aisle, have had very bad experiences with the Justice Department over the last four years.

The Attorney General, should you be confirmed, is at the nexus of what may be the most fundamental and important conflict or tension in our Government, and that is between security and liberty, and the Founding Fathers paid a lot of attention to that, and realized the importance of that tension. One thing I think they called for in the structure of the Government they set up that these hearings embody and so much else, and that there be consultation, that there be discussion, and then you come to a conclusion. Obviously, the line moves. No one can dispute that we live in a new world after 9/11. No one disputes, certainly not me, that old rules should be re-examined because the world has changed dramatically, and what governed when the War of the Roses was fought does not govern today.

But the previous Attorney General ran the most secretive Justice Department in my lifetime. He seemed to make every major decision behind closed doors in the dark of night, and then when ideas popped out, because there was no consultation, because there was no vetting, he had to pull back because he had gone too far. That happened in torture, where there has been some retraction by the administration. It happened with the TIPS program, where originally your predecessor, or Attorney General Ashcroft, rather, wanted neighbors to spy on neighbors. Another was the Total Information Awareness Program. Time and time again proposals were pulled back because they were half-baked or not vetted or not discussed, and they would have come out much better had there been the kind of dialogue that I think Democratic and Republican administrations in the past on these key delicate and important issues that have to be carefully balanced, there was discussion.

So my general concern is to know how you are going to approach these issues should you be confirmed. Will you be a voice for inclusion and consultation, or will you be continuing the John Ashcroft "my way or the highway" approach that often led to embarrassment on his part, on the Department of Justice's part, and others? And I have a few questions in this regard, some specifics.

The first is on judges itself, an issue of great concern to me. In your position as Counsel, you and I have worked out things very well together in New York State. Every vacancy is filled. They are filled with moderate or conservative but mainstream judges. But we had a real dialogue. You would bounce names off of me; I would bounce names off of you. There were some each of us said to the other are not acceptable, and they were pulled off the table. The judges, make no mistake about it, do not mirror my views. Most of them are pro-life and more conservative on most issues, but they are mainstream. I really believed that they would interpret the law.

That is not what has happened nationally. We have had on most circuits just a throw down the gauntlet, here is who we want, you better approve them, and if you do not approve them, you are obstructionist, even though we have approved 204 out of 214, a record, I think, that is better than the first few Congresses, where I think one-fifth of all Supreme Court nominees, although that may be in the history of all the Congresses, have been rejected. And many of us believe that some of these nominees were radical. They were not strict constructionists. They were not following the law.

They wanted to get rid of decades and sometimes even centuries of law when it came to environment or civil rights or women's rights or privacy or property rights.

And as you know, we are going to have a Supreme Court nomination, you know, before long. I hasten to add, by the way, parenthetically, that the standard that I am going to use and I think most of us are going to use to judge you as Attorney General will be different than we would use for Supreme Court Justices should you or anybody else be the nominee. No one should mistake the votes here as a ratification because it is a different job, it is a lower standard. In the executive branch, you want the President to have more leeway than in an independent judicial branch.

But I want to ask you, when it comes to Supreme Court nominations, which we are likely to get here, will you be a real voice for consultation? Will you come to us or will you urge the President to come to us and say here are the names I am considering, what do you think? Which ones would cause a knock-down, drag-out fight? Which ones would be acceptable? Can we reach compromise? There may be more than one nomination.

Can you just give me a little bit of your feeling on how that ought to happen and your judgment on what has happened thus far in New York versus what has happened in the rest or many of the other circuits?

Judge GONZALES. Thank you, Senator. First of all, let me make it clear: I am not a candidate for the Supreme Court.

Senator SCHUMER. Right. Just making sure that everyone knows in case that should happen, one standard is different than the other.

Judge GONZALES. I'm focused on this position.

Senator SCHUMER. I understand that.

Judge GONZALES. I want to thank you for your work in connection with filling Federal judgeships in New York. I agree with you, we have been able, in my judgment, to reach accommodations where the President is able to put people on the Federal bench that he believes should serve as lifetime judges. As to why we haven't been able to replicate that around the country, I'm still trying to understand that as well.

You mentioned some circuit court judges that were way, way out of the mainstream. We look at these picks very, very carefully, and we talk to a lot of people. We bring them in. We look at their writings, if they have been judges. They have been rated well qualified or qualified by the American Bar Association, as you well know.

Senator SCHUMER. Yes, but they do not rate on their views. They rate on their integrity and demeanor. I mean, a judge who believes there should be no zoning laws, which is one of the people you nominated, is 1890s.

Judge GONZALES. Well, I am not going to try to defend every single act and every single statement of all of the President's nominees. In my judgment, collectively they do come to the job with the appropriate character and integrity, professional excellence, and with a judicial philosophy—

Senator SCHUMER. Will you urge the President to consult with us, with our side, in a real way, give us some names, some choices, a real dialogue rather than “We are doing this one”?

Judge GONZALES. Well, in my judgment, consultation has always been good. It has been fruitful. I will certainly make the President aware of your request.

Senator SCHUMER. The second issue, related, the so-called nuclear option. Now, again, the pique of some, some of my colleagues and many in the hard right, is, well, we didn’t get every one of our judges, therefore, we have to change the rules by having the Vice President, as he sits as President pro tem, rule that a filibuster is unconstitutional. I find it confounding. The very same people who urge strict construction of the Constitution—find the words, there is no right to privacy in the Constitution, it does not say “right to privacy”—are now saying that the Constitution says there should only be a majority vote on judges.

First, are you aware of any words in the Constitution that say there should be a majority vote for judges?

Judge GONZALES. Senator, I have no views as to whether or not a filibuster is constitutional. We view that as an internal Senate matter—

Senator SCHUMER. You know the Constitution. We are asking you to be Attorney General. Are there any words that say “only majority vote for judges”?

Judge GONZALES. I’m not aware of that, Senator, but, please, give me the opportunity to go back and check my Constitution.

Senator SCHUMER. All right. I will ask you to answer that in writing and find me those words.

Second, I would ask you your opinion, and this is important: Do you believe filibusters of judicial nominees violate the Constitution? And on what basis, if you do?

Judge GONZALES. Senator, we talked about this in our meeting, and my answer—

Senator SCHUMER. We did, and you were going to think about it. You have had time to think about it.

Judge GONZALES. My answer today is the same as it was in our meeting, and that is, I do not have a view as to whether or not it is constitutional. From my perspective, from the perspective of the White House, this is a matter, an internal Senate matter, to be resolved within the Senate.

Senator SCHUMER. Well, you know, I am going to submit—I am going to ask you to think about that over the next several hours. This is something that I think is important, and I do not think you should be able to duck it because the very functioning of our Government could be at stake.

One final question—

Chairman SPECTER. Senator Schumer, your red light is on.

Senator SCHUMER. We will have a second round, Mr. Chairman?

Chairman SPECTER. A second round.

Senator SCHUMER. Thank you.

Chairman SPECTER. Senator Brownback?

**STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR
FROM THE STATE OF KANSAS**

Senator BROWNBACK. Thank you very much, Mr. Chairman. It is good to be back on the Committee and to welcome you as Chairman. And I welcome Judge Gonzales and am delighted in your public service to the State of Texas, the United States, and what I believe will be soon as Attorney General of the United States. Delighted to have you here. Welcome to your family as well. I love the name of the town you are from of Humble, Texas. I think that is a great place for a public servant to come from, and it reminds you of the proverb that humility comes before honor. You come from the right place to be honored with this type of position.

I want to ask you about a couple of areas. We have had a lot of questioning about the Geneva Convention, the issues surrounding that. I am pleased that those have come out. And on your job, I want to follow up on what Senator DeWine was asking about on what you hoped to be known for in the position as Attorney General. Obviously the primary task is protecting the security of the country and the people here, and I don't want you ever to take your eye off of that ball, and I am sure you won't, that it is the war on terrorism, it is protecting the security of the American people, and that has got to be your primary focus and function and measure of success of the agency is were the American people protected.

I do want to ask you about a couple of other areas of what I hope would be opportunity because it is a large agency and there are a number of different functions and areas that go on. One—and there is a bill that we put in last year, a bipartisan bill that the President spoke about in the State of the Union message last year on dealing with prisoner recidivism rates. I realize this is off of virtually everybody's radar screen in this hearing, but if you look at it for an issue that is affecting our country, once a person goes into our court system now and is convicted, 70 percent of them are going to commit another crime and be convicted again. It is an enormous rate of recidivism that we have. It is a huge price tag. I think we are spending at State levels \$28 billion plus a year, prisons' annual operating cost of over \$22,000 per inmate, and that is as it needs to be. We need to lock people up that commit crime.

But the President sighted on this, and I agree and put forward a bipartisan bill, a bicameral bill with Senator Biden, Rob Portman in the House, on targeting reducing that recidivism rate, cutting it in half in 5 years. We called the bill "The Second Chance Act," and it is just targeting those prisoners within 2 to 3 years of getting out for intensive work with them, intensive counseling, relationship building for when they are in, when they get out, to try to really track that rate. Also, children of prisoners are five times more likely to commit a crime than the general population, and we need to target in on that group.

I put this forward as a compassionate conservative topic because I think this is one where we need to lock people up that commit crimes, but we know they are going to come out at some point in time, too—most—and we really also need to work with them.

I am hopeful you can work with us on this issue because I think this is one of those topics that we can have an agreement across the aisle that this needs to be addressed. There are ways to ad-

dress it. We have a faith-based prison in Kansas that the recidivism rate is below 10 percent. We have got other examples across the country of where this has been attacked and addressed quite successfully. And so I am hopeful that can be one of your legacies that you work on as well.

Do you have a short response on that?

Judge GONZALES. I do. Senator, I believe that it is not only smart but it is right. I think that we have an obligation to provide some kind of support structure, to provide some kind of training to people that are coming out of prison. It is the right thing to do. It is certainly smart because we simply do not want to have people that come out of prison merely go out and commit crimes, they cannot support themselves, and so we have to provide some kind of way for these folks to support themselves.

There are a lot of prisons in Texas. Obviously this is a problem that Governor Bush was focused on, so he is keenly aware of this. That is why he spoke about this in the State of the Union. I believe the Department of Justice is doing some studies about what—research about what kinds of programs really work. And so I look forward to the end of that research and sitting down with you and talking to you about what would be the most effective way to deal with this problem.

Senator BROWNBAC. I think the American people want us to get outcomes, things that work. Welfare reform was something that worked, the country needed. I really think this is a key area where we have got a chance to really do something that will work, and it is going to help, and I think it is something we can work across the aisles to get done.

A second issue you raised with Senator DeWine during your comments about things you want to be known for, and that is the issue on obscenity laws and the enforcement of that. I held a hearing the last session of Congress on the issue of these—not obscenity laws but on addictions to pornography. And it was an amazing set of experts that came forward talking about the addictiveness of pornography. It has grown much more potent, much more addictive, much more pervasive, much more impactful. You have cited teenage children that you have and that I have in our private conversation.

There has been criticism of the Department of Justice for not enforcing obscenity laws, work on these issues, on community standards. I would hope that this would be something that you would take a look at, maybe make some personnel shifts within the Department of Justice to address this from the law standards on community standards, look at the addictiveness and the nature of it. There are, obviously, certain guarantees of First Amendment rights, but there are also these laws that have been upheld by community standards, upheld by the Supreme Court that can be and I really think should be enforced given the nature of this very potent, what one expect called a delivery system in this country. And I hope you can look at that.

Judge GONZALES. I will commit to you that I will look at that, Senator.

Senator BROWNBAC. I believe you said your wife had some interest in this, and I may recruit her on this topic as well, even though she is not up for confirmation here, work with her as well.

Finally, there is a topic I wanted to give you a chance to address. While you were on the Texas Supreme Court, in June of 2000—and this came up during Judge Owen’s hearing—of a case on a parental consent law that you wrote, I believe, the majority opinion on, and this was upholding the decision regarding the parental notification law where a minor sought an abortion. In this particular case, a minor was seeking an abortion without, as was required by Texas law, notification of her parents. You had some pretty strong words for those in the minority opinion and thought the law should be applied as written and was affirmed by the trial court.

I just wanted to give you a chance to express your opinion on this case. It came up often during Judge Owen’s confirmation hearing here. You were cited on the other side of that often. And I would like to get your thoughts on that here for the record. Do you believe that the interpretation of duly enacted legislation is open to interpretation by the courts in a manner not consistent with a strict reading of the law, that is, the underlying issue involved with this?

Judge GONZALES. Thank you for that question, Senator. Let me just say at the outset regarding Judge Owen, I served with Judge Owen on the Texas Supreme Court, and I think she did a splendid job, a superb job as a judge. I think she would make a superb job on the Fifth Circuit, and that is why her name was recommended to the President.

There were a series of very contentious opinions written in connection with six cases, I think involving four minor daughters, in the year 2000 while I was on the court. It is true that the legislature made a policy judgment that they wanted more—they wanted parents more involved with the abortion decisions of their minor daughters. But the legislature did not make the parental rights absolute. They provided three exceptions. And most of the decisions of the court revolved around interpreting those exceptions, allowing a judicial bypass.

My comment about an act of judicial activism was not focused at Judge Owen or Judge Heck. It was actually focused at me. What I was saying in that opinion was that given my interpretation of what the legislature intended by the words that they used in terms of having a minor not totally informed or well informed but sufficiently well informed, and the structure of the act, it was in my judgment that the legislature did intend the judicial bypasses to be real. And given my conclusion about what the legislature intended, it would have been an act of judicial activism not to have granted the bypass in that particular case.

If someone like Judge Owen in that case reached a different conclusion about what the legislature intended, it would have been perfectly reasonable for her to reach a different outcome. But as to the words that have been used as a sword against Judge Owen, let me just say that those words were related to me in terms of my interpretation of what the legislature intended, again, through the words of the statute and the way that the judicial bypass procedure would actually operate in practice.

Senator BROWNBACK. I thank you and your family for being here—

Chairman SPECTER. Senator Brownback, your—

Senator BROWNBACK. —and I look forward to your confirmation.

Chairman SPECTER. Senator Brownback, your red light is on.
Judge GONZALES. Thank you, Senator.
Chairman SPECTER. Senator Durbin?

**STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR
FROM THE STATE OF ILLINOIS**

Senator DURBIN. Thank you, and congratulations, Mr. Chairman, on your new appointment. I am looking forward to working with you, and I thank you for your phone call over the holiday break to talk about some of the big issues we face.

Chairman SPECTER. Thank you.

Senator DURBIN. It was a welcome opportunity to discuss a lot of things that we will concern ourselves with.

Judge Gonzales, thank you for being here. My thanks to your family for their patience in waiting through all these questions and those that will follow.

I think that Senator Specter has done a great service to the White House by moving this hearing as quickly as he has, January 6th, two days after the swearing-in of the new Members of the Senate. It is understandable this is a critically important job for the safety of America, and we need to fill it as quickly as we can.

I am sorry that there has been some breakdown between this Committee and the White House about the production of documents. As I told you in our office meeting, it is very difficult for us to sit on this side of the table and believe that we have the whole story when the White House refuses to produce documents that tell us what happened about many of the issues that we are raising. But based on what we do have, I want to try to get into a few specific questions on the issue of torture.

The images of Abu Ghraib are likely to be with us for a lifetime and beyond, as many images of war can be. The tragedy of Abu Ghraib and the embarrassment and scandal to the United States are likely to be with us for decades and beyond. Yesterday we paid tribute to our colleague Congressman Robert Matsui, not only a great Congressman but particularly great in light of the fact that as a Japanese-American, he was sent to an internment camp by his Government that did not trust his patriotism or the patriotism of his family. That shameful chapter in American history is recounted even today more than 50 years later as we think about it. I am afraid that the torture that occurred in Abu Ghraib and Guantanamo will similarly be recounted 50 years from now as a shameful chapter in American history.

When you answered Senator Kohl, you said we are going to divide what happened in Abu Ghraib into two areas: physical and sexual torture, never acceptable; some idea of fun by depraved people. And you condemned it. Then a second area, interrogation techniques that went too far, and you conceded that those interrogation techniques might have migrated or started at Guantanamo and somehow made it to Iraq.

My question to you is: Would you not also concede that your decision and the decision of the President to call into question the definition of torture, the need to comply with the Geneva Conventions, at least opened up a permissive environment for conduct which had

been ruled as totally unacceptable by Presidents of both parties for decades?

Judge GONZALES. Thank you, Senator, for the question. Maybe perhaps I did misspeak. I thought I was clear that I was not dividing up the categories of abuse into two categories, that that was really—that division had been done within these reports themselves. And those reports did indicate that there was some migration as to the second category. But the reports and the briefings were fairly clear in my judgment, and others may disagree, that the reasons for the migration were because there was inadequate training and supervision, that if there had been adequate training and supervision, if there had been adherence to doctrine, then the abuses would not have occurred. And that's what I see in the reports and what I see in the briefings.

As to whether or not there was a permissive environment, you and I spoke about this in our meeting. The findings in these eight reports universally were that a great majority, an overwhelming majority of our detention operations have been conducted consistent with American values and consistent with our legal obligations. What we saw happen on that cell block in the night shift was limited to the night shift on that cell block with respect to that first category, the more offensive, the intentional severe physical and the sexual abuse, the subject of those pictures. And this isn't just Al Gonzales speaking. This is what, if you look at it, the Schlesinger report concludes. And so what you see is that you have got this kind of conduct occurring at the night shift, but the day shift, they don't engage in that kind of conduct because they understand what the rules were.

And so I respectfully disagree with the characterization there was some sort of permissive environment. That's just not the case. The facts don't bear that out, sir.

Senator DURBIN. Then let's go to specific questions. Can U.S. personnel legally engage in torture or cruel, inhuman, or degrading treatment under any circumstances?

Judge GONZALES. Absolutely no. Our policy is we do not engage in torture.

Senator DURBIN. Good. I am glad that you have stated that for the record. Do you believe that there are circumstances where other legal restrictions like the War Crimes Act would not apply to U.S. personnel?

Judge GONZALES. Senator, I don't believe that that would be the case, but I would like the opportunity to—I want to be very candid with you and obviously thorough in my response to that question. It is sort of a legal conclusion, and I would like to have the opportunity to get back to you on that.

Senator DURBIN. I will give you that chance.

In your August memo, you created the possibility that the President could invoke his authority as Commander in Chief to not only suspend the Geneva Convention but the application of other laws. Do you stand by that position?

Judge GONZALES. I believe that I said in response to an earlier question that I do believe it is possible, theoretically possible, for the Congress to pass a law that would be viewed as unconstitutional by a President of the United States. And that is not just the

position of this President. That has been the position of Presidents on both sides of the aisle.

In my judgment, making that kind of conclusion is one that requires a great deal of care and consideration, but if you're asking me if it's theoretically possible that Congress could pass a statute that we view as unconstitutional, I'd have to concede, sir, that I believe that's theoretically possible.

Senator DURBIN. Has this President ever invoked that authority, as Commander in Chief or otherwise, to conclude that a law was unconstitutional and refused to comply with it?

Judge GONZALES. I believe that I stated in my June briefing about these memos that the President has not exercised that authority.

Senator DURBIN. But you believe he has that authority? He could ignore a law passed by this Congress, signed by this President or another one, and decide that it is unconstitutional and refuse to comply with that law?

Judge GONZALES. Senator, again, you are asking me whether hypothetically does that authority exist, and I guess I would have to say that hypothetically that authority may exist. But let me also just say that we certainly understand and recognize the role of the courts in our system of Government. We have to deal with some very difficult issues, very, very complicated. Sometimes the answers are not so clear.

The President's position on this is that ultimately the judges, the courts will make the decision as to whether or not we've drawn the right balance here. And in certain circumstances, the courts have agreed with administration positions, and in certain circumstances, the courts have disagreed. And we will respect those decisions.

Senator DURBIN. Fifty-two years ago, a President named Harry Truman decided to test that premise in *Youngstown Steel and Tube v. Sawyer* in the Supreme Court. The Supreme Court said, as you know, President Truman, you are wrong, you do not have the authority to decide what is constitutional, what laws you like and do not like.

I am troubled that you would think, as our incoming Attorney General, that a President can pick and choose the laws that he thinks are constitutional and ultimately wait for that test in court to decide whether or not he is going to comply with the law.

Judge GONZALES. Senator, you asked me whether or not it was theoretically possible that the Congress could pass a law that we would view as unconstitutional. My response was that obviously we would take that very, very seriously, look at that very carefully. But I suppose it is theoretically possible that that would happen.

Let me just add one final point. We in the executive branch, of course, understand that there are limits on Presidential power. We are very, very mindful of Justice O'Connor's statement in the *Hamdi* decision that a state of war is not a blank check for the President of the United States with respect to the rights of American citizens. I understand that and I agree with that.

Senator DURBIN. Well, let me just say in conclusion, I am glad to hear that. I am troubled by the introduction. The hypothetical is one that you raised in the memo relative to torture as to whether the President had the authority as Commander in Chief to ignore

the Geneva Conventions or certain other laws. This is not something that comes from our side of the table of our own creation. It is your creation, the hypothetical you created.

My concern is this: I do not believe that this Government should become a symbol for a departure from time-honored traditions where we have said that we will not engage in torture, directly or indirectly by rendition—which I hope to ask you about in the next round—that we will stand by the same standards of Geneva Conventions since World War II and, frankly, dating back to Abraham Lincoln and the Civil War, in terms of the treatment of prisoners.

I am concerned that that round of memos that went through the Department of Justice, Mr. Bybee, into the Department of Defense, into Guantanamo, and then migrated somehow to interrogation techniques in Abu Ghraib has stained our world reputation. I want to win this war on terrorism, but I do not want to do it at the expense of our soldiers who may someday become prisoners themselves.

Thank you, Mr. Gonzales.

[The prepared statement of Senator Durbin appears as a submission for the record.]

Chairman SPECTER. Senator Coburn?

Senator COBURN. Mr. Chairman, thank you very much, and I appreciate the opportunity to share this with you, and congratulations on your chairmanship. I look forward to working with you.

Chairman SPECTER. Thank you.

**STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM
THE STATE OF OKLAHOMA**

Senator COBURN. Mr. Gonzales, thank you so much. I enjoyed our visit in the office. I think it is very important what has not been said here today. We have talked about mistakes that have been made. We have talked about problems. But we always fail to emphasize the fact that the vast majority of the people who serve this country are doing it right, honorably, and in an aggressive, tolerable way that represents our values each and every day. And to not bring that forward and to always talk about the negative does a disservice to our country, our heritage, and to our future. And I think we ought to be very thankful for the vast majority of Americans that are serving our country today and are doing it in an honorable way. And that would include you, sir, as you come forward and serve and have served our country.

I want to follow on a couple of things. Number one, I have an interest in prison reform as well with Senator Brownback, but more specifically in terms of drug possession and drug addiction. I am convinced that we are handling that problem wrong in this country. As a physician, I believe that we ought to be doing drug treatment rather than incarceration, and I look forward to working with you in terms of emphasizing that, not only in terms of the faith-based ministries in prison but also the direction towards drug treatment, because we know we can be successful there. And when we fail to do that, we do a disservice not only to those people that are incarcerated, we do a disservice to our public.

I am going to be rather short, but I am the only non-attorney on this panel, I think. And I am reminded in Article I, section 5 of the

Constitution, it says, "Each House may determine the rules of its proceedings." That is what our Founders said. And so I am not confused at all about the ability to change the rules in the operation of the Senate even though it has a wonderful historical privilege.

I also am reminded that in the *United States v. Balin*, the Supreme Court unanimously upheld that, and they said two things: one, when the Constitution is silent, the rule is majority vote; and, number two, a majority of either chamber can always retain the power to draft and enact its own rules and procedures. So I do not think we ought to allow confusion of what the Constitution actually says versus what potential may come in the future. And I think we ought to deal with what is here.

The other thing that I think is important is to recognize the President's right to nominate and our right to confirm, and to do that in a rigorous way. I appreciate the other side of the aisle and the questions that they have had of you. I think they are pertinent. I think that the questioning that Senator Graham had I think raises significant questions for us to learn from, especially in terms of the Code of Military Justice that has to be inculcated in decisions that go down the line. But I also want to ask just a couple of questions.

Are you aware of any war that this country has been involved in in its history in which mistakes of human beings have not been made and brought to light?

Judge GONZALES. Well, as you well know, as I well know, human beings are not perfect. Mistakes happen. Abuses occur. We know that that's true in all conflicts. Abuses occur not just in connection with military operations; abuses occur here in our prisons. It is regrettable, and when we find out the abuses have occurred, we need to correct them and hold people accountable. But it is true that abuses occur and have occurred, as far as I know, in all military conflicts.

Senator COBURN. And is it, to your knowledge, a policy of this administration at any time to tolerate torture or inhumane behavior towards any of the detainees that we have?

Judge GONZALES. It is not the policy of the administration to tolerate torture or inhumane conduct toward any person that the United States is detaining.

Senator COBURN. And then, finally, I would ask as you look at the Geneva Convention in Iraq and the difference that we apply to that versus that against the Taliban and al Qaeda, was there a consideration for those who are not Iraqis in that combatant field? In other words, did the Geneva Convention necessarily apply to all combatants in Iraq whether or not they were Iraqi citizens or they were foreign mercenaries?

Judge GONZALES. That question was considered by the Department, and there was a fear about creating a sanctuary for terrorists if we were to say that if you come and fight against America in the conflict with Iraq that you would receive the protections of a prisoner of war. And I believe the Department—I know the Department issued, I believe some guidance, the Department of Justice issued some guidance with respect to whether or not non-Iraqis who came into Iraq as part of the insurgency, whether or not they would also or likewise enjoy the protections of the Geneva Conven-

tion. And I believe the conclusion was that they would not. But I would need to go back and confirm that, Senator.

Senator COBURN. Thank you.

I have no additional questions, and I yield back the balance of my time.

Chairman SPECTER. Thank you very much, Senator Coburn, and thank you, Judge Gonzales.

It is now 12:55. A room has been set aside for Judge Gonzales, and we have conferred with him, and he thinks an hour would be sufficient for lunch. So the Committee will resume at 2 o'clock. And for the information of everyone, there is a nice cafeteria in the basement of this building.

See you all at 2:00.

[Whereupon, at 12:55 p.m., the Committee was recessed, to reconvene at 2:00 p.m., this same day.]

AFTERNOON SESSION[2:00 p.m.]

Chairman SPECTER. The hour of two o'clock having arrived, we will now proceed with the confirmation hearing on the President's nominee, Judge Alberto Gonzales, to be Attorney General of the United States.

In the morning we completed a round of questioning by every Senator present, and we will now proceed on round two, again with a 10-minute round.

I pick up on comments made by Senator Brownback and Senator Coburn this morning about their concern about what happens in our correctional facilities, our prison facilities. Senator Brownback is looking for improvements. Senator Coburn made the cogent comment about rehabilitation for drug addicts, and this is an item which is going to be a priority for the Judiciary Committee this year and next year, and into the foreseeable future.

The problem of violent crime is pervasive in America. It is a problem which I have been working on since my days as an Assistant District Attorney, and I will not mention the year, and that is District Attorney of Philadelphia. And then on this Committee, the first bill which I introduced was the Armed Career Criminal Bill shortly after I was elected to the Senate, and as Attorney General Barr described it as one of the most effective weapons against violent crime because it deals with career criminals, where you have three or more major offenses, robbery, burglary, drug sales, kidnaping, and caught in the possession of a firearm, and there is a mandatory 15-year to life sentence. That has been a very effective weapon.

I found when I was DA that many defendants would get continuances in the State courts and wear out the judicial system, but if they ran the risk of going to Federal court with a mandatory 15 years to life, you could get them tried and perhaps get 5- to 10-year sentences or something substantial, and it has been enormously helpful in putting the pressure on State court adjudications.

The other side of the coin from dealing with the violent criminals is the issue of realistic rehabilitation. My own experience suggests to me that violent crime in America could be cut enormously, perhaps by as much as 50 percent. It is always hard to quantify. If you take the career criminals and put them in jail, you really just throw away the key. Seventy percent of all major crimes are com-

mitted by career criminals, but then there is the other group, where you need literacy training, and job training, and detoxification and rehabilitation on drugs. It is no surprise when a functional illiterate without a trade or skill gets out of jail, they go back to a life of crime. So you have two very, very important societal interests. One is protecting the law-abiding citizens from repeaters, recidivists, and the other is to try to take people out of the crime cycle because you know the first offenders, juveniles, even second offenders and beyond are going to be returning to our streets.

My question for you, Judge Gonzales, is that if confirmed, what kind of a priority would you assign to try to turn our correctional system into a system which really corrects with realistic rehabilitation?

Judge GONZALES. Thank you, Senator, for that question. I think I agree with you, that for people who commit violent crimes and are career criminals, they should remain in our prisons, but there is a segment of the prison population, juveniles, for an example, as you mentioned, and first-time, maybe sometime second-time offenders, who can be rehabilitated. And as I said earlier in a response to a question, I think it is not only smart but I think it's the right thing to do. I think it is part of a compassionate society to give someone another chance, and oftentimes, unfortunately, it's a question of limited resources, but we have to find a way around this. Obviously, it's an issue that's equally important in our State criminal justice system, but it's important to me. We need to do what we can to enforce the laws, make sure the laws are being enforced, and obviously that would be a big priority for me as Attorney General.

Chairman SPECTER. Well, it is going to require very substantial resources to make it work. Literacy training and job training and drug rehabilitation are items which are going to require some money in advance. I am confident that it would pay very major rewards because the cost of crime in America, burglaries, robberies, car thefts, homicides, and the tragedy of suffering rape and physical abuse and kidnapping, just the costs are incalculable, so that is something which this Committee and I will be working with you on very closely, and we need to get the administration involved because it is a matter of resources.

Let me turn now to a subject which I raised in the opening statement, and that is the potential for use of our antitrust laws to deal with OPEC and the international oil cartels which have engaged in violations of our antitrust laws by limiting production in a calculated way, and then raising prices. When the supply goes down, the prices go up. And this is a subject which I have long been interested in. We have had hearings in the Antitrust Subcommittee. It is a subject that I wrote to President Clinton about back on April 11th in the year 2000 and wrote to President Bush about in the year April 25th, 2001, and without objection, these two letters will be made part of the record.

They set forth an approach on enforcing the antitrust laws, noting that OPEC is not immune from the act of state doctrine, which removes foreign governments from our courts when they are engaged in commercial activity. If they are engaged in governmental activities, and succinctly stated it is their business, but it is not

their business if they are engaged in commercial matters. We all know the soaring prices at the pump and the increase in the cost of heating and the tremendous expenses. A subcommittee which I chair on Labor Health Human Services and Education, puts up more than a billion dollars a year on LIHEAP, low-income energy assistance. I would be interested to know your thinking, Judge Gonzales, on the potential for using our antitrust laws in this field.

Judge GONZALES. Senator, I have not had the opportunity to review the two letters that you just discussed, and I have not spent a great deal of time looking at this issue. I'm sure there are folks at the Department of Justice that have done so, and obviously, if confirmed, I would like to visit with them. It seems to me of course, that we need first of all to promote competition. We need to make sure that everyone's operating on a level playing field to the extent possible.

I do have some concerns. I haven't done the analysis it appears that you have. I do have some concerns about the foreign relations impact, the diplomatic impact, upon taking such an antitrust action against OPEC, and so in addition to legal considerations it seems to me there are foreign relations considerations, and obviously I would be very interested in receiving the views of the State Department. But I would look forward to working with you and having further discussions with you about this.

Chairman SPECTER. I am glad you mentioned the foreign relations aspects because I think those are exactly the considerations we ought to ignore. The Saudis are not our friends, and that is a subject which I got very deeply involved in when I chaired the Intelligence Committee back in 1995 and 1996, and regrettably, we make too many decisions on foreign policy, where we are having the cost paid by consumers of OPEC oil, by the Saudis and by our foreign relations considerations, and there is no doubt about the importance of not having Saudi Arabia go the way that Iran went, but it seems to me we have to segregate these issues and not allow the foreign policy considerations to put a heavier burden on one segment of our population when it is something that ought to be borne by the country as a whole. If it is something in our national interest that we have to undertake certain financial and economic losses, then so be it. But this is a subject matter going easy on the Saudis which applies in fields other than what OPEC oil does.

Judge GONZALES. Senator, if I may respond to that. I'm not suggesting that we go easy on the Saudis. What I'm suggesting is it seems to me that it should be a consideration what will be the ramifications on our foreign relations if we take an action against OPEC is all I'm suggesting.

Chairman SPECTER. I am about to—no, I am not about to. There goes the red light.

Senator Leahy.

Senator LEAHY. If you want to go further, I am the only one waiting.

Chairman SPECTER. No, no, no. I am going to stick to 10 minutes as an example. If it is good for the goose, it is good for the gander. As the saying goes, if it is good for the Chairman, et cetera.

Senator LEAHY. Judge, I am going to go back to the so-called Commander in Chief override. I listened to your answer to other

Senators, and I checked the transcript, and frankly, you never answered my question. I still want to know whether you think the President can suspend the laws prohibiting torture and thus immunize torturers. I think there is a pretty simple answer. I think the answer is just no, the President cannot suspend such laws. Your response to me in the earlier round, your comments at your June 2004 press conference, show you disagree, that you presume such power does exist. Only the President has not exercised it yet. I think this is kind of fundamental. Your view of the scope of executive power is something we need to understand. If you are going to be the chief law enforcement officer of this country, and if you have this view that there is some extraordinary executive power that allows the President to override the laws of the United States, especially something so fundamental, we should know because that sets in motion a whole lot of other things. We saw this in the Nuremberg trials, and I am not in any way equating our President with the leaders in Germany. What I am saying though is that you had people that said, well, we were just following orders. If the President is able to set aside laws that have been set in place, those who do things that are wrong can just say, well, we were just following orders. But as the United States has always said, and every President has said, this is not a defense.

So I am going to ask you again, can the President immunize from prosecution those who commit torture under his order? I am not suggesting the President has made such orders, but can a President immunize from prosecution those who would commit torture under his order?

Judge GONZALES. Senator, one thing that I failed to emphasize in the first round is of course if confirmed by the Senate, I will take an oath of office to defend the laws of this country.

Senator LEAHY. We all do.

Judge GONZALES.—and that means the laws passed by the Congress. So I was responding to a hypothetical question about whether or not is it theoretically possible that Congress could pass a law that a President would not follow because he believed it was unconstitutional, a position that is not unique to this President, but a position—

Senator LEAHY. But I am not asking you a hypothetical question. I am asking about a particular law, the torture law. Can the President ignore that law, say it does not apply, and immunize people who then committed torture?

Judge GONZALES. I believe my earlier response, Senator, was that that is a hypothetical situation that is not going to happen. This President is not going to order torture. I will also say—

Senator LEAHY. Could a President?

Judge GONZALES. Senator, this President is not going to order torture. We don't condone it. I will say with respect to the opinion, the August 1st opinion has been withdrawn. I reject that opinion. It has been rejected. It does not represent the views of the executive branch. It has been replaced by a new opinion that does not have that discussion. And so as far as I am concerned, it is not an issue in which the executive branch has taken a position on it. I am not prepared in this hearing to give you an answer to such an important question.

Senator LEAHY. Let me say this. The order stayed there for a long time until the press got hold of it. Then there is a lot of scrambling around, and on the first three-day weekend prior to your confirmation, all of a sudden they come up, oh, wait a minute, we have a new order. I am not going to be cynical, but some might be. Let me put forward another example. The President has claimed authority to lock up a U.S. citizen arrested in the United States and hold him incommunicado for an indefinite period, without access to a lawyer or a family, and without real access to the courts. That is not hypothetical. The President has claimed that authority. Does the President have that authority?

Judge GONZALES. The Supreme Court in the *Hamdi* decision said yes, the President of the United States does have the authority—

Senator LEAHY. *Hamdi* was the case where he was arrested on the battlefield in Afghanistan. What about a case here, an American citizen, in the United States?

Judge GONZALES. Senator, the Supreme Court has not addressed that decision straight on, but in *Hamdi* the Court did say that the United States could detain an American citizen here in this country for the duration of the hostilities without filing charges.

Senator LEAHY. Do you think that here in the United States the President has authority to have a citizen arrested, a U.S. citizen, held incommunicado for an indefinite period, without access to a lawyer or family?

Judge GONZALES. Senator, the—

Senator LEAHY. I asked you if the President has that. Now, in *Hamdi* of course they were talking about the AUMF, the authorization for the use of military force, the Congress had voted on for military force in Afghanistan. *Hamdi* was picked up in Afghanistan. We had a second case, *Padilla*. There the Court kind of punted it, they did not answer the question. They have said the jurisdiction was wrong, it was brought in the wrong court. It should have been brought habeas corpus in another court.

All I am asking, does the President, the President today have the authority to hold a U.S. citizen incommunicado for an indefinite period of time in the United States?

Judge GONZALES. Well, the President does have the authority under *Hamdi*. That is what the Court said, is you could hold an American citizen. Let me be very, very clear. The United States Government never took the position that a U.S. citizen detained by its Government could not challenge the detention by the Government.

Senator LEAHY. But they are held incommunicado and have no access to a lawyer or a court. Is that not kind of saying, gosh, you could appeal it everywhere else. We are not going to let you out of the cell, we are not going to let you talk to anybody, we are not going to let you have the court. We just want you to know you got all your rights.

Judge GONZALES. Senator, respectfully, not only did *Hamdi* have access to the courts, he had such good access and such good representation by counsel that his case was heard all the way by the highest court in the land. So, the decision as to whether or not to provide access to counsel is probably one of the most difficult decisions that we have to confront because there are competing inter-

ests here. As a lawyer, I have a great deal of concerns about not providing lawyers to American citizens that are being detained by this country. On the other hand, there is a competing interest of gathering information that this American citizen, this enemy combatant, may have information that may save the lives of American citizens, and our position has been is that we provide counsel as quickly as possible that the American citizen—I'm sorry, Senator, I didn't mean to interrupt you.

Senator LEAHY. No, no. I was just going to say we can go back there, and we will have to, because we are talking about a perfect world. If you do a dragnet, as we have found out, we end up holding people for a long time, and then say, whoops, we have got the wrong guy. We have—

Chairman SPECTER. Judge Gonzales, did you finish your last answer? Feel free if you want to.

Judge GONZALES. That's fine. Thank you, Senator.

Senator LEAHY. Let us take the Bybee memo. It is a lengthy document, 50 single-spaced pages, that relies upon a whole wide range of sources. I think somebody has already put it in the record. It references, for example, health care administrative law at least five times, and that is not the issues we are raising with you. But you know one thing it never does? It never cites this document, which you would think would be the best thing to do, the Army Field Manual on Intelligence Interrogation.

Now, the Army Field Manual on Intelligence Interrogation is something that holds all the experience of this Nation for 200 years, the things we have done right, and the things we have done wrong. The memo tells our people what they can do, but not once does it mention this, and this is the manual that says U.S. policy expressly prohibits acts of violence or intimidation including physical or mental torture, threats, insults or exposure, inhumane treatment as a means to or aid interrogation. You think it is at all troubling that Bybee never references it? I mean if it had, if it incorporated this, we probably never would have had the issue raised.

Judge GONZALES. Senator, the work of OLC in connection with interpreting the anti-torture statute was an analysis of that domestic statute in Title 18. The fact that the opinion covers only conduct related to that statute doesn't mean that there might not be other legal prohibitions in which our military soldiers might be bound. OLC was looking only at an interpretation of that domestic statute, and the fact that there may be other laws or regulations that might be binding, of course, they would not be excused from following those other laws and regulations by virtue of the opinion, which again, was focused only in interpretation of a statute in Title 18.

Chairman SPECTER. Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman.

Judge Gonzales, I know Senator Durbin has raised the issue of whether a President might try to uphold the Constitution by declining to enforce statutes that are unnecessary, and I found the notion fascinating from a legal standpoint, and so I asked staff to look at some of the OLC opinions during the Clinton administration during the lunch break, and here is what we found.

In 1994, the Office of Legal Counsel, during the Clinton administration, issued an opinion authored by Walter Dellinger, who is a well-known constitutional legal scholar, that said, "Let me start with a general proposition that I believe to be uncontroversial. There are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional," and of course Presidents of both parties famously reject the War Powers Resolution as unconstitutional. Moreover, in the Dickerson case the Clinton administration refused to defend a Federal statute against constitutional attack in the courts. The Supreme Court had to look to special counsel to offer a defense of that statute. It seems to me that this administration is being attacked for something that the Clinton administration did on a—if not a frequent basis, did at least more than once. Would you care to comment on that?

Judge GONZALES. As I said earlier, Senator, I think that we should look—the executive branch should always look very carefully with a great deal of seriousness and care about reaching a decision that a statute passed by Congress is somehow unconstitutional and should not be followed. Certainly if I were confirmed, I would take my oath very, very seriously to try to defend any Act passed by Congress, but it does appear to me, based upon my review of history and precedent is that Presidents and White Houses on both sides of the aisle have taken the consistent position that a President may choose to not enforce the statute that the President believes is unconstitutional.

Senator CORNYN. I would like to shift subjects a little bit to return to something we have been talking about off and on all day, and that is the policy reasons behind the Geneva Convention decision, and I hope that I have been able to establish the position the administration takes and the position that you advocated for enjoys broad support in the legal community, and by scholars of international law, and we can go back to that again if some of my colleagues still disagree with me and the administration on that. But I can think of at least four reasons, four important reasons why the President's legal determination was correct, and this has to do again with giving terrorists, conferring upon them the status of prisoners of war as provided for under the Geneva Convention.

First of all, is it not true that the Geneva Convention gives prisoners of war rights and protections that could directly endanger their captors if given to combatants who do not respect the laws of war? And if you agree with that, could you please talk about some of them?

Judge GONZALES. If a determination were made that the Geneva Convention applied in our conflict with al Qaeda, we would have to provide certain things, certain access to certain items of comfort that could be used as weapons against our soldiers. Also we would be limited in our ability to put them in individual cells. They would have the right to congregate together and to talk, to talk about strategy and responding to interrogations, to perhaps talk about how to attack a guard, or perhaps talk about how to plan an escape. The additional problem with providing Geneva protections, prisoner of war protections to terrorists who do not abide by the laws of war, is that we would in essence provide combat immunity for their engaging in war crimes.

Senator CORNYN. If I can interrupt you briefly, is that not what John Walker Lindh tried to do, the “American Taliban” I believe he was known as? He claimed an immunity by virtue of his prisoner of war status against criminal prosecution for committing war crimes; is that right?

Judge GONZALES. That’s my recollection.

Senator CORNYN. When I traveled to Guantanamo Bay about a year or so ago to see for myself the facilities and the conditions under which detainees were kept, I was interested to learn about certain techniques, here again, humane techniques, but techniques nonetheless for eliciting cooperation and intelligence from some of these detainees. For example, the providing of certain incentives, for example, what the food that was provided. I remember specifically one instance where detainees who cooperated a little more got to cook out on a grill, basically, or food cooked out on a grill as opposed to the institutional type food they got. They were permitted to move from individual cells into group settings where they could make more arrangements for their own comfort and convenience. Are those the sorts of things that we could do to elicit actionable intelligence if the Geneva Convention applied and these were conventional prisoners of war?

Judge GONZALES. Senator, if the Geneva Conventions applied, you would be prohibited from providing incentives in order to induce cooperation. I, like you, have been down to Guantanamo, and much of the operation of the bases at Guantanamo are to induce cooperation, and we would not be able to do that if the Geneva Conventions applied.

Senator CORNYN. And indeed, I think it has been recounted time and time again, one reason we do not use torture as a matter of policy, period, but one pragmatic reason why it does not work is because people will say things under those circumstances that do not provide good actionable intelligence. So I think one of the things I observed and was really fascinated to see in practice was the use of some of these essentially incentives that provided for greater cooperation, but gave us the results we needed, which in fact have saved American lives.

Let me ask you, why would extending the Geneva Convention to terrorists, why would that have a negative impact on international law? What would that do to any incentive that might exist on the part of our enemies to comply with the laws of war?

Judge GONZALES. Senator, it seems to me, it seems logical to me that you want to reward good behavior, and if you want members of al Qaeda to fight according to the laws of war, you don’t do that by providing them prisoner of war legal protections.

Now, let me emphasize, and I can’t emphasize this strongly enough, there are certain basic values that this country stands for and this President certainly believes in, and those values are reflected in the directives that he has issued regarding the treatment of al Qaeda detainees, and those who do not meet those standards are going to be held accountable. In addition, there are of course other legal restrictions. For example, the Convention Against Torture, that would be applicable, Army regulations that would be applicable. All those exist to conscript the type of conduct that our military can engage in with respect to detainees. And so we want

to of course meet basic standards of conduct with respect to treatment of al Qaeda, but information is very, very important, and if there are ways we can get that information, for example, through inducements, it seems to me that there is a responsibility of this government to exercise those needs.

Senator CORNYN. Finally, let me just say that that opinion that you just expressed finds you in pretty good company. I have in my hand a legal textbook called "The Legal Status of Prisoners of War" by Rosas, Alan Rosas, that says on page 344: The only effective sanction against perfidious attacks in civilian dress is a deprivation of prisoner of war status. And I take it you would agree with that conclusion?

Judge GONZALES. Yes, sir.

Senator CORNYN. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Cornyn.

Senator Kennedy?

Senator KENNEDY. Thank you very much, Mr. Chairman.

I neglected in my first round to indicate how pleased I am with your chairmanship. I hope it is not too late to say that I have enjoyed working with Senator Specter over a long, long period of time, since he has been on the Committee, and look forward to his service on this Committee. I join with those who think that this Committee is well served with this Chairman.

Chairman SPECTER. Thank you very much, Senator Kennedy.

Senator KENNEDY. Now, Mr. Gonzales, let me, if I could, there are sort of three general areas I want to try and cover in the time that I have. During my last round of questions, and the reason I come back to this is because, when you come right down to it, that Bybee memo, and the views expressed in that, certainly was policy. It was printed in the working group's report. It was reported by those over in Iraq. It has been referred to in the Armed Services Committee, in the Schlesinger report, as being the policy of the Department of Defense. And the change that memorandum gave, in terms of how we were going to treat detainees in there, I believe, runs roughshod or did run roughshod over the Geneva Conventions. But we have a dispute.

You indicated that this was served up by the Office of Legal Counsel, and it is the interpretation that Legal Counsel has provided for statutes that we have passed in 1994.

Judge GONZALES. Senator, if I may, of course, the August 1 memo has been withdrawn. I mean, in essence, it has been rejected. It does not represent the views of the executive branch. The views of the executive branch regarding the anti-torture statute are now reflected in the December 30th memo which, as we know, the deputy attorney general announced in June that this was going to happen. It was going to be withdrawn. The opinion would be revisited and issued by the end of the year, and it was issued before the end of the year at the request from a member of this Committee.

Senator KENNEDY. Well, I think that is very good news in terms of the future. I think that is very good news. But over this period of time, there have been the most extraordinary abuses that have been reported by DIA and the FBI. And you say now all of that memorandum that was interpreted that way is no longer operative. But over a period of time, as has been referenced by others in the

Committee, there is no question in my mind—I have listened to you answer the questions about what happened at Abu Ghraib—that there were military personnel that bear responsibility, and there is no question that there was a lack of training.

But the third part that you have not referenced in any of your answers is that there was also the working group report that effectively would have justified and approved those kinds of activities. Now, you may say that you differ with that. That was the document at DOD, and there is no reason to believe that the same kind of document was not given to the CIA. Was it given to the CIA—the Bybee memo?

Judge GONZALES. Sir, first of all, I am not sure what—was the memo given to the CIA? I suspect that it was given—it represented the administrative branch position, and so it would not surprise me, of course, that agencies involved in the war on terror—

Senator KENNEDY. Who would have given it to the CIA?

Judge GONZALES. Sir—

Senator KENNEDY. Was not this memorandum directed to you?

Judge GONZALES. Sir, it was addressed to me.

Senator KENNEDY. Was it not requested by you?

Judge GONZALES. Sir, I do not recall if it was requested by—

Senator KENNEDY. We can—

Judge GONZALES. Let me just say, Senator, in practice, how this may work. An agency, of course, has its own in-house shop. An issue comes up, their lawyers get involved in providing legal advice. From time to time, the issues are so complicated or so complex it may cut across various agencies that the issue gets elevated up to the Office of Legal Counsel. And so it may well have been that the CIA or DOD asked OLC, as an initial matter, for their views on this, and then, for whatever reason, the memo was addressed to me.

I accept responsibility that the memo is addressed to me.

Senator KENNEDY. Well, do you accept responsibility that you requested it?

Judge GONZALES. Sir—

Senator KENNEDY. Is this such a difficult—

Chairman SPECTER. Let him answer the question, Senator Kennedy.

Judge GONZALES. I don't recall specifically whether or not I requested this memo or whether or not the initial request came from the CIA or the CIA came to me. I don't recall, Senator.

Senator KENNEDY. You do not have notes about these various meetings? You do not jot these down, so you would not be able to know whether this happened? You have no notes, no information, no memoranda that would indicate? On an issue of this kind of importance and consequence, at the time that this country was at war on this and where there is enormous pressure, as we understand now, to gain information and intelligence from this, you would not be able, even today, to be able to respond to the question about how this was initiated, particularly when it is against the background where OLC indicates that it came from you and from the news reports? This is not enormously complicated—I want to get into some other kinds of things—the fact that you basically initiated.

Judge GONZALES. Senator—

Senator KENNEDY. Your answer is you cannot remember.

Judge GONZALES. Senator, I certainly don't want to be argumentative with you. I really do not remember. It seems to me what is important here is that we realize, there was a recognition within the agencies, and I believe within the White House, that this was an important issue and that the Department of Justice should play its traditional role of providing legal advice about the parameters of this statute.

Senator KENNEDY. I just want to point out, if it is true, the Post reported, that you held several meetings at which the legality of interrogation techniques, such as threat of live burial and waterboarding were discussed; do you remember that?

Judge GONZALES. Senator, I have a recollection that we had some discussions in my office, but let me be very clear with the Committee. It is not my job to decide which type of methods of obtaining information from terrorists would be most effective. That job responsibility falls to folks within the agencies. It is also not my job to make the ultimate decision about whether or not those methods would, in fact, meet the requirements of the anti-torture statute. That would be a job for the Department of Justice. And I never influenced or pressured the Department to bless any of these techniques. I viewed it as their responsibility to make the decision as to whether or not a procedure or method of questioning of these terrorists that an agency wanted, would it, in fact, be lawful.

Senator KENNEDY. Well, just as an attorney, as a human being, I would have thought that if there were recommendations that were so blatantly and flagrantly over the line, in terms of torture, that you might have recognized them. I mean, it certainly appears to me that water-boarding, with all its descriptions about drowning someone to that kind of a point, would come awfully close to getting over the border and that you would be able to at least say today there were some that were recommended or suggested on that, but I certainly would not have had a part of that as a human being.

Judge GONZALES. Well—

Senator KENNEDY. But as I understand, you say now that no matter what they recommended or what they discussed, there was not going to be anything in there that was going to be too bad or too outrageous for you to at least raise some objection.

Judge GONZALES. Senator, of course, we had some discussions about it. And I can't tell you today whether or not I said, "That's offensive. That's not offensive." But it seems to me it's the job of the lawyers to make a determination as to whether or not something is lawful or not and then for the policymakers, the principals, to decide whether or not this is a method of receiving information from terrorists is something that we want to pursue, that the lawyers have deemed lawful, under the directive of a President, who says that we should do everything that we can to win this war on terror, so long as we are meeting our legal obligations.

Senator KENNEDY. This is all against a background, as you know, Mr. Gonzales, of a series of statutes on torture that the Congress has passed in recent times. This is not a new issue. We had the Federal Antitorture Statute in 1994 that both President Reagan and President Bush, unanimous Committee, the Federal War

Crimes Act of 1996, the Uniform Code of Military Justice goes back to 1950, the Convention Against Torture ratified by Congress, one was domestic, the other international. The International Covenant on Civil and Political Rights, in 1992, provides “no one shall be subject to torture or cruel, inhumane, degrading treatment or punishment.” And then last year Congress reaffirmed, virtually unanimously, that the Nation’s commitment not to engage in torture, cruel, inhumane and degrading.

So this is a subject matter that Republicans and Democrats have spoken out very clearly, and many of us find, and perhaps you do—certainly, you do at the present time—that the Bybee memo certainly was in conflict with those particular statutes.

But let me ask you this: In these reports on Guantanamo—

Chairman SPECTER. Senator Kennedy, your red light is on, but why do you not finish the question.

Senator KENNEDY. What I would be interested in, should you be confirmed, is what you are going to do with regards to the FBI. They have been involved in many of these reports. It would be interesting if you could tell the Committee what you are going to do, confirm to do, about the involvement of the FBI in this. And I was going to ask, just the two, if the fact that this memo has been repealed, whether that information now has been communicated to the CIA and the CIA has accepted it and DOD, if they are all together. But if you could just let me know—

Judge GONZALES. Senator, my presumption is—

Senator KENNEDY. I thank the Chair.

Judge GONZALES. —my presumption is it has been communicated to the agencies. I have not, myself, communicated the new position, but again it does represent administrative policy.

And with respect to FBI involvement, the recent reports about these FBI e-mails about abuses in Guantanamo, quite frankly, surprised and shocked me because it is certainly inconsistent with what I have seen. I have traveled down there. And it is certainly inconsistent with other reports I have seen with respect to investigations about activities in Guantanamo.

I would like to sit down with the folks at the FBI and other folks within the Department of Justice to make sure that the facts are accurate because I know one very important fact in these stories, the FBI—much was made of the fact about an FBI agent referring to an Executive order by the President authorizing certain techniques. That is just—that is just plain false. That never occurred. And so if something like that is wrong in these e-mails, there may be other facts that are wrong in the e-mails. And what I am suggesting is I just need to, if confirmed, I need to have the opportunity to go into the Department and the FBI and just try to ascertain the facts.

Chairman SPECTER. There has just been the call of the roll call on the counting of the electoral votes. So we will recess very, very briefly. I will go directly to the floor and return, and I am going to take Senator Brownback with me. And on return, Senator Brownback will commence his next round of questions.

[Recess from 2:43 p.m. to 2:57 p.m.]

Chairman SPECTER. The Judiciary Committee will resume the hearing on Judge Alberto Gonzales to be Attorney General of the

United States. We were interrupted for a challenge on the counting of the electoral votes, and if you are interested in the result, I cannot tell you because we left before the tally was up.

Thank you, Senator Brownback, for returning so that we can lose no time and proceed with the hearing.

Judge Gonzales is en route, so we shall commence momentarily.

Senator BROWNBACk. Sounds good by me.

Chairman SPECTER. In the meantime, it might be worth using the time, since we have a moment, to notify all Senators, who are interested in their second round, that this is a very good time to come. Anybody who returns is likely to have priority treatment.

Welcome back, Judge Gonzales.

Judge GONZALES. My apologies, Senator.

Chairman SPECTER. No apology necessary. Did you vote?

[Laughter.]

Chairman SPECTER. Senator Brownback?

Senator BROWNBACk. Thank you very much, Mr. Chairman. I appreciate that.

Judge Gonzales, I wanted to ask you, on a couple of different areas that have come up somewhat, but I wanted to get into a little more specific areas. One is on antitrust laws, and the other one is on the Solomon amendment. And these are contact points and work that the Department of Justice will be involved in at any rate, and I think that you will be directly involved in as Attorney General.

The Department of Justice recently approved a major telecommunications merger between Cingular and AT&T Wireless. And now Sprint, a company that I am familiar with—it is headquartered in my State—and Nextel have announced their intentions to merge. Many expect more mergers from the telecommunications industry to take place in the near future. It is an issue that I think a lot of people in the industry have anticipated just with the nature of what has taken place. It is a very dynamic business. A lot of things are happening with this, a number of companies were formed, a number have broken up, a number are coming back together.

I would just like to get, to the degree that you can discuss this topic, your view on how DOJ, under you, under your leadership, should be allowing these types of mergers, what sort of factors you may look at or would consider in these type of mergers and would hope that you could explain your views on how aggressive or otherwise the Department of Justice should be in its antitrust prosecutions.

Judge GONZALES. Senator, thank you. I believe that competition in this industry is important. And as to whether or not what factors or standards we would look at, the Department of Justice has longstanding regulations regarding mergers and how they should be considered. I have not become an expert on those regulations, but obviously would talk to the experts in this area and would be happy to visit with you at the appropriate time and share with you my views after becoming more educated about how this process works.

Senator BROWNBACk. Do you have any thoughts, in particular, on the telecommunications industry—it has been a very dynamic industry. There have been a number of things that have been going

on, and these do seem to be queued up—of its concentration or lack thereof, its competition or lack thereof?

Judge GONZALES. I do not, Senator. I really would like the opportunity to study this issue more and be happy to visit with you at the appropriate time.

Senator BROWNBACK. I do think that is something we are going to see, and it is such a key part of the economy. It is the pavement of the superhighway. It is how we communicate. The wireless industry has grown so rapidly. The number of people in the country that use the cell phone now as their primary phone has grown exponentially. It will be a majority, if it is not a majority already, of its usage, and it just has been a very dynamic field, a lot of new players coming into it to compete as well.

And so it seems to me that it is one of those that has to be looked at from the totality of the picture of who all is providing telecommunications service. Is it an Internet provider? Is it an old-line phone company? Is it somebody coming in new with a different satellite or other type of wireless service, whether celestial or otherwise? And I think it is one that is going to be important for our economic growth and vitality in this country. I know it is going to demand some of your time.

There was a letter sent to you, January 4th, from four members of this committee regarding the Solomon amendment. This may not be something you are familiar with yet. I am sorry. It was not sent to you. It was sent to Attorney General Ashcroft. That law prohibits institutions of higher learning that receive Federal funds from discriminating against military recruiters. It has been an issue of some visibility.

The law was struck down by the Third Circuit Court of Appeals in November. The Department of Justice has yet to announce whether it will seek further review of that decision. As Attorney General, what would you do to defend and enforce the Solomon amendment?

Judge GONZALES. Well, Senator, as Attorney General, I do have an obligation to try to defend all congressional statutes as a presumption of constitutionality. I will, of course, have to confer with the lawyers at the Department of Justice in making a decision as to whether or not an appeal should be pursued, but beyond that, I have nothing further to add in response to your question.

Senator BROWNBACK. Judge Gonzales, another area that is likely to come up is the issue that had a lot of State interest, State laws coming forward on the issue of definition of marriage coming from the courts in Massachusetts, coming from the courts now in a number of places. The Congress had previously acted on the Defense of Marriage Act, which the lawyers that I have talked to, most have viewed this as something that will not stand a constitutional test, a constitutional scrutiny, and therefore have pushed the issue of a Federal constitutional amendment, defining marriage as the union of a man and a woman. A number of States have taken this up, I think 13. All have passed the issue of a traditional definition in State constitutional law.

Have you had a chance to think about this issue some, from the position of Attorney General, if a challenge to the Defense of Marriage Act comes in front of the Federal courts that the Attorney

General's Office is asked to look at to determine its constitutionality and the position that you would take?

Judge GONZALES. Before offering up a definitive conclusion about that, Senator, I, of course, would want to talk to the lawyers at the Department of Justice. But, again, the presumption is that the statute is constitutional, and my presumption is, is that I would do everything I could to defend it.

Senator BROWNBACK. It is an issue that is going to continue to be with us, one of those very difficult issues of society to deal it, and it continues to be thrown to the courts; one that I think legislative bodies are very capable of handling, but, nonetheless, the issues migrate to the courts, and I think it is one you are going to see quite a bit of.

Mr. Chairman, thank you very much and, Judge Gonzales, for being here.

Chairman SPECTER. Thank you, Senator Brownback.

We turn now to Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

Judge Gonzales, thank you for your patience in answering all of these questions today.

Chairman SPECTER. Before you begin, Senator Feingold, might I, again, say to any Senators who are looking for a second round of questions, that now is a good time to come to the hearing room. And I would ask the staff for Senators who are interested in a second round to notify your principal, so that we can move ahead.

I think there is a realistic likelihood of finishing up the hearing today, if all Senators are present to take the time in an orderly sequence.

Pardon the interruption, Senator Feingold. The floor is yours, and we will start the clock at the beginning.

Senator FEINGOLD. Thank you for the opportunity to ask another round of questions. Again, thanks, Judge Gonzales.

Let me return, first, to the death penalty issue and then move on to some other questions.

We talked earlier about your specific role vis-a-vis George Bush and clemency proceedings and about a couple of cases. Let me ask you more generally.

Critics of your clemency memo say you did not make serious inquiries into viable claims of innocence. Based on your review of the information you gathered in those cases, were you certain then, and are you certain today, that all of the individuals whose execution you and George Bush approved were, in fact, guilty?

Judge GONZALES. If, in fact, there were questions about guilt or innocence or issues raised in a clemency petition that had not been reviewed by the courts, then the position of then-Governor Bush was that he would not grant clemency.

Obviously, of paramount concern was whether or not was this person guilty of the crime convicted of. And you must understand, Senator, that I don't, as counsel, I didn't have the kind of resources you would normally find in a DA's office. I wouldn't have the opportunity or resources to go out and reinterview witnesses and physically examine evidence. Oftentimes there were allegations made in a clemency petition that had never been made in the trial or had been raised in the courts and had been rejected, had been looked

at by the courts and had been summarily rejected. And so the fact that something is raised in a clemency petition and is not mentioned in the memo doesn't mean that it was ignored, by any stretch of the imagination.

Senator FEINGOLD. What I am asking here, Judge, is your personal opinion, at this point.

Judge GONZALES. My personal view—

Senator FEINGOLD. And this is, I am sure you will be the first to say, an incredibly difficult process for anyone to be involved in. At this point, your own opinion, are you certain that all the individuals whose executions you and George Bush approved were, in fact, guilty?

Judge GONZALES. I could not have made a recommendation for the President—for the Governor to deny clemency if there was any question in my mind about the guilt or innocence of someone who had submitted a petition for clemency to this Governor.

Senator FEINGOLD. I guess I will leave it at that. Thank you.

Would you be in favor of statutes, on the State or Federal level, that would permit access to evidence for DNA or other forensic testing to determine if an innocent person has been executed, if a colorable claim of innocence has been made? As I understand it, there is such legislation being considered in Texas at this time.

Judge GONZALES. This is after the fact—

Senator FEINGOLD. Yes.

Judge GONZALES. —after someone has been executed?

Senator FEINGOLD. Yes. Correct.

Judge GONZALES. Senator, I think that that is something that I would want to look at. I hesitate to comment on legislation without looking at specific language of the legislation. Obviously, the administration speaks with one voice about legislation.

I will say that, if we are going to apply the death penalty, we need to make sure, as I said earlier to you, is that it should be applied fairly, and only the guilty should be punished.

As technology evolves and the use of DNA has become more and more common, I think it is something that we ought to consider.

Senator FEINGOLD. I guess, if you could provide me in writing, after you have had a chance to look at the Texas legislation, your reaction to it.

Judge GONZALES. I would be happy to do that, Senator.

Senator FEINGOLD. Thank you.

Let me switch to a subject that has come up a lot here today. In the August 2002 memorandum, the Justice Department concludes that the President, as Commander in Chief, may authorize interrogations that violate the criminal laws prohibiting torture and that the Congress may not constitutionally outlaw such activity when it is authorized by the President. This is the claim, essentially, that the President is above the law so long as he is acting in the interest of national security.

A December 30 rewrite of the August memorandum does not repudiate this view. It simply says the issue is irrelevant because the President has prohibited torture.

Today, in response to questions on this subject, you have been unwilling to repudiate this legal theory. You have danced around the question a bit. But as I understand your answers so far, you

have said there may be a situation where the President would believe a statute is unconstitutional and would therefore refuse to comply with it, but would abide by a court's decision on its constitutionality. You, also, I am told, said that many Presidents have asserted the power not to enforce a statute that they believe is unconstitutional. But there is a difference between a President deciding not to enforce a statute which he thinks is unconstitutional and a President claiming to authorize individuals to break the law by torturing individuals or taking other illegal actions.

So what I want to do is press you on that because I think perhaps you have misunderstood the question, and it is an important one. It goes to a very basic principle of the country that no one, not even the President of the United States, is above the law. Of course, the President is entitled to assert that an Act of Congress is unconstitutional.

This President did so, for example, with respect to some portions of our McCain-Feingold bill when he signed it, but his Justice Department defended the law in court, as it is bound to do with every law duly enacted by the Congress. And his campaign and his party complied with the law while a court challenge was pending. No one asserted that the President had the power to ignore a law that he thought was unconstitutional.

The question here is what is your view regarding the President's constitutional authority to authorize violations of the criminal law, duly enacted statutes that may have been on the books for many years when acting as Commander in Chief? Does he have such authority? The question you have been asked is not about a hypothetical statute in the future that the President might think is unconstitutional. It is about our laws in international treaty obligations concerning torture. The torture memo answered that question in the affirmative, and my colleagues and I would like your answer on that today.

I, also, would like you to answer this: does the President, in your opinion, have the authority, acting as Commander in Chief, to authorize warrantless searches of Americans' homes and wiretaps of their conversations in violation of the criminal and foreign intelligence surveillance statutes of this country?

Judge GONZALES. Senator, the August 30th memo has been withdrawn. It has been rejected, including that section regarding the Commander in Chief's authority to ignore the criminal statutes. So it has been rejected by the executive branch. I, categorically, reject it. And, in addition to that, as I have said repeatedly today, this administration does not engage in torture and will not condone torture. And so what we are really discussing is a hypothetical situation that—

Senator FEINGOLD. Judge Gonzales, I have asked a broader question. I am asking whether, in general, the President has the constitutional authority, at least in theory, to authorize violations of criminal law when there are duly enacted statutes simply because he is Commander in Chief? Does he have that power?

Judge GONZALES. Senator, in my judgment, you have phrased sort of a hypothetical situation. I would have to know what is the national interest that the President may have to consider. What I am saying is it is impossible to me, based upon the questions you

have presented to me, to answer that question. I can say that there is a presumption of constitutionality with respect to any statute passed by Congress. I will take an oath to defend the statutes. And to the extent that there is a decision made to ignore a statute, I consider that a very significant decision and one that I would personally be involved with, I commit to you on that, and one I will take with a great deal of care and seriousness.

Senator FEINGOLD. Well, that sounds to me like the President still remains above the law.

Judge GONZALES. No, sir.

Senator FEINGOLD. If this is something where you take a good look at it, you give a presumption that the President ought to follow the law, you know, to me that is not good enough under our system of Government.

Judge GONZALES. Senator, if I might respond to that, the President is not above the law. Of course, he is not above the law. But he has an obligation, too. He takes an oath as well. And if Congress passes a law that is unconstitutional, there is a practice and a tradition recognized by Presidents of both parties that he may elect to decide not to enforce that law. Now, I think that that would be—

Senator FEINGOLD. I recognize that and I tried to make that distinction, Judge, between electing not to enforce as opposed to affirmatively telling people they can do certain things in contravention of the law.

Judge GONZALES. Senator, this President is not—it's not the policy or the agenda of this President to authorize actions that would be in contravention of our criminal statutes.

Senator FEINGOLD. Finally, will you commit to notify Congress if the President makes this type of decision and not wait 2 years until a memo is leaked about it?

Judge GONZALES. I will commit to advise the Congress as soon as I reasonably can, yes, sir.

Senator FEINGOLD. Well, I hope that would be a very brief period of time, and I thank you again, Judge Gonzales.

Judge GONZALES. Thank you, Senator.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Feingold.

Senator SCHUMER?

Senator SCHUMER. Thank you, Mr. Chairman.

Senator LEAHY. Mr. Chairman, before we start that, I would ask consent that—Senator Feinstein has the flu, and she would like to submit some questions. She thought rather than contaminate the whole Committee, she could submit a couple questions.

Chairman SPECTER. Well, of course, we will await Senator Feinstein's questions, and I am sure that Judge Gonzales will submit them promptly. We are making every effort—and it may be worth just a public statement very briefly—to move ahead with the process so that if confirmation is possible in advance of the Inauguration Day, we will try to meet that schedule. It may be difficult because Senators will not be here. We will have to have an executive session. But when written questions are submitted, Judge Gonzales is aware of the timetable that we are trying to meet to accommodate the President's request to the extent we can. But the Committee has its procedures, and we will give due deliberation. But

when written questions are submitted, the earlier they are received, the better chance there is of expediting Senate consideration.

Judge GONZALES. Thank you, Mr. Chairman.

Chairman SPECTER. Senator Schumer?

Senator SCHUMER. Thank you, Mr. Chairman, and thanks for your courtesy here with the votes and everything else.

I just want to first go back to that nuclear option we talked about. My friend from Oklahoma was speaking about this. Unfortunately, I was not here. Now I will speak about it and he is not here. But from what I understand, he said, well, the Constitution says the Senate can make its own rules.

That is not the point. That misses the point entirely. The overruling of this, what would happen in the chair is the Senate rules would be overruled by the Vice President on the basis that it is unconstitutional to require more than a majority for a judge. The Senate rules are very clear. You need two-thirds to change the rules. And just by the stroke of a pen, what the Vice President and those who are urging him are attempting to do is say on his own that is unconstitutional, and I ask and I challenge my friend from Oklahoma, anyone from the other side who claims to be a strict constructionist, or, in all due respect, you, Mr. Counsel, to find the words in the Constitution that say that. Everywhere else we want to define the Constitution narrowly as could be, only the words, no expansive reading. But all of a sudden because 10 out of 214 judges have not been approved, we are going to say, oh, well, we divine in it in the Constitution.

Well, that is a Pandora's box if there ever was one, and the sophistry in the thinking to try and achieve an end to me does not rise to the dignity, wisdom, and majesty that this body has shown itself capable of. But that is my answer to my friend from Oklahoma. Well, the Constitution says the Senate can make its own rules. We have a rule, two-thirds. Can the Vice President overrule it on a constitutional basis? And if you are strict constructionist, you better find the words in the Constitution that says he can.

Now, what I would like to ask you, again, Mr. Counsel, because you have had a little time to think about this, and I asked you in all due respect—I guess we met about 3 weeks ago. We had a very nice, friendly meeting. You know, on too many of these issues we are not getting answers. And, again, as I said, there is a higher standard for judges. A couple of our judge nominees did not get approved because they would not answer any questions. I do not know if it rises to that level with the AG, but I certainly think it is better for the Republic if there are answers.

You did tell me that you couldn't find words in the Constitution that said you needed a majority to vote on judges. That is clear. I went back and just checked the Constitution for the 48th time myself. You can check it again if you want. But what is your view on saying that it is unconstitutional for the Senate to require more than a majority to approve judges?

Judge GONZALES. Senator, I appreciate your question.

Senator SCHUMER. It is going to be a very important question over the next 6 months.

Judge GONZALES. Senator, again, respectfully, my answer remains the same. I don't have a view as to whether or not such a procedure would be constitutional. My judgment, and others' within the White House, is that this is a Senate internal matter to be worked out amongst the Members of the Senate.

Senator SCHUMER. Then that would follow we should follow the Senate rules, which say you need two-thirds.

Judge GONZALES. Sir, I will let the Senators debate that.

Senator SCHUMER. Okay.

Judge GONZALES. Of course.

Senator SCHUMER. Let me ask you another question, and that is this: We have had a lot of talk about the Geneva Convention and what has happened in the past. I want to ask you a prospective question about the Geneva Convention. Do you think that we should seek revisions of the Geneva Convention in the future? I do not know if that is right or wrong, but do you think we should? Have there been any discussions in your office as Counsel or in the White House or in the administration as to whether we should seek those revisions? And if there is a determination that we should seek certain revisions—and I do not know what they would be; they might be reasonable—should Congress be include in that discussion?

Judge GONZALES. Thank you, Senator, for that question. I think it's a very good question because we are fighting a new type of enemy and a new type of war.

Senator SCHUMER. Sure.

Judge GONZALES. Geneva was ratified in 1949, Geneva Conventions, and I think it is appropriate to revisit whether or not Geneva should be revisited.

Now, I'm not suggesting that the principles of Geneva regarding basic treatment, basic decent treatment of human beings, should be revisited. That should always be our polestar. That should always be the basis on which we look at this. But I am aware—there has been some very preliminary discussion as to whether is this something that we ought to look at. I'm also aware that certain academicians and international law scholars have written on this subject as to whether or not should we revisit Geneva and asked whether or not the Senate should play a role or the Congress should play a role. Obviously, if you're talking about modifications of Geneva or a new treaty, the Senate would play a very important role in the ratification process.

Senator SCHUMER. I understand that, but what I am saying is if the new administration were to begin internal discussions on whether Geneva should be modified and in what way, would they include the Senate in those discussions rather than saying here is what we recommend? You know, I mean, obviously this needs to be negotiated in a multilateral way. But would you include us in those—or would you recommend to the President that we be included in those discussions?

Judge GONZALES. Before answering a question, I want to emphasize, when I indicate that there's been some discussion within the White House or the administration, it's not been a systematic project or effort to look at this question, but some—I know certainly with the people that I deal with, the lawyers have ques-

tioned maybe this is something that ought to be looked at. So I do not want to leave the impression—

Senator SCHUMER. I do not hold any brief against that. Obviously, you can re-examine these things.

Judge GONZALES. And it seems to me that it's probably always better to consult with the Senate since the Senate is going to have a role in the ratification process. I think consultation is usually better than not consulting.

Senator SCHUMER. Okay. And there is no proposal you know that is being formulated right now, is there?

Judge GONZALES. Not that I'm aware of, Senator.

Senator SCHUMER. Thank you.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Schumer.

Senator DURBIN?

Senator DURBIN. Thank you, Mr. Chairman.

I think this has been asked earlier, Judge Gonzales, but at the risk of repeating, over the last 4 years Attorney General Ashcroft has appeared before the Judiciary Committee five times. His appearances before the Committee are as rare as humility and brevity in the Senate. And I am hoping that we will see a new approach and a new dialogue between our new Attorney General and this Committee.

I believe the Chairman has already asked you this, but for the record, is it your plan to come see us a little more often than five times in four years?

Judge GONZALES. Senator, as I said in my meeting with you, I enjoy dealing personally face-to-face with the Senators.

Senator DURBIN. Still?

Judge GONZALES. Even after this hearing. Yes, that would be my commitment. I think in order for the Department to be successful, I need the cooperation—if confirmed, I need the cooperation of this Committee, and I would certainly endeavor to be more available, provide greater—be available to the Committee, yes, sir.

Senator DURBIN. Thank you. My gifted legal staff listened closely to your answers to my questions and believe you gave a very carefully worded lawyer answer to a question, which I missed. And so for the record, I want to make certain that I understand your position again on this torture issue. Can U.S. personnel legally engage in torture under any circumstances?

Judge GONZALES. I'm sorry. Can U.S. military personnel—

Senator DURBIN. U.S. personnel. Of course, that would include military as well as intelligence personnel, or other who are under the auspices of our Government.

Judge GONZALES. Senator, there are obligations under the treaty against torture and there are obligations under the anti-torture statute. There are obligations, legal obligations in the UCMJ. And so I suppose without—I don't believe so, but I'd want to get back to you on that and make sure that I don't provide a misleading answer. But I think the answer to that is no, that there are a number of laws that would prohibit that.

Senator DURBIN. I would like if you would give me a definitive answer.

Judge GONZALES. Yes, sir.

Senator DURBIN. And then the follow-up question which they tell me I did not ask was whether or not it is legally permissible for U.S. personnel to engage in cruel, inhuman, or degrading treatment that does not rise to the level of torture.

Judge GONZALES. Senator, our obligations under the Convention Against Torture with respect to cruel, inhumane, and degrading conduct, as you know, is under Article 16, I believe. As Counsel to the President—

Senator LEAHY. I am sorry. I cannot hear you. I am sorry, Judge.

Judge GONZALES. I am sorry, Senator. As Counsel to the President, my job was to ensure that all authorized techniques were presented to the Department of Justice, to the lawyers, to verify that they met all legal obligations, and I have been told that that is the case.

As you know, when the Senate ratified the Convention Against Torture, it took a reservation and said that our requirements under Article 16 were equal to our requirements under the Fifth, Eighth, and 14th Amendment. As you also know, it has been a long-time position of the executive branch and a position that has been recognized and reaffirmed by the Supreme Court of the United States that aliens interrogated by the U.S. outside the United States enjoy no substantive rights under the Fifth, Eighth, and 14th Amendment. So as a legal matter, we are in compliance. But let me just emphasize, we also believe that we are in—we want to be in compliance as a substantive matter under the Fifth, Eighth, and 14th Amendment. I know Jim Haynes wrote a letter to Senator Leahy about whether or not we were meeting our obligations, and the response certainly would lead one to conclude that what we were saying was that we were meeting our substantive obligations under the Fifth, Eighth, and 14th Amendment. And no one has told me otherwise. My understanding is that we are meeting our obligations under Article 16.

Senator DURBIN. It is your belief that we are legally bound to do that; is that correct?

Judge GONZALES. Well, subject to the reservations taken by the Senate in ratifying the treaty—

Senator DURBIN. Just by definition, which definitions we use.

Judge GONZALES. We are meeting our legal obligations, yes, sir.

Senator DURBIN. And so this morning we read in the paper about rendition, an argument made that we took a prisoner whom we could not, should not torture legally, and turned him over to a country that would torture him. That would be illegal as well, would it not?

Judge GONZALES. Under my understanding of the law, yes, sir, that we have an obligation not to render someone to a country that we believe is going to torture them. That is correct.

Senator DURBIN. All right. Now, let me ask you quickly about your situation as counsel to the Governor of Texas when the President served in that capacity. I know a lot of questions have been asked about the memos that you wrote. I want to go to a more fundamental question. It is clear to me, having served on this Committee and by human experience, that if you are black or brown in America, you are more likely to be detained, arrested, convicted—prosecuted and convicted and serve time for many crimes in this

country. I think that is a sad reality, but that is the reality of America today.

I would like to ask you your observation of that. I can give you statistics—I will not bore you or fill the record with them—about the disproportionate number of black and brown people who are in prison today and on death row. I would like to hear your sentiments as our aspiring Attorney General on this obvious injustice in America.

Judge GONZALES. Senator, I have a vague knowledge about the statistics that you refer to. I believe that if we are going to have the death penalty—and this is consistent with the President's beliefs—that it should be administered fairly and only the guilty are punished.

If, in fact, the case is that only minorities—Hispanics and African-Americans—are receiving the death penalty, it would be hard for me to conclude that that is a fair system. And if that were indeed the case, I think that we would—we should re-examine the application of the death penalty.

I personally do believe in the death penalty. I do believe that it deters crime and saves lives. But I fundamentally believe that it has got to be administered fairly.

Senator DURBIN. I am afraid I believe the challenge goes beyond death penalty issues. Drug crimes are another illustration where disproportionately black and brown people are imprisoned over drug crimes, where many, if not most, of the customers are white and do not face the same penalties. So I hope that as you set that standard, it would apply to non-death penalty situations which also raise these serious issues of justice.

Judge GONZALES. I will commit to you that I will look at that, Senator.

Senator DURBIN. The other thing I would like to talk to you about for a moment is mandatory minimum sentencing. You are familiar with it, as every member of the Committee might be. I will tell you that judges that I have spoken to tell me that we have created an impossible situation for them in many circumstances where they are required to imprison for extraordinarily long periods of time people who frankly are no threat to society and may have been bargained into prison by other criminals seeking a better treatment.

I visited the women's prison in Illinois to find hundreds of middle-age and elderly women knitting afghans and playing pinochle who will serve 10-, 15-, and 20-year sentences because a drug-dealing boyfriend ratted them out.

What is your feeling about mandatory minimum sentencing in this country?

Judge GONZALES. Well, of course, Senator, we have to apply the law. My judgment is that the sentencing should be tough, but it should be fair, and it should be determinant. And whether or not we have enough discretion or too much discretion, I mean, the key is finding the right balance. It shouldn't be the case that you have so much discretion that someone who commits a crime in one State gets a much tougher sentence than someone who commits the same crime in another State. But this is a very difficult issue, as everyone in the Committee knows. The Sentencing Guidelines are sub-

ject to litigation, being reviewed now by the Supreme Court, and so we are all waiting to see whether or not under *Booker* and *Fanfan* that the Court is going to apply the *Blakey* decision to the Sentencing Guidelines. And if that happens, I suspect you and I and other—if I am confirmed, and other members of the Committee will be spending a lot of time talking about sentencing issues.

Senator DURBIN. The last question is a brief one, and it may have been touched on earlier. But when Senator Ashcroft in your position aspired to this Cabinet-level appointment, he was asked about *Roe v. Wade*, which he disagreed with on a political basis, and his argument was he would enforce, in his words, “settled law” and *Roe v. Wade* was settled law in America.

I do not want to put words in your mouth, but could you articulate in a few words your position about the enforcement of *Roe v. Wade* or any other Court decision that you personally or politically disagree with.

Judge GONZALES. Thank you, Senator. Of course, the Supreme Court has recognized the right of privacy in our Constitution, and in *Roe* the Court held that that right of privacy includes a woman’s right to choose to have an abortion. A little over a decade ago, the Court in *Casey* had an opportunity to revisit that issue. They declined to overturn *Roe* and, of course, made a new standard that any restriction that constituted an undue burden on the woman’s right to choose could not be sustained.

My judgment is that the Court has had an opportunity, ample opportunities to look at this issue. It has declined to do so. As far as I’m concerned, it is the law of the land, and I will enforce it.

Senator DURBIN. Thank you. Thank you, Judge Gonzales.

Thank you, Mr. Chairman.

Chairman SPECTER. Senator Graham?

Senator GRAHAM. Thank you, Mr. Chairman.

Judge, you still want the job?

[Laughter.]

Judge GONZALES. Yes, sir.

Senator GRAHAM. Okay. That is good. I know you have been asked a bunch of questions. The working group that was formed in the Pentagon, as I understand it, occurred in the January time frame of 2003, and one of the documents the working group was working off of was the now infamous August DOJ memo. And I asked you a question before about whether or not you believe that the techniques in the August memo being espoused, whether or not that would put some of our troops at risk for court martial. And I do not expect you to answer that off the cuff, but there was a series of JAG memos as part of this working group that suggested that might be the case.

Have you ever seen those memos?

Judge GONZALES. I don’t recall. I don’t believe so, sir. Let me just say that I don’t believe it’s the case that our office had anything to do with the work of the working group. I might also say that with respect to your question, the work of the Department of Justice in reviewing—or in that August 1 opinion was related to a review of the anti-torture statute, a particular statute. I don’t believe—I mean, if there were other provisions, other restrictions upon people in the military, the fact that the Department has given

guidance about the scopes of the anti-torture statute doesn't mean that somehow other binding regulations wouldn't apply. And so it is possible that you could engage in conduct that would satisfy that statute, according to the memo, but be inconsistent with other obligations that would remain binding upon members in our military.

Senator GRAHAM. I think that is probably what happened, and I am try to learn from this process because you have one Department of the Government suggesting techniques that I think run afoul of the way the military is organized. And what I am trying to get us to look at is to make sure we don't go down that road again. And if you didn't see the memos, that to me is a bit disturbing because you are sort of out of the loop. And I think I better understand your role in this. You are trying to collect information. The working group is trying to implement policy.

Judge GONZALES. If I could just interrupt you, Senator, you said something—if I've said—if I've given the impression that the Department of Justice was suggesting techniques, they never were. What was happening is the Department of Defense, I believe, was suggesting the use of certain methods of obtaining information from the terrorists, and that was presented to the Department of Justice, and the Department then gave its opinion as to whether or not such methods were, in fact, lawful.

Senator GRAHAM. Well, what actually happened, as I understand it, is that the Department of Justice memo in August talks about the torture statutes in ways that I think you and I—I think you have said that you disagree with that original legal reasoning. I can assure you that I do, and it got us into a situation of where we are getting our troops potentially in trouble. And that memo launched a thought process in the Department of Defense that divided the Department. And I think you need to know this and go back and study how this happened because there were 35 techniques suggested, I believe is the number. And when the judge advocates were finally consulted, they looked at the underlying memo from the Department of Justice and said, Whoa, if you go down this road and you look at this definition of what it takes to commit an assault and, you know, the pain level involved, that is totally inconsistent with how we are going to govern our troops when it comes time to regulate detainees because there is a specific article in the Uniform Code of Military Justice that makes it a crime to assault a detainee.

And here is the good news. After Secretary Rumsfeld understood that there was a debate within the Department between civilian lawyers and military lawyers, he stopped and required a re-evaluation in April of 2004. The techniques were changed.

The only reason I bring this out is that it illustrates to me, Judge, that when you try to cut corners, it always catches up with you. And I think it has caught up with us. And what I am looking for you to hopefully do is bring us back on the right road. And the new memo coming out of the Department of Justice to me is a step in the right direction.

Do you believe that was a necessary thing to have done?

Judge GONZALES. Sir, first of all, let me—your characterization that we're cutting corners, I believe we have good people at the Department of Justice who did the very best they could interpreting,

in my judgment, a difficult statute. So I think they did the very best they could.

Senator GRAHAM. Well, that is where me and you disagree. I think they did a lousy job.

Judge GONZALES. That opinion and the analysis has now been withdrawn. It is rejected. It is no longer the position of the executive branch.

Senator GRAHAM. Okay. Well, it was withdrawn for whatever reason. I am glad it was, and I am glad that you see that it needs to be withdrawn.

Now to Gitmo. I am very encouraged by the efforts to fill this legal vacuum because once the Supreme Court decided that Gitmo was not Mars and it was part of the American legal system as far as habeas corpus relief, you are confident that this working group now headed by the Navy is going to come up with some due process standards that will meet international scrutiny?

Judge GONZALES. Well, I am not sure it will meet international scrutiny, Senator. What I can say is based upon what I've been told by the lawyers at the Department, what is in place now at Guantanamo should meet our legal obligations as described in the recent Supreme Court cases.

Senator GRAHAM. And maybe the word "international scrutiny" was a bad word, trying to say that there is a French standard that I am trying to adhere to, and that is not it. The point is that the world is watching.

Judge GONZALES. Senator, if I might just comment on that, because I want to emphasize to the Committee how important I think treaties like Geneva are for America, because they do represent our values. And in many way and at many times they have protected our troops. And it is true that part of winning the war on terror is winning the hearts and minds of certain communities. And to the extent there is a perception—and I think it's a wrong perception, but there's a perception out there that as a matter of policy the United States is ignoring its legal obligations, I think it makes it more difficult to win the hearts and minds of certain communities and, therefore, more difficult to win the war on terror.

Senator GRAHAM. That is encouraging to me, that thought process, but it is not enough, I am afraid, to talk about it unless there are deeds to follow. So what I would suggest—and this is one junior Senator suggesting—is that we do have an international image problem, partly unfair, partly of our own making, that it would serve us well to maybe get Congress involved, maybe not through legislation but to try to form some working environment where we can have input, you can tell us what you think, we can tell you what we think, and the world can see that our country is on the road to correction. I would encourage you to include us where you think we can be fairly included to make sure that what comes out as the new policy at Gitmo is something that kind of achieves the best of who we are and still aggressively fights the war on terror.

One last thought. The tsunami victims have been through hell, those who have survived, and the children apparently are going to through a new kind of hell. One thing I have been working on with the Chairman and other members of this Committee in a bipartisan way is dealing with human trafficking. We are hearing re-

ports every day, Judge Gonzales, that the children who are orphaned are being preyed upon by sexual predators, that people are going to the region claiming to be family members of these orphan children with the worst of motives. I along with Senator Cornyn and others are going to try to come up with some way to address this in the disaster relief bill.

I would ask you, if you could, put your thinking hat on and see what we can do in the short term and in the long term to deal with this, and I look forward to working with you on that. And if you have any thoughts, now would be a good time.

Judge GONZALES. Well, I think preying on children is sort of the worst kind of violation of civil rights. It would be a priority for me, if I am confirmed, Senator. I would look forward to the opportunity to work with you on this issue.

Senator GRAHAM. Thank you.

Chairman SPECTER. Thank you very much, Senator Graham.

Let us make an assessment here as to how many more rounds we are going to need. I think we have a realistic chance of concluding the hearing today. Following Judge Gonzales, we have three witnesses requested by Senator Leahy. May I ask, Senator Kennedy, do you think one more round will do? Or do you want more than one more?

Senator KENNEDY. Well, Mr. Chairman, I think I would need one more round generally on this OLC. I would like to ask about OLC and these ghost detainees and Article 49 of the Geneva Convention. I think that is an enormously important area that I do not think we have gotten into.

Then after that, I was interested in visiting with our nominee on some of the immigration issues, that is, the enforcement issues on immigration with local and State authorities. I have talked about civil rights issues, the changes in the Civil Rights Division and the prosecution in several different areas of civil rights laws that we have seen in the last 3 years, and some in the Criminal Division. I do not intend to be dilatory in any way, but I think these are important areas.

Chairman SPECTER. Senator Kennedy, do you think a 15-minute round would be sufficient?

Senator KENNEDY. I will do the best that I can, Mr. Chairman, but I would prefer not to agree just to a 15-minute round at this time, but I will move along. You have been kind to let me complete the questions which I had the last time. I think there are important questions with regards to the change in the Geneva Conventions with regards to ghost detainees, which the Central Intelligence Agency has been involved in. OLC wrote a long memorandum. I think I want to question about this issue.

So I will move along as rapidly as possible, but I think I would like to inquire on that and also about civil rights, which is enormously important, just on immigration issues. I talked to Mr. Gonzales about those items on civil rights, civil rights enforcement, also on immigration, some of the immigration issues. I don't intend to be lengthy. I have indicated to Mr. Gonzales the areas that I would be going into so that he would have some idea about these. But I think they are extremely important and—

Chairman SPECTER. Well, this is a very important hearing, and we want to give you every opportunity. Three rounds is more than customary. It is extensive. It is hard to go back on old custom. Senator Leahy, the Ranking Member, I know wants an additional round. Senator Hatch, would you like an additional round?

Senator HATCH. No, I think we have—I think the witness has acquitted himself tremendously well, and other than Senator Leahy and Senator Kennedy, I think we ought to wind it up if we can.

Chairman SPECTER. Senator Cornyn, do you care for an additional round?

Senator CORNYN. I just have probably three or four questions, is all that I have, Mr. Chairman.

Chairman SPECTER. Okay. Senator Graham?

[No response.]

Chairman SPECTER. Well, let us proceed this way. I have an additional round. Let us yield to Senator Kennedy to see if he—

Senator KENNEDY. Why doesn't Pat go?

Senator LEAHY. No. Go ahead. You are former Chairman. Mr. Chairman, before we do yield—and you have been absolutely fair in setting this up, but you also know we have cooperated in every way possible to move forward on this hearing within 2 days of the new Congress coming in. I will as usual, of course, put a number of things in the record, including a number of letters I have sent to Judge Gonzales, including ones where I laid out what some of the questions were that I was going to ask today. I do it out of frustration because I really feel most of those letters have never been answered and probably never will be. Once he is confirmed, if he is, I am sure he will never feel he has any duty to answer them. But I will put them in the record, in any event, that and some other letters and material.

Chairman SPECTER. Thank you very much, Senator Leahy. You certainly have been cooperative.

I am going to yield on my third round at this point to Senator Kennedy with the request that 15 minutes be allocated to Senator Kennedy.

Senator KENNEDY. Thank you.

Chairman SPECTER. And perhaps it would suffice, if there are questions beyond the additional 15 minutes on round three, that the questions be submitted in writing. There are still other Senators who have not had round two, so let the word go out and put them on notice. If they want to come for round two, the hearing will remain.

Now, Senator Kennedy, the floor is yours.

Senator KENNEDY. Thank you. Thank you, Mr. Chairman.

Mr. Gonzales, on March 19th, the Office of Legal Counsel provided you with a memorandum to allow the CIA to relocate certain prisoners from Iraq for the purpose of "facilitating interrogation." The memo interprets Article 49 of the Fourth Geneva Convention which prohibits the forcible transfer or deportations of protected persons from occupied countries like Iraq, and violations of Article 49 are considered to be grave breaches of the Convention and thereby constitute war crimes under our Federal law.

The cover letter from OLC states that the legal opinion was requested by Judge Gonzales. In the newspaper—I do not know

whether it was the Times or the Globe or Post—one of them reported that one intelligence official familiar with the operation said the CIA had used the March draft memo as legal support for secretly transporting as many as a dozen detainees out of Iraq in the last 6 months. The agency has concealed the detainees from the International Committee of the Red Cross and other authorities, the official said. In other words, this memorandum is being used to justify the secret movement and interrogation of ghost detainees.

In his report on the prisoner abuse at Abu Ghraib, General Taguba—and as I mentioned, the members of the Armed Services Committee listened to General Taguba testify on this very subject matter—criticized the CIA practice of maintaining ghost detainees as deceptive—this is General Taguba—saying that the policy of the CIA maintaining ghost detainees in Iraq is deceptive and contrary to army doctrine and in violation of international law.

Do you agree or disagree with General Taguba's view of the practice?

Judge GONZALES. Senator, I have not reviewed this opinion in quite some time. I believe based on—I believe that we are honoring our legal obligations with respect to these detainees. There was a concern that by the application of Geneva that terrorists would come into Iraq and we would create a safe haven for them, and that's why the opinion was solicited, so that we would not create such a safe haven for al Qaeda, who are not entitled to prisoner of war legal protections. But in terms of the actual facts or specifics of what is actually being done, I don't have any knowledge about what the CIA or DOD is doing. And I am presuming—again, I don't have any knowledge—that they have solicited legal advice as to what constitutes—what would constitute a violation of our legal obligations.

Senator KENNEDY. Well, the memo applies to protected persons, as I understand it. As I understand, it was the CIA that actually requested you to request the memorandum, and I think any logical conclusion one would draw is in order to protect their agents from being prosecuted. At least that would certainly be my conclusion.

Now, this is what the memorandum from the Office of Legal Counsel interprets Article 49 of the Geneva Convention. The Geneva Convention 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." And in spite of the clear and unequivocal language of the provision, the OLC concluded that Article 49 does not, in fact, prohibit the temporary removal from Iraq of protected persons who have not been accused of a crime to reason that both the words "deportations" and "transfers" imply a permanent uprooting from one's home, and that because a different provision in the Fourth Geneva Convention prohibits the relocation of persons accused of crime, it follows that persons who aren't accused of crime may be temporarily relocated for interrogation.

Do you believe that this legal advice is sound?

Judge GONZALES. Senator, I really would like the opportunity to re-review this memo. My recollection is that this was a genuine concern, that we had members of al Qaeda intent on killing Ameri-

cans flooding into, coming into Iraq, and the question was legitimately raised in my judgment as to whether or not—what were the legal limits about how to deal with these terrorists. And I believe—certainly that opinion represents the position of the executive branch.

Senator KENNEDY. Well, do you know why the request came from the Agency? Why did the request come from the CIA? Do you know why they requested this? Did they explain why they wanted it? And do you remember what the CIA actually asked for?

Judge GONZALES. I do not, sir.

Senator KENNEDY. The language—and I will move on—from the OLC clearly contradicts the plain language of the Convention. And there are many that conclude that this was in order to allow the CIA to engage in the unlawful practice.

Did you form any opinion about the whole policy of ghost detainees, the fact that the CIA was moving individuals, ghost detainees, around to different prisons in different parts of the world in terms of interrogating them, as was found and mentioned in the Taguba report and in the Red Cross reports? Have you drawn any personal conclusions yourself as to whether this was sound policy or whether it contradicted the Geneva Conventions?

Judge GONZALES. Quite candidly, Senator, my objective as the Counsel to the President would be to try to ensure that questions were being asked as to whether or not what kind of conduct someone felt was appropriate or necessary was, in fact, lawful. And I don't think I would have considered it my role necessarily to second-guess whether or not that represented a good policy judgment.

Senator KENNEDY. Well, it does appear to some that the CIA is looking out and asking, you know, for the legal authority to do whatever they want to do and be protected from war crimes and other kinds of prosecutions and protections by the Commander in Chief provisions. That certainly has been a conclusion that has been drawn by many authorities, and it certainly would appear that way to many.

Judge GONZALES. Sir, if I may, that is the reason why we categorically rejected it, that analysis, when the existence of the memo became public, because we were concerned that someone might assume that, in fact, the President was exercising that authority. That has never been the case, and we have said that there has been no action taken in reliance upon that authority.

Senator KENNEDY. Well, you know, we hear now about the recent decision and judgment that was made recently in terms of the Bybee memo. But I asked you at the end what you have done about this since it is so offensive. Clearly you have to feel that given the fact the administration does that it is not longer operative. And I was interested, since it wasn't, what was done with the Agency and what was done with DOD. And then I asked just at the end what you were going to do with the FBI should you be appointed, and you indicated that with the FBI you are going to consult, find out the facts, and take action.

But I am just wondering what you have done to implement the more recent decision to say that this Bybee memo is no longer operative since it continues to be a part of the working document that has been made available to DOD.

Judge GONZALES. Sir, as far as I'm concerned, the December 30th opinion from the Office of Legal Counsel represents the executive branch position with respect to the interpretation of the anti-torture statute. The August 1 OLC memo has been withdrawn. It has been rejected and does not represent the position of the executive branch.

Senator KENNEDY. That is your position now, but when you first saw it and for a 2-year period when it was in effect, you did not object to it, as I understand.

Judge GONZALES. Sir, there was, of course, as with many decisions, tough legal decisions, discussions between the Department of Justice and the Counsel's Office. Ultimately, as I've said repeatedly during this hearing, it is the responsibility of the Department of Justice to make the final call. Ultimately, it is their decision as to what the law requires. And it was accepted by us as the binding interpretation of that statute.

Senator KENNEDY. If I could come back to the unprecedented expansion of executive power contained in the Bybee memo, which you seem to have adopted at the time it was issued, so we are clear, the Bybee memo concluded that the law of the land cannot prevent the President from carrying out his Commander in Chief authority in any way he sees fit, even if the directives and actions violate clearly established law.

Judge GONZALES. Senator, that old opinion, as I've said, has been withdrawn. That analysis has been rejected, and I consider it rejected.

Senator KENNEDY. But at the time when you first saw it, it still was put into—it was effectively the law of the administration's position for some 2 years.

Judge GONZALES. Well, that certainly reflected the position of the Office of Legal Counsel, but, again, let me re-emphasize that that authority was never exercised. As far as I know, the President was never advised of that authority. And so no actions were taken in reliance upon that authority.

Senator KENNEDY. That has been repealed. He hasn't exercised it. Your view whether it is legitimate, whether it is a legitimate statement of fact.

Judge GONZALES. Sir, respectfully, it doesn't represent the position of the executive branch.

Senator KENNEDY. I understand that, but it did for a period of time, and I was just interested in what your view on that is as a legal issue. It has important implications in the separation of powers. It has very important implications on it. We are entitled to understand your view about the separation of powers. This has very important implications on it, and that is why I am asking the question.

Judge GONZALES. Sir, and I appreciate that, Senator, thank you. Whether or not the President has the authority in that circumstance to authorize conduct in violation of a criminal statute is a very, very difficult question, as far as I'm concerned. And I think that any decision relating to this line of reasoning would be one that I would take with a great deal of seriousness, because there is a presumption that the statutes are, in fact, constitutional and should be abided by. And this President does not have a policy or

an agenda to execute the war on terror in violation of our criminal statutes.

Senator KENNEDY. Let me move on. The Bybee memorandum made up out of whole cloth a necessity defense application to torture. It argued that such a defense is viable because Congress did not make a determination on values vis-a-vis torture. However, the Congress categorically banned the torture when it enacted the statute in 1994. The Convention Against Torture, which the U.S. ratified in 1994, specifically states that no exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability, or any other public emergency may be invoked as a justification of torture.

What did you think when you read the memorandum's section on the necessity provision? Did you realize right away that this was bad law and bad guidance for our military and intelligence?

Judge GONZALES. Sir, I don't recall today my reaction to the line-by-line analysis in that opinion. What I did realize, being a former judge, trying to interpret a statute that may not be as clear as one would normally want to see on an issue this important, was that that was an arguable interpretation of the law. They were relying upon the definition of severe physical pain in other statutes passed by the Congress. And I'm sure we had discussions about it, and ultimately it was accepted because that was the ultimate decision and position of the Office of Legal Counsel.

Senator KENNEDY. Well, just to reach the conclusion that torture must involve the kind of pain experienced with death or organ failure, the Bybee memorandum relied on unrelated Federal statutes that define emergency medical conditions for purposes of avoiding health benefits, Medicaid statute. I have gone through it. I am not going to take the time on this. But that is how far they went.

As the revised OLC memo on December 30th—

Chairman SPECTER. Senator Kennedy, the red light is on for your 15 minutes. Will you proceed with this last question? Then the Chair is going to rule that we would ask you to submit the balance of your questions in writing.

Senator KENNEDY. Well, I would like to finish this, and then I would hope that I would have—I have attending the hearings. It is 4 o'clock. I know others want to inquire. I am glad to remain here and take my turn. I know there are some others that have to have a second or third, but I would certainly like to try to get into something on the civil rights issues, which are enormously important, and also something on the immigration issues. I don't intend to take a great deal of time, but I—

Chairman SPECTER. Senator Kennedy, we talked about multiple rounds. We would like to finish the hearing today. How much more time do you need?

Senator KENNEDY. Well, I would think this is probably the last question I would have—I had hoped to ask about extraordinary rendition on the definition of torture, and then I have some—I need a round in which I would combine the immigration and the civil rights and criminal justice into one round.

Chairman SPECTER. Well, can you conclude your questions with an additional 10 minutes?

Senator KENNEDY. Senator, with all respect to you, Mr. Chairman, I was on the Committee when the Senators asked an Attorney General for two and a half days about civil rights. You know, it is 4 o'clock in the afternoon. I am ready to comply with the rules on this, but these issues are extraordinarily important. We have not been dilatory. I think we are entitled to ask these questions. I know the process. I have other questions I am going to submit in writing. But I do think that we ought to be entitled to ask about civil rights and about immigration issues. I will wait my turn. I will be the last one. I will not be dilatory, but I would like to try to get responses on these issues.

Chairman SPECTER. Well, the latitude has been extensive. Everyone else has taken two rounds, some only one. I do not think it is unreasonable to ask for an approximation as to how much time you will need so that an evaluation can be made as to whether we can conclude today. It is true that I said there would be multiple rounds, but that is within the realm of reason, and you have had 35 minutes so far, and I am prepared to give you an additional reasonable amount of time. I would just like to know what it is so we can plan.

Senator KENNEDY. Well, if I can conclude this one and then do 15 minutes, that would be fine.

Chairman SPECTER. Conclude in 15 minutes?

Senator KENNEDY. If I can do this, the definition of torture, and then that will be the end on this subject, and then I will do—try to do it in less than 15 minutes. If I could get 15 minutes, it would wind me up.

Chairman SPECTER. All right. Then take the last question, and the green light will go on for 15 more minutes.

Senator KENNEDY. After this one.

As I mentioned in defining torture, the OLC used the description of “severe pain” contained in a Medicaid regulation on health benefits, which is completely unrelated to the whole question on torture. Now, as the revised OLC memo of December 30th explains, the statutes relied on by the Bybee memorandum do not define severe pain even in that very different context, and so they do not state that death or organ failure or impairment of bodily function caused severe pain. Clearly, the reasoning was unsound, and I guess what we conclude at this time, I would have thought it would be fairly obvious to you that someone can suffer severe physical pain without being in danger of organ failure.

When I hear this kind of activity, I always remember meeting President Duarte of El Salvador, and when he was in prison, what they did is cut off a joint every week of his fingers. When he shook hands with you, he had four parts of fingers that were left on that part. But every week they used to tell him—they would leave it unattended. It got infected and caused him enormous kinds of health hazards on these parts. But I am always mindful about what I have seen with some individuals, as one, like others in this Committee, Republicans, who care about human rights and the excesses that have taken place.

The question that I have is: Wasn't it obvious to you that someone can suffer severe physical pain without being in danger of organ failure? Wouldn't the removal of fingers, for example, fall

outside the definition of torture and why wouldn't we have expected that you would have raised some kind of objection to it?

Judge GONZALES. Senator, if I may answer your question, I don't recall reading that analysis to conclude that it would have to be that kind of pain in order to constitute torture. Obviously, things like cutting off fingers, to me that sounds like torture.

Let me just remind you, Senator, that the Office of Legal Counsel was trying to interpret a statute written by the Congress. The Foreign Relations Committee, in making recommendations to the Congress regarding ratification of the Convention Against Torture, described torture as the top of the pyramid in terms of inflicting pain upon a human being. It described it, the Committee described torture as extreme cruel, extreme inhumane, extreme degrading conduct. This is what the Congress said. And I think the people at the Office of Legal Counsel were simply doing their best to interpret a statute drafted by Congress.

Senator KENNEDY. Well—

Chairman SPECTER. Well, now, that is your question, Senator Kennedy. This round now has gone in excess of 22 minutes, and now we are going to start the clock again for 15 minutes, which under our discussion will conclude your allotted time. Start the time clock at 15 minutes.

Senator KENNEDY. I would be glad if Senator Leahy wanted to go, whatever way you want to proceed.

Chairman SPECTER. Senator Leahy wants to intervene before starting Senator Kennedy's last 15-minute round.

Senator LEAHY. Senator Cornyn was waiting.

Senator CORNYN. I am going to be here for the duration, Mr. Chairman, but I do have about 5 minutes or less.

Chairman SPECTER. Senator Kennedy, why—

Senator LEAHY. Why don't I go?

Chairman SPECTER. You want to go.

Senator LEAHY. Yes.

Chairman SPECTER. Senator Leahy.

Senator LEAHY. And I probably will take about 15.

One, I was glad to hear you say—and correct me if I misunderstood you—to Senator Durbin that it is wrong if a U.S. personnel turns somebody over to another country knowing they are going to be tortured. Did I understand you correctly on that?

Judge GONZALES. I believe that is a law. That's certainly U.S. policy.

Senator LEAHY. And so they would be prosecuted, people who did that.

Judge GONZALES. Yes.

Senator LEAHY. Now, President Bush signed a memorandum on February 7, 2002, which went through you, in which he directed U.S. armed forces to treat al Qaeda and Taliban prisoners humanely. You have said publicly this was the only formal written directive from the President regarding treatment of detainees. Is it your testimony the President has issued no other directive regarding the treatment of detainees? It is not a trick question. I want to make sure you understand it very clearly because you are under oath. My question is meant to include a directive in any form, to any government personnel, regarding any category of detainee from

any theater of operations, regarding any aspect of detainee treatment, including interrogation.

Judge GONZALES. Senator, I don't have any firsthand knowledge about the President giving directions regarding, say, specific techniques. That was not—in my judgment, in the Schlesinger report, he concluded it would be sort of out of the question to expect the President would be involved in making individual determinations—

Senator LEAHY. I am just going by your statement publicly that this was the only formal written directive from the President regarding treatment of detainees. Do you have any firsthand or secondhand knowledge of any other directive?

Judge GONZALES. Sir, other than the directive by the President that we're not going to engage in torture and that we're going to abide by our legal obligations, I'm not aware of any other directive by the President.

Senator LEAHY. You have been at the center of many administration battles to keep Government information secret, from the Executive order that I believe gutted the Presidential Records Act, to the initial attempt to refuse to allow Dr. Rice to testify before the 9/11 Commission, to the question of keeping secret the Vice President's Energy Task Force. Now, I have always found that every administration, Republican or Democratic, would love to keep a whole lot of things from the public. They do something they are proud of, they will send out 100 press releases. Otherwise, they will hold it back. We have the FOIA, Freedom of Information Act, which is a very good thing. It keeps both Democratic and Republican administrations in line. Historically the Government has established two broad categories of restricted Government information, classified information governed by Executive orders, and nonclassified information controlled by exemptions in the Freedom of Information Act. Now, recently there has been several new quasi-secret designations, sensitive but unclassified, or sensitive security. They seem to be done by ad hoc agency directive.

If you are confirmed as Attorney General will you take steps to create a uniform standard to ensure material should be kept from public disclosure only to the extent necessary to prevent harm?

Judge GONZALES. Senator, I will commit that that would be something that I would certainly look at.

Senator LEAHY. In September 2001, a speech in Houston, you talked about the work your office does vetting the personal background of every Bush appointee. You told your audience that after reviewing the FBI background report on an individual, you determine that person's suitability for the position, then the President makes a determination to go forward and nominate them. But numerous stories, news stories have reported that Bernard Kerik's name was publicly announced as nominee for the Department of Homeland Security before the FBI background report was begun, and this was not an uncommon practice in the White House. We know that he was a strong political supporter of the President, but it seems that the move was in haste here. It was reported that he withdrew his nomination because he discovered he had employed an illegal nanny, whose Social Security taxes he had not paid, this even though nobody seems to know the name of this nanny or what country she was from or whether she even existed. But there are

a lot of other problems that were there, and apparently anybody was aware of them.

I would like to know when you first learned about his being a defendant in a civil suit over unpaid debts; about reported extramarital relationship; about his use of a donated apartment for those involved in the aftermath of the 9/11 disaster in New York City, especially if it was used for adulterous situation, it would be a little illegal; and about gifts and ties to Interstate Industrial and its executives. Now, a White House spokesman said the White House was aware that many of these issues had been reported. My question, were you aware? What were you aware of before the President announced a plan to nominate Mr. Kerik to one of the most sensitive, important jobs of our Federal Government, the head of the Homeland Security, where he would handle the most sensitive classified material in this country?

Judge GONZALES. Well, of course, Senator, there was no actual nomination of Mr. Kerik. There was an announcement of an intent to nominate. And before an actual nomination occurs, there is an FBI background check that is completed, and the reason you announce it as an intent to nominate is because you want to see the results of an FBI background check to see whether or not there is anything there that would somehow otherwise disqualify a potential nominee.

Senator LEAHY. But, Judge Gonzales, according to the press accounts, you were the one who personally, at some length, went over questions with Mr. Kerik. Were you aware of the apartment, the so-called 9/11 apartment?

Judge GONZALES. Senator, my conversation with Mr. Kerik I would prefer not to discuss today, what is in my judgment—

Senator LEAHY. Are you claiming executive privilege?

Judge GONZALES. No, sir, I'm not claiming executive privilege. The President had a desire to nominate Bernie Kerik to a very important position, someone I think by most accounts is well qualified, would have been well qualified to serve as Secretary. For a variety of reasons there was a desire to announce a potential nomination. That was done. There was, of course—there was some vetting in connection with Mr. Kerik's background, but the actual vet was—it was never intended that the vet would be—

Senator LEAHY. Let me ask you a hypothetical then. In this administration, would something, such as the so-called 9/11 apartment, as referenced by the press by itself disqualify somebody from a position of enormous security clearance as Mr. Kerik's?

Judge GONZALES. Senator, I have no idea whether or not those kind of allegations are true.

Senator LEAHY. Would the question of his extramarital relationship that had been in the press, would that disqualify him?

Judge GONZALES. Senator, would that disqualify him? I can't say that it would definitely disqualify someone from consideration for a position.

Senator LEAHY. Do you know whether there ever was a nanny?

Judge GONZALES. Senator, again, Mr. Kerik is no longer under consideration for Secretary of Homeland Security.

Senator LEAHY. The reason I ask this, there is some concern that if the President wants something you are going to go ahead and

make it work, which—if I might, and I will give you all the time you want to respond—works against the idea of the independence of the Attorney General who is there, not as the President’s Attorney General, but, as I said in my opening statement, the Attorney General for the whole United States. Then you have this whole list of things that were out there, apparently a lot of people knew about it, and suddenly he is withdrawn when Newsweek sends a copy of a story to the White House, look, we are going to publish all these things. Do you want to comment? You know, you are going to be vetting a whole lot of people if you are Attorney General, in some of the highest positions—the Assistant Attorney General in charge of the Criminal Division, Assistant Attorney General who handles intelligence matters and so on. I am just wondering what are the standards?

Judge GONZALES. Senator, I hope as Attorney General that I would have and would commit to this Committee to have the highest standards regarding ethics. Let me just also say that I do very much understand that there is a difference in the position of Counsel to the President and as Attorney General of the United States. As Counsel to the President, my primary focus is on providing counsel to the White House and to White House staff and the President. I have a very limited staff. The staff doesn’t have the expertise or the experience in a great many of substantive legal issues. All of those reside in the Department of Justice. I do have a client who has an agenda, and part of my role as counsel is to provide advice that the President can achieve that agenda lawfully. It is a much different situation as Attorney General, and I know that. My first allegiance is going to be to the Constitution and to the laws of the United States.

My responsibility, by statute, is to provide legal advice to the executive branch. I know it is very important that there not be this idea or perception that somehow the Department of Justice is going to be politicized by virtue of the fact that someone who has served in the Counsel’s Office for four years is now the Attorney General of the United States. I am very sensitive to that. I am committed to working hard that there are no accusations that that is happening to the Department.

There are several ways that I can achieve that. One is to—again, as I have done today, is recognize and announce to this Committee that I do understand the difference between the two jobs. Secondly, talk to the career staff, work with the career staff to make them understand that I’m coming in to this department with a clear understanding of the distinct roles between the two jobs.

Finally, I would just say that there is a very restrictive contacts policy between the Department and the White House, limiting who from the White House can contact the Department of Justice, because what we don’t want to have is people from various divisions within the White House calling the Department about an ongoing investigation, and so that is something that I would look at and make sure that it is as strong as it should be, and would commit to the Committee that we would obviously honor any kind of contacts policy.

Chairman SPECTER. Senator Leahy, how much more time would you like?

Senator LEAHY. Probably about 10 minutes, and then I will submit anything else for the record.

Chairman SPECTER. Reset the clock for Senator Leahy for 10 minutes, and beyond that he will submit questions in writing.

Senator LEAHY. Judge Gonzales, I do not raise the question of Mr. Kerik to pick on Mr. Kerik. I met him a few times. I have no feelings one way or the other. And certainly I have no objection to the President putting people into positions whom he wants and feels comfortable with. I used that example because it is like Abu Ghraib in a sense in that the administration knew about this torture. They have been asked questions by me, by Republican Senators and others that they refuse to answer about the torture before it became public. Nobody said, oh, my gosh, this is horrible. We're all against torture or anything else. When the pictures started appearing on the front page of the newspapers or on television, then everybody scrambles around and takes memos and policies that have been in place for some time, and they start changing it. We have talked about the memo on torture that was changed at the beginning of a three-day weekend just before New Year's, coincidentally, just before your coming here to testify.

I mention the Kerik thing because apparently everybody in New York knew all these things. He had gone through all kinds of scrutiny, initial scrutiny by you. According to press from your office you gave him a very strenuous talking to. You know there are certain questions that are asked to elicit background information, yet it was only when Newsweek said, oh, yeah, we are going to print some stuff on this, that we suddenly find a convenient nanny. Maybe there was such a nanny. I do not know. But you see what I am getting at? I want to be more proactive, not just because the press finds something out, in what is a very, very secretive administration, but that people like yourself and others will say, wait a minute, do not go there. We have a problem.

I will tell you, November 2003 we learned that for more than a year a Republican staff member named Manny Miranda had stolen computer files from a Democratic staff person on the Judiciary Committee, especially on matters relating to judicial nominations. Did you know about that file theft before it was publicly uncovered in November 2003?

Judge GONZALES. No, sir, I did not.

Senator LEAHY. Do you know of anybody at the White House who received copies of those stolen memos?

Judge GONZALES. No, sir, I do not.

Senator LEAHY. I know that—I do not think that anybody at the White House has denounced the theft of these memos on nominations from stolen memos from Democratic staffers. I would assume that you are not, by not making a denouncement, you are not endorsing what Mr. Miranda did.

Judge GONZALES. Absolutely not, Senator.

Senator LEAHY. Now, the U.S. Attorney for the Southern District of New York is currently investigating the matter. Insofar as it involves the White House, I would assume that is an issue that you would consider recusing yourself from?

Judge GONZALES. I would consider recusing myself, yes, sir, but of course, Senator, the actual decision would be made based upon

examination of the facts and talking to the career professionals at the Department of Justice who have a great—of history in these kinds of issues, but of course I would be very sensitive about the appearance of a conflict of interest.

Senator LEAHY. You mentioned the sentencing guidelines earlier, specifically the *Blakely* case, which struck down the sentencing system in the State of Washington and cast serious doubts on the constitutionality of the Federal Sentencing Guideline. After that decision came down, I would hate to be a Federal prosecutor anywhere because a whole lot of plea bargains or other things are going to be revisited. From a defense point of view it is a great decision, but from a prosecutor's point of view it is terrible. There are a lot of Senators on both sides of the aisle here who would like to fix this situation. Would you, and the Department of Justice, work with an open mind with those Senators—Senator Specter and I were both prosecutors, and there are a number of others here who were as well—and to try to fix the situation in *Blakely*, try to constitute something that can be acceptable to the courts?

Judge GONZALES. I will commit to that, Senator.

Senator LEAHY. I appreciate that. And in October last year the Congress passed and the President signed the Justice For All Act. It included the Innocence Protection Act. That is a death penalty reform initiative I have championed for many years, and is supported by people who are strong advocates of the death penalty, Ray LaHood of Illinois, for example, and the leadership, the Republican leadership in the House. It sets procedures for courts to consider requests for DNA testing by Federal inmates, but it also authorizes grants to States to help improve the quality of counsel in capital cases. We have had some discussion of this, and you know and I know in many instances, whether it is your own State of Texas or others, the counsel often are not qualified in capital cases, whether it is the sleeping counsel, or the drunk counsel, the \$100 a day counsel. Other states do a very good job of it. Will you work with me to help make sure the IPA is properly implemented?

Judge GONZALES. I will commit to you that I will do that, Senator.

Senator LEAHY. I would like to raise a concern about nominees and religion. Althout I object to some of the President's nominations, for most of them I have absolutely no idea of what their religion are. Yet I saw that somebody from the White House or White House connected, apparently denounced me as being anti-Catholic on a Sunday morning program. I did not happen to see it because my wife and I were at Mass at the time.

[Laughter.]

Senator LEAHY. I would hope that whether it is Boyden Gray or anybody else who does this kind of thing, try to move them off that. You have people who care very deeply about their faith up here, and they are trying to do their job, no matter what religion they are.

Judge GONZALES. I have no doubt about that, Senator.

Senator LEAHY. My religion means a great deal to me. I do not try to impose it on anybody else, but I also resent such charges.

Here is a softball for you. When he announced your nomination, the President noted that your sharp intellect and sound judgment

have helped shape our policies on the war on terror. Looking back on that, were any mistakes made, and were they corrected?

Judge GONZALES. Any mistakes made in the war on terror?

Senator LEAHY. Involving you, and were they corrected?

Judge GONZALES. Involving me, Senator, I will be the first to admit I am not perfect, and I make mistakes.

Senator LEAHY. Glory, hallelujah, you are the first one in the administration who has said that.

Judge GONZALES. Hopefully, I learned from those mistakes. I think I have learned during these past four years Washington is a different type of environment than the one I am used to. And could I have done things better? Yes. And hopefully I have grown and I have learned. I think if confirmed it will make me a more effective Attorney General for the people of this country.

Senator LEAHY. It is a different town than many other places. You have had to look at those photographs of the mountains and the fields and whatnot from my farm in Vermont, and I can assure you I feel a lot different about the world when I am sitting there.

Mr. Chairman, anything else I will submit for the record. As I told you before, I would work with you to try to keep things on schedule, and I believe I have done just that.

Chairman SPECTER. Yes, you have, Senator Leahy. Thank you very much.

Senator LEAHY. You have been very fair.

Chairman SPECTER. Thank you. I try to be fair.

Senator Cornyn, you have five minutes more. Senator Kennedy has 15 minutes, and then we will submit whatever else he has in writing. Senator Sessions, would you care for another round?

Senator SESSIONS. Please, that would be great.

Chairman SPECTER. Senator Cornyn, the floor is yours.

Senator CORNYN. Thank you, Mr. Chairman.

Really just two matters. I know Senator Kennedy was asking about the memo, I believe it was a draft of March 19th, 2004. This was the memo that was I guess leaked regarding permissibility of relocating certain protected persons from occupied Iraq. It was leaked, was it not?

Judge GONZALES. I believe that's correct.

Senator CORNYN. I will just go back to what I said earlier about very few secrets in Washington, D.C., and I guess this helps to—is further evidence of that. But let me just ask. I see this is a draft memo; is that right?

Judge GONZALES. I believe that is correct.

Senator CORNYN. So it was not a final determination or a final statement of policy or a final legal conclusion, was it?

Judge GONZALES. The draft is a draft.

Senator CORNYN. I also see that the last footnote of the draft—and of course lawyers like footnotes, but they are important—says that protected persons “ordinarily retain Convention benefits.” So I guess in a strict sense these are not ghost detainees because the conclusion at least of this draft is that they retain, essentially retain protections under the Convention. Would you agree with that?

Judge GONZALES. I believe so, Senator, but I would want the opportunity to look at that again before agreeing without any kind of reservation.

Senator CORNYN. Fair enough. That just struck me as a contradiction with the suggestions we had heard earlier that somehow that this is a lawless enterprise, that indeed the conclusion at least of the draft was that ordinarily these detainees retain Convention benefits.

And finally, as you know, because we worked together in Texas when I was Attorney General, I have a deep and abiding faith in the cause of open government, and as Attorney General I was responsible for ruling on open records requests and writing legal opinions on open meetings laws. Well, Senator Leahy and I have joined cause, and I hope will be able to come up with some improvements to the Freedom of Information Act. I hope we can count on you to work with us in that cause. Here again, as we have observed, Washington operates a little differently from what at least my experience had been in Austin and elsewhere, but the fundamental proposition about the people, the legitimacy of Government flowing from the consent of the governed, seems to be in a principle that I hope would apply here, as well as it applied in Austin, and I am being somewhat facetious there.

But let me get to my question. As you know, Justices Scalia and Breyer both testified during the last Congress that the Administrative Conference of the United States is a great agency with a long track record of promoting good government, and that it deserves to be renewed. Indeed President Bush recently signed legislation renewing the Conference, and I am confident did so after soliciting your input. I am particularly interested in the Administrative Conference because of its previous role in improving Agency performance under the Freedom of Information Act. If confirmed, will you commit to working with me and the Committee and the Congress generally to ensure that the Administrative Conference has a strong role to play in enhancing Agency performance under the Freedom of Information Act?

Judge GONZALES. I would commit to you, Senator, that I would look forward to working with you on that issue.

Senator CORNYN. Thank you very much.

Thank you, Mr. Chairman.

Chairman SPECTER. Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

Judge Gonzales, I congratulate you. It has been a long day, but you have handled yourself with skill, integrity and good humor, and that is a valuable trade in the difficult job you undertake. My experience is that the Department of Justice is such a wonderful institution, but it is big, it is complex. It has agencies and departments do not realize within its ambit, such as the Federal Bureau of Prisons, the Drug Enforcement Administration, the FBI, the U.S. Marshals Service. Those are tremendous entities of great importance to our country. I hope that you will spend some time looking at all of those agencies and departments and making recommendations to how to make them more efficient.

Senator DeWine asked you about what if you run short. I think that is possible in certain areas. But I also think, from my experience in the Department, there will probably be some areas that are overstaffed. You could have a circumstance in which there are more Assistant United States Attorneys than there are FBI and DEA

agents to bring them cases, or vice versa, too many agents for the prosecutors to prosecute the cases effectively. So I hope you will look at that and work toward the efficiencies.

Judge GONZALES. I will do that, Senator.

Senator SESSIONS. You know, you were asked about saying some of the language of the Conventions are quaint. I remember when I was in law school at Alabama, my wife and I lived at Northington Campus, and that was where the German prisoners of war were held. I do not think they had much more than a fence. They had a recreation grounds. I am told that they interfaced with the people in the community, and even went to church and played the organ or sang in choirs.

But this is a different type of prisoner from the World War II group that we were looking at, and we do need to—some of the things are not quite as logical, such as guaranteeing them scientific instruments or giving them pay, paying them while they are prisoners, or athletic equipment and clothes. But I guess also the President—and you have been with him—feels deeply the responsibility he has and had during this post 9/11 time to protect the American people. That had to be on his mind whenever he made a decision. Is that correct?

Judge GONZALES. That was his number one objective, Senator, to do so, consistent with the legal obligations of this country.

Senator SESSIONS. And I know that in October of this past year, we released close to 150 detainees at Guantanamo Bay. I guess ACLU or somebody sued over that or whatever, and they were released. Here are some of the headlines that have occurred since. “Freed detainees rejoin fight; Ten ex-Guantanamo inmates have been caught or killed,” headline in the Washington Post of October 2004. “Detainees back in battle. At least eight ex-Guantanamo inmates fighting again in Afghanistan,” Pittsburgh Post Gazette. “Ten freed from Cuba return to fighting,” Chicago Tribune. “Freed detainees return to jihad, at least 10 militants captured or killed Gitmo captors of intent,” Orlando Sentinel.

So it is easy to say why do we not just err in the side of being lenient and let people go, but you knew and the President knew and the people supervising Guantanamo Prison knew that there were risks when you did that; is that not true? And that makes you cautious?

Judge GONZALES. Of course, Senator, we don’t want to detain anyone that shouldn’t be detained, and not for a minute longer than we need to detain someone. There are multiple screening processes in place with respect to detainees that go to Guantanamo. There are multiple screens when they are captured, when they’re moved into Bagram into a central holding facility. There’s a multiple screen—I mean there’s a screen with respect to deciding whether or not they should go to Guantanamo. Then when they arrive at Guantanamo, there’s an additional screen to see whether or not they should be at Guantanamo. And then there are annual review screens. We’ve now implemented a process to ensure that if we no longer need to hold someone, that we should release them. But it is true that some have been released that we’ve now discovered have come back to fight against Americans, and that of course is the danger. We obviously don’t want to hold anybody longer than

we have to, but we don't want to be releasing people that are going to end up killing American soldiers. So it's been a challenge.

I think the good people within DOD have exercised, have addressed that challenge in the very best way they can. It hasn't worked perfectly, but they've done a good job in my judgment.

Senator SESSIONS. And by the way, this was a Department of Defense decision, is that correct, on releasing there at Guantanamo?

Judge GONZALES. Oh, of course. That's not a decision made by the White House. That would be a decision ultimately made by Department of Defense. But they would also consult with the CIA. They would also consult with the Department of Justice to see whether or not those agencies had any information about the detainee. And so it would be a collaborative effort to gather up the intelligence information about a detainee, but ultimately the Department of Defense would make the decision that this is someone that it would be okay to go ahead and release.

Senator SESSIONS. Well, you did not run the Department of Defense or have any supervisory control over anybody at the Department of Defense, did you?

Judge GONZALES. Absolutely not.

Senator SESSIONS. Now, of course, so we have 10 rearrested. I think we can logically conclude that more than 10 have returned to terrorist activities, they just have not been caught, maybe twice or three times that many. So that is a pretty good number out of the 150 we took a change on releasing, who have returned to the battlefield. They were released while the war is continuing. And I just want people to note that this is not just an academic exercise. Lives are at stake. You had to make tough decisions and recommendations to the President. The President had to make them. Secretary Rumsfeld had to make them. He let some of these go, and some of them returned to battle right away, and we know that is true.

Judge Gonzales, I have offered, and Senator Hatch has joined me, in the first real piece of legislation that would modify the sentencing guidelines that are very, very tough on crack cocaine possession and distribution. In fact, I have concluded, as a prosecutor who utilized those guidelines completely, and fairly, and aggressively, that they are tougher than we need them to be.

The Department of Justice has not signed on to that as of this date. We have not gotten some of our Democratic members. I do not know where they are. But we need this year to bring up some legislation that is fully vetted by the Department of Justice to make sure we do not make any mistakes. And I do not take a back seat on anybody in my belief that criminals and drug dealers need to be punished. But I honestly believe that we could improve these guidelines and that there is disparity between crack and powder, and we can narrow that substantially.

Will you work with us on that to see if we cannot gain the support of the Department of Justice?

Judge GONZALES. I will commit to you that I will look at that, Senator.

Senator SESSIONS. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Sessions.

Now, we turn to Senator Kennedy for his final 15-minute round, with additional questions to be submitted for the record.

Senator Kennedy?

Senator KENNEDY. Thank you very much, Mr. Chairman.

Let me just underline what Senator Sessions has mentioned on crack cocaine. We have tried to work together on this with the Sentencing Commission, and we worked with former Deputy Attorney General Wayne Budd, who, after he left the Justice Department, took an interest in it. It is probably the most difficult part of the Sentencing Guidelines, but it is also one of the most offensive and unfair aspects of it. So we appreciate it. We will try and work with Senator Sessions as well and see if we cannot come up with a common position.

Senator SESSIONS. Thank you, Senator Kennedy. I believe that, if studied, you would feel comfortable that this would be a good step.

Senator KENNEDY. Thank you.

I wanted to talk, in the time that is available, about immigration issues and some civil rights issues and then quickly on the death penalty what you are going to do. Those are the three areas I would like to try and cover. One which we have talked about is the State and local law enforcement of immigration laws. You are familiar with this. In 2002, the Department of Justice reversed longstanding policy of support of the inherent authority of States to enforce Federal immigration laws. This reversal was based upon an Office of Legal Counsel opinion that has not been made public. I have asked for a copy of the opinion, so have others of the Congress. Interested parties have asked for it, too. Their refusal to disclose has been the subject of a lawsuit.

The Department's response failed to provide the opinion, but simply offered its conclusion without any discussion. I have difficulty in finding a good reason why the Department continues to keep the opinion and its legal analysis secret, especially since it reverses a longstanding policy that scores of police chiefs, police departments around the country, including many in your home State of Texas have denounced the idea of involving State and local police in Federal immigration enforcement.

Last month, the International Association of Chiefs of Police issued a report expressing concern. They and others believe it will destroy the remarkable progress they have made with community policy, in which police work closely with the public, including immigrant communities and develop productive bonds of trust. Concerns raised by law enforcement, shared by many conservative security experts—I cannot believe I am quoting Grover Norquist, Bob Barr of the Heritage Foundation—all say this could be an unmanageable burden on the law enforcement officials.

So could you tell us why the secrecy on the OLC memo, and can you tell us whether you support releasing the OLC opinion on the authority to—

Judge GONZALES. Senator, thank you for that question. You and I did talk about that in your office. This matter is in litigation, as you indicated. There is FOIA litigation about the release of the memo. The conclusions are known. It is the analysis, the delibera-

tions that went into the opinion I think that the Department is seeking to protect.

Let me just emphasize, though, or try to provide reassurance about this. There is no requirement, of course, upon State and locals to enforce Federal immigration laws. This is truly voluntary and, in fact, of course, some States have prohibitions. They could not do it even if they wanted to. In some cases, the Department, as I understand it, has run into, with State or local departments, in terms of memoranda of understanding, in order to enforce this.

I am certainly sensitive to the notion that some local law enforcement people don't want to exercise this authority. Well, we are not saying that they have to. But if they want to and can assist in fighting the war on terror, that is what this opinion allows us to do.

Personally, I would worry about a policy that permits someone, a local law enforcement official, to use this authority somehow as a club, to harass. They might be undocumented aliens, but otherwise lawful citizens. That would be troubling. That would be troubling to the President, who, as the former Governor of a border State understands and appreciates the roles that immigrants and undocumented aliens play in our society. But it is in litigation, and it would probably be better if I didn't speak more about that.

Senator KENNEDY. All right. Well, I am going to move on to some of these other areas, but we can come back.

One, considers the actions on the Arabs, Muslim, and other immigrant communities. After September 11th, thousands of immigrant men from Arab Muslim countries were fingerprinted, photographed, interrogated under various Justice Department programs. Individuals were targeted based on their religion and national origin, instead of evidence of dangerousness. The result was massive fear in many Muslim and Arab communities, and cooperation with antiterrorism efforts were frustrated. At a time when we needed critical intelligence, members of the Arab and Muslim communities were unfairly stigmatized and discouraged. I think part of the result was an increase in the hate crimes as well against them. I am going to try and come back to that.

Do you believe that targeting persons, based on their religion or national origin, rather than specific suspicion or connection with terrorist organizations is an effective way of fighting terrorism? And can we get interest from you, as Attorney General, that you would review the so-called antiterrorism programs that have an inordinate and unfair impact on Arab and Muslims?

Judge GONZALES. I will commit to you that I will review it. As to whether or not it is effective, will depend on the outcome of my review.

Senator KENNEDY. On the issues of civil rights enforcement, civil rights is still the unfinished business of America. If you are confirmed, you will be overseeing the Civil Rights Division. Unfortunately, that progress has been sometimes stalled by the administration. It is very important that the Committee know that you are committed to that progress. I would like to get into some specific questions about it.

In 2004, the Civil Rights Division did not file a single case alleging racial or ethnic discrimination against minority voters, not one.

In 2003, the division filed only one such case. That is not very satisfactory, given the widespread discrimination against minorities in State, local, even Federal elections across the country.

So, if you are confirmed, will you review those particular statutes and find out what the Department is doing or should do in terms of ensuring that the law is complied with?

Judge GONZALES. I will commit to you that I will do that, Senator.

Senator KENNEDY. I am going to move on from Section 2 of the Voting Rights Act, which prohibits voting practices that discriminate based on race, color or membership in a language minority.

I would ask you to take a very close look at this issue, given, again, the Department's record on it. The Civil Rights Division has actually opposed voters' interest in several court cases. The division opposed attempts by the Michigan NAACP and others to ensure that all provisional ballots by eligible Michigan voters were counted in the November election. That is the *Bay County Democratic Party v. Land*. And the division argued that the Help America Vote Act's creation of provisional ballots did not give private citizens any legal rights that they could enforce in court.

In fact, the Department was supporting attempts by States not to count votes of some of the actual eligible voters. And this provision I think disregards the fact that Congress passed the Act, including the provisional ballot requirement, precisely because they were concerned about violations of the 2000 election. And the division's argument that individuals had no right to enforce the provisional ballot provisions in the Help America Vote Act had been rejected by every court that heard it. So I am troubled the Department used limited resources to discourage and prevent citizens from enforcing the right to vote, and the Civil Rights Division has been the champion for civil rights not opposing the voting rights in keeping votes from being counted.

So I would hope that you would have a chance to review that particular activity in the Department.

Judge GONZALES. You have my commitment on that, Senator.

Senator KENNEDY. Thank you.

A third area in civil rights is the pattern and practice on job discrimination. Many of us are concerned that the Civil Rights Division reduce the enforcement of the landmark law against employment discrimination. This is Title VII of the 1964 Act. The division has filed few cases alleging a pattern or practice of discrimination. This is in spite of the fact, I believe, that the Equal Employment Opportunity Commission has record sort of numbers. So there are some that say, well, this is not such a problem today, but you have another Government agency indicating that it really is a problem. I would appreciate it very much if you could review that section of the Civil Rights Act and—

Judge GONZALES. I will commit to you that I will do that, Senator.

Senator KENNEDY. And also on the disparate impact laws and job discrimination. That is the 1991 Civil Rights Act that we have had.

I would appreciate the review of those. We will have an opportunity to talk with you about it. We can submit questions in more precision, but having your assurance in this is good enough for me.

The death penalty. General Ashcroft had repeatedly rejected the recommendations by U.S. attorneys not to seek the death penalty. In fact, on some occasions, the Federal prosecutors had been required to seek the death penalty, even though defendants were willing to plead guilty in return for life imprisonment.

General Ashcroft required his approval in all cases in which the death penalty is taken off the table. He required notice to him in all prosecutions where the death penalty was a possibility, even if the local U.S. attorney believed the case did not merit it. As of last September, the Attorney General had directed U.S. attorneys to pursue the death penalty in 41 cases in which U.S. attorneys had specifically recommended against it. Of these 41, only three resulted in the penalty actually being imposed.

We have seen the Attorney General deal with the death penalty issues in different ways in the Department. I mentioned, when we talked, that Janet Reno dealt with it one way, in terms of the reviews. Other Attorneys General have done so as well.

I do not know whether you are prepared to make any comments about how you might set up some kind of a process or procedure in terms of the Department, in reviewing recommendations or how you might proceed.

Judge GONZALES. Senator, I am not prepared at this time, but I understand that this is a very important issue for you and, if confirmed, I would look forward to the opportunity to visit with you more about it.

Senator KENNEDY. I would like to mention, also, the hate crimes. The Chairman of the Committee, myself, and others have been strong supporters. We have had strong support for it in a bipartisan way in the Senate, in the past. We have been unable to gain support in the administration. This is extremely important. The number has increased. I think many of us look at hate crimes as sort of the domestic terrorism, and we believe that, in fighting the hate crimes, which are focused not just on the individuals, but individuals representing a group, that we ought to be able to have the full force of the Federal Government on the side of the victims on this issue.

I do not expect that you are able to give us a definitive answer on this issue this afternoon, but I would ask if you would be willing to work with us at least to try and see if we can. Senator Hatch has been interested in this. He has got a somewhat different approach than we have had, but if we could have some assurance that you would review this issue as well and work with us, to the extent that you can.

Judge GONZALES. I am happy to look at this issue, Senator.

Senator KENNEDY. Mr. Chairman, I have a limited number of additional, which I will file with the—

I want to point out what we had, and this will be my final comment, we had 22 days of hearings with Mr. Kleindienst for his Attorney Generalship. We are doing this with Mr. Gonzales in rapid form, as we might. So I thank the Chair. I appreciate Mr. Gonzales' visit in the office and also his responses today.

I will submit a limited number of questions on some additional areas: a gun show loophole and some other issues which are of importance.

I thank the Chair.

Chairman SPECTER. Thank you very much, Senator Kennedy. I agree with you, the Judiciary Committee hearings on Mr. Kleindienst were not long enough.

[Laughter.]

Chairman SPECTER. We have tried to accommodate all of the questions. We were prepared to have, and did have, multiple rounds. And as witnessed, most of the Senators took one or two rounds, and I think we have had a very full hearing. And if it is required more days, if more Senators had been here, more time was necessary, we were prepared to do what was necessary.

I have some concluding questions on my third round. I want to give you an opportunity, Judge Gonzales, to respond to a story in the Washington Post today, where the lead comment is about a case involving a Mr. Henry Lee Lucas, who was an applicant for clemency. And the Post makes a comment that left out of the summary you made was any mention in 1986 of an investigation by the Texas attorney general that concluded that Mr. Lucas had not killed the woman, and Jim Maddox, the attorney general, was critical, saying that he would not have wanted to see a decision on such partial information.

What response would you care to make to that?

Judge GONZALES. Sir, I don't recall, I don't have the text of that summary in front of me. And as to whether or not—I have recollection that there was some discussions about the issue you just raised, and my views are that, if, in fact, I had knowledge about that, that certainly would have been information that would have been communicated to the Governor. As I indicated, in response to an earlier question, those summaries were just summaries. There were, in virtually every case, numerous conversations with the Governor about a particular case before an execution actually went forward.

Chairman SPECTER. Just one question about the so-called Bybee memorandum, and it is do you agree with the statement in the memo, "Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield"?

Judge GONZALES. I reject that statement, Senator.

Chairman SPECTER. You reject that statement.

Do you agree with the decision by U.S. District Judge James Robertson, handed down on November 24th of last year, when he stopped the military tribunals, ruling that detainees' rights are guaranteed by the Geneva Conventions?

Judge GONZALES. Sir, I haven't studied the rulings. That decision is on appeal. I believe, generally, we respectfully disagree with the judge.

Chairman SPECTER. Do you believe that the CIA and other governmental intelligence agencies are bound by the same laws and restrictions that constrain the operations of the U.S. armed forces engaged in detention and interrogations abroad?

Judge GONZALES. Certainly, some of the laws, sir. UCMJ, for example, would be a limitation on military forces that would not be applicable to the CIA.

Chairman SPECTER. Well, in what circumstances would the CIA have a broader latitude? Why do you not think about that one and give us a response in writing. That is a fairly involved question.

Judge GONZALES. I appreciate that, Mr. Chairman.

Chairman SPECTER. Do you support affording the International Committee of the Red Cross access to all detainees in U.S. custody?

Judge GONZALES. As a general matter, I very much support the work of the Red Cross and, as a general matter, would agree that they should be provided access. I think the Red Cross serves a very, very important function. They have, in the past, been responsible for the safe treatment and health of U.S. soldiers who are captured by our enemy and so, yes, as a general matter, that is true.

Chairman SPECTER. Your answer is, yes, to that question.

Judge GONZALES. As a general matter, yes, sir.

Chairman SPECTER. The final subject that I want to take up with you is one on congressional oversight. A fair amount of concern with Attorney General Ashcroft, and I have a very high personal regard for Attorney General Ashcroft. I served with him. I sat next to him for 6 years on the Judiciary Committee. And when he came in for oversight hearings, I commented, from time to time, how different his opinion was, as a Senator on the oversight committee, questioning the Attorney General than in reverse.

And one of the items which I would urge you to do is when you are scheduled for oversight to allow sufficient time so that it is not a matter of coming in and having another commitment at noon or 2 o'clock to give the members the opportunity to question you. You have certainly been very forthcoming here today. I think it is a very healthy sign when Senator Leahy and Senator Kennedy ask a series of questions or are working with you in the future, that does not commit them to their vote or does not commit them to what is going to happen, but it is nice to hear that they want your commitment as to future activities, if confirmed.

But I would like your assurance that you would be responsive to the invitation from the Committee twice a year.

Judge GONZALES. Certainly, my goal would be to be as responsive as I reasonably can, and certainly two times a year certainly sounds reasonable to me, Mr. Chairman.

Chairman SPECTER. And on the question of responding to letters, that is not an easy job. It has been very hard, from time to time, in fact, most of the time, not just the current Attorney General, but preceding Attorneys General, for getting responses to Committee questions. We would like your commitment that you will see to it that these letters do receive your attention. There are not so many of them. On one subject matter, I had to write to the Attorney General five times and still have not gotten an answer. So I ask you the question here today.

Judge GONZALES. I will certainly look at that, Mr. Chairman.

Chairman SPECTER. A final subject matter is one which gives the scope of congressional authority on oversight, and I wrote to you on December 27th, so you would have a specific notice that I wanted to talk to you about it. And this is on the Congressional Research Analysis, which was done in 1995, and I quote in material part, a "review of congressional investigations over the past 70

years demonstrates that DOJ has been consistently obliged to submit to congressional oversight regardless of whether litigation is pending.” And I have omitted irrelevant parts. And then going on, this covers “the testimony of subordinate DOJ employees, such as line attorneys and FBI field agents, and included detailed testimony about specific instances of the Department’s failure to prosecute alleged meritorious cases. In all instances, investigating committees were provided with documents respecting open or closed cases that included prosecutorial memoranda, FBI investigative reports, summaries of FBI interviews, memoranda and correspondence prepared during the pendency of cases.”

Do you agree with that generalized statement as to the authority of congressional oversight?

Judge GONZALES. Certainly, I respect the fact that, if confirmed as Attorney General, I will be at a Department, and as Attorney General, I am accountable to the American people for the oversight of this Committee. It is a different situation than over in the White House, where there are perhaps different views about oversight of the White House.

I look forward to working with the Committee. I think, as I said earlier, in response to another question, my goal is to have a good working relationship with this Committee. I respect the oversight role of this Committee. I do have some concern because I want to be very candid with you about whether or not the release of information may somehow impinge upon an ongoing investigation. I do have concerns about whether or not the release of information may somehow jeopardize national security. But my goal, Mr. Chairman, is to work with the Committee and to try to find a way that we can reach an accommodation, so that your goals are met, and the institutional interests of the executive branch are met.

Chairman SPECTER. Judge Gonzales, that is your first answer that I find insufficient. The oversight issue is one which is really of vital importance. This Committee wants to be helpful to you, and there is a lot of experience on this Committee. You have Senator Cornyn, who is gaining more experience by the minute because he has been so diligent in attending these hearings, and I commend you especially, Senator Cornyn. Senator Sessions was a U.S. attorney and an Attorney General. And there are very experienced members of this Committee. Senator Leahy was the district attorney of Burlington, and others on the Democratic side have very extensive experience, and I have had some myself.

And we are in a position to be helpful to you. And it may be that we will be asking you some matters that you can only show Senator Leahy and myself when they are pending matters. That is the practice in the Intelligence Committee, where matters are not given to the full membership of the Committee, but only to the Chairman and Vice Chairman.

Judge GONZALES. Mr. Chairman, if I may—

Chairman SPECTER. Yes.

Judge GONZALES. —I am not saying, no, to any kind of request. My commitment is to work with this Committee. I understand about your oversight responsibility, and I will do my very best to work with this Committee.

Chairman SPECTER. On our oversight, we are going to be very, very diligent, and we are going to be asking you for a lot of tough material on pending litigation, which we have the authority to do and to talk to line attorneys. We had an issue a few years back where we had a very difficult time and finally got the line attorneys, and FBI field agents, and detailed testimony about specific cases of the Department's failure to prosecute alleged meritorious cases, and documents respecting open or closed cases, which include prosecutorial memoranda, FBI investigative reports, summaries of FBI interviews, memoranda and correspondence prepared during the pendency of cases.

There has been a long history, Judge Gonzales, of requests being made by this Committee and not being honored, and we intend to pursue that.

Judge GONZALES. I understand, Mr. Chairman.

Chairman SPECTER. And we intend to pursue them in a very, very helpful way.

Judge GONZALES. And I appreciate that.

Chairman SPECTER. And if we ask you for something which is pending or something which is confidential, and you want to make it available only to Senator Leahy and myself, we will understand that. I think we have established our trustworthiness. Well, I will not go beyond, but we have great respect for the position of Attorney General of the United States, and there is a very, very close working relationship with the Judiciary Committee. And we think we could have been helpful to the Department on what happened at Guantanamo early on, very sensitive as to what the Government's response was after 9/11. And, again, the first responsibility of the Government is to protect its citizens. But I think, had there been a little oversight and a few inquiries as to what was going on, on Guantanamo, we could have been very helpful to you.

And had we known about the Bybee memo and what was happening with the transmission and the migration, I think we could have been helpful to you again on taking a look at that memo and giving you the advantage of our experience. And by hindsight, there is no doubt that the Bybee memo was not what it should have been, without getting into it or characterizing it in any way. But we are in a position to be helpful to you.

So, in taking up this subject, I have laid it on the line as to what we are going to be looking for.

Judge GONZALES. Thank you, Mr. Chairman.

Chairman SPECTER. Judge Gonzales, I repeat I think you have been very responsive. I think the fact that there were not more Round Two of questions is a tribute to the answers which you gave to Round One. And where we had Round Three and a half and Round Four and Four and a half, and about an hour of questioning from one of our very diligent Senators, whom I respect very, very much, and the extended questioning of Senator Leahy, I think you have been very responsive.

So thank you very much, and there will be questions submitted to you in writing in a number of directions, and your prompt responses would be very much appreciated.

Judge GONZALES. Thank you, Mr. Chairman, and I thank the Committee.

Chairman SPECTER. As the expression goes, Judge Gonzales, you are excused.

Judge GONZALES. Thank you.

Chairman SPECTER. Thank you.

Senator CORNYN. Mr. Chairman, may I make a brief UC request?

Chairman SPECTER. Of course, Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman.

I neglected earlier, when I was asking about the written response to the document request that Senator Leahy had made to the White House, I neglected to ask unanimous consent that the three letters that were written, I believe authored by David Leitch, in response to Senator Leahy's request, dated December the 17th, 30th, and January the 5th, be made part of the record.

Chairman SPECTER. Without objection, they will be made—

Senator LEAHY. If we might, could we, also, then put as part of the record my response letter, pointing out that those were not responsive and my concern that those letters were not responsive.

Chairman SPECTER. Both requests for and inclusion into the record will be honored without objection.

I would offer, for the record, a letter to me, dated December 26th, 2004, from the Committee of Concerned Philadelphia Rabbis.

Under the Committee rules, we have one week for the submission of written questions.

I would like to call our next witnesses, a panel, Dean Hutson, Mr. Johnson and Dean Koh.

Our first witness, in alphabetical order, is Dean John Hutson.

Senator KENNEDY. Mr. Chairman, just while the witness is coming, could I extend a warm welcome to Dean Koh—the whole panel. But Dean Koh has a brother who ran the Public Health Service in Massachusetts and was just, I would say, under Republican governors, but his outreach was extraordinary, and his leadership was just exemplary. And he is just a very highly regarded and respected member of our Massachusetts community. So I am sure the good dean has seen him more recently than I have, but I just wanted to point out that service and commitment to the public good runs long and deep in this family, and I appreciate the chance to add a warm welcome to him.

Senator LEAHY. If I could, also, note for the record, too, Mr. Chairman, Dean Koh's daughter Emily is here, too, as a freshman at Yale. And I thought someday, in the Koh archives, they will go back to this record, and she will be able to see her name is in there.

Chairman SPECTER. Well, thank you very much, Senator Kennedy and Senator Leahy, for those comments.

As I had started to outline, our first witness, alphabetically, is Dean John Hutson, dean and president of the Franklin Pierce Law Center in Concord, New Hampshire. Dean Hutson has a record as a rear admiral, a graduate of the University of Minnesota Law School, and has had a long and distinguished naval career, including being the Navy's judge advocate general during the administration of President Bill Clinton.

We are allotting 10 minutes for the testimony of each of you gentlemen, and then it will be followed by questioning from the panel.

Dean Hutson, we look forward to your testimony, and the floor is yours.

STATEMENT OF JOHN D. HUTSON, DEAN AND PRESIDENT OF THE FRANKLIN PIERCE LAW CENTER, CONCORD, NEW HAMPSHIRE

Admiral HUTSON. Thank you, Mr. Chairman, Senator Leahy, Senator Kennedy, Senator Cornyn. Thank you for inviting me. I request that my written statement be made a part of the record.

Chairman SPECTER. Your statement will be made a part of the record in full, as will the statements of Dean Koh and Mr. Johnson.

Admiral HUTSON. Thank you, sir.

As Americans, we have been given many gifts by our Creator and our forbearers, and we hold these gifts in trust for our progeny and for mankind, generally. One of these gifts is great military strength. This military prowess is enhanced by our legacy of our strong advocacy for human rights for all human beings by virtue of their humanity alone and by our long history of unwavering support and adherence to the rule of law.

These gifts come with a string attached. Like all gifts, there is a responsibility to husband them. We must not squander them; rather, we must nurture them, refine them and pass them on in even better condition than they were given to us. Generations of Americans have understood this responsibility and have accepted it.

In the wake of World War II, Truman, Eisenhower, Marshall, Senator Vinson and others fulfilled their part of that sacred trust. They had seen the horror of war, a horror that few of us have seen, but have only read about. They responded with programs like the Marshall Plan and with international commitments like the Geneva Conventions. I believe that the Geneva Conventions are part of our legacy not unlike the Bill of Rights, the Fourteenth Amendment, and *Brown v. Board of Education*. They demonstrate the goodness of the United States. They also demonstrate our strength and our military might. Even in the midst of that most awful of human endeavors—war—we should treat our enemies humanely, even when we have captured them. To do so is a sign of strength, not weakness. To not do so is a sign of desperation.

I come here to speak in opposition to the confirmation of Judge Gonzales because he appears not to understand that. He finds the Geneva Conventions to be an impediment, a hindrance to our present efforts, quaint and obsolete in important respects. His analysis and understanding of the Geneva Conventions, which I discuss in detail in my written statement, is shallow, shortsighted and dangerous. It is wrong legally, morally, diplomatically, and practically. It endangers our troops in this war and future wars, and it makes our Nation less safe.

My 28 years in the Navy tells me that his analysis of the Geneva Conventions and their applicability to the war in Afghanistan and the war on terror is particularly disturbing because it indicates an utter disregard for the rule of law and human rights. Those are the reasons American fighting men and women shed their blood and why we send them into battle. But if we win this battle and lose

our soul in the process, we will have lost the war, and their sacrifices will have been for naught.

The Geneva Conventions have protected American troops from harm for many years. Our forces are more forward deployed than any other Nation's in terms of numbers of deployments, locations to which they are deployed, and the number of forces deployed. This has been the case since World War II and will continue to be true. Because of that there is no country for which adherence to the rule of law and to the Geneva Conventions is more important than it is to the United States. It is our troops that benefit. The original U.S. proponents of the Conventions saw them as a way to protect U.S. troops from the enemy not the enemy from U.S. troops.

It is not good for our military if we now throw them over the side just because some people believe they are inconvenient to the present effort. This is only the present war. It is not the last war. It is not even the next-to-last war.

Another important aspect of the Geneva Conventions is that it prepares us for the peace that will ensue. We cannot so alienate our allies that they will not fight alongside us again nor should we embitter our enemies so that they will fight on longer and harder than they otherwise would or be unwilling to relent, even though their cause is hopeless. Abrogating the Geneva Conventions imperils our troops and undermines the war effort. It encourages reprisals. It lowers morale.

I believe that the prisoner abuses that we have seen in Iraq, as well as in Afghanistan and Gitmo, found their genesis in the decision to get cute with the Geneva Conventions. At that point, it became a no-holds-barred unlimited warfare not just in Abu Ghraib, but around the country. I remind the Committee that we are conducting 40 or more death investigations in the course of the war on terror for detainees at the hands of their U.S. captors.

Our military doctrine has long been, and I quote from the Department of the Army pamphlet, "The United States abides by the laws of war in spirit and letter. Cruelty on enemy prisoners is never justified."

Twenty-eight years in the military taught me there are two indispensable aspects to military good order and discipline. They are the chain of command and the concept of accountability. Accountability means that you can delegate the authority to take an action, but you may never delegate the responsibility for that action. Young, fresh-caught judge advocates know that Government lawyers cannot hide behind their adviser role to evade accountability for the actions that they recommend.

The value of the chain of command is that what starts at the top of the chain of command drops like a rock down to the bottom of the chain of command, and subordinates execute the orders and adopt the attitudes of their superiors in the chain of command. It has always been thus, and that is the way we want it to be.

Government lawyers, including Judge Gonzales, let down U.S. troops in a significant way by their ill-conceived advice. They increased the dangers that they face. At the top of the chain of command, to coin a phrase that we have heard in the past, they set the conditions so that many of those troops would commit serious crimes. Nomination to Attorney General is not accountability.

Only recently, in the face of the confirmation process, has the administration attempted to undo the damage. I have three thoughts on that:

One is that I applaud the administration for doing that.

The second is that it is a little late. We have had several years under the other policy.

And last is that I do not see this as an exoneration of Judge Gonzales; rather, it is somewhat of an indictment. It is an acknowledgment of error. Damage has been done, but it is never too late to do the right thing. If Judge Gonzales goes on to be the chief law enforcement officer in the United States after his involvement in this, we will have failed to undo a wrong, but will have only exacerbated it.

We are at a fork in the road. Somewhat ironically, this nomination has given the United States Senate an opportunity to tell the world what you think about those issues. What you do here will send a message, good or bad, to the world and, importantly, to American armed forces and fighting men and women.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Hutson appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Dean Hutson.

We turn now to Mr. Douglas Johnson, executive director of the Center for Victims of Torture in Minneapolis. Previously, he served as a consultant to the Human Rights Organization in Latin America and to UNICEF and to World Health Organization.

We welcome you here today, Mr. Johnson, and look forward to your testimony.

STATEMENT OF DOUGLAS A. JOHNSON, EXECUTIVE DIRECTOR, THE CENTER FOR VICTIMS OF TORTURE, MINNEAPOLIS, MINNESOTA

Mr. JOHNSON. Thank you, Mr. Chairman and members of the Committee, for the opportunity to be here to testify.

It is a particular pleasure to testify to you, Senator Specter, because you were the primary champion of the Torture Victims Protection Act, which a couple of American clients of the Center for Victims of Torture worked with you on that and are great admirers of your commitment to human rights. The Torture Victims Protection Act has been welcomed by human rights advocates around the world as a model of a new tactic in the arsenal of torture prevention.

The Center for Victims of Torture was established in 1985 as the first specialized institution in the United States to provide rehabilitation to victims of Government-sponsored torture and to work for abolition of torture. As CVT's executive director for 16 years, I offer to you our expertise and experience about the realities of torture.

It is CVT's policy, however, not to comment on the qualifications of specific individuals for Government posts, but I think it is appropriate to be here because, in the general global human rights effort and global human rights campaign, there is a particular focal point on the Minister of Justice or the Attorney General of countries who have at least three important roles in the prevention of torture:

First, is to establish policies and procedures that diminish the incentive to use torture, such as regulating the role that confessions play in the overall administration of justice;

Secondly, to prosecute or sanction torturers or persons or ill treat detainees;

And, third, to eliminate both the reality and the appearance of impunity among interrogators.

These roles require a clear understanding of what torture is and why it is wrong, as well as very practical ideas on how to prevent its use.

I just want to note that the position against torture has been a very strong bipartisan effort by this Congress and by administrations for many years. And one very notable measure of that was that the Convention Against Torture was passed by this Congress, and no other human rights treaty has been ratified so promptly. That is an important measure because torture has a very human cost.

The Center for Victims of Torture has provided care for more than 7,500 people from 60 different nations. Although there are different physical symptoms associated with the form of torture they endured, there is a remarkably common pattern of profound emotional reactions and psychological symptoms that transcends cultural and national differences. The effects can include, but are not limited to, besides organ failure and death, emotional numbing, depression, disassociation, depersonalization, atypical behavior, such as impulse control problems and high-risk behavior, psychosis, substance abuse, neurophysiological impairment such as the loss of short-term and long-term memory, perceptual difficulties, the loss of ability to sustain attention or concentration and the loss of the ability to learn. The main psychiatric disorders associated with torture are post-traumatic stress disorder and major depression.

While it is important to recognize that not everyone who has been tortured develops a diagnosable mental disorder, it is equally important to recognize that for many survivors the symptoms and aftereffects of torture endure for a lifetime. Torture is said to be one of the most effective weapons against democracy as survivors usually break their ties with their community and retreat from public life. And in that regard, I would like to acknowledge the presence of a number of victims of torture here in the room today and the organization they have pulled together called TASC, which represents a counter to that often frequent retreat from public life.

Now, the memoranda written by and also apparently solicited by White House Counsel Gonzales are replete with legal errors, which the other two members of the Committee will describe, but also, we believe, with political miscalculations and moral lapses. They disregard the human suffering caused by torture and inhumane treatment. They are based on faulty premises, even fantasies about the benefits and payoffs of torture. What is striking about all of these memoranda is the lack of the recognition of the physical and psychological damage of torture and inhumane treatment.

The assumption behind the memoranda, and particularly the Bybee memorandum, and the later Report of the Working Group on Interrogation, is that some form of physical and mental coercion is necessary to get information to protect the American people from

terrorism. These are unproven assumptions based on anecdotes from agencies with little transparency, but they have been popularized in the American media by endless repetition of what is called a ticking time bomb scenario.

Based on our experience at the center with torture survivors and understanding the systems in which they have been abused, we believe it is important that these discussions not be shaped by speculation, but rather through an understanding of how torture is actually used in the world. From our understanding, we have derived eight broad lessons.

And those are, first of all, torture does not yield reliable information;

Secondly, torture does not yield information quickly;

Third, torture has a corrupting effect on the perpetrator;

Fourth, torture will not be used only against the guilty;

In fact, fifth, torture has never been confined to narrow conditions. Once it is used, it broadens.

Psychological torture results in long-term damage;

Stress and duress techniques are forms of torture;

And, finally, number eight, we cannot use torture and still retain the moral high ground.

The cost to America of abandoning strict opposition to all forms of torture are far-reaching; from the disillusionment and fear of individuals, on the one hand, to complications in our ability to conduct foreign policy on the other. It is up to all of us, as Americans, but particularly to members of the Senate and to U.S. Attorney General, to be clear that torture is a line we will not cross under any circumstances or for any purpose. It is imperative that the Attorney General is in agreement with American values and will use the full scope of American and international law to prevent torture and prosecute torturers.

To that end, I respectfully call on the Senate Judiciary Committee to keep torture on its agenda and to require a routine report from the Department of Justice on its work to stop and prevent the use of torture. I ask the Committee to be vigilant in your oversight until it is clear, in both our tacit and explicit policies, and in our actions, that the U.S. is back on course and is in full compliance with national and international law and American values.

When speaking on the Senate floor in support of ratification of the Convention Against Torture, Kansas Senator Nancy Kassebaum said, "I believe we have nothing to fear about our compliance with the terms of this treaty. Torture is simply not accepted in this country and never will be."

Let us also make it true today.

Thank you.

[The prepared statement of Mr. Johnson appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Johnson.

We now turn to Dean Koh, the dean of the Yale Law School, having been named there earlier, well, in July of last year. He has taught at the Yale Law School since 1985 in international law, served as assistant secretary of state, was a U.S. delegate to the United Nations Human Rights Commission and the U.N. Committee on Torture.

Welcome, Dean Koh, and we look forward to your testimony.

STATEMENT OF HAROLD HONGJU KOH, DEAN AND GERARD C. AND BERNICE LATROBE SMITH PROFESSOR OF INTERNATIONAL LAW, YALE LAW SCHOOL

Mr. KOH. Thank you, Mr. Chairman. Thank you members of the Committee and especially thank you, Senator, for your kind remarks about my family.

Let me say, in particular, Mr. Chairman, we, at Yale Law School, are very delighted to have you in this important constitutional role in our country.

Chairman SPECTER. I am just sorry I was not there to take your course, Dean Koh. I would have been better prepared for the job.

[Laughter.]

Mr. KOH. Thank you. Well, let me give you a little synopsis of what you might have gotten had you taken it.

[Laughter.]

Mr. KOH. As I mentioned, I have twice been in the U.S. Government. I served in the Clinton administration as the assistant secretary for Human Rights. But previously I was in the Reagan administration as an attorney at the Office of Legal Counsel, which is the very office which has generated these memoranda.

Let me say that I do not appear today to advise you on how to vote. Your decision as to whether this candidate deserves confirmation turns on many factors on which you are the experts and may involve qualifications and positions that I have not reviewed.

But I do appear today because I want to comment on Mr. Gonzales' positions regarding three very important issues. I think these are issues of the highest significance in American life, and these are issues on which I do have legal expertise and Government experience.

They are, first, the clear and absolute illegality of torture and cruel, inhumane and degrading treatment;

Second, the nonexistence of the President's constitutional powers to authorize torture and cruel treatment by U.S. officials—what Senator Leahy has been calling the Commander in Chief override. It does not exist as a matter of constitutional law;

And, third, the broad applicability of the Geneva Conventions on the laws of war to alleged combatants held in U.S. custody. This broad applicability has been for the benefit of our soldiers. The more that we ensure broad applicability of the conventions to others the more our own soldiers are entitled to protection.

With regard to each of these, I think the legal position is clear. As Attorney General, Mr. Gonzales has said that his first allegiance would be to uphold the Constitution and laws of the United States. That would mean he would strictly enforce the laws banning torture, he would strictly enforce the ratified treaties regarding torture and the Geneva Conventions, and he would ensure that the President abides by the constitutional principle of checks and balances. But I think more fundamentally he has to assure that no one is above the law, including the President, and that no one is outside the law, whether they are an enemy combatant or held in a place like Guantanamo or outside the United States.

And I think that there has been a concern raised about Mr. Gonzales' record and which continues through the hearing today. It is that some of the statements he has made and some of the things that he has tolerated have created the impression that the President is above the law or that certain individuals live outside the law as extralegal persons because they are called enemy combatants or because they are being held in rights-free zones such as Guantanamo.

Let me just address these three issues, starting first with the torture memo—the Bybee memo.

As you mentioned, Senator Specter, I presented the United States report on our compliance with torture in Geneva in 1999 and 2000. And at that presentation, I told the United Nations, as a country, we are unalterably committed to a world without torture. We had cleared through all the agencies at the U.S. Government a statement of zero tolerance, of zero tolerance policy. And the real question is how did we move from the zero tolerance policy of 2000 to the permissive environment that seems to have been created in the last few years.

Now, I think the answer is partly shown by the Bybee memo, and having worked in the Office of Legal Counsel, I am very sympathetic with the pressures that people are under in drafting opinions like this. Nevertheless, in my professional opinion, as a law professor and a law dean, the Bybee memorandum is perhaps the most clearly legally erroneous opinion I have ever heard. It has five obvious failures.

First, it asks, "How close can we get to the line," when, in fact, it is supposed to be enforcing a zero tolerance policy.

Second, the way that it defines torture would permit many of the things that Saddam Hussein's forces did during his time as not torture. Just for example, the White House website lists that beating, pulling out of fingernails, burning with hot irons, suspension from ceiling fans were all acts of torture committed by Saddam Hussein's forces. Nevertheless, under the Bybee memorandum, if they did not cause serious organ failure or death, they would not constitute torture.

Third, as I said, the memo grossly overreads the President's constitutional power to order torture. If the President has a constitutional power to order torture in the face of a criminal statute preventing it passed by Congress, it is not clear why he could not similarly order genocide or other kinds of acts.

Fourth, the memorandum says that executive officials can escape prosecution if they carrying out the President's orders as Commander in Chief. This is the "following orders" defense which was rejected in Nuremberg and is the very basis of our international criminal law.

And, finally, an important point, the Bybee memo essentially is very tolerant with regard to cruel, inhuman or degrading treatment. A convention against torture, and cruel, inhuman and degrading treatment is read to permit various kinds of cruel, inhuman, and degrading treatment. And even today there was some lack of clarity in Mr. Gonzales' answer about whether U.S. officials are barred from cruel, inhuman or degrading treatment.

I think that if this kind of reasoning is left unchallenged, it could be used to justify atrocities of the kind we saw at Abu Ghraib, where lower executive officials felt a license to be cruel, inhuman or degrading to people in their custody.

Now, some have said that the August 1st memo is a lawyer setting out options for their client. But I think, as lawyers, those of you who have served know that if a client asks a lawyer to do something which is flatly illegal, the answer is, no; not here is how we can justify it.

So I believe that this is a stain on our law, a stain on our national reputation, a legal opinion that is so contrary to a zero tolerance policy, which has a definition of torture that would have exculpated Saddam Hussein, that reads the Commander in Chief power to remove Congress as a check on torture that turns Nuremberg on its head and that gives Government officials a license to be cruel is wrong from the beginning.

If the counsel for the President had received such an opinion, you would have expected him to do at least one of two things: First, reject it on the spot and send it back or, second, send it to other parts of the Government and have them give a second opinion, particularly the State Department, which I believe, following the policies in the U.S. Report on the Convention Against Torture, would have said that the opinion is flatly wrong.

Instead, what happened, as you heard, was that that opinion was allowed to become executive branch policy, was incorporated into the DOD working group report, and remained as executive branch policy for some two and a half years, during which time I believe that a permissive environment was inevitably created.

Now, I welcome the very strong statements that Mr. Gonzales made in finally repudiating this analysis. But I think he also was begging the question of whether the parts of the memo that were not explicitly replaced, namely about the President's constitutional powers to order his subordinates to commit legal—to commit torture, should be repudiated. At the beginning of the testimony, Mr. Gonzales said those parts had been withdrawn; by the end, he said he repudiated it. I think he should say, I rejected—I reject them because they are legally wrong and they never should have been put out there in the first place. I do not think our Nation's chief law enforcement officer should tolerate ambiguity on a matter that is so central to our national values. I think that Mr. Gonzales should repudiate all elements of the memorandum, ask for withdrawal of the Defense Department's working group report, and I also agree with Mr. Johnson that it is a very good idea to have a regular report about what we are doing to root out torture within the executive branch.

With regard to the commander in chief power, a very simple point. The statement is made, "Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's vesting of the commander in chief power in the President." If that were strictly true, large sections of the Uniform Code of Military Justice would also be unconstitutional. I think that is an over-broad position, I do not think it is sustainable as a matter of law, and I think it should be repudiated definitively.

Remember that the Attorney General has a duty not just to serve his client, but to preserve the Constitution's system of checks and balances. I think that to ensure that the President is not above the law, Mr. Gonzales should repudiate the constitutional theory that is put out there. A very simple question which you could have asked him today was—

Chairman SPECTER. Dean Koh, your red light is on. If you would conclude your current thought, we would appreciate it.

Mr. KOH. A simple question you could have asked him today is, Is the anti-torture statute constitutional? If the answer to that question is yes, then it cannot be overridden by the President's commander in chief powers.

And the final thought, the Geneva Conventions, I believe that this point has been made very well. The Geneva Conventions do apply broadly. And the fact that the administration chose, I think, through Mr. Gonzales's recommendation not to apply the Geneva Conventions in Afghanistan was an error which I think that Secretary Powell properly challenged.

Thank you.

[The prepared statement of Mr. Koh appears as a submission for the record.]

Chairman SPECTER. Thank you, Dean Koh.

We will now proceed with a round of 10 minutes each. It is late in the afternoon and we have had extensive testimony from Attorney General-designate Gonzales dealing with the specifics of the issues which he faced, which the country faced. And now, with three individuals who are more, perhaps, academicians, or at least in part academicians, we could explore a subject which we have not taken up, a delicate subject, and that is the issue of a so-called ticking bomb case on torture.

There are some prominent authorities, and I do not subscribe to this view but only set it forth for purposes of discussion, that if it was known, probable cause, that an individual had a ticking bomb and was about to blow up hundreds of thousands of people in a major American city, that consideration might be given to torture. Judge Posner, a very distinguished judge on the Seventh Circuit has commented that this is worth considering, or perhaps even more positively than that. Professor Dershowitz has written extensively on the subject, has come up with a novel idea of a torture warrant. And there runs through some of the considerations on interrogation techniques, not to be decided by the people at the base level but when dealing with higher officials trying to get something out of the ranking al Qaeda person, that an escalation of tactics ought to be left to more mature authorities, perhaps even—well, higher authorities in the Federal chain of command.

The Israeli Supreme Court has opined on the subject by way of dictum. As they put it, recognizing in certain circumstances Israeli interrogators may be able to use torture—not saying they ought to, but those who do may be able to employ the defense of necessity to save lives of a so-called ticking time bomb or other such imminent threat.

Dean Koh, start with you. Are considerations for those tactics ever justifiable even in the face of a ticking bomb threat?

Mr. KOH. Well, Senator, you are a former prosecutor. I think that my approach would be to keep the flat ban, and if someone, the President of the United States, had to make a decision like that, someone would have to decide whether to prosecute him or not. But I do not think that the answer is to create an exception in the law. Because an exception becomes a loophole and a loophole starts to water down the prohibition.

I think what we saw at Abu Ghraib is the reality of torture. I have had the misfortune to visit many torture dens in my life. Many of them, I am sure, were justified on emergency national security concerns, and at the end of the day, you have places where they are just places where people are routinely mistreated. And not for any broad national security purpose.

Chairman SPECTER. That sounds essentially like the hypothetical question defense—if the President does it, then it is a prosecution matter. I do not know about that.

Dean Hutson, what do you think? Ever? On occasion? To even consider that?

Admiral HUTSON. I agree with Dean Koh that it is always illegal. Now, you may decide that you are going to take the illegal action because you have to, but two points: One is that that is not necessarily the situation—or, not “necessarily,” it is not at all the situation we are talking about here with Gitmo or Abu Ghraib or other prisons. There is no implication that there was a ticking bomb anywhere. The other is that you pose a question in which there is by definition in the question not sufficient time to use more effective methods of getting information—the good guy/bad guy, rewards and punishments, those kinds of things where you are much more capable of getting valuable information.

A third difference is that, by the hypothetical, you are dealing with a particular individual. You are not dealing with 550 people at Gitmo or however many people at Abu Ghraib. So that it is an interesting academic question. We have all debated it. But I do not think that it is the sort of question that the Bybee amendment—or, excuse me, the Bybee memo, for example, addresses.

Chairman SPECTER. Dean Hutson, there is no doubt that it was not involved at Abu Ghraib for any of the issues which we have taken up. But anybody who has watched on C-SPAN since 9:30, we are off on a long day, might deserve a little academic discussion even if it is only highly theoretical. And it is pretty tough to advocate torture under any circumstances, even with a ticking bomb, so I can understand the reticence of the witnesses because I have the same reticence.

What are your views, Mr. Johnson?

Mr. JOHNSON. Well, the Israeli Supreme Court concluded that the necessity was a defense in prosecution, it could never be turned on its head to be made a policy moving forward. And of course the Bybee memo has the same problem. It takes a question of law about how to prosecute someone for torture and turns it into proactive advice on what is allowed and what is not. And that is the moral problem with that Bybee memorandum.

On the specifics of the ticking time bomb, I think that it is very overblown in our imaginations and it is very right with what I could only call fantasy and mythology. The number one issue, as

I said, is that torture is unreliable to get information. We look at our clients. Nearly every client we had confessed to something. They confessed to some crime, they gave up some information, they gave up the name of an innocent friend. What they said was, I would do anything, I would say anything to get it to stop. And one of the major problems with torture from a legal perspective, and especially from an interrogation perspective, is it produces so much extraneous information that it actually distracts from good investigation.

But secondly, the second part of this which is often the question of fantasy, is that we have to do it because the bomb will go off in the next hour, and if I do not agree for the next hour, it will go off in the next five minutes—would you do it there? It actually takes time to make someone break. It takes strategy to make someone break. One of the very disturbing things I find in the memorandum is to know that some of the techniques that were used in Gitmo, such as water-boarding, were being used on our own troops, supposedly to train them to resist torture. I have talked to American soldiers who have gone through that training and who have been required to be engaged in that kind of activity, and they tell me that it has taken them 15 years of therapy to get over it.

So I am very disturbed to think that it is any part of the practice of our soldiers at this point, in this day and age. But at the same time, we know it happens. I know of stories in Argentina, where supposedly the professional criminals go through training to resist torture over the 48 hours they need before they get access to their lawyer. Everything I have heard about the operational sophistication and the commitment of al Qaeda would lead me to believe that they go through the same training. So the notion that torture acts quickly to deal with the ticking time bomb is also a fantasy.

Chairman SPECTER. Well, it may well be fantasy, and we hope that it never arises.

Mr. KOH. Senator, might I just add—

Chairman SPECTER. Excuse me, I am in the middle of a sentence, Dean Koh.

Let us hope it is fantasy. And as we have examined interrogation techniques, we really have not gotten into the subject matter today of the suspect as—or the person subject to interrogation as a relevant factor, or the quality of the information that that person might have, or the sophistication and judgment if it went to the Secretary of Defense or the Under Secretary, where there is more time to have an interrogation technique. And let us hope that no President ever has to face the decision or any official at any level, but there are gradations and complications here which do not provide any easy answers far beyond the scope of what we have heard today.

My red light is on, so I ask no more questions. But you were in the middle of a sentence, Dean Koh.

Mr. KOH. I was just saying that the new OLC opinion of last week withdraws the necessity defense, and so it would not function to permit the invocation of necessity as a reason for torture.

Chairman SPECTER. Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman.

Admiral Hutson and Dean Koh and Mr. Johnson, I want to thank you for being here. You have sat through a long day. I hope, though, it has been of interest.

I would also hope—and I apologize for my voice, which is just about gone—I would hope that the Senators would read the material you have submitted. I have read it; I found it fascinating to go through. And I have learned from it. I will be sending most of it around to members of my staff. Those who have not read it, they might read it. It is well worthwhile.

And Dean Koh, you heard Judge Gonzales's testimony today. I asked him a number of questions regarding his views of executive power. I asked him if he agreed with the legal conclusion in the August 1, 2002, memo by Assistant Attorney General Jay Bybee—the President has authority as commander in chief to suspend the torture laws and immunize those who commit torture on his order.

I never really did get a yes or no answer on that. But can a President override our laws on torture and immunize the person who did the torture?

Mr. KOH. No.

Senator LEAHY. That is a good answer. I happen to agree with it.

Now, I asked Judge Gonzales about the administration's claims regarding enemy combatants. The President has claimed unilateral authority to detain a U.S. citizen whom he suspects of being a terrorist, hold him indefinitely, incommunicado, no access to a lawyer, and so on. He says he has this authority with respect to U.S. citizens both abroad and here. Judge Gonzales said the Supreme Court upheld this in *Hamdi*. Of course, in *Hamdi* the Court did not decide that, they simply reached the conclusion that the Congress had authorized this.

Do you believe that the President has authority as commander in chief to lock up a U.S. citizen arrested in the United States, and hold him indefinitely without access to counsel or the courts?

Mr. KOH. No, and not when a civilian court is open. I was surprised by the answer, because I think that if you look at the *Hamdi* decision, the opinion that he was citing, Justice O'Connor's opinion, is a plurality decision. It does not say that he has a right to hold someone indefinitely. That very issue is being litigated before the District of South Carolina in the *Padilla* case on remand. And also, I think at the oral argument in those cases, Justice Stevens asked the solicitor general, How long would you hold the person? And the answer was, For the duration of the war. And he said, What if it was a hundred years war? And then the Government lawyer backed away from the assertion.

So I do not think they were claiming at the time that there was a right to indefinite detention, and I do not think the Supreme Court gave them a right to indefinite detention.

Senator LEAHY. Following a question one of the other Senators asked, let us say the President followed Secretary Powell's advice—declared the Geneva Conventions applied to the conflict in Afghanistan. What effect would that have had on our ability to prosecute captured al Qaeda and Taliban fighters for war crimes?

Mr. KOH. Well, I think what was proposed, which I think would have made sense, was for everyone to get a hearing, as required

by Article 5 of the Geneva Conventions. Everyone who is taken into captivity ordinarily gets a hearing under the Geneva Conventions, and thousands of these hearings have been given in Iraq and were also given in Vietnam. That is what was not done. I think, particularly with regard to the Taliban, they were acting as essentially the army of Afghanistan, and I believe that they should have been given POW status. I think that there was some confusion in the questioning today about whether, quote, Geneva applies or not. Geneva may apply, in the sense that everybody gets a hearing to find out what their status is, but some of them may not be POWs.

Senator LEAHY. Well, that is what—thank you. That is what I was looking for. We follow certain standards. Whether the other side does or not, we do. We need to comply with Geneva whether our enemies do or not. Is that not the logic of Geneva?

Mr. KOH. Broad applicability is the logic. We have been the ones who are saying it should apply broadly because we want our troops to have a strong presumption of protection. Afghanistan was the first time in which we said that it did not apply to a conflict. You were also asking questions about rendition. Once it was said that Geneva Conventions did apply in Iraq, there was the danger that people would then be removed from Iraq as a way of bringing them outside of the scope of the Geneva Conventions.

The bottom line, Senator, is we have tried not to create ways in which people can be taken in and out of the protections of the Convention, because that might happen to our troops.

Senator LEAHY. Well, and if we have somebody who is treating our troops inhumanely, or others, we can also eventually bring about prosecutions of them as war criminals, can we not? And there is a lot of tradition of that.

Admiral, the January 2002 draft memo for the President—this was the one signed by Judge Gonzales—argued the war against terrorism is a new paradigm, renders obsolete the Geneva Convention's, quote, strict limitations in questioning of enemy prisoners. But we have talked about the Army Field Manual. That makes it perfectly clear that POWs can be interrogated, is that not correct?

Admiral HUTSON. That is absolutely right, Senator. A couple of thoughts. One is that all the wars are new paradigms when you first start to fight them. You know, there's new weapons systems, there's new enemies, there's new tactics, there's new strategy. So that the fact that it is a new paradigm does not necessarily change things.

The other thing is that the Geneva Conventions place on the detainee an obligation to provide certain information. It does not place on the capturer a limitation on the questions or the numbers of questions or the numbers of times to question. You know, this is not a Miranda kind of situation. You can keep asking questions. It does limit the torture, cruel, inhuman, degrading kinds of ways that you may ask questions. If by "obsolete" Judge Gonzales meant that we are going to have to use more kinds of techniques, harsher techniques, more aggressive techniques, tortuous techniques, then I disagree with him very strongly on that. If he is just saying that we need to throw it over the side because we are dealing with terrorists and we cannot ask any question beyond name, rank, serial number, then he is just wrong on the law. You know, it is one or

the other. He is either wrong on the law or he is advocating techniques that I would not support.

Senator LEAHY. From a military lawyer's perspective, could we have avoided what we see in Afghanistan, Iraq, and Guantanamo?

Admiral HUTSON. Absolutely. It goes back, Senator, to what I think I said in my statement, written and oral statement, about the chain of command. You know, those soldiers that we saw in the pictures, the people that are being investigated otherwise have picked up the attitude that started at the top of the chain of command. And if the attitude that started at the top of the chain of command was, they may be terrorists, they may be evildoers, but they are human beings and we will treat them with the dignity and respect that Americans treat human beings, we would not have seen what we saw. Rather, the attitude at the top was, they are terrorists so different rules apply—without really explaining what the rules were that applied. And as Dean Koh said, they ended—or I guess Mr. Johnson—they ended up in this never-neverland where nothing applied, and then we saw what happened.

Senator LEAHY. Well, we have some members of Congress in both parties who have suggested we have some kind of an independent, truly independent, investigation of what happened here. Is that your position, too?

Admiral HUTSON. Absolutely, it is, Senator. Judge Gonzales referenced several times the number of investigations that are going on, as if that somehow fixed the problem. And, you know, if 10 investigations is good, then 20 would be even better, and 30 better than that.

That is not the point. The point is that we need an investigation, a comprehensive investigation not unlike the investigation that perhaps Admiral Gammon did in the Challenger disaster, in which the investigating body has subpoena power, the power to administer oaths, which raises the specter of perjury, and is told to go wherever their nose leads it—not to look at the few bad apples, you know, atrocities have been committed by a few bad apples, now go out and demonstrate how that happened. And if it goes to the E ring, then it goes to the E ring; and if it goes to the Office of Legal Counsel, then it goes to the Office of Legal Counsel. But when you put them in a box with a series of investigations to look at junior enlisted personnel, you are never going to find what happened.

Senator LEAHY. Thank you. And Mr. Chairman, you asked the question of Mr. Johnson I was going to ask, basically how effective torture is. And I think he gave a very good answer from his experience. Most people being tortured are going to say whatever you want to stop the torture.

Thank you, Mr. Chairman. And again, I compliment you for the hearing you held today.

Chairman SPECTER. Thank you very much, Senator Leahy.

Senator Cornyn?

Senator CORNYN. Thank you, Mr. Chairman.

Mr. Johnson, Mr. Koh, Mr. Hutson, thank you for being here with us today. I wanted to just ask whether you agree or disagree with this proposition—to begin with, and then we will get into more questions.

Do you agree or disagree that all lawful means to gather actionable intelligence that is likely to save American lives should be permitted?

Let me say that again. Do you agree or disagree that the United States Government should use all lawful means to gather actionable intelligence that is likely to save American lives? Dean Hutson?

Admiral HUTSON. I agree.

Senator CORNYN. Mr. Koh?

Mr. KOH. I agree with "lawful means," not including torture or cruel, inhuman, or degrading treatment.

Senator CORNYN. Exactly. That is implicit in the question, but thank you for being specific.

Mr. Johnson?

Mr. JOHNSON. I agree, and my concern is that there has been such a fascination with the supposed effectiveness of forms of torture and duress that all lawful means in fact have not been used.

Senator CORNYN. But as far as the proposition goes, "all lawful means," as qualified—as amplified, I should say, by Dean Koh and you, Mr. Johnson, and Dean Hutson, you would agree with that proposition, would you not, sir?

Mr. JOHNSON. Yes.

Senator CORNYN. Well, that is the thing. I think we all agree with that. I mean, certainly we do on the Committee, and as I heard Judge Gonzales testify today, that is what he said his position was and what he believed the President's position was.

But let me get to an area where maybe there is—well, I know there is disagreement because we have already talked about it some here today, not with you, but these witnesses. But first of all, and I would like to maybe start with Dean Koh and then Dean Hutson and then ask Mr. Johnson some other questions.

First of all, Mr. Johnson, let me just be—just as a background matter, are you a lawyer by profession, sir?

Mr. JOHNSON. No.

Senator CORNYN. Okay. Well, I will not ask you any legal questions.

Mr. JOHNSON. Please.

Senator CORNYN. It is not every day that you get to ask the legal questions of the deans, of a couple of law school deans. And Mr. Chairman, they would not let me into Yale Law School, so I did not even bother trying to apply, because I was not qualified. So it is a great honor to be here with such—

Admiral HUTSON. We would have been glad to have you at Franklin Pierce Law Center, Senator.

Senator CORNYN. Well, it is great to be here with such distinguished legal minds. But, you know, I asked earlier Judge Gonzales—I think it was—whether lawyers disagree about even the matters as important as what you have testified here today, Dean Koh and Dean Hutson. And we already, I believe, have established that there are legal scholars and international law experts who hold a contrary opinion to the one you have expressed today, for example, Dean Koh, with regard to the applicability of the Geneva Convention to terrorists. Would you concede the point that there are respectable legal scholars who hold a contrary opinion?

Mr. KOH. Yes. And I think that you have to define exactly what you mean—the applicability to al Qaeda, the applicability to Taliban. There is a different nose count on each one.

Senator CORNYN. I understand your distinction. But let us talk about al Qaeda first. But do you—and you take the position that Geneva applies to al Qaeda. Is that correct, sir?

Mr. KOH. I take the position that Geneva applies to people who are captured and a tribunal could quickly determine that someone is al Qaeda. And, as for example in the case of Mousawi, he could then be turned over to a criminal proceeding.

Senator CORNYN. But for example, if there is a status hearing to determine the status of an enemy combatant, and they are determined to be, at that status hearing, a member of al Qaeda, would they be entitled to the protections of the Geneva Convention, in your opinion, Dean Koh?

Mr. KOH. Well, they fall under Geneva, but they are not POWs, and they should then be treated as common criminals and prosecuted.

Senator CORNYN. But nevertheless entitled to humane treatment. Is that correct?

Mr. KOH. Yes.

Senator CORNYN. Okay. And Dean Hutson, do you have a contrary view, or do you take the same position?

Admiral HUTSON. I take the same view. You know, one of the issues, I think, here, Senator, at least in my mind one of the issues here is that—I do not want to sound pedantic, so forgive me, but, you know, law is not practiced in a vacuum. It is practiced in real life. And sometimes, whether or not lawyers agree or disagree about the gray areas in the middle—and I do not think this is necessarily a gray area in the middle—there are other factors, like protecting U.S. troops, that have to be taken into consideration in making the decision about whether or not you are going to apply the Geneva Conventions or the role that the Conventions are going to take. And I think it is naive to say, well—not you are, but that others, naive on the part of others to say, well, we are going to very narrowly limit this because we are clever lawyers and we can figure out a way to get around this. Because I think that that, in the end, risks U.S. troops in this or future wars.

Senator CORNYN. Well, Dean Hutson, let me pursue that just a second. Is it not naive to assume that al Qaeda, people who employ suicide bombing attacks, who attack innocent civilians, will have any regard whatsoever for the international norms of conflict?

Admiral HUTSON. I do not think that they will have any regard for the international norms of conflict, nor do I think that they are suddenly going to say, oh, gee, if we start conducting our behaving in other ways, we will get the benefit of being POWs; if we start wearing uniforms, everything is going to be okay. You know, I do not think it makes a difference particularly one way or the other.

Senator CORNYN. So it would not influence their decision to treat our troops, were they captured, in any particular humane way, or when they complied with the Geneva Convention.

Admiral HUTSON. I think it may. I think Senator McCain said that he thought that it did in Vietnam. I think that it—

Senator CORNYN. Vietnam is—obviously we were at war with another nation state and one that wore a uniform with insignia and they had a chain of command—all the criteria by which the Geneva Convention is determined to apply—did we not?

Admiral HUTSON. They did not necessarily comply with the law of war, which is one of the factors that is determinative of POW status.

Senator CORNYN. Well, let me get back, before we digress too much, to my earlier point, and that is that lawyers disagree. I mean, that is one of the things that attract some of us to the law, either as law professors, as practitioners, or as judges. For example, Dean Koh, you have a colleague at Yale Law School, Ruth Wedgwood, do you not?

Mr. KOH. She has left Yale and gone to Johns Hopkins.

Senator CORNYN. Okay. But at one time she was at Yale. Do you regard her as an expert in international law, including some of the issues we are talking about here, the applicability of Geneva?

Mr. KOH. She is a friend and colleague of mine with whom I often disagree on points of law.

Senator CORNYN. Exactly. That is really my point. And you do know that she has filed—she joined, along with former Carter administration officials, an amicus brief in *Shafiq Rasul v. George Bush* and argued, for example, that the President's conclusion that members of al Qaeda and the Taliban are unlawful combatants is clearly correct.

Therein lies your disagreement, is that correct?

Mr. KOH. But I think you make an important point, Senator, which is disputes among lawyers are often resolved at the Supreme Court. In that case, the Bush administration's position in *Rasul* was rejected definitively by the Supreme Court.

Senator CORNYN. Certainly not on the basis of Geneva Convention applicability?

Mr. KOH. The issue was sent to a habeas corpus proceeding, and Justice Souter, in another opinion issued that day, suggested the question that the issue of Geneva could be raised there.

Senator CORNYN. Sure. And one judge does not make a disposition on a controlling issue of law. You would agree with that, would you not?

Mr. KOH. I think we are moving to a definitive resolution of these issues, but I think that these issues are going to continue to be disputed and resolved in the courts.

Senator CORNYN. Well, let me just mention a group of other distinguished lawyers: Professor W. Thomas Malison, who has written in *Case Western Reserve Journal of International Law*; Professor Alan Rosos, who has written on this subject; Professor Ingrid Dieter; Professor Gregory M. Travaglio—and I hope I pronounced that name correctly. And I will not go through a whole long list. But you would acknowledge that there are others who—other legal scholars, people who have written in this area, who agree with Professor Wedgwood and disagree with you on the application of Geneva to al Qaeda. Would you concede that, Dean Koh?

Mr. KOH. I think the question, Senator, is whether Afghanistan can be removed from the scope of the Geneva Conventions. And I do not know that anybody agrees with that.

Senator CORNYN. So you would not concede that there is a fairly lengthy list of distinguished legal scholarship that holds that al Qaeda fighters are not entitled to the protections of the Geneva Convention? You would not concede that?

Mr. KOH. I think this was a point that was made in your Washington Times op ed quoting Mr. Malinowski from Human Rights Watch. But as I think he pointed out in his letter of response, the danger is an assertion that an entire conflict is outside the scope of the Geneva Conventions. If that were true, then the U.S. soldiers participating also would not enjoy Geneva Convention protections. So I think the solution is to bring all the combatants who are captured in, to give them hearings, decide who are POWs and who ought to be treated as common criminals, and that al Qaeda members could well be among those who are treated as common criminals.

Chairman SPECTER. Senator Cornyn, would you like one more round?

Senator CORNYN. I would like two more minutes and I will be through.

Chairman SPECTER. Deal.

Senator CORNYN. Thank you, sir.

Well, gentlemen, you know, regardless of the disagreement among lawyers on this particular issue with regard to the application of the Geneva Convention, and regardless of whether you say Geneva does not apply or that Geneva does apply but al Qaeda fighters are exempted from the requirement of Geneva's protections with regard to POW status, would each of you—would you agree, Dean Koh, for example, that, you know, some very important lawyers, namely Federal judges, have decided in three different cases that the President's position and Judge Gonzales's position on the Geneva Convention is correct? Are you aware of that?

Mr. KOH. If one of those cases is the *Padilla* case, that case was reversed by the Second Circuit. If another case—

Senator CORNYN. But for lack of jurisdiction, right? And it is not one of the ones I was referring to.

Mr. KOH. And I think you also need to include into the mix Judge Robertson's opinion in the D.C. Circuit, which has in part suspended the military commission proceeding precisely because of the Geneva Conventions. And—

Senator CORNYN. Is that the one that is on appeal right now?

Mr. KOH. Yes. And then—

Senator CORNYN. Well, for the record, the ones I am referring to are the Arnot case, the John Walker Lindh case, the American Taliban—

Mr. KOH. Which is a plea bargain.

Senator CORNYN. Well, I beg your pardon, sir. It is 212 F.Supp.2d 541. It is not a plea bargain. This is the one where he claims immunity from prosecution by virtue of his being protected by the Geneva Convention and a POW, but the court held he was not entitled to the protection of the Geneva Convention.

Mr. Chairman, given the late hour and my commitment to you not to go much farther than a couple of more questions, we will save all these interesting discussions perhaps for a later time. But thank you.

Chairman SPECTER. Senator Cornyn, if Yale had an opportunity to consider your application *nunc pro tunc* and had seen you spar with the distinguished dean of the Yale Law School, I think you would have been admitted, beyond any question. But I do not know that, had you gone to Yale, you would have been the superb questioner that you are today. Senator Leahy and I are sort of chained to the mast—that is the role of being ranking and chairman—but you are a free agent. So your presence here is extraordinarily commendable. And I think, including your introduction, you may have outranked Senator Kennedy on tenure of speeches.

That concludes the hearing. Thank you very much, gentlemen.

[Whereupon, at 6:24 p.m., the hearing was concluded.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

Responses of Alberto R. Gonzales
Nominee to be Attorney General
to the Written Questions of Senator Joseph R. Biden, Jr.

Violence Against Women Act

One in three women in America is physically assaulted by her husband or boyfriend. It is a staggering statistic. And a deep reminder to me day in and day out, that we have not yet won a critical domestic battle – ending violence against women. There is work still to be done. I want to make sure that in your Department of Justice fighting domestic violence and sexual assault will be a high priority, not an afterthought.

As you may know, I consider the Violence Against Women Act my single most significant legislative accomplishment during my 30 years in the Senate. Since the Act became law in 1994, nearly \$4 billion have been spent on programs created by the bill. Since passage of the bill, domestic violence has dropped by almost 50 percent. More than half of all rape victims are stepping forward to report the crime. Over a million women have found justice in our courtrooms and obtained domestic violence protective orders.

But the fact remains that there is still more to be done. Recent crime statistics released by the FBI in December showed that the only crime rate to increase was forcible rape – up 1.4 percent. Last month, the *Washington Post* published a compelling series on the tragedy of maternal homicide – the most extreme and horrendous form of domestic violence. The most common reason for death among pregnant woman is not a heart attack or an accident – it is murder committed by a boyfriend or husband.

We need to work together to pass legislation this session to reauthorize the Violence Against Women Act. I am working on draft legislation with Senator Hatch and Senator Specter – longtime champions on this issue – and want the Department of Justice's serious assistance and support.

1. Can you assure me, Judge Gonzales, that you support reauthorizing the Violence Against Women Act and fully funding its programs?

Response: Yes, I support reauthorizing the Violence Against Women Act. If confirmed as Attorney General, one of my most important duties will be to make sure that Department of Justice resources are marshaled to prevent and reduce violent crime and to provide services to victims of violent crime. If confirmed, I look forward to working with Congress as it moves forward to reauthorize the Violence Against Women Act during the 109th Congress. For Fiscal Year 2005, the President requested approximately \$362,477,000 in funding for the programs administered by the Office on Violence Against Women, and I expect it will be funded at comparable levels in Fiscal Year 2006.

2. In recent history, I've been disappointed in the timing and methods the Department of Justice has used during the legislative process. For instance, the Department of Justice submitted views letters on an important, bicameral, bipartisan DNA bill far too late in the process. Can I have your commitment that under your stewardship, the Department will participate early in the process to reauthorize the Violence Against Women Act?

Response: I appreciate your concern on this matter, and I look forward to working with the Congress as it considers reauthorization of the Violence Against Women Act. It is, in my judgment, always important for the Department to provide its views to the Congress in a timely fashion, and I commit to seek the Administration's early participation in the legislative process to make its views clear to the Congress.

3. An important component of the Violence Against Women Act is the criminal provisions. Should you be confirmed, what steps will your Department take to vigorously prosecute those who cross state lines to commit domestic violence, break protection orders, stalk or sexually assault?

Response: Using the full array of federal statutes to prosecute domestic abusers vigorously would continue to be a priority of the Department of Justice if I am confirmed as Attorney General. In addition to the VAWA statute (18 U.S.C. 2261-2266), federal prosecutors can use federal firearms laws to keep guns out of the hands of persons with misdemeanor domestic violence convictions and domestic restraining orders. I understand that under the Department's Project Safe Neighborhoods (PSN), a number of U.S. Attorneys' Offices have identified domestic violence as their primary gun violence problem and have devoted substantial resources toward prosecution and prevention efforts. At the national level, the Department has supported these districts by providing public service announcements aimed at warning domestic violence abusers about firearm laws as a means of deterrence. In addition, the Department has provided training and materials to federal prosecutors, victim witness coordinators, state judges, and the domestic violence service community on how to prosecute these cases and promote effective prevention and deterrence efforts.

4. As relates to faith-based programming the Department may pursue in the context of the Violence Against Women Act, how will respect for religious views and beliefs be balanced so as to ensure appropriate safeguards and protections for adult and minor victims of domestic violence, dating violence, sexual assault and stalking?

Response: Consistent with President Bush's Executive Order 13279, December 12, 2002, and 28 CFR Part 38 and Sec. 90.3, it is the policy of the Department's Office on Violence Against Women (OVW) that faith-based and community organizations are invited and encouraged to apply for assistance awards. Faith-based and community-based

organizations will be considered for awards on the same basis as other eligible applicants and, if they receive assistance awards, will be treated on an equal basis with non faith-based and community organization grantees in the administration of such awards.

The primary purpose of the VAWA Grant Programs is to enhance the safety of victims of domestic violence, dating violence, and stalking and to hold offenders accountable. To ensure victim safety and to guarantee that victims' views and concerns are addressed, all applicants for OVW programs are required to provide documentation that demonstrates they have consulted and coordinated in a meaningful way with nonprofit domestic violence programs. In addition, all OVW grantees are monitored to ensure appropriate use of government funds.

As you may know, in October 2002, Congress passed a law to create an independent and separate Office on Violence against Women (hereinafter the "Office") in the Department of Justice, a proposal that I first introduced in the Senate in March 2001. I championed this measure because I know that a separate office means that the Office's leadership and agenda cannot be marginalized or pushed to a back office. A separate office means that violence against women issues stay at the forefront and that its Director – appointed by the President and confirmed by the Senate – will have an office with the stature and status to use it as the "bully pulpit" on domestic violence issues that I intended when I authored the Violence against Women Act.

Despite the law's clear language and intent, immediately after its passage the Department of Justice attempted to "reinterpret" the law's scope and delayed implementation. After some back and forth with the Department and with the Attorney General directly, the law was properly construed, and the Office made independent. As directed by the legislation, the Office is now its own entity outside of the Office of Justice Programs, and the Director of the Office has a direct line of reporting to the Attorney General.

5. **Should you be confirmed as Attorney General, do I have your firm commitment that the Department of Justice will continue to abide by the law and maintain a separate and independent Office on Violence against Women established outside the Office of Justice Programs with the Director of the Office reporting directly to the Attorney General?**

Response: If I am confirmed, I pledge to abide by this law as passed by the Congress. I am informed that the transfer of OVW out of OJP has been completed. If confirmed, I will support OVW in fulfilling its responsibility for all activities authorized under the Violence Against Women Act of 1994 and 2000 and have no plans to change the current organizational structure of this program.

Immigration

Sadly, domestic violence and sexual assault know no boundaries. Violence against women is an international problem. Recent data from a World Health Organization study on domestic violence found that as many as 70 percent of women surveyed reported experiencing physical and/or sexual violence by an intimate partner during their lifetime. In many parts of the world violence against women and girls is manifest in honor killings, human trafficking, female genital mutilation and the rape of women in situations of armed conflict.

In light of these stark conditions, I want to get your views on gender-based asylum. While an immigration judge granted gender-based asylum and the Department of Homeland Security urged issuance of regulations permitting gender-based asylum, Attorney General Ashcroft has still not issued a decision on this pending issue in the case In re: Rodi Alvarado.

Granting Ms. Alvarado asylum would protect a narrow but compelling class of women and girls fleeing gender-based persecution. (Indeed, in Canada, which has recognized gender-based persecution as a basis for refugee status since 1993, gender-based claims consistently constitute only a tiny fraction of overall asylum claims, never more than two percent of the total.)

6. Should you be confirmed as Attorney General, will you work with the Department of Homeland Security to issue final regulations granting Ms. Alvarado, and other abused immigrant women and girls like her, asylum in the United States?

Response: I am aware of the general issues presented in Matter of R-A- which is currently pending on review before the Attorney General. Also, I understand that the proposed rules that were published for public comment on December 7, 2000 have not been finalized. If confirmed, I would review the issues relating to domestic violence and gender-based claims with great care. Since the enactment of the Homeland Security Act, any regulatory amendments will need to be coordinated closely with the Department of Homeland Security. The Asylum Office is now part of that Department, while the decisions regarding asylum claims for aliens in removal proceedings are made by the immigration judges and the Board of Immigration Appeals, which remain under the Attorney General's authority.

Federal Support for State and Local Law Enforcement

In 1993, crime rates throughout the nation were at an all-time high. In order to respond to this crisis, Congress passed the 1994 Crime bill, which, among other things, established a stream of funding for state and local law enforcement, including funding to hire new local police officers through the Office of Community Oriented Policing Services (COPS). This program, which has funded over 118,000

community policing officers is supported by every law enforcement group in the country, mayors, sheriffs, police chiefs, and criminal justice experts throughout the nation.

This program has been credited with reducing crime rates from historically high rates in 1993 to the all-time lows that we have today. In fact, Attorney General John Ashcroft called it a “miraculous” success. Rather than build on these successes, however, the Bush Administration has cut Department of Justice funds to assist state and local law enforcement by 50% over the past three years, including calling for a complete elimination of COPS hiring funds. While crime rates remain low, many police chiefs are reporting troubling crime trends, such as increased gang violence. At the same time, the FBI has significantly cut its number of investigators of violent crime, drugs, white collar crime, and so on.

Local governments are starting to feel the pinch. Local budget problems are forcing police chiefs to abandon proven crime prevention programs and even lay-off officers. Moreover, with increased homeland security duties, overtime expenses are placing further strains on local agencies and depleting local budgets.

Our local COPS are on the front lines in our efforts to fight crime and prevent terrorism. In your speech to the ABA last February, you noted that terrorists have already infiltrated our communities, and many experts have pointed out that community policing programs will be critical in the fight against terrorism. Nevertheless, the Bush Administration is cutting the very program that helps local agencies hire new officers and expand community policing.

I understand that the Administration is spending money for “first responders” equipment and training, but there is no substantial funding set aside for hiring more officers. Although necessary, this equipment funding does nothing to prevent a terrorist attack. Indeed, ask any police chief and he will tell you that new radio equipment and Haz Mat suits are great, but they are concerned that there are fewer and fewer cops on the beat.

7. As Attorney General you will be the “Top Cop” in the land. As such, I would like to know what you envision as the appropriate role for state and local law enforcement, and what do you see as the federal government’s responsibility to assist state and locals in their efforts with respect to terrorism and crime prevention.

Response: I have tremendous respect for our state and local law enforcement communities, who are America’s first line of protection. If I am confirmed, it will be critical to ensure that state and local law enforcement have the tools they need to perform their jobs most effectively. We must partner and coordinate with law enforcement for their input on chronic crime concerns and the latest crime trends to provide resources—from training and equipment to information sharing—based on state and local needs and conditions. In this way, initiatives will be built by those who know their community’s

crime and public safety needs, and will reflect America's best crime enforcement, reduction, and prevention practices.

8. **Do you agree with the International Association of Chiefs of Police, the Fraternal Order of Police, the National Sheriffs' Association, the National Association of Police Organizations, the United States Conference of Mayors, and other groups that the Office of Community Oriented Policing is a critical component of state and local law enforcement efforts and that the program should be fully funded in this post 9-11 era?**

Response: Through the Community Oriented Policing Services (COPS) hiring programs, 118,000 community police officers have been added to our nation's streets and schools. Thus, the goal of funding 100,000 officers has been achieved. The Department's COPS Office continues to invest in efforts to improve public trust with law enforcement, fight methamphetamine, assist the development of law enforcement infrastructure in Indian Country, and increase community policing training and technical assistance.

9. **I hope that you will agree to join me in meeting with state and local law enforcement on a regular basis. Will you commit to meeting with representatives from state and local law enforcement at least quarterly?**

Response: Combating terrorism and violent crime requires unprecedented cooperation and coordination among all levels of law enforcement -- federal, state, and local officials. No individual state or municipality alone can succeed in preventing acts that threaten public safety and national security. In order to provide for the safety and security of the American people, I commit to continuing and strengthening the Department's collaborative efforts with state and local law enforcement agencies if confirmed. As part of that commitment, I will meet often, and at least quarterly, with representatives from state and local law enforcement.

Drug Investigation Resources

I am troubled that with the increased focus on counter-terrorism investigations there has been a sharp decline in the resources devoted to drug investigations. The General Accounting Office (GAO) has reported that since September 11th, about 40 percent of the positions allocated to FBI field offices' drug programs have been reallocated to counterterrorism and counterintelligence.

In 1998, the Bureau opened 2,420 drug investigations. Contrast that to 2003 when the FBI opened just 587 drug investigations. That's more than a 75 percent decline. In addition, there are fewer drug squads in FBI field offices and the number of FBI agents supporting the High-Intensity Drug Trafficking Area program has been reduced. Finally, the FBI's national shift toward counter-terrorism has hit U.S. Attorneys offices in non-urban areas particularly hard, where a bigger chunk of their agents have been pulled off drug and violent crime investigations.

In one respect, that's exactly how it should be. Director Mueller was right to refocus the Bureau, and the FBI needs to be looking at preventing terrorist acts first and foremost. That's the number one priority for the FBI and the rest of law enforcement. But if we want realistic homeland security, we can't take our eye off the ball: we can't let new security priorities undermine existing law enforcement missions including drug cases. I have always believed that the flood of illegal drugs onto our streets is not just a threat to Wilmington or Chicago or Los Angeles, but ultimately a threat to our national security. And, quite frankly, the FBI pullout has been made worse by the Administration's refusal to push for adequate funding for the DEA. DEA simply hasn't gotten the budget increase it really needs to do its job.

10. **Do you agree with the conclusion reached by the GAO that drug investigations are suffering from the Justice Department's post 9/11 shift in priorities?**

Response: As I said in my hearing, the Department of Justice is different from other agencies, in that justice has to be achieved everywhere, which means that we have to protect our country against terrorist attack and continue our fight on the war on drugs. I agree that drug proceeds can finance terror, so fighting drugs can be a real part of the war on terror. As a nominee for Attorney General, I am not yet in a position to evaluate the history or quality of the FBI's drug investigations in detail. I am aware that the FBI has been required to refocus resources in order to fulfill its important role in the war on terrorism, and I believe the FBI must work closely with its federal, state, and local law enforcement partners to build and participate in multi-agency task forces as force multipliers. Among other strategies, this can and should be accomplished by assisting in the training of state and local partners so they can assume a greater share of this law enforcement role and by effective collaboration with state and local law enforcement, such as through law enforcement advisory groups that bring together federal, state, and local officials. If confirmed I would work with the FBI and this Committee to ensure that adequate resources are devoted to ensure that the FBI's anti-drug program and its participation on these task forces are sustained at the levels necessary to respond to the real and continued threat posed by illegal drug trafficking.

11. **What specifically will you do as Attorney General to make sure that drug investigations do not get lost in the shuffle of our post-9/11 world and ensure that the men and women of the DEA have the resources that they need to do their job?**

Response: The men and women of the Drug Enforcement Administration (DEA) have a proven record of success in targeting and dismantling drug trafficking organizations, incarcerating their chief operatives, and reducing the supply of drugs to our society. During the past two years, DEA has dismantled or disrupted 15 major drug trafficking organizations. In one case alone – Operation Busted Manatee – DEA took down the Caribbean cocaine supply chain that accounted for 10 percent of the cocaine that made it to America's streets. The result of these and other efforts is record reductions in drug use

among 8th, 10th, and 12th graders – the first drop across all three grades in a decade. If confirmed, I would seek the resources necessary to build upon that good record of success – success that is critical to the future and security of America.

Gun Violence

- 12. For the past four years, the Administration promoted Project Safe Neighborhood as the strategy to reduce gun violence and credited the program for a 76 percent increase in federal firearm prosecutions. More than \$500 million was devoted to the initiative. And yet, without a word of protest from the Department of Justice, the Congress eliminated all direct funding sought for the program. If confirmed as Attorney General, do you intend to continue Project Safe Neighborhood initiative, and if so, how do you intend to fund the program?**

Response: If confirmed, I fully intend to continue Project Safe Neighborhoods (PSN). Although the Administration was disappointed that Congress failed to fund some aspects of PSN, given the success the program has enjoyed in increasing firearms prosecutions, the Department of Justice's efforts to enforce federal firearms laws will not be adversely affected by the elimination of the funding you reference. Congress provided funding for federal PSN efforts, including the federal prosecutors and investigators dedicated to the program. Congress failed to fund only certain elements of PSN, specifically research and State and local grants. My understanding is that each of the 94 PSN task forces throughout the United States will retain the dedicated Assistant United States Attorneys designated as firearms prosecutors, and Congress provided funding to the Bureau of Alcohol, Tobacco, Firearms, and Explosives for its PSN-related efforts. I am informed that the impact of the failure to fund certain elements of PSN for fiscal year 2005 will be minimal because the Department of Justice had only recently awarded PSN funding from the fiscal year 2004 appropriation, and these funds should last through the current fiscal year.

- 13. From my review, the vast majority of recent federal firearm prosecutions appear to be aimed at either (1) increasing the punishments for felons discovered in possession of guns; or (2) charging criminals who have already used guns to commit violent or gun-related crimes – in 2003 alone, 87 percent of all federal firearm-related cases involved those two charges. The other 20 major federal gun crimes – gun trafficking, corrupt gun dealers, stolen guns, selling to minors, obliterated serial numbers, and lying on the background check in an attempt to buy a gun – are rarely prosecuted. In light of this prosecution disparity, as Attorney General what strategies would you enact at the Department of Justice to reduce gun violence, and more specifically, to prevent criminals from illegally obtaining guns in the first place?**

Response: The Administration developed Project Safe Neighborhoods (PSN) to target firearms-related criminal conduct. As you note in your question, since PSN's inception, federal firearms prosecutions have increased 76 percent. During that period, violent crime has fallen to 30-year lows, and crimes committed by offenders armed with a firearm have also fallen to record low levels. It is important to remember that federal enforcement of the criminal laws remains a relatively small portion of criminal enforcement throughout the United States. States prosecute the vast majority of criminal cases, as has been their traditional role, and PSN has supported the States' efforts by funding State prosecutors. I can assure you and the Committee that I am committed to continuing the Administration's aggressive efforts to combat violent crime with all means and resources Congress makes available to the Department, and I will work with the Committee to look for new ways to improve our efforts. If confirmed, I would examine the Department's enforcement of federal to ensure that every effort is being made to prosecute the crimes identified in your question.

- 14. Much to my disappointment (and to the dismay of America's major law enforcement organizations), the federal ban on military-style semiautomatic assault weapons and large-capacity ammunition magazines expired in September last year. In its 1994 Assault Weapons Profile, ATF stated that, "[a]ssault weapons were designed for rapid fire, close quarter shooting at human beings. That is why they were put together the way they were. You will not find these guns in a duck blind or at the Olympics." Likewise, large capacity magazines have no legitimate hunting purpose and allow criminals to fire 20, 50 or even 100 or more rounds without reloading. Do you agree with law enforcement authorities that military-style assault weapons pose an extraordinary threat to public safety? If not, why not?**

Response: At my hearing I introduced my younger brother, Tony Gonzales. He is a SWAT officer and has been a Houston police officer for 26 years. I worry for his safety. I worry that one day he will encounter criminals or terrorists with military style assault weapons. The President has made clear that he stands ready to sign a reauthorization of the federal assault weapons ban if it is sent to him by Congress. I support the President's position, and I also believe the most effective means of continuing to reduce violent crime and crime committed with a firearm is through aggressive law enforcement and prosecution. This Administration has increased federal firearms prosecutions by 76 percent, and has supported an increase in State and local resources devoted to prosecuting firearms-related crime. I am committed to ensuring the continued vigorous enforcement of federal firearms laws so that law-abiding Americans can benefit from a continuation in the reduction in violent crime experienced during President Bush's first term.

- 15. Will you take steps to urge Congress to reinstate the federal ban on military-style assault weapons and large-capacity ammunition magazines? If not, why not?**

Response: The decision to reinstate the now-expired ban on certain specific weapons is up to Congress, which must decide whether to ban specific weapons because they have

specific features. The President has said that he supports reinstating the federal ban, and I support the President's position. If the ban is reinstated, I commit to the Committee that the Department of Justice will enforce it aggressively.

As you know, under the Brady Act, the FBI administers the National Instant Check System (NICS), a background check system for the purchase of firearms. Under this system, firearms dealers are required to contact NICS before the transfer of a firearm to ensure that a person receiving the gun is not prohibited from possessing one. To verify the eligibility of a prospective firearms purchaser, Federal Firearms Licensees must request a NICS check through either the FBI or a state point of contact.

Prior to the Bush Administration, Justice Department policy was to retain records on purchasers who had passed the NICS background checks for 90 days to allow for proper auditing of the system. After the 90 days had elapsed, the records were destroyed.

Attorney General Ashcroft, however, proposed that the 90-day retention policy be changed to 24 hours. Last year, that policy was signed into law by President Bush as part of an omnibus appropriations bill. NICS records on purchasers who pass the background checks are now destroyed 24 hours after completion of the background check.

In July 2004, the Justice Department's Inspector General Glenn Fine found that "the shortened retention time will make it much easier for corrupt [licensed dealers] to avoid detection." According to the Inspector General, the new 24-hour record destruction period, "will limit the ATF's ability to detect certain fraudulent NICS checks...."

Before it was enacted into law, the 24-hour record destruction proposal also was criticized by the General Accounting Office, which found in 2002 that the shortened period would prevent the FBI from identifying cases where felons and other prohibited buyers were incorrectly approved by the NICS system and allowed to buy guns. The GAO identified hundreds of cases where a 24-hour policy would have prevented the FBI from retrieving guns from prohibited buyers.

- 16. Will you support legislation to change the current 24-hour Brady record destruction requirement to allow the NICS system to operate more effectively to keep guns out of the hands of criminals?**

Response: If confirmed, I would commit to working closely with Congress for effective legislation that keeps guns out of the hands of criminals and would ensure that the Department enforces the law as passed by Congress regarding the retention of FBI records identifying lawful gun buyers. I understand that even with 24-hour retention of

such records, the Department still has adequate means of detecting and deterring misuse of the National Instant Criminal Background Check System (NICS) by corrupt gun dealers through improved dealer inspections by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) using the Individual FFL Audit Logs that are now authorized by the recently amended NICS regulation, as well as through random rechecks by ATF of proceeded gun transactions. By causing the NICS to move to real-time audits of the system, the requirement that the covered records of approved transactions be destroyed within 24 hours may actually result in the more rapid detection of system errors. In addition, the new requirement does not affect records of delayed and denied transactions. As provided for in the newly amended NICS regulation under the 24-hour destruction rule, I understand the Department is confident that ATF can continue to retrieve firearms from any prohibited persons in “delayed denial” cases.

Patriot Act

Judge Gonzales, if you are confirmed you will be the Administration’s point person on the reauthorization of the USA Patriot Act. I voted for it in October 2001, and I stand by my vote today. In fact, I tried to enact some of its key provisions in 1995 and 1996.

In my view, the Patriot Act made necessary updates to the Federal Code to harmonize the criminal laws against terrorists with those prior laws to combat organized crime and drug kingpins. I’ve long said that “what’s good for the mob, is good for the terrorist.” The Patriot Act was an attempt, however, imperfect, to level the playing field to allow – for example – the FBI to get a “roving wiretap” on a terrorist, the same as they could always do against a mobster.

But no law is perfect, and we need to take this year to carefully study those 16 expiring provisions to make sure they are truly necessary in our fight against terrorism, and to see how the Department has exercised the authorities granted to it in the Act. I also want to make sure that in our efforts to “level the playing field,” we didn’t inadvertently tilt the playing field in the direction of terror investigations, giving greater authorities to the FBI than they have against mobsters and drug kingpins.

Section 215 of the Patriot Act amended the Foreign Intelligence Surveillance Act (FISA), to allow increased access to certain business records. Unlike grand jury subpoenas for business records in the criminal context, then, the government is no longer required to show that the requested records are relevant to the FISA investigation when obtaining such records under section 215. Yet last year, FBI Director Mueller testified at a terrorism oversight hearing that the standard for obtaining business records under FISA should be a relevance standard, as are required of grand jury subpoenas in the garden variety criminal context.

17. Do you agree with Director Mueller that the standard for obtaining business records under section 215 should be a relevance standard, rather than the

lower standard that merely requires the government to specify that the requested documents are “sought for an authorized investigation”?

Response: I agree that relevance is the appropriate standard for obtaining business records under section 215, and I believe that the existing “sought for” language in section 215 is a relevance standard.

There have also been concerns raised about the potential for a FISA “John Doe” indictment under section 213 of the Patriot Act. This concern appears to result because unlike in the Title III context – which has separate sections proscribing procedures for obtaining a traditional tap and for a roving tap – section 215 collapses discussion of both traditional and roving FISA taps into a single section.

18. Would you support amending section 215 to create separate sections for traditional and roving FISA taps, following the model of Title III (Title 18, Section 2518), in an effort to clarify that roving wires always require identification of the target?

Response: Section 206 of the USA PATRIOT Act amended 50 U.S.C. § 1805 to allow for the use of “roving” wiretaps in national-security investigations under FISA. Such wiretaps had been available for years in domestic criminal investigations, and the USA PATRIOT Act simply authorized the use of the same technique in international terrorism and other intelligence investigations. It is my understanding that section 206 has been of significant value to counterterrorism investigators because it has enhanced their ability to monitor sophisticated international terrorists, who are trained to thwart surveillance, such as by rapidly changing cell phones, just before important meetings or communications.

With respect to concerns that have been raised regarding so-called “John Doe” wiretaps under 50 U.S.C. § 1805, the “John Doe” moniker is a misnomer because even if the government is unsure of a target’s name, it still must provide “a description of the target of the electronic surveillance” to the Foreign Intelligence Surveillance Court (“FISA court”) in order to obtain a wiretap order. The government cannot change the target of its surveillance under such a wiretap order; instead, it must apply to the FISA court for a new order for the new target. It is important to keep in mind that, in international terrorism investigations, it may be the case that the government has a detailed physical description of a suspected terrorist but may not know that suspect’s name. In such cases, it is important that the government not be precluded from obtaining a wiretap order.

For these reasons, I do not currently see any need to amend 50 U.S.C. § 1805. If, however, you were to develop legislative language creating separate statutory provisions for “traditional” FISA wiretaps and “roving” FISA wiretaps, which preserved the government’s ability to obtain a wiretap order in instances where the government has a detailed physical description of a suspected terrorist but does not know that suspect’s name, I would be happy to review and provide my views on such a proposal.

19. **The Justice Department publicly agrees with me that the playing field should be level between criminal and terrorism investigative tools. Thus, as part of reauthorizing the Patriot Act, do you support efforts to improve and refine the Act where – as with Sections 213 and 215 – there are different standards between criminal and terrorism provisions?**

Response: I believe it is always appropriate to examine and reexamine the exercise of government authority. The Founders of our country were concerned about government abuses, and I welcome an open and real debate about protection of our civil liberties. I strongly believe that those USA PATRIOT Act provisions that are set to expire at the end of this year must be renewed. That having been said, however, I am also open to any ideas that would improve and refine the Act.

With respect to the issue involving “roving wiretaps,” I explained in my answer to the question above why I do not believe it is necessary to amend that provision of the Act. With respect to section 215, I believe that the standard for obtaining business records in criminal investigations is already the same as the standard for obtaining business records in intelligence investigations related to international terrorism. It is well-established that the simple standard of relevance governs grand jury subpoenas in criminal investigations. And, as I explained in the answer to Question 17, an equivalent standard applies to the issuance of FISA court orders for the production of business records in authorized international terrorism and espionage investigations pursuant to section 215 of the USA PATRIOT Act. *See* 50 U.S.C. §§ 1861(a)(1), 1862(b)(2).

It is important to note, moreover, that orders for the production of business records under section 215 are subject to greater judicial oversight than are grand jury subpoenas, which prosecutors regularly use to obtain business records in criminal investigations. A court must explicitly authorize the use of section 215 to obtain business records. A grand jury subpoena for such records, by contrast, is typically issued without any prior involvement by a judge.

DNA

Last year, Congress passed H.R. 5107, the Justice for All Act, which seeks to improve the public safety and the quality of our criminal justice system for victims, the public, the prosecution and the accused by the use of DNA technology. Section 311 of H.R. 5107 requires that all states seeking Paul Coverdell Forensic Sciences Improvement grants certify that in their state “a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic laboratory system, medical examiner’s office, coroner’s office, law enforcement storage facility, or medical facility.”

20. **As Attorney General, will you rigorously enforce this requirement and ensure that states have an entity and an appropriate process to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic laboratory system, medical examiner's office, coroner's office, law enforcement storage facility, or medical facility?**

Response: It is imperative that our nation's crime laboratories conduct scientific analyses using competent staff and appropriate scientific methods. If confirmed, under my direction the Department of Justice will rigorously enforce the certification provision added by the Justice for All Act.

21. **Under your leadership, how will the Department of Justice require timely certification for states seeking receipt of Paul Coverdell Forensic Sciences Improvement Grant funds for 2005?**

Response: The National Institute of Justice (NIJ) administers the Paul Coverdell Forensic Sciences Improvement program. If confirmed, I will direct the NIJ to ensure that all applicants for these grant funds comply with this certification requirement. States that fail to provide this certification as part of the grant application process will be denied funding.

Offender Reentry

As you know, there's a record number of people currently serving time in our country – over two million. This translates into 1 out of every 143 U.S. residents. In its latest statistics on the matter, the Bureau of Justice Statistics found that the nation's overall prison population increased by over 40,000 from midyear 2002 to midyear 2003, the largest increase in four years.

95 percent of all these millions we lock up will eventually get out. That equals nearly 650,000 being released from federal or state prisons to communities each year. In a state like Delaware, that's over 4,000 inmates per year. And, a staggering 2/3 of these released state prisoners are expected to be rearrested for a felony or serious misdemeanor within three years of release.

Unfortunately, it's not too difficult to see why such a huge portion of our released prisoners recommit serious crimes. Up to 60 percent of former inmates are not employed; 15-27 percent of prisoners expect to go to homeless shelters upon release; and 57 percent of federal and 70 percent of state inmates used drugs regularly before prison, with some estimates of involvement with drugs or alcohol around the time of the offense as high as 84 percent.

I feel that these huge numbers of released prisoners each year and the out-of-control recidivism rates are a recipe for disaster – leading to untold damage, hardship, and death for victims; ruined futures and lost potential for re-offenders; and a huge drain on society at large. One particularly vulnerable group is the children of these offenders. We simply cannot be resigned to allowing generation after generation entering and reentering our prisons. This pernicious cycle must come to an end.

To combat this problem I have worked with Chairman Specter, Senator Brownback, and others to offer common-sense, smart-on-crime proposals. Specifically, the Biden/Specter Enhanced Second Chance Act and similar bills in the Senate and the House would offer federal grant money for innovative state and local programs as well as working to reduce federal barriers to reentry currently faced by many ex-offenders.

22. Will you commit to working with us to pass this important legislation?

Response: As you know, the manner in which offenders transition from prison to civil society is critical to the future of the individual offender and to our communities. In his 2004 State of the Union Address, President Bush announced a four-year, \$300 million prisoner re-entry initiative to promote training and mentoring initiatives for newly released prisoners. I am committed to improving the transition of offenders from prison to civil society. As I understand it, the Department is funding innovative programs in the States, working with faith-based and community groups to bolster mentoring programs, developing and implementing programs for federal prisoners, and conducting research to improve prisoner re-entry programs. I support these efforts. If confirmed, I will look forward to working with Congress as it considers legislation to improve prisoner re-entry programs across the country.

23. Can I have your commitment that under your stewardship, the Department will participate early in the process to pass this legislation, to ensure that any comments and feedback by your Department will arrive in a timely basis?

Response: If confirmed, I will look forward to working with the Congress, and timely providing the Department's feedback to the Congress, as it considers legislation to improve prisoner re-entry programs across the country.

August 1, 2002, Justice Department Office of Legal Counsel Memorandum for Alberto R. Gonzales

24. At your June 2004 press conference, you distanced yourself from the August 2002 Department of Justice memo, calling its reasoning “irrelevant and unnecessary” and “overbroad.” Had you previously expressed any concerns with the August 1 memo’s contents prior to your June 2004 press conference? To whom had you expressed those concerns? When?

Response: I expressed my general reaction to staff and others in the Administration prior to the June 2004 press conference that people would incorrectly assume from the hypothetical discussions contained in the August 2002 memorandum that the President was somehow relying on those discussions as authority under our Constitution to engage in torture despite the statutory prohibition, when that was not in fact the case. That memorandum was withdrawn and the record clarified that the President has never authorized torture and does not condone torture.

- 25. Do you agree with the “Commander-in-Chief” analysis in the August 2002 memo? Are there any parts of that reasoning you disagree with? Are there any parts of that reasoning that you agree with?**

Response: In the Authorization for Use of Military Force, passed by Congress on September 14, 2001, Congress stated that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.” Thus, the Congress has recognized that the President leads the war on terror pursuant to his constitutional authority. As a hypothetical matter, the Congress could pass a statute infringing on the President’s constitutional authority. The President has always made clear that the United States will, under no circumstances, engage in torture, and therefore the “Commander-in-Chief” analysis contained in the August 2002 memo was unnecessary and irrelevant. I said in the Administration’s June 2004 briefing that the Administration had not authorized any action under this authority. The August 2002 memorandum was withdrawn and does not represent the position of the Executive Branch. The December 30, 2004, opinion from the Department of Justice, containing no Commander in Chief analysis, represents the Executive Branch position.

- 26. Were you aware that the August 2002 memo nowhere cites the Army Field Manual, the definitive military document on interrogations? Did you ask the Justice Department to consult with military experts on interrogation in crafting the memo? Did that subject ever come up in the discussions producing the memorandum?**

Response: I do not remember noting that fact when I read the August 2002 memorandum and do not recall asking the Department of Justice to consult with military experts on interrogation practices, nor do I recall the subject coming up in discussions concerning that memorandum. The Office of Legal Counsel was asked to give advice on the anti-torture statute, it was not asked to interpret the Army Field Manual. I note that the Department of Justice was not responsible for formulating interrogation techniques or assessing their efficacy.

- 27. The U.S. Army Field Manual on Intelligence Interrogation (FM 34-52) states that “the use of torture is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he things the interrogator wants to hear....It also may place US and allied personnel in enemy hands at greater risk.” Do you agree with this statement?**

Response: I accept this as the view of individuals with extensive experience in interrogation who have reviewed the potential use of torture. I do not have sufficient expertise and experience to judge the validity of this view. I do know, however, that the President has made clear that the United States will not engage in torture. This direction applies whether one concludes that torture is a valuable or a poor technique for gathering reliable information. Although our troops have unfortunately all too often been subject to harsh mistreatment at the hands of the enemy regardless of U.S. actions, I agree that the use of torture may place U.S. and allied personnel in enemy hands at greater risk.

Geneva Conventions

In 1955, upon favorably reporting the Geneva Conventions to the Senate floor, the Foreign Relations Committee, stated:

Our nation has everything to gain and nothing to lose by being a party to the conventions now before the Senate [the Geneva Conventions], and by encouraging their most widespread adoption.... The practices which they bind nations to follow impose no burden upon us that we would not voluntarily assume in a future conflict without the injunctions or formal treaty obligations.

28. Do you believe that this is still an accurate statement?

Response: Yes. The Geneva Conventions are vitally important and we have consistently complied with our obligations under them. Unfortunately for the United States and for the civilized world, however, global terrorist organizations like al Qaeda have no intention of following the principles of the Geneva Conventions, and they despise all of the norms of international law that are embodied in those Conventions. Our challenge is to protect our country and our way of life from the grave threat posed by these terrorist organizations without compromising the principles of law, including the requirements of the Geneva Conventions, that we have always honored and that, indeed, the United States has led the world in developing. And even where the Conventions do not apply as a legal matter, the President has directed our military to treat all detainees humanely and, to the extent consistent with military necessity, in a manner consistent with the principles of Geneva.

29. What experience with the Geneva Conventions did you have prior to your involvement in January 2002 with deciding whether these established international conventions should apply to our war in Afghanistan?

Response: By statute and regulation, the Office of Legal Counsel at the Department of Justice provides legal advice to the Executive Branch under the authority delegated by the Attorney General. That office has the responsibility to advise as to what the law is. In addition, judgments of OLC and of others in the government are appropriately informed by the expertise of particular agencies – such as the Departments of State and

Defense with respect to the Geneva Conventions. As Counsel to the President, I do not have to – nor should I – rely solely on my own personal knowledge of the law or personal experience in a particular area, but instead look to the appropriate agencies to provide expertise on legal questions. Although I had limited experience with the Geneva Conventions prior to serving as Counsel to the President, I looked to those with expertise in the area to ensure the issues were fully explored in this area, and studied both the terms of the Conventions and the views of the experts on the Conventions.

Clemency

In 1986, Texas arrested and convicted Tristan Montoya, a Mexican national, for a grisly murder. He was sentenced to death. The Mexican Government protested to the State Department that Texas had violated the Vienna Convention by failing to notify them at the time of Montoya's arrest.

You exchanged correspondence with the State Department about a Diplomatic Note the Mexican government had sent to attempt to prevent the execution. When you drafted your clemency memo to Governor Bush, you omitted any mention of the dispute involving the Vienna Convention. Montoya was executed the same day.

Did you believe the Vienna Convention applied to this case and to the State of Texas? Did you believe it was violated? Why did you omit mention of the issue from your clemency memo to Governor Bush? In your view, what was the proper remedy for a violation of the Vienna Convention?

Response: The President believes the death penalty deters crime and saves lives. At the same time, he believes that all appropriate steps should be taken to ensure that only the guilty are punished. As Governor, he took clemency petitions very seriously, particularly focusing on the question whether the petitioner had a credible claim of wrongful conviction. The memorandum referred to in your question represented the end of the process through which I provided the Governor with information regarding a petition, and was only a summary of that information. As General Counsel to the Governor, I made sure that each petition was reviewed carefully by my staff and me and that the Governor was provided with all information that he should appropriately consider to make his determination. The process I used in reviewing clemency petitions and advising the Governor was modeled on the process used by my predecessor, the General Counsel to Governor Ann Richards. In a letter to me dated January 4, 2005, Governor Richards' former counsel stated, "Capital cases and clemency are among the most important and profound matters that I dealt with during my tenure, and I am confident that you discharged this duty with the utmost professionalism during your tenure in the Governor's office."

In the particular case you reference, I believed that it was for the Department of State, with its specialized expertise, to make determinations regarding the Vienna Convention

as it applied to the facts of the case, and I provided to the Department of State all the factual information it requested regarding the matter. In a letter dated June 18, 1997, to the State Department's Acting Legal Adviser providing him with the requested information, I also noted that Governor Bush had been advised that "it appears that [the petitioner] did not receive consular notice prior to his confession. The Governor has instructed me to assure you that these matters will be considered in his decision regarding clemency." The Acting Legal Adviser sent a letter to Governor Bush in response expressing appreciation for "your cooperation in this case." The Governor was apprised of and considered the dispute involving consular notification when he made his clemency decision in this matter.

**Responses of Alberto R. Gonzales
Nominee to be Attorney General
to the Written Questions of Senator Coburn**

1.) Illegal obscenity is more available now than ever before. As Attorney General, will you agree to review DoJ strategy on obscenity prosecutions and assure us that in the future you will prosecute the major producers and distributors of illegal obscenity and make such prosecutions a priority?

Response: If confirmed as Attorney General, I intend to make the investigation and prosecution of obscenity one of my highest criminal enforcement priorities.

Responses of Alberto R. Gonzales
 Nominee to be Attorney General of the United States
 to Written Questions of Senator Richard J. Durbin

TORTURE POLICY

1. **The December 30, 2004 memo from the Department of Justice (“DOJ”) Office of Legal Counsel to the Deputy Attorney General (“12/30/2004 torture memo”) states, “This memorandum does not address the many other sources of law that may apply, depending on the circumstances, to the detention or interrogation of detainees.” It is unclear why you would ask DOJ to define the outer limits of torture when other legal restrictions, e.g., the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (“Torture Convention”) and the Uniform Code of Military Justice, prohibit abuses that do not rise to the level of torture. In your press briefing on June 22, 2004, you said that an August 1, 2002 memo from DOJ’s Office of Legal Counsel to you (“8/1/2002 torture memo”) “was written in response to questions only about the scope of the torture convention and the anti-torture statute.” You said you requested this guidance because “our soldiers need to know the limits of permissible conduct.”**
 - a. **The torture prohibitions in the Torture Convention and in the anti-torture statute, 18 U.S.C. §§ 2340-2340A, (“anti-torture statute”) are not “the limits of permissible conduct” because U.S. personnel are also prohibited from engaging in abuse that does not rise to the level of torture. Do you agree? If yes, why did you request the 8/1/2002 memo? If your aim was to define the limits of permissible conduct, why did you not ask the Office of Legal Counsel to examine all of the legal restrictions governing the treatment of detainees?**

Response: I agree that there may be many other sources of applicable law, depending on the circumstances. It is common for a legal opinion only to address certain questions. In this case, the federal criminal prohibition against torture was one that was not clear, and it appeared appropriate to seek legal advice concerning its meaning.

- b. **In your June 22, 2004 press briefing, you said, “every interrogation technique that has been authorized or approved throughout the government is lawful and does not constitute torture.” Is it also true that every authorized interrogation technique that has been authorized or approved throughout the government does not constitute cruel, inhuman or degrading treatment, as this term is defined by the Torture Convention and the Senate reservations thereto?**

Response: As I testified, because of the Senate’s reservation to Article 16 of the Convention Against Torture and the jurisdictional and other limitations of Article 16 and of the Fifth, Eighth and Fourteenth Amendments, which have been held not to apply to aliens overseas who are not being punished within the meaning of the Eighth Amendment, Article 16 has a limited reach. However, we also want to be in compliance with the relevant substantive constitutional standard incorporated into Article 16 by virtue of the Senate’s reservation, even where it may not be

legally required. I had been advised that approved interrogation techniques were analyzed under that standard and satisfied it. Since that time, we have determined to undertake a comprehensive legal review of all interrogation practices. Part of that review was completed when the Office of Legal Counsel released its memorandum addressing 18 U.S.C. §§ 2340 & 2340A on December 30, 2004. The analysis of practices under the standards of Article 16 is still under way, but no one has told me that we are not meeting the substantive requirements of Article 16.

- c. **At your hearing, I asked you whether U.S. personnel can legally engage in cruel, inhuman, or degrading treatment under any circumstances. You told me that “We are meeting our legal obligations,” but you did not respond directly to the question. Can U.S. personnel legally engage in cruel, inhuman, or degrading treatment under any circumstances?**

Response: Please see my response to 1(b), above.

- d. **You also told me at the hearing: “As you know, when the Senate ratified the Convention Against Torture, it took a reservation and said that our requirements under Article 16 were equal to our requirements under the Fifth, Eighth and 14th Amendment. As you also know, it has been a long-time position of the executive branch, and a position that’s been recognized and reaffirmed by the Supreme Court of the United States, that aliens interrogated by the U.S. outside the United States enjoy no substantive rights under the Fifth, Eighth and 14th Amendment. So as a legal matter, we are in compliance.” If I understand you correctly, you believe that the Torture Convention’s prohibition on cruel, inhuman, or degrading treatment imposes no affirmative obligations on the U.S. regarding aliens interrogated outside the U.S. Is that your view? Is that the U.S. government’s position? Is this consistent with the June 25, 2003 letter from Department of Defense (DOD) General Counsel William Haynes to Senator Leahy, which states, “‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States. United States policy is to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with this commitment”?”**

Response: Please see the response to 1(b), above.

2. **At your hearing, you told me, “As Counsel to the President, my job was to ensure all authorized techniques were presented to the DOJ, to the lawyers, to verify that they met all legal obligations, and I have been told that is the case.”**
- a. **Please provide a list of all interrogation techniques presented to you, your office, or the DOJ for their review and, for each technique, indicate whether you, your office, or the DOJ determined that it is legally permissible. Please provide copies of all documents related to the review of these interrogation techniques.**

Response: As I explained in my testimony before the Committee, with respect to the conflict with al Qaeda and the Taliban, the role of reviewing the legality of methods of questioning terrorists for information that might save American lives that agencies wished to adopt fell to the Department of Justice. While I may have participated in some discussions of particular methods of questioning, my role was to ensure that methods of questioning being proposed were cleared with the lawyers at the Department of Justice, not to approve them myself. A list of the particular methods of questioning reviewed by the Department of Justice, and the results of such reviews, would contain classified information. However, as the Committee is aware, documents relating to the legality of certain methods of questioning, in particular methods of questioning under consideration or adopted by the military for limited use at Guantanamo Bay, were made public on June 22, 2004.

b. According to media reports, U.S. personnel have used each of the interrogation techniques listed below. For each of these techniques, please indicate (1) whether use of the technique would constitute torture or cruel, inhuman or degrading treatment or violate any other legal prohibition, (2) whether you, your office, or DOJ reviewed the technique, and (3) if you, your office, or DOJ did review the technique, whether it was determined to be legally permissible and the legal basis for that determination. Please provide copies of all documents related to the review of these interrogation techniques.

- (a) Simulated drowning (including "waterboarding")
- (b) Stress positions (including forcing detainees to assume painful, contorted positions for extended periods of time)
- (c) Prolonged isolation
- (d) Forced grooming
- (e) Inducing stress by use of detainee's fears (e.g., dogs)
- (f) Removal of clothing (forced nudity)
- (g) Hooding
- (h) Sensory deprivation
- (i) Food deprivation (as distinguished from dietary manipulation)
- (j) Sleep deprivation (as distinguished from sleep adjustment)
- (k) Removal of comfort items (including religious items)
- (l) Environmental manipulation (including exposure to extreme temperatures, loud music and strobe lights)
- (m) Physical contact such as a face or stomach slap
- (n) Forcible injection of mood-altering drugs
- (o) Mock executions
- (p) Threatening to send detainees to countries where they would be tortured

Response: Some of these activities, at least under certain factual assumptions, might very well be prohibited, either under the torture statute or under other prohibitions such as, for example, the standards of conduct contained in the Army Field Manual. Some might likewise be permissible in specific circumstances, if appropriately limited, depending on the nature of the precise conduct under consideration. As the Administration has made clear in the past, the

Department of Justice has reviewed specific interrogation practices used in the conflict with al Qaeda and the Taliban and has concluded they are lawful. It would be inappropriate for me to address methods of questioning discussed in the press and to attempt to analyze them under the prohibitions of 18 U.S.C. §§ 2340 & 2340A. As the Office of Legal Counsel's recent memorandum addressing 18 U.S.C. §§ 2340 & 2340A makes clear, Congress defined torture as an act that is "specifically intended to inflict severe physical or mental pain or suffering." Analyzing whether a particular practice meets that test is a highly fact-intensive inquiry. In addition, were the Administration to begin publicly ruling out speculated interrogation practices, by virtue of gradually ruling out some practices in response to repeated questions and not ruling out others, we would provide al Qaeda with a road map concerning the interrogation that captured terrorists can expect to face and would enable al Qaeda to improve its counter-interrogation training to match it.

3. **At your hearing, I asked you whether the President can invoke his authority as Commander-in-Chief to avoid the restrictions of any statute. You told me, "I do believe it is possible, theoretically possible, for the Congress to pass a law that would be viewed as unconstitutional by a President of the United States." Do you believe that the anti-torture statute or any other statute governing the treatment of detainees is unconstitutional? Can you assure me that, if you are confirmed as Attorney General, you will not in any circumstance advise the President that he is not required to comply with the anti-torture statute or other laws that currently govern the treatment of detainees?**

Response: The President has consistently stated that the United States will not use torture in any circumstances, so it is simply implausible that I would ever be called upon to address whether the President's constitutional authority as Commander-in-Chief would permit him to, in effect, nullify the torture statute for national security reasons. Further, the President has repeatedly affirmed the Administration's commitment, in dealing with terrorists in our custody, to act in accordance with all laws and international treaties. It is theoretically possible, of course, as I explained in my testimony to the Committee, that Congress could pass a law that the President might regard as unconstitutional; presidents of both parties have held that view. I would also remind you that Congress itself recognized in the Resolution Authorizing the Use of Force in September 2001, that the President has the constitutional authority to deter and prevent acts of terrorism against the United States. For a president to consider whether or not to ignore a particular law as unconstitutional, however, would pose a question of extraordinary gravity and difficulty. I would approach such a question with a great deal of care.

4. **There have been numerous media reports indicating that the Central Intelligence Agency (CIA) has used highly coercive interrogation techniques such as "waterboarding." According to some reports, your office or DOJ reviewed and approved the use of these techniques. Please provide unclassified responses to the following questions to the greatest extent possible, with a classified annex if necessary. What are the legal standards for CIA interrogations? What role did you, your office, and DOJ play in developing and approving these standards? Have you, your office, or DOJ approved any CIA interrogation techniques or issued any interrogation guidelines to the CIA? If yes, please provide any documents related to this.**

Response: As I explained in my testimony to the Committee, the Department of Justice has reviewed specific interrogation practices used in the conflict with al Qaeda and the Taliban and has concluded they are lawful. Although I do recall participating in certain discussions about the legality of particular methods of questioning, in each case it was for the Department to decide whether a particular methods of questioning could lawfully be employed. Information about the standards for interrogation by the CIA would be classified, as would be information about any particular methods of questioning approved for use by the CIA.

5. **At an Appropriations Committee's Defense Subcommittee hearing on May 12, 2004, I asked Secretary of Defense Donald Rumsfeld about interrogation techniques that had been approved for use in Iraq. These techniques were reflected in a document, "Interrogation Rules of Engagement," that was created by the U.S. Army and posted in the Abu Ghraib prison. DOD provided this document to Congress, a copy of which is attached to these questions for your reference. The document specifically mentions stress positions, presence of military working dogs, sensory deprivation, isolation for longer than 30 days, and environmental manipulation. The document also states, "The Geneva Conventions apply within CJTF-7," and Secretary Rumsfeld told me that these techniques had been "checked by the lawyers" and "deemed to be consistent with the Geneva Convention." However, these techniques seem to violate the Fourth Geneva Convention, which, according to the Administration, is applicable in Iraq. In particular, Article 27 states, "Protected persons ... shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity," and Article 31 states, "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them." Do you believe that using these interrogation techniques would violate the Geneva Conventions?**

Response: I am not aware whether the Department of Justice has analyzed whether particular interrogation techniques intended for use in Iraq would comply with the requirements of the Fourth Geneva Convention, and that is not an issue with which I am familiar. I would expect the Department of Defense to address that issue.

6. **As you know, Secretary Rumsfeld established a Working Group to advise him on interrogation policies for Guantanamo Bay. According to some media reports, you and/or your office were involved in the establishment and deliberations of the Working Group. The Working Group produced a report on April 4, 2003 ("DOD Working Group Report"), recommending that the Secretary of Defense approve the use of numerous coercive interrogation techniques. In response to the Working Group's recommendation, Secretary Rumsfeld issued revised rules for interrogations at Guantanamo Bay. These allowed for the use of coercive interrogation tactics, including prolonged isolation, sleep adjustment, dietary manipulation, and environmental manipulation. As you also know, the 8/1/2002 torture memo was recently rescinded and replaced by the 12/30/2004 torture memo. However, the DOD Working Group Report, which is based in part on the 8/1/2002 torture memo and which formed the legal basis for the use of coercive interrogation techniques, has not been revised. Moreover,**

Secretary Rumsfeld has not revisited his approval of coercive interrogation techniques for use at Guantanamo Bay, which was based upon the DOD Working Group Report's recommendations. Please describe the role of you and your office in the Working Group's establishment and deliberations. Will the DOD Working Group Report be revised in light of the fact that the 8/1/2002 torture memo was withdrawn? Will the Defense Secretary revisit his approval of coercive interrogation techniques for use at Guantanamo Bay?

Response: The Department of Defense Working Group was established by the Department of Defense. Although I was occasionally and informally advised of the status of the Working Group's progress, neither I nor, to my knowledge, anyone in my office played a role in its deliberations. The status of the Working Group Report and the Defense Secretary's policy regarding interrogation techniques are matters for decision by the Department of Defense.

- 7. One reason that the DOD Working Group Report should be revised is that it, like the 8/1/2002 torture memo, redefines torture. For example, the anti-torture statute defines torture to include "prolonged mental harm caused by or resulting from ... the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality." The 8/1/2002 torture memo and the DOD Working Group Report adopt a new, restrictive definition of this standard. These documents argue that the statute only prohibits the use of mind-altering drugs that "penetrate to the core of an individual's ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality." They give the example of "pushing someone to the brink of suicide (which could be evidenced by acts of self-mutilation)" as "a sufficient disruption of the personality to constitute a 'profound disruption.'" This seems to go far beyond the legislative language.**

- a. When you received the 8/1/2002 torture memo, you had the chance to review this definition. Did you then and do you now believe that this definition is legally correct?**

Response: The President has repeatedly made clear that it is the policy of the United States that torture will not be authorized or tolerated under any circumstances. I support the President's long-standing policy in this regard. The August 1, 2002, memorandum has been withdrawn and replaced by the Department of Justice. By statute and regulation, the Department of Justice is the entity within the Executive Branch that provides legal advice for the entire branch. I accepted the August 1, 2002, memorandum as a good-faith effort to interpret the anti-torture statute and to explore other matters potentially relevant to its application. I support the Department's decision to withdraw and replace the memorandum and agree with the analysis contained in the replacement memorandum.

- b. The anti-torture statute also defines torture as "an act ... specifically intend to inflict severe physical or mental pain or suffering." The 8/1/2002 torture memo and the DOD Working Group Report argue, however, that "Even if the defendant knows that severe pain will result from his actions, if causing such**

harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith. Instead a person is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control.” The 12/30/2004 torture memo rejects this approach, stating, “We do not believe it is useful to try to define the precise meaning of ‘specific intent’ in section 2340 [the anti-torture statute].” Did you then and do you now believe that the 8/1/2002 torture memo’s definition of specific intent is legally correct?

Response: The President has repeatedly made clear that it is the policy of the United States that torture will not be authorized or tolerated under any circumstances. I support the President’s long-standing policy in this regard. The August 1, 2002, memorandum has been withdrawn and replaced by the Department of Justice. By statute and regulation, the Department of Justice is the entity within the Executive Branch that provides legal advice for the entire branch. I accepted the August 1, 2002, memorandum as a good-faith effort to interpret the anti-torture statute and to explore other matters potentially relevant to its application. I support the Department’s decision to withdraw and replace the memorandum and agree with the analysis contained in the replacement memorandum.

- c. In your press briefing on June 22, 2004, you said, “The definition of torture that the administration uses is the definition that Congress has given us in the torture statute and the reservation of the torture convention.” Similarly, in testimony to the Senate Judiciary Committee on June 8, 2004, Attorney General Ashcroft testified, “it is not the job of the Justice Department or this administration to define torture. Torture has been defined by the Congress.” The 8/1/2002 torture memo and the DOD Working Group Report seem to contradict your statement of June 22, 2004. Do you stand by this statement?**

Response: I believe the August 1, 2002, memorandum was an effort by the Department of Justice to interpret what Congress meant when it defined torture.

- 8. Last June, in response to the prison abuse scandal, the Senate unanimously adopted a bipartisan, anti-torture amendment, which I had offered with Senators Specter, McCain, Feinstein, Leahy, Kennedy, and Levin. My amendment affirms the U.S.’ long-standing obligation not to engage in torture or cruel, inhuman or degrading treatment, and requires the Secretary of Defense to issue policies to ensure compliance with this standard and to report to Congress on violations of the standard. This standard is embodied in the U.S. Constitution and in numerous international agreements which the U.S. has ratified. Yet, the Bush Administration opposed my amendment. The Durbin amendment was enacted into law after some revisions in the conference committee (Sections 1091-1093 of Public Law 108-375, Defense Authorization bill for FY2005). Last fall, the bipartisan 9/11 Commission unanimously recommended that the U.S. develop policies to ensure that all detainees are treated humanely. In response, I worked with Senators McCain and Lieberman on an amendment to the intelligence reform legislation that would have extended the requirements of my Defense Authorization amendment to the intelligence community. This bipartisan amendment**

was also adopted unanimously by the Senate, but because the Bush Administration opposed it, the language was stripped during conference, and thus never became law. Why did the Administration oppose these anti-torture amendments? Did you or your office review and comment on the amendments? If so, what were you or your office's recommendations? According to an October 18, 2004 letter from National Security Advisor Condoleezza Rice and Office of Management and Budget Director Joshua Bolten, the Administration opposed the intelligence reform amendment because it "provide[d] legal protections to foreign prisoners to which they are not now entitled under applicable law and policy." What are these legal protections to foreign prisoners to which they are not now entitled under applicable law and policy? Why does the Administration oppose these legal protections?

Response: The Administration stated in its October 18, 2004 letter to conferees on the intelligence reform legislation that it opposed a provision in the draft legislation that would have provided legal protections to foreign prisoners to which they are not now entitled. The President has repeatedly stated that his Administration does not authorize or condone torture under any circumstances by U.S. personnel. I, of course, fully support the President's policy in this area.

9. The State Department's "Country Reports on Human Rights Practices," which are submitted to Congress every year, have characterized the following interrogation techniques as "Torture and Other Cruel, Inhuman and Degrading Treatment: "beatings," "threats to detainees or their family members," "sleep deprivation," "depriv[ation] of food and water," "suspension for long periods in contorted positions," "prolonged isolation," "forced prolonged standing," "tying of the hands and feet for extended periods of time," "public humiliation," "sexual humiliation," and "female detainees ... being forced to strip in front of male security officers." Do you agree that these techniques constitute torture or cruel, inhuman or degrading treatment?

Response: Certain of those techniques could constitute torture as defined by Congress in the federal criminal prohibition, or "cruel, inhuman or degrading" treatment as defined by the Senate in its reservation to the CAT, depending on the circumstances of how they were employed.

10. The Army Field Manual on Intelligence Interrogation (FM 34-52) states that "acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or an aid to interrogation" are "illegal." It defines "infliction of pain through ... bondage (other than legitimate use of restraints to prevent escape)," "forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time," "food deprivation," and "any form of beating," as "physical torture" and defines "abnormal sleep deprivation" as "mental torture" and prohibits the use of these tactics under any circumstances. Do you agree that "acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or an aid to interrogation" are "illegal"? Do you agree that "infliction of pain through ... bondage (other than legitimate use of restraints to prevent escape)," "forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time," "food deprivation," and "any form of beating," are "physical torture"? Do you agree that "abnormal sleep deprivation" is

“mental torture”? Are U.S. personnel prohibited from using these techniques under any circumstances?

Response: Please see the response to Question 2(b), above.

- 11. FM 34-52 also provides very specific guidance about interrogation techniques that may approach the line between lawful and unlawful actions. Before using a questionable interrogation technique, an interrogator is directed to ask whether “If your contemplated actions were perpetrated by the enemy against U.S. [prisoners of war], you would believe such actions violate international or U.S. law. . . . If you answer yes. . . do not engage in the contemplated action.” This is the Army’s version of “the golden rule.” It is an important reminder that the prohibition on torture and other cruel treatment protects American soldiers as much as it does the enemy. Do you agree that this standard should govern U.S. personnel? Does it?**

Response: My understanding of the Army Field Manual is that it is designed to provide guidance for the military in complying with the requirements of the Third Geneva Convention, applicable to the treatment of prisoners of war, where that Convention applies. I have no reason to question the guidance developed by the military in the Army Field Manual.

- 12. As you know, Article 3 of the Torture Convention requires, “1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.” At your hearing, you told me, “Under my understanding of the law. . . we have an obligation not to render someone to a country that we believe is going to torture them.” According to media reports, the United States has rendered individuals to countries, including Egypt, Saudi Arabia, and Syria, which are known to engage in torture. In some cases, the U.S. reportedly sought assurances from these governments that the rendered individuals would not be tortured. Nevertheless, these individuals allege that they were subsequently tortured. Has the government complied with Article 3 of the Torture Convention from September 11, 2001, to the present? Is it legally permissible in any circumstances to render someone to a country known to engage in torture? If yes, in what circumstances is it legally permissible? Is it legally permissible to render someone to a country that is known to engage in torture if the U.S. receives assurances from that country that they will not torture a rendered individual? If yes, why do you believe that promises from a country known to engage in torture are a reliable basis for asserting that the U.S. is in compliance with its obligations under Article 3 of the Torture Convention? If confirmed as Attorney General, will you ensure that we do not accept assurances from a country known to engage in torture that they will not engage in torture as grounds for rendering someone to that country?**

Response: The government has complied with its obligations under Article 3 of the Convention Against Torture. The Senate, in giving its advice and consent to the CAT, included an understanding to Article 3 stating, "That the United States understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in Article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.'" In carrying out U.S. obligations under Article 3, as subject to the Senate understanding, it is permissible in appropriate circumstances to rely on assurances from a country that it will not engage in torture, and such assurances can provide a basis for concluding that a person is not likely to be tortured if returned to another country.

TEXAS CLEMENCY

1. **As General Counsel to then-Governor Bush, you supervised 59 executions on behalf of the Governor. As you explained in a speech to the Texarkana Bar Association on February 17, 1999, you "reviewed every file for every case and recommended to the Governor whether clemency was appropriate."**
 - a. **I understand that of the 59 cases you supervised, you did not recommend clemency – or even a 30-day stay of execution – in any case. I also understand the Governor of Texas has limited clemency powers and that the Texas Board of Pardons and Paroles has a large role in this process. However, doesn't the Governor have the authority to order the Board to investigate a case or to hold a hearing if he or she has doubts about guilt or due process? And doesn't the Governor also have the authority to instruct the Board to reconsider negative recommendations on clemency? Did you recommend that Governor Bush pursue any of these courses of action in any of the 59 cases you supervised?**

Response: The President believes the death penalty deters crime and saves lives. At the same time, he believes that all appropriate steps should be taken to ensure that only the guilty are punished. As Governor, he took clemency petitions very seriously, particularly focusing on the question whether the petitioner had a credible claim of wrongful conviction. As General Counsel to the Governor, I made sure that each petition was reviewed carefully by my staff and me and that all information the Governor should appropriately consider in order to make his determination was provided to him. The process I used in reviewing clemency petitions and advising the Governor was modeled on the process used by my predecessor, the General Counsel to Governor Ann Richards. In a letter to me dated January 4, 2005, Governor Richards' former counsel stated, "Capital cases and clemency are among the most important and profound matters that I dealt with during my tenure, and I am confident that you discharged this duty with the utmost professionalism during your tenure in the Governor's office." The members of the Board were confirmed by the Texas Senate. The Governor expected the Board to exercise its own independent good judgment in reviewing these petitions, free from political pressure or influence. Finally, as I understand it, this is the process the Board has used for many years during several administrations, including Governor Richards' administration.

- b. **From 1973 to 1998, the Board of Pardons and Paroles itself never investigated a case or held a hearing on a clemency appeal – or even conducted a meeting on**

any of the 70-plus cases it had considered. Furthermore, according to testimony in a 1998 civil lawsuit, some Board members do not even review case files or read correspondence they are required to read before casting their votes on clemency petitions. Most of all, U.S. District Judge Sam Sparks, who presided over that lawsuit found that “There is nothing, absolutely nothing that the Board of Pardons and Paroles does where any member of the public, including the governor, can find out why they did this. I find that appalling.” Based on the Board’s record and the lack of an explanation for denying clemency, how were you able to rely on its determination on clemency petitions in every case you supervised, without ever asking the Board to conduct a hearing or investigation?

Response: As noted above, as General Counsel to the Governor, I made sure that each petition was reviewed carefully by my staff and me and that all information the Governor should appropriately consider in order to make his determination was provided to him. The process I used in reviewing clemency petitions and advising the Governor was modeled on the process used by my predecessor, the General Counsel to Governor Ann Richards. In a letter to me dated January 4, 2005, Governor Richards’ former counsel stated, “Capital cases and clemency are among the most important and profound matters that I dealt with during my tenure, and I am confident that you discharged this duty with the utmost professionalism during your tenure in the Governor’s office.” The members of the Board were confirmed by the Texas Senate. The Governor expected the Board to exercise its own independent good judgment in reviewing these petitions, free from political pressure or influence. Finally, as I understand it, this is the process the Board has used for many years during several administrations, including Governor Richards’ administration.

- c. **Under what circumstances would you have recommended that the Governor grant clemency or a 30-day stay to a death row inmate? In particular, I would like you to explain a comment from a speech you made on October 19, 1999, to the Southwestern Insurance Information Service. You said the following: “I believe that some crimes are so horrific to warrant the death penalty and I believe also that those of us in state government have an obligation to carry out the death sentence rendered by the citizens of Texas.” If you had an “obligation” to carry out these death sentences, did any death row inmate truly have an opportunity for an objective, non-political review of his or her clemency petition?**

Response: The President believes the death penalty deters crime and saves lives. At the same time, he believes that all appropriate steps should be taken to ensure that only the guilty are punished. As Governor, he took clemency petitions very seriously, particularly focusing on the question whether the petitioner had a credible claim of wrongful conviction. In support of his policy, I focused in particular on this issue when reviewing clemency petitions and advising the Governor. Clemency is an act of grace by the sovereign, to be exercised by the Governor in his discretion as he chooses. A governor theoretically could grant some type of clemency in every case or decide never to grant clemency. Governor Bush respected the role of juries, judges and courts in the criminal justice system. He was willing to defer to them in making decisions about the guilt or innocence of an accused and was unwilling to second-guess those decisions unless

there was legitimate doubt about the guilt or innocence of a person. In response to your question, I believe every death row inmate truly had an opportunity for an objective, non-political review of his or her clemency petition. Governor Bush's approach to clemency was overwhelmingly embraced and supported by the voters of Texas in 1998.

2. According to press reports, typically, on the day of a scheduled execution, you would provide Governor Bush with a briefing memo containing a summary of the facts of the case; background information and personal history of the petitioner, including previous criminal history; a summary of proceedings; and a brief review of applicable law and legal claims. This memo, usually three to seven pages in length, would accompany a 30-minute briefing in person. During your hearing, you testified that these memos reflected a "summary of discussions" between your office and the Governor. However, even as a summary, these memos often omitted key information. Please respond to questions about the following four specific cases:

- a. David Wayne Stoker was convicted of murdering a convenience store clerk while committing a robbery in 1986. On June 16, 1997, you provided Governor Bush with a three-page briefing memo on Mr. Stoker's scheduled execution. The summary of the facts is quite detailed, including such specifics as the name of the assistant manager who discovered the victim's body and the time of the victim's death. However, the memo omits the following facts: (i) A key state witness – who a federal appellate judge concluded was just as likely the murderer – received a financial reward for implicating Stoker and also had felony drug and weapons charges dropped the day he testified against Stoker. This witness, along with two police witnesses, lied in court about what the witness received in exchange for his testimony. While your memo notes that this individual was a "police informant who purchased drugs from Stoker," it does not include any of these details. (ii) Another fact not included in your memo is that an additional state witness recanted his original testimony, explaining that he had been pressured by the prosecution to perjure himself. (iii) Your memo also does not inform the Governor that since Stoker's trial, the state's expert medical witness had pled guilty to seven felonies involving falsified evidence in capital murder trials and the state's expert psychiatric witness had never even examined Stoker and had since been expelled from the American Psychiatric Association for providing unethical testimony in murder cases.

(1) Why did you exclude all of these facts from your briefing memo?

Response: The memorandum to which your question refers represented the end of the process through which the Governor was provided information by my office regarding a petition and was only a summary of that information. As General Counsel to the Governor, I made sure that each petition was reviewed carefully by my staff and me and that all information the Governor should appropriately consider in order to make his determination was provided to him. I do not know if the "facts" to which you refer are from the trial proceedings or are from the clemency petition. If the information is from the clemency petition, I have no way of confirming that the facts are true, and thus I cannot respond to your question. If the information is from the trial, that would lead

me to believe that the issues were considered in a court, probably by a jury, and reviewed on appeal at several levels. In either event, as I said in my hearing, information such as the type you described, whether substantial or not, likely was communicated to the Governor in a variety of other means.

(2) These facts raise genuine issues regarding Mr. Stoker's guilt. Why not at least recommend that Governor Bush order the Board of Pardons and Paroles to conduct an investigation?

Response: The President believes the death penalty deters crime and saves lives. At the same time, he believes that all appropriate steps should be taken to ensure that only the guilty are punished. As Governor, he took clemency petitions very seriously, particularly focusing on the question whether the petitioner had a credible claim of wrongful conviction. In support of his policy, I focused in particular on this issue when reviewing clemency petitions and advising the Governor. See my answers to questions 1c and 2a(1), above.

(3) Mr. Stoker's counsel for his clemency appeal told an *Atlantic Monthly* reporter that your office called a week to ten days before the execution, advising him that there would be no reprieve. Was it typical for your office to make such notifications before the Governor had received your memo and briefing?

Response: My approach was to make as transparent as I could to defense counsel the process by which the Governor assessed each clemency petition. In many cases, the Governor and I had discussed a particular clemency petition several times before he was provided with the final summary memorandum. I doubt seriously that I would have called 10 days before the execution. The Governor would as a matter of practice wait for a recommendation from the Board of Pardons and Parole, which routinely would not make a recommendation until just before the execution date. Additionally, the Governor would normally not make a decision on clemency as long as an appeal was pending in the courts. Finally, I would not notify defense counsel of the Governor's decision before having had an opportunity to fully brief the Governor.

- b. In 1986, Irineo Montoya was convicted of capital murder. Your briefing memo on June 18, 1997, notes the following: "Montoya is a Mexican national and requests for clemency on his behalf have been received from the Governor of Tamaulipas, members of the Tamaulipas legislature, and local officials." Therefore, it is puzzling why your memo omitted the most important issue: whether the Vienna Convention on Consular Relations had been violated and whether this should be considered in the decision to grant or deny clemency to Mr. Montoya. In 1969, the United States ratified the Vienna Convention, which in part requires law enforcement officials to inform foreign nationals that they have the right to contact their consuls when they have been arrested or detained. In this case, Montoya was not notified of this right, which was especially significant because he did not speak English – another fact omitted from your memo. In fact, the Dallas Morning News on June 19, 1997, reported that,**

according to Montoya, he believed the confession he signed was an immigration document, and according to press reports, he was convicted "almost exclusively upon the strength of this confession."

(1) Why did your memo not even mention the Vienna Convention or the possible violation of it?

Response: The President believes the death penalty deters crime and saves lives. At the same time, he believes that all appropriate steps should be taken to ensure that only the guilty are punished. As Governor, he took clemency petitions very seriously, particularly focusing on the question whether the petitioner had a credible claim of wrongful conviction. The memorandum referred to in your question represented the end of the process through which the Governor was provided information by my office regarding a petition and was only a summary of that information. As General Counsel to the Governor, I made sure that each petition was reviewed carefully by my staff and me and that all information the Governor should appropriately consider in order to make his determination was provided to him. The process I used in reviewing clemency petitions and advising the Governor was modeled on the process used by my predecessor, the General Counsel to Governor Ann Richards. In a letter to me dated January 4, 2005, Governor Richards' former counsel stated, "Capital cases and clemency are among the most important and profound matters that I dealt with during my tenure, and I am confident that you discharged this duty with the utmost professionalism during your tenure in the Governor's office."

In the particular case you reference, I provided to the Department of State all the factual information it requested regarding the matter. I believed that it was for the Department of State, with its specialized expertise, to make determinations regarding the Vienna Convention as it applied to the facts of this particular case. In a letter dated June 18, 1997, to the State Department's Acting Legal Adviser providing him with the requested information, I also noted that Governor Bush had been advised that "it appears that [the petitioner] did not receive consular notice prior to his confession. The Governor has instructed me to assure you that these matters will be considered in his decision regarding clemency." The Acting Legal Adviser sent a letter to Governor Bush in response expressing appreciation for "your cooperation in this case." I regret that some are more concerned with what the memo said than what the Governor actually knew about a case. In this case, the Governor was advised in numerous conversations of the possible violation of the Vienna Convention.

(2) Five days before Montoya's scheduled execution, the State Department contacted your office to inform you that it had received a formal diplomatic note from the Government of Mexico concerning Montoya's scheduled execution and alleging a violation of the Vienna Convention in this case. Why didn't your memo mention the State Department contact or the diplomatic note?

Response: Please see my response to 2b(1), above.

(3) On October 16, 1999, you addressed the Sixth Annual Conference of the Texas/Mexico Bar Association. This speech contained great detail regarding the Montoya case, including the violation of the Vienna Convention, your discussions with the State Department, and even your contact with the Mexican Consulate in Austin, the Mexican Attorney General's office, and Mexican Ambassador to the United States. None of this was included in your briefing memo to Governor Bush. Why did you provide more specific information regarding this case to the Texas/Mexico Bar Association two years after Montoya was executed than you did in your memo to Governor Bush on the day of Montoya's scheduled execution?

Response: Please see my response to 2b(1), above.

(4) On March 31, 2004, the International Court of Justice in The Hague ruled that the United States had violated the rights of 52 Mexican nationals on death row – including 15 in Texas – and ordered the United States to review and reconsider the convictions and sentences of foreign nationals who were denied consular notification. Especially in light of that decision, do you regret not including the breach of the Vienna Convention in your briefing memo?

Response: Please see my response to 2b(1), above.

c. During Governor Bush's six years as Governor, he presided over 152 executions and granted only one clemency petition. Coincidentally, the clemency petition he granted was to Henry Lee Lucas, a convicted murderer who had a scheduled conviction while you were General Counsel. Your memo noted that Mr. Lucas' execution would not be carried out as scheduled on the day of your memo and briefing, March 13, 1995. However, this does not explain why your memo did not include any reference to a 1986 investigation by the Texas attorney general's office, which concluded that Lucas had not committed the crime for which he was given the death sentence and had falsely confessed to numerous killings. Jim Mattox, the Texas attorney general from 1983 to 1991 who instigated the investigation, has reviewed your briefing memo of March 13, 1995, and said "it does not really address in any way...all the questions that were raised about his guilt."

(1) Why did you choose not to include the 1986 investigation and its findings in your briefing memo?

Response: The President believes the death penalty deters crime and saves lives. At the same time, he believes that all appropriate steps should be taken to ensure that only the guilty are punished. As Governor, he took clemency petitions very seriously, particularly focusing on the question whether the petitioner had a credible claim of wrongful conviction. The memorandum to which your question refers represented the end of the process through which the Governor was

provided information by my office regarding a petition and was only a summary of that information. As General Counsel to the Governor, I made sure that each petition was reviewed carefully by my staff and me and that all information the Governor should appropriately consider in order to make his determination was provided to him. The process I used in reviewing clemency petitions and advising the Governor was modeled on the process used by my predecessor, the General Counsel to Governor Ann Richards. In a letter to me dated January 4, 2005, Governor Richards' former counsel stated, "Capital cases and clemency are among the most important and profound matters that I dealt with during my tenure, and I am confident that you discharged this duty with the utmost professionalism during your tenure in the Governor's office."

(2) Why did you not at least recommend that Governor Bush order the Board of Pardons and Paroles to conduct its own investigation of this case?

Response: Please see my response to 2c(1), above.

(3) In 1998, after you had left the office of General Counsel, Governor Bush's office let the Board of Pardons and Paroles know that the Governor was concerned that Lucas was to be executed for a crime he had not committed. As a result of this communication, the Board recommended, by a vote of 17-1, commutation to life in prison, which Bush then approved. Why did you not recommend similar action in 1995, when you supervised this case?

Response: Please see my response to 2c(1), above.

- d. In 1985, Anthony Ray Westley was sentenced to death for robbery and the murder of a Houston bait store owner. In your memo, you note that the trial court appointed a special master to conduct an evidentiary hearing and that this special master recommended that Westley be granted habeas corpus relief. However, your memo did not include the special master's actual findings and conclusions: that Westley was not the shooter and that "a breakdown of the adversarial process" occurred in the case because Westley did not have adequate counsel.**

(1) Why did you omit the special master's finding of innocence from your memo?

Response: The memorandum to which your question refers represented the end of the process through which the Governor was provided information by my office regarding a petition and was only a summary of that information. As General Counsel to the Governor, I made sure that each petition was reviewed carefully by my staff and me and that all information the Governor should appropriately consider in order to make his determination was provided to him. The process I used in reviewing clemency petitions and advising the Governor was modeled on the process used by my predecessor, the General Counsel to Governor Ann Richards. In a letter to me dated

January 4, 2005, Governor Richards' former counsel stated, "Capital cases and clemency are among the most important and profound matters that I dealt with during my tenure, and I am confident that you discharged this duty with the utmost professionalism during your tenure in the Governor's office."

As to your question regarding this particular clemency petition, the Governor concluded that the petitioner's claim that he should not have been sentenced to death had been properly reviewed by the courts.

(2) In light of the special master's conclusions, why not at least recommend that Governor Bush order the Board of Pardons and Paroles to conduct its own investigation of this case?

Response: Please see my response to 2d(1).

(3) In the conclusion of your memo, you state the following: "Based on the law of parties, Westley's claim of actual innocence does not overcome the fact that he planned and participated in the robbery which resulted in the murder." While this is legally accurate and Westley's claim that he was not the shooter does not overcome his guilt in the underlying charges, do you believe that planning and participating in a robbery which results in murder merits a death sentence?

Response: Please see my response to 2d(1).

JUDICIAL NOMINATIONS

1. At your nomination hearing, in response to a question from Senator Schumer about the "nuclear option," you testified that "I have no views as to whether or not a filibuster is constitutional. We view that as an internal Senate matter." Yet, on a White House online interactive forum on May 8, 2003, you stated that "the Senate has a constitutional responsibility to provide an up or down vote on judicial nominees." How do you reconcile these statements? Why don't you consider the decision whether or not to give a judicial nominee an up-or-down vote to be "an internal Senate matter?"

Response: President Bush has repeatedly urged the Senate to vote up or down promptly on a President's judicial nominees. The Constitution explicitly requires a supermajority vote for such things as trying impeachments or overriding a presidential veto; it does not do so for confirming nominations. Article II, section 2, even mentions ratifying treaties and confirming nominees in the very same sentence, requiring a supermajority for the first but not for the second. Whether the Senate also concludes that the filibuster of judicial nominees is unconstitutional is an internal matter for the Senate to decide.

2. At your nomination hearing, Senator Brownback asked you about the Texas abortion case In re Jane Doe in which you voted to allow a pregnant minor to receive a judicial

bypass because you concluded that the case fell into one of the narrow categories that the Texas state legislature believed was an exception to the state parental notification law. You stated at the hearing that “If someone like Judge Owen reached a different conclusion about what the legislature intended, it would have been perfectly reasonable for her to reach a different outcome.” Yet, as a member of the Texas Supreme Court, you wrote that Justice Owen’s position in this case was “an unconscionable act of judicial activism.” How do you reconcile your statement at the hearing with your statement in the case?

Response: The statement that you quote from my concurring opinion was not directed at Justice Owen, but rather was a comment indicating that for *me* to go further than I believed statutory construction warranted would have been judicial activism. As I explained during my testimony before the Committee, what I wrote in my opinion was that, having formed a view as to what particular requirements the Texas legislature had intended to impose on a minor seeking to bypass parental notification—and, in particular, having concluded that the Texas legislature had not intended those requirements to be so strict as to effectively eliminate the possibility of satisfying them—I could not, as a judge, proceed to apply the statute “so narrowly as to eliminate bypasses, or to create hurdles that simply are not to be found in the words of the statute.” For me to have done so, in the face of my understanding of the statute, would have been, as I stated, “an unconscionable act of judicial activism.” This statement was not a rebuke of the dissenting judges, such as Justice Owen. She had in good faith construed the ambiguous terms of a very difficult statute differently than I had done and for that reason reached a different conclusion. It is not unusual for two judges who share common assumptions about their roles as judges to reach different conclusions when considering complex questions of statutory interpretation; that circumstance does not necessarily mean that one of the judges is engaging in “activist” judging, and it did not mean so in this case. It was never my intention to suggest otherwise.

3. **As White House Counsel, you oversee the Bush Administration’s judicial nomination selection process. You are the chair of the White House Judicial Selection Committee, which makes recommendations to the President regarding nominations for federal judgeships. On December 23, 2004, the President announced his intention to re-nominate every single judicial nominee who was not confirmed in the previous Congress, except for those nominees who declined to be re-nominated. What role did you play in the President’s decision to re-nominate these individuals? Did you agree with the decision? Please explain why or why not.**

Response: The President is committed to nominating men and women of the highest integrity and intellectual caliber who share his view of the proper role of judges in our constitutional system, which is to interpret the law and not to legislate from the bench. I fully supported the confirmation of those individuals whom the President nominated during his first term, including those individuals who regrettably were denied a confirmation vote by the full Senate. I believe they were all well-qualified candidates for the federal bench— all were rated qualified or well-qualified by the ABA. And I fully support the President’s announcement of his intention to re-nominate those who are willing to be considered again; each would be confirmed if given an up or down vote, which suggests that a majority of your Senate colleagues shares the President’s

judgment concerning these nominees. My personal advice to the President is a confidential matter that would be inappropriate for me to discuss.

4. **Following his confirmation hearing to be considered for the U.S. Court of Appeals for the D.C. Circuit, I submitted this two-part question to Brett Kavanaugh: “When you were helping select judicial nominees for President Bush, did you give preference to individuals who were members of the Federalist Society? Did you consider membership in the Federalist Society to be a positive factor for a potential nominee?” Mr. Kavanaugh provided the following response: “The President has selected judicial nominees based on their qualifications, including their intellect, integrity, and temperament, and whether they will fairly and strictly interpret the law. As far as I am aware, the majority of President Bush’s judicial nominees have not been members of the Federalist Society.” I do not believe that Mr. Kavanaugh answered either part of my question. How do you answer this question?**

Response: The Administration does not give preferences to judicial candidates based solely on their membership in any given group, whether it is the Federalist Society, the American Bar Association, or any other organization. Taken alone, membership in an organization such as the Federalist Society or any other organization within the broad mainstream of American legal thinking would be neither a positive nor negative factor. For the record, I have been a member of the ABA, but never a member of the Federalist Society.

5. **A January 5, 2004 Washington Post article about your nomination quoted one of your former staff members, Bradford Berenson, as saying that you filled your staff at the White House Counsel’s office with “Federalist Society regulars.” Do you agree with the Federalist Society mission statement that says: “Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society?” Why or why not?**

Response: I am not a member of the Federalist Society and am not familiar with its entire “mission statement.” I do not believe that the legal profession is strongly dominated by a form of orthodox liberal ideology. I have no knowledge of the current composition of law schools, but would expect that there is a wide range of political beliefs within the student bodies of our nation’s law schools.

CIVIL RIGHTS

1. **At your confirmation hearing, in response to Senator DeWine’s question about what you would want to be remembered for as Attorney General, you stated that you would first give “special emphasis” to the war on terror. The second area in which you stated you would give “special emphasis” was “the protection of civil rights, the protection of our voting rights.”**
- a. **What will be your top priorities for the Civil Rights Division? Please be as specific as possible.**

b. What will be your top priorities for the protection of voting rights? Please be as specific as possible.

Response: The work of the Civil Rights Division can best be expressed in human terms: in the prosecution of human traffickers, in ensuring access to all aspects of American life for those with disabilities, in ensuring access for those with limited English proficiency, and in ensuring access to the ballot for the citizen voting for the first time. These are a few of the issues I plan to emphasize if confirmed.

2. At your nomination hearing, you stated that you felt a “special obligation . . . to reassure the career people at the Department and to reassure the American people that I’m not going to politicize the Department of Justice.” Your statement suggests that you believe DOJ has been politicized in the past. In what ways, if any, do you believe that Attorney General Ashcroft or any of his predecessors politicized DOJ?

Response: It was not my intent to make a comment regarding past Attorneys General. Providing reassurance of the important principle that the Department should not be politicized merely emphasizes how important and fundamental that principle is; it is worth emphasis no matter what actions have been taken by past Attorneys General. The Department of Justice has a long-established tradition of enforcing the law fairly and equally on behalf of all Americans. If confirmed, I would lead the Department in continuing to uphold that tradition.

3. A Knight-Ridder article dated November 21, 2003, entitled “Going Backwards: Justice Department’s Civil Rights Division Retreating from Activist Roots,” stated: “Lawyers inside and outside the department describe a slowdown in which career lawyers investigate and recommend legal action, only to watch their recommendations sit waiting for approval from political appointees. ‘I have never known morale in the [Civil Rights] Division to be lower than it is today,’ said Paul Hancock, former head of the housing discrimination section.” If confirmed, what specific steps would you take to improve morale in the Civil Rights Division among career attorneys and investigate the work slowdown alleged in this article?

Response: I am aware that there are many people who go to work at the Justice Department every day pursuing justice for all Americans. I applaud them for that; they are pursuing a noble calling. I look forward to working with all of them if I am confirmed. It is difficult to describe specific steps that I would take to improve morale or any alleged work slowdown, if indeed there are problems in those areas. I am informed that the Assistant Attorney General for Civil Rights meets with his section chiefs on a regular basis and that an attorney development program has been established within the division. If confirmed, I certainly would work with the Division to continue to improve overall performance and morale and support it in its vital role.

4. Eight months ago, following a rare Senate Judiciary Committee oversight hearing, I submitted twelve written questions to Attorney General Ashcroft, asking about various civil rights law enforcement and firearm policies at DOJ. These questions have not yet been answered. Nine months ago, following another Senate Judiciary Committee hearing, I submitted eight written questions to Director Mueller, asking about civil

rights law enforcement at the Federal Bureau of Investigation (“FBI”). These questions have not yet been answered either.

- a. **Would you commit to me that, if confirmed, you will ensure that written answers to these twenty questions are provided to me within 60 days of your confirmation?**
- b. **Would you commit to me that, if confirmed, you will ensure that written answers to all future questions from members of Congress – from both parties – as well as correspondence submitted by members of Congress, are substantively reviewed and responded to by DOJ officials within 90 days of their receipt?**

Response: I look forward to working with this Committee, and my goal is to have a good working relationship with it. If I am confirmed, I would work with you and the Department’s components to improve the Department’s responsiveness to the Committee. Because I am not familiar with the particular questions you have asked or aware of all questions you may ask in the future, it would not be prudent for me to commit to specific deadlines. The time periods you suggest, however, certainly strike me as reasonable in ordinary circumstances.

FAITH-BASED INITIATIVE

1. **From 1965 until 2002, Executive Order 11246 prohibited employment discrimination by federal government contractors, including discrimination on the basis of religion. However, on December 12, 2002, President Bush signed Executive Order 13279, which repealed these longstanding civil rights protections and now allows for religious organizations that contract with the federal government to discriminate on the basis of religion, even in government-funded positions.**
 - a. **What role did you and the White House Counsel’s office play in the issuance of Executive Order 13279?**

Response: The White House Counsel’s office ordinarily has a role in drafting or reviewing Executive Orders prior to their being issued, and I expect that the Counsel’s office played such a role in connection with Executive Order 13279, although I do not have a specific recollection of the matter.

- b. **Over the course of its 37-year history, were there any complaints or difficulties reported by religious organizations in complying with Executive Order 11246’s nondiscrimination provisions? If so, please specify and describe those reports.**

Response: I am not personally familiar with the compliance history of Executive Order 11246, as it pertains, as amended, to the consideration of religion in hiring by the recipients of federal funds. (Executive Order 11246, as signed in 1965, did not address discrimination on the basis of religion. Rather, it was amended to address religion by Executive Order 11375, signed on October 13, 1967.) Such question would be better directed to the Department of Labor, the Department Executive Order 11246 itself makes responsible for its enforcement.

- c. **Do you believe that federal government contractors should be allowed to discriminate in hiring on the basis of religion? Why or why not?**

Response: I agree with the President that the federal government should not discriminate against faith-based organizations or religiously motivated individuals in federal funding and programs. Such groups and persons should be allowed access to federal programs on the same basis as all other groups, rather than being singled out due to their religious nature.

2. **In 2003, the White House Office of Faith-Based and Community Initiatives issued a publication entitled "Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved." This booklet contains the following statements: "President Bush will continue to work to make clear that faith-based organizations that receive Federal funds retain their civil rights to base employment decisions on their beliefs and vision. At the Federal level, this means that the Administration will support changes to laws, like the Workforce Investment Act and the Head Start statute, that currently prevent religious organizations that participate in these programs from taking religion into account when hiring." It also includes the following statement: "To make matters even more complicated, a number of States and localities have statutes, regulations, and ordinances that contain express language prohibiting discrimination on the basis of religion and/or sexual orientation. Most of these laws exempt religious organizations that receive government funds, but some do not . . . The President will urge the courts to provide guidance on whether faith-based organizations are required to comply with State and local ordinances that restrict their ability to participate in Federally funded formula and block grant programs."**

- a. **What role did you and the White House Counsel's office play in issuing this publication?**

Response: I do not recall playing any role personally in connection with the issuance of the booklet to which the question refers. Publications of that nature originating from the White House would, however, ordinarily be reviewed by the Counsel's office prior to being issued.

- b. **Do you believe that faith-based organizations should be able to discriminate in hiring on the basis of religion, even for government-funded positions? Why or why not?**

Response: I agree with the President that the federal government should not discriminate against faith-based organizations in federal funding and programs. Such groups should not be required to check their religious beliefs at the door in order to provide much-needed social services.

- c. **Do you believe that faith-based organizations should be required to comply with state and local ordinances, including those regarding (1) civil rights and nondiscrimination and (2) health and safety? Why or why not?**

Response: As is true for all organizations and all individuals, faith-based organizations are obliged to comply with state and local ordinances regarding civil rights, non-discrimination, health, safety, and any other subject, so long as the specific ordinance in question does not run contrary to federal law or the Constitution.

FIREARMS POLICY

1. Under the Brady Handgun Violence Prevention Act, licensed firearms dealers generally are prohibited from transferring firearms to an individual until a search of the National Instant Criminal Background Check System (NICS) determines that the transfer would not violate applicable federal or state law. Until 2004, regulations allowed the records of approved firearms sales to be retained in a computer database, also known as the NICS Audit Log, for up to 90 days, after which the records must be destroyed. The NICS Audit Log provides many useful and necessary functions. First, it allows examiners to determine if, based on new information, someone who was allowed to receive a firearm is in fact prohibited by federal law from doing so. Second, the NICS Audit Log allows the FBI to search for patterns of fraud and abuse by both gun dealers and purchasers. Finally, it can help determine if gun buyers have submitted false identification in order to thwart the background check system.

A provision in the Consolidated Appropriations Act of 2004 reduced the amount of time records in the NICS Audit Log could be retained, from 90 days to 24 hours. In July 2001, DOJ proposed an almost identical policy change, and I asked the non-partisan Government Accountability Office (GAO) what the effect would be on public safety. The GAO Report stated: "Regarding public safety, the FBI would lose certain abilities to initiate firearm-retrieval actions when new information reveals that individuals who were approved to purchase firearms should not have been. Specifically, during the first 6 months of the current 90-day retention policy, the FBI used retained records to initiate 235 firearm-retrieval actions, of which 228 (97 percent) could not have been initiated under the proposed next-day destruction policy."

Additionally, last July, Department of Justice Inspector General Glenn Fine found that "the shortened retention time will make it much easier for corrupt [licensed dealers] to avoid detection." Specifically, Mr. Fine found that retaining the records for 90 days allowed federal authorities to audit the system to detect cases where corrupt gun dealers had provided false purchaser names to the NICS system to enable felons and other prohibited buyers to pass the background checks. The new 24-hour record destruction period, he wrote, "will limit the ATF's ability to detect certain fraudulent NICS checks."

- a. What is your response to the findings of the GAO and DOJ's Inspector General regarding the 24-hour record destruction requirement?

Response: I am unfamiliar with the work of the Inspector General in this regard, but would obviously be concerned about a policy that limits ATF's ability to detect certain fraudulent NICS checks. If confirmed as Attorney General, I would review this matter.

- b. If confirmed as Attorney General, will you change the 24 hour destruction period or support legislation to return the 24-hour record destruction requirement to 90 days, in order to allow the NICS system to operate more effectively to keep guns out of the hands of criminals? Please explain.**

Response: If confirmed, I would ensure that the Department enforces the law as passed by Congress regarding the retention of FBI records identifying lawful gun buyers. I understand the Department believes, as it explained in its recent amendment to the applicable regulation, that even with 24-hour retention of such records, it still has adequate means of detecting and deterring misuse of the National Instant Criminal Background Check System (NICS) by corrupt gun dealers through improved dealer inspections by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) using the Individual FFL Audit Logs that are now authorized by the recently amended NICS regulation, as well as through random rechecks by ATF of proceeded gun transactions. By causing the NICS to move to real-time audits of the system, the requirement that the covered records of approved transactions be destroyed within 24 hours may actually result in the more rapid detection of system errors. In addition, the new requirement does not affect records of delayed and denied transactions. As provided for in the newly amended NICS regulation under the 24-hour destruction rule, I understand the Department is confident that ATF can continue to retrieve firearms from any prohibited persons in "delayed denial" cases.

- 2. The July 2004 report of the DOJ Inspector General found that, in more than 99% of the cases where prohibited purchasers tried to obtain guns but were blocked by the Brady background check law, there was no prosecution. In 2002-2003, the FBI referred 7,030 cases to the Bureau of Alcohol, Tobacco, and Firearms ("ATF") where prohibited purchasers obtained guns and 121,909 cases where prohibited purchasers tried to buy guns but were denied by a background check. Only 154 were prosecuted.**
- a. Are you satisfied with this failure to prosecute 99% of the cases where criminals have committed a federal crime by lying about their criminal records in attempting to obtain guns?**
- b. What will you do to improve DOJ's record in prosecuting criminals in Brady Act cases?**

Response: Since the inception of Project Safe Neighborhoods (PSN), Federal firearms prosecutions have increased 76 percent. During that period, violent crime has fallen to 30-year lows, and crimes committed by offenders armed with a firearm has also fallen to record low levels. It is the case that federal prosecutions of all types of crimes associated with firearms and firearms trafficking have increased during President Bush's Administration. Furthermore, it is important to remember that federal enforcement of the criminal laws remains a relatively small portion of criminal enforcement throughout the United States. States prosecute the vast majority of criminal cases, as has been their traditional role, and PSN has supported the States' efforts by funding State prosecutors. With respect to the numbers you cite, I am not sufficiently aware of the reasons behind them. I can assure you that I am committed to continuing the

Administration's aggressive efforts to combat violent crime with all means and resources that Congress makes available to the Department, and, if I am confirmed, I would work with the Committee to seek to continue to improve our efforts.

3. **In a separate July 2004 report, DOJ Inspector General criticized ATF for failing to inspect federally-licensed gun dealers for possible violations of federal law. The report found that ATF conducted only 4,581 compliance inspections of licensed gun dealers in FY 2002, which is roughly 4.5 percent of the approximately 104,000 Federal Firearms Licenses (FFLs) nationwide. At that rate, it would take ATF more than 22 years to inspect all FFLs. Because of the lack of inspections, many gun dealers are routinely breaking the law. In FY 2002, 1,934 of the 4,581 inspections that ATF conducted uncovered violations. Inspectors found an average of almost 70 violations on each of these 1,934 inspections. In FY 2003, the ATF found violations on 1,812 inspections, with an average of over 80 violations each. Furthermore, ATF has been lax in its penalties for gun dealers who violate the law. In FY 2002, ATF sought to revoke the licenses of only 30 gun dealers, despite violations in 1,934 inspections. In FY 2003, ATF sought to revoke only 54 dealer licenses, despite violations in 1,812 inspections.**
 - a. **If confirmed as Attorney General, would you increase the number of ATF inspections of federally licensed gun dealers?**
 - b. **If confirmed as Attorney General, would you request additional resources for ATF to conduct its inspections of FFLs?**
 - c. **If confirmed as Attorney General, would you seek more revocations of federal licenses for gun dealers with multiple violations of gun laws?**

Response: At the hearing, I introduced my brother, Tony, who is a SWAT officer and a 26-year veteran of the Houston Police Department. I worry about his safety. The President supports a reauthorization of the assault weapons ban. I, of course, support the President's position. The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is an important component of the Department of Justice, and it performs critically important law enforcement and public safety functions. Within the resources provided to ATF by Congress, I expect ATF targets its inspection resources in the manner that is most effective. I do not know enough about this issue to comment further at this time. If I am confirmed, I would look into the questions you have raised. As I did in connection with the previous question, I can assure you that I am committed to continuing the Administration's aggressive efforts to combat violent crime, including illegal gun trafficking, with all means and resources that Congress makes available to the Department, and, if I am confirmed, I would work with the Committee to seek to continue to improve our efforts.

4. **Do you agree with law enforcement authorities that military-style semiautomatic assault weapons, including those banned by federal law until September 2004, pose an extraordinary threat to public safety? What specific actions will you take to achieve the President's goal of reinstating the federal assault weapons ban?**

Response: I believe the most effective means of continuing to reduce violent crime and crime committed with a firearm is through aggressive law enforcement and prosecution. This administration has increased federal firearms prosecutions by 76 percent and has supported an increase in State and local resources devoted to prosecuting firearms-related crime. I am committed to ensuring the continued vigorous enforcement of federal firearms laws so that law-abiding Americans can benefit from a continuation in the reduction in violent crime experienced during President Bush's first term. The decision to reinstate the now-expired ban on certain specific weapons is up to Congress. If Congress does reinstate the ban, I commit to the Committee that the Department of Justice would enforce it aggressively if I am confirmed.

TOBACCO LITIGATION

DOJ is still in the midst of litigation against the tobacco industry for its sustained deception of the public regarding the health risks of tobacco use. On September 5, 2001, I held an oversight hearing in the Senate Judiciary Committee to determine DOJ's management of the tobacco litigation. At that time, I was troubled by the media reports that seemed to indicate that DOJ under the Bush Administration was not pursuing the case as aggressively as it had been since the case was filed in 1999 under the previous administration. In fact, it appeared at that time that the administration was urging the parties to settle the case, first by not adequately funding the DOJ office in charge of this litigation, then by issuing veiled threats to the industry. For example, in an August 15, 2001, interview on CNN, you were quoted as saying: "The White House drives a lot of policy on issues that affect the tobacco industry . . . the kind of positions we take on these policies may be affected by how agreeable the tobacco industry is to settling this case." You were also quoted as saying, "We haven't fared too well in the courts, which gives us little leverage." Three years later, in September 2004, the case proceeded to trial after surviving eleven motions to dismiss by the defendants and attempts by Attorney General Ashcroft to settle. If confirmed as Attorney General, will you vigorously pursue this case in court?

Response: United States v. Philip Morris was filed in September 1999; almost five years to the date after its filing, on September 22, 2004, trial began in the United States District Court for the District of Columbia. These efforts have been supported by the Administration, and if confirmed as Attorney General, I would continue to support prosecution of the case. The trial continues, and the United States has in place a dedicated trial team with sufficient attorney and litigation support resources to vigorously pursue this complex litigation. I understand that the Tobacco Litigation Team (TLT) is adequately staffed, and the Assistant Attorney General has authorized hiring for TLT over other Civil Division components. With approximately 35 career lawyers pursuing the case on a daily basis—with no other assignments—the United States has had significant victories. In addition, I myself have provided declarations to the District Court in support of privilege assertions made by the Tobacco Litigation Team; I supported their efforts when I was in the White House, and I would continue to support those efforts if confirmed.

FINGERPRINT SYSTEM

I am concerned that the FBI's Integrated Automated Fingerprint Identification System (IAFIS) and the Department of Homeland Security's (DHS) Automated Biometric Identification System (IDENT) are still not integrated. In a recent report entitled, "Follow-up Review of the Status of IDENT/IAFIS Integration," DOJ's Inspector General concluded that the efforts to achieve the fully interoperable biometric fingerprint identification system directed by Congress have "stalled." This troubling circumstance is attributed to the inability of DOJ, DHS and the State Department to agree on a uniform fingerprint collection method or on the extent to which law enforcement agencies will have direct access to biometric fingerprint records. To make significant progress, the report emphasizes that "high-level policy decisions must be made regarding who should be subjected to fingerprint searches, the fingerprint collection standards to be used, the databases to be queried, who will have access to the information, how the information will be used, and who will maintain the databases."

1. What is your plan for addressing this situation? What efforts will you pursue to engage the other agencies in resolving the fundamental fingerprint policy discrepancies, breaking the impasse, and in jump-starting this project?

Response: The Inspector General's Report highlighted the difficulties involved in achieving interoperability between the biometric identification systems operated by the Department of Justice and the Department of Homeland Security. If confirmed, I would fully support the goal of achieving full interoperability between IAFIS and INDENT. One of the best methods of protecting the United States is to prevent terrorists and dangerous criminals from entering the United States or to detain them when they attempt to enter.

2. What assurances can you provide me that you will act on the Inspector General's recommendations, including meeting specific deadlines for reports, increasing the frequency of transmission of known or suspected terrorists' fingerprints, and ensuring that IAFIS meets the 99% availability requirement?

Response: If confirmed, I would review carefully the recommendations of the Inspector General. We must do what we can to protect the security of the United States, and I would continue to focus the Department's efforts in that direction.

WHISTLEBLOWER

Last year, a bipartisan bill was introduced by Senators Akaka and Grassley entitled, Federal Employees Protection of Disclosures Act (S. 2628), which the Senate Governmental Affairs Committee reported out unanimously. I served on that committee during that time and was an original cosponsor of the bill. The bill would make it easier for government whistleblowers to come forward with complaints. In light of the recent media reports on the potential whistleblower cases, including those affecting our national security and the safety of our drug supply, I believe this bill is important and necessary. The bill would increase protections for the employee against improper agency interference and strengthen

the Office of Special Counsel. For years, DOJ has had concerns about this issue. Because DOJ defends both the Office of Special Counsel, which is charged with protecting whistleblowers, and the federal agencies accused of retaliating against those whistleblowers, DOJ appears to not want any changes in whistleblower laws. Accordingly, DOJ opposed this bill even though members of the Governmental Affairs Committee were willing to make some changes.

1. What is your position on the bipartisan Federal Employees Protection of Disclosures Act?

Response: I am committed to the protection of whistleblowers who bring to light significant information about waste, fraud, or abuse in federal agencies, and I support the protections against retaliation that are afforded to them by current law. It is my understanding, however, that as currently drafted, the Department of Justice continues to have strong objections to the changes proposed in S. 2628. If confirmed, I would commit to review this issue.

2. Do you believe that federal employees have a right to disclose fraud and abuse information directly to Congress without fear of retaliation?

Response: With the exception of classified information, the Whistleblower Protection Act currently protects federal employees, as defined by the WPA, who disclose information that they reasonably believe is evidence of fraud or abuse. These existing protections include disclosures directly to Congress. The time, place and manner in which classified information can be disclosed lies solely with the President or his designee. Executive Branch employees may not circumvent the existing procedures for disclosure of classified information.

3. If confirmed as Attorney General, would you commit to protecting federal employees from retaliatory action when they come forward to disclose information about government waste, fraud, abuse, or illegal conduct that may not be covered by the Whistleblower Protection Act?

Response: No federal employee, whether covered by the WPA or not, should be subjected to unwarranted and retaliatory personnel actions. However, individuals who fail to follow governing statutes, regulations, and policy in disclosing classified or other protected information may be subject to appropriate disciplinary action.

LOAN FORGIVENESS

In the 108th Congress, I introduced a legislation that would provide partial student loan repayment to prosecutors and public defenders who agree to serve as public attorneys for a minimum of three years. This program was modeled upon the current federal employee's student loan forgiveness program. It would provide aid for state and local prosecutors and public defenders and forgive Perkins Loans, Family Education Loans, and William Ford Direct Loans.

It is critical to our criminal justice system that prosecutors and public defenders be able to recruit and retain highly-qualified attorneys to prosecute criminal cases and to represent the accused. However, almost one-third of prosecutors' offices across the country reported problems with recruitment and retention of staff attorneys in 2001, and low salaries were cited as the primary reason for these difficulties. Last summer, the Office of Personnel Management issued a report showing that the federal employee's student loan forgiveness program (upon which my proposal is modeled) has been an effective tool in recruiting and retaining employees. For example, an agency within the Defense Department reported its acceptance rate by job applicants rose from 42 percent to 60 percent last year because of this program. Eight of the 20 people hired by the agency cited the program as their top reason for accepting the job. Overall, federal agencies used student loan repayments in FY 2003 to recruit and retain three times as many employees as they did the year before; many agencies reported that this loan forgiveness program has allowed them to remain competitive with the private sector in recruiting workers.

The program I have introduced is the "top legislative priority" for both the National District Attorneys Association and the National Legal Aid and Defender Association. The American Bar Association, National Association of Prosecutor Coordinators, and the American Council of Chief Defenders also support this program. Finally, a report issued by DOJ's Office of Justice Programs in 2000 concluded that prosecutors and public defenders should have access to student loan forgiveness as "an important means of reducing staff turnover and avoiding related recruitment/training costs and disruptions to the office and case processing."

1. What is your position on providing student loan forgiveness to prosecutors and public defenders who agree to serve as public attorneys for a minimum of three years?
2. Specifically, would you support such a program, established in DOJ, as the one I have introduced in the 108th Congress (Section 202 of S. 2358)? Why or why not?

Response: The Administration has not yet taken a position on this legislation as described. If I am confirmed, I would request that the legislation be reviewed if it is reintroduced.

**Responses of Alberto R. Gonzales
Nominee to be Attorney General
to the Written Questions of Senator Russell D. Feingold**

Texas Death Penalty

1. As we discussed in the hearing, your clemency memo to then-Governor Bush regarding Carl Johnson did not mention Johnson's argument that he had ineffective assistance of counsel because his lawyer slept through major portions of his trial. In answer to my questions about this, you stated that you do not remember the facts surrounding your clemency briefing in this case but that you may have had numerous discussions about this claim with then-Governor Bush and only left it out of the memo because it had been thoroughly considered by the courts. When then-Governor Bush made the decision to deny clemency to Carl Johnson, did he know that Johnson's clemency petition was based, at least in part, on the fact that his lawyer slept through major portions of his trial?

Response: The President believes the death penalty deters crime and saves lives. At the same time, he believes that all appropriate steps should be taken to ensure that only the guilty are punished. As Governor, he took clemency petitions very seriously, particularly focusing on the question whether the petitioner had a credible claim of wrongful conviction. The memorandum referred to in your question represented the end of the process through which the Governor was provided information by my office regarding a petition and was only a summary of that information. As General Counsel to the Governor, I made sure that each petition was reviewed carefully by my staff and me and that all information the Governor should appropriately consider in order to make his determination was provided to him. The process I used in reviewing clemency petitions and advising the Governor was modeled on the process used by my predecessor, the General Counsel to Governor Ann Richards. In a letter to me dated January 4, 2005, Governor Richards' former counsel stated, "Capital cases and clemency are among the most important and profound matters that I dealt with during my tenure, and I am confident that you discharged this duty with the utmost professionalism during your tenure in the Governor's office."

With respect to the particular case you mention, I am personally troubled by allegations that a lawyer for a defendant in a capital case slept through major – or any – portions of the trial. It is important to the administration of justice that capital defendants be competently represented by competent counsel. It has been my experience that from time to time untrue allegations are included in a clemency petition. Because I do not have access to the clemency petition or to the record of the case, I do not know whether the facts you allege were included only in the clemency petition, or had been fully and adequately reviewed by the courts. I am confident, however, that if Mr. Johnson's request for clemency was based in part on the fact that his lawyer slept through part of his trial, that information would have been communicated to and considered by the Governor in deciding whether to grant clemency.

2. At the hearing, you noted that under Texas law, the Governor may commute a death sentence only upon a recommendation by the Board of Pardons and Parole ("BPP")

a. Would you agree that as a practical matter, Governor Bush had it in his power to stop any execution he wanted, that he could have expressed his dissatisfaction or concerns to the BPP about any case, and that he could have ordered the BPP to conduct an investigation into any issue that raised questions in his mind?

Response: As I recall, under the Texas Constitution, a Governor has the authority, acting with a recommendation from the BPP, to grant one 30-day reprieve. Members of the BPP are appointed by the Governor and confirmed by the Texas Senate. Governor Bush expected appointees to exercise good and independent judgment in discharging their responsibilities, free from any political influence or pressure. The BPP was created precisely to serve as a check on the discretion of a Governor with respect to clemency. As I already noted, the process I used in reviewing clemency petitions and advising the Governor was modeled on the process used by my predecessor, the General Counsel to Governor Ann Richards. In a letter to me dated January 4, 2005, Governor Richards' former counsel stated, "Capital cases and clemency are among the most important and profound matters that I dealt with during my tenure, and I am confident that you discharged this duty with the utmost professionalism during your tenure in the Governor's office."

b. It has been reported that this is what happened in the Henry Lee Lucas case -- that it was the Governor's legal counsel's office that instigated the commutation for Lucas, and not the BPP. Is that true?

Response: I do not believe that I was the General Counsel when Lucas' sentence was commuted. My recollection is that concerns were raised as an initial matter by the Texas Attorney General.

Federal Death Penalty

1. In 2000, the Department of Justice produced a detailed statistical survey of federal death penalty prosecutions. At that time, Attorney General Reno stated that the report raised serious concerns about how the death penalty was being applied, and she ordered that the Department's National Institute of Justice (NIJ) contract for a thorough study. The 2000 report was updated by the Department in June 2001, but the Department has released no detailed information about death penalty prosecution to the public since then, and the NIJ-sponsored studies have still not been released.

a. Do you agree that data concerning the administration of the federal death penalty should be regularly made available to the public?

Response: I certainly agree that sharing as much information as possible with the public about the operation of the Department is a worthy goal. I believe this is particularly true on issues such as the application of the death penalty. The public should have confidence that the Department is applying the death penalty fairly. I also believe the American people should be advised generally of information of the Department regarding the

effectiveness of the death penalty. In sharing information, however, the Department must be mindful not to put law enforcement objectives at risk or chill frank discussion and communication among decision makers. If confirmed, I would look into what can be shared with the American people regarding this serious issue.

b. Will you commit to a prompt updating of the September 2000 DOJ study, covering the period from June 2001 to the present, so that the public can evaluate how the federal death penalty laws have been implemented by this Administration?

Response: I share the goal of ensuring that the death penalty is administered in an even-handed fashion. Of course, I have not been in the Department and am unaware of where discussions stand regarding an update, nor do I have complete information regarding the basis of previous DOJ discussions regarding these studies. If confirmed, I would consult with the experts at the Department and consider whether the compilation of such data and statistics contributes in a meaningful way to an assessment of capital charging decisions or prosecutions.

c. Will you agree to order the collection of such data and statistics and that this collected data should track cases through disposition in order to get an accurate picture of the entire case, from beginning to end?

Response: Please see my response to 1b, above.

2. Department of Justice procedures permit the Attorney General to direct United States Attorneys to seek the death penalty in cases where the U.S. Attorneys and the line prosecutors working for them do not favor doing so. It has been reported that about one-third of the current Administration's death penalty authorizations have occurred over the opposition, or at least non-concurrence, of the prosecutors who actually have to try the cases. There have also been reports that 25 such cases have now been concluded, and that the death penalty was actually imposed by juries in only three of them – a failure rate of 88 percent, not counting the possibility of additional reversals on appeal.

Given this record, will you accord greater deference and respect than your predecessor did to the recommendations of federal prosecutors who do not wish to seek the death penalty in cases for which they are responsible?

Response: I am unfamiliar with the reports you reference, and not having been in the Department, I do not have firsthand knowledge of the reasons for particular DOJ decisions regarding specific cases. Of course, I believe the views of the local prosecutor are important in a particular case and should be given serious consideration. But it is important that decisions as important as decisions to seek the death penalty are fair and consistent throughout the country, and that is not possible without some centralized decision making. This is a very serious matter and, if confirmed as Attorney General, I commit to the Committee that I will personally look at this matter and would also consider whether the results of the process indicate the need for modifications.

3. In 1998, the Judicial Conference issued a study of defense costs in federal death penalty cases. The study included the cost information concerning 21 of 24 completed federal death penalty prosecutions in which the Attorney General had decided to seek the death penalty after January 1995. The Department of Justice reported an average total cost per prosecution of \$365,296, but this figure does not include the cost of investigation or the cost of scientific testing and expert evaluations performed by law enforcement personnel." This study is clear precedent for providing a cost-accounting of how much money is being spent for the Capital Case Unit, and for each death case that you authorize. Will you authorize the disclosure of an updated cost-accounting of death case funding?

Response: I am not familiar with the study referenced in your question. If confirmed, I would look into the question of whether to conduct and disclose a cost-accounting of capital prosecutions.

PATRIOT Act and Oversight

1. On December 6, 2001, Attorney General Ashcroft testified before this Committee about the Justice Department's anti-terrorism policies. In his opening statement, he said, "to those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve." Do you agree with Attorney General Ashcroft's assessment that those who question Justice Department policies and conduct in the war on terrorism aid the terrorists? Will you commit to having an open dialogue with your and the Department's critics that will not rely on such rhetoric?

Response: I believe that robust public dialogue about the government's actions in prosecuting the war on terrorism is both an important feature of our democracy and an aid to well-considered decision-making. Should I be fortunate enough to be confirmed as Attorney General, I would do my best to explain the Department's policies and practices on terrorism clearly and respectfully.

2. In 2003, as the public was beginning to understand the full breadth of expanded federal law enforcement power authorized by the PATRIOT Act, Attorney General Ashcroft characterized the American Library Association's concerns about the authority granted to the FBI in the PATRIOT Act as "hysteria." Do you agree with Attorney General Ashcroft's characterization of this nonpartisan group's concerns as "hysteria?" Do you think it is productive to belittle critics of the PATRIOT Act rather than engaging in a respectful dialogue with them?

Response: As stated above, I believe that public dialogue about the Department's policies and practices in the terrorism context is important, and I would do my best should I be confirmed as Attorney General to explain those policies and practices clearly and respectfully.

3. When the PATRIOT Act was enacted, Congress placed sunsets on certain surveillance powers so that Congress could evaluate how the powers had been used before deciding whether to extend them or to make them permanent. Some of those provisions scheduled to expire at the end of this year are not controversial. Other provisions are controversial,

and some provisions not subject to the sunset have been criticized for having the potential to infringe on the privacy and civil liberties of law-abiding Americans.

Please describe the steps you will take, if confirmed, to work with the Judiciary Committee and Congress to ensure that we have the information we need to make an informed decision about whether to renew those provisions that will expire at the end of this year or make other changes to the PATRIOT Act.

Response: If confirmed, I would seek to take account of the information to be provided to the Congress regarding the USA PATRIOT Act. I would intend to work with this Committee in a manner that ensures the Congress has accurate and useful information regarding the USA PATRIOT Act, so that Congress may make an informed decision about its reauthorization.

4. In the 108th Congress, I cosponsored the SAFE Act (S.1709), a bipartisan proposal to modify certain PATRIOT Act provisions. Will you sit down with me and the other sponsors of the SAFE Act to discuss the reauthorization process and how we can ensure that reasonable safeguards are included in whatever reauthorization bill is enacted?

Response: Yes. If confirmed, I would be happy to meet with you and other Members interested in the reauthorization of the USA PATRIOT Act.

5. The current Attorney General has failed to consult with Congress and members on both sides of the aisle on some of the most important, expansive law enforcement legislation that has been proposed, debated and even passed since 2001, including the PATRIOT Act. A full draft bill, known as PATRIOT II, became public before any discussions with interested members had taken place, and while the proposed bill was later disavowed as merely a draft, many of the proposals contained in it have been included in subsequent Administration proposals. If confirmed, will you consult with Congress and members on both sides of the aisle before rolling out additional legislative proposals to expand federal law enforcement powers that might curtail constitutional rights and protections? What action will you take to ensure this consultation occurs?

Response: If confirmed, it is my intention to work closely with members of Congress and committees of jurisdiction to pass legislative proposals that the President believes to be necessary and expedient. Such consultation and cooperation is an important part of explaining and justifying any Administration proposal that Congress ultimately decides to consider. Having said that, it is nonetheless important to note that, to meet its constitutional responsibilities, the Executive Branch will often have internal discussions concerning potential legislative proposals that are not yet ready to be shared with the Congress. Such discussions are an important part of any process by which legislative initiatives are first proposed by the Administration and can appropriately take place without real-time consultation with the Congress. As you know, the package of proposals that was being considered (to which you refer as PATRIOT II) was leaked to the public before the Administration had completed its internal deliberations and before it was ready to confer with Congress.

6. The current Attorney General has appeared before the Senate Judiciary Committee only about once a year since he took office, and he has often been very slow to respond to legitimate oversight inquiries from Congress. Will you pledge to personally appear before the Committee at least three times a year if you are confirmed?

Response: As I said at my hearing, I enjoy meeting personally with Members. I also said that meeting with the Committee at least two times a year appears reasonable. Certainly my goal, if confirmed to be Attorney General, is to be as responsive as I reasonably can to Committee requests and inquiries – including invitations to appear and testify before the Senate Judiciary Committee – consistent with my ability to perform my other significant duties if I were the Attorney General. I believe that in order for the Department to be successful, I will need the cooperation and support of this Committee, and I understand that support must be earned through working and cooperating with the Committee and its members.

Torture, Inhumane Treatment, Detention, Role of OLC

1. You stated repeatedly during the hearing that it is not the administration’s policy to engage in torture. Are there any exceptions to this policy?

Response: No.

2. You repeatedly stated that torture is against U.S. policy, but then asked for more time when Sen. Durbin asked whether there were any circumstances in which U.S. personnel could legally engage in torture. In a discussion of the practice of “extraordinary renditions,” you used a different formulation, saying that rendition was illegal and against U.S. policy: “I believe that that is the law, and naturally U.S. policy.”

a. Why were you willing to state that rendition was illegal, but not willing to make that same categorical statement about torture?

Response: When Senator Durbin questioned me late in the day of my hearing, I simply wanted to make sure that I was giving an accurate answer. That answer is as follows: Torture is illegal, and there are no circumstances in which U.S. personnel can legally engage in torture.

b. Are there any circumstances where U.S. personnel could engage in torture without violating United States law?

Response: No. The President has not authorized anyone to commit torture. To the contrary, he has emphatically stated that the United States will not engage in torture.

c. Without reference to U.S. policy, please explain whether there are any circumstances where U.S. personnel could commit acts of cruel, inhuman and/or degrading treatment without violating United States law.

Response: By agreeing to and ratifying the Convention Against Torture, the United States undertook to prevent acts of “cruel, inhuman or degrading” treatment as that term is defined in the Senate’s reservation to Article 16 of the Convention Against Torture. As I testified, because of the Senate’s reservation to Article 16 of the Convention Against Torture and the jurisdictional and other limitations of Article 16 and of the Fifth, Eighth and Fourteenth Amendments, which have been held not to apply to aliens overseas who are not being punished within the meaning of the Eighth Amendment, Article 16 has a limited geographical reach as a legal matter. Congress did not pass legislation implementing that obligation as it did the obligation to criminalize torture under the Convention.

d. Are U.S. laws prohibiting torture unconstitutional as applied to the President or anyone expressly authorized by the President acting as Commander in Chief to commit torture?

Response: No. The President has not authorized anyone to commit torture. To the contrary, he has emphatically stated that the United States will not engage in torture.

3. During the hearing, you acknowledged that:

“[T]o the extent there’s a perception, and I think it’s a wrong perception, but there’s a perception out there that as a matter of policy, the United States is ignoring its legal obligations, I think it makes it more difficult to win the hearts and minds of certain communities, and therefore more difficult to win the war on terror.”

At the hearing, you repeatedly refused to say that the Department of Justice was wrong to claim that the President has the constitutional power to violate our torture law. You pointed out that the memo in question had been “withdrawn,” and was no longer policy, but of course the memo was “binding” for more than two years, and you have not rejected this legal argument on the merits.

a. Is it possible that your answers at the hearing—specifically, your refusal to say that the Department was wrong to claim a Presidential power to torture— furthered the perception that the United States is ignoring or may ignore in the future our international legal obligations?

Response: That would not be a fair or reasonable perception. As the President has made clear, and as I tried to convey at my hearing, the United States has always honored and will always honor its treaty obligations relating to torture under the Convention Against Torture. I also stated at the hearing that the August 2002 memorandum has been withdrawn and rejected and that I reject the memorandum. It does not represent the position of the executive branch.

b. As Attorney General, what will you do to combat this perception?

Response: If confirmed as Attorney General, I would say and do everything within my power to make sure that the United States acts in all matters consistently with its treaty obligations under the Convention Against Torture and to communicate with the public our commitment to abide by international legal obligations.

4. As you stated during the hearing, lawyers sometimes disagree. Do you remember disagreeing with any aspect of the August 2002 memorandum when you read it? If so, do you remember expressing that disagreement to anyone? Please specify any parts of the August 2002 memorandum, if any, with which you disagreed when you received it.

Response: As I said in the hearing, I do not recall my line-by-line reaction to the analysis in the memorandum. I did realize and discuss that the Office of Legal Counsel was interpreting a statute that was not perfectly clear and was using tools of statutory interpretation, including references to other statutes passed by Congress, to do its best to interpret an unclear statute. I realize that approaches to interpretation of an unclear statute – one that has not been interpreted by the courts – are frequently a matter of debate among lawyers.

5. During the hearing, you indicated to Senator Kennedy that you as White House Counsel were obligated to accept the opinions of the Office of Legal Counsel as binding. In response to a question about the August 2002 memo’s position on a necessity defense to torture, you said, “I’m sure we had discussions about it, and ultimately it was accepted because that was the ultimate decision and position of the Office of Legal Counsel.” In response to another question about the August 2002 memo, you said, “Ultimately, as I’ve said repeatedly during this hearing, it is the responsibility of the Department of Justice to make the final call. Ultimately, it is their decision as to what the law requires, and it was accepted by us as the binding interpretation of that statute.”

a. Did you mean to imply that “the final call” on issues of torture’s legality does not rest with the President? If the President receives an opinion from OLC which he believes is wrong, is he nonetheless obligated to accept it?

Response: As a general matter, the President as head of the Executive Branch has a legal duty to take care that the laws are faithfully executed. In doing so, the President must know what the laws mean. The Office of Legal Counsel has been delegated by regulation the authority of the Attorney General to provide legal advice to the Executive Branch. A conclusion by OLC that a certain course of action is legal, however, does not mean that the President is obligated to pursue that course of action; he may as a constitutional matter decide not to exercise authority that OLC has advised him he possesses under the laws and the Constitution. With respect to the torture statute, the President has repeatedly made clear that it is contrary to U.S. policy to engage in torture under any circumstances. He has also clearly directed that persons detained by our military forces are to be treated humanely and, as appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Convention. I believe that the President, as the head of the Executive Branch, could direct OLC to reconsider an opinion where warranted and retains the power as the Chief Executive to countermand OLC’s legal conclusion in extraordinary situations. But where the President has no intention of

relying on portions of an OLC opinion indicating that he has authority to act, it would not be expected that he or anyone acting on his behalf should order an opinion revisited or revised.

b. Does the President have the legal authority to order OLC to reconsider an opinion? Would it not be your responsibility, as White House Counsel, to advise him as to whether he could and should issue such an order?

Response: Please see my response to 5a, above.

c. As Attorney General, if the White House Counsel asked you to order OLC to reconsider an opinion, would you decline? If you cannot categorically answer yes, please explain in what sense you believe an OLC opinion is "binding" on the White House.

Response: As you know, in interpreting certain statutes on which the courts have given no guidance, there may be disagreements among lawyers about the scope of such statutes. It would be natural, and prudent, for lawyers to debate and discuss hard questions of law. I believe we should encourage lawyers to examine and reexamine the basis for their conclusions on hard questions of law. Whether I would order OLC, if I am confirmed as Attorney General, to reconsider an opinion at the request of the White House Counsel would depend on the reasons for reconsidering the opinion. Please see my response to 5a, above.

6. During the hearing, you said:

"It is not my job to decide which type of methods of obtaining information from terrorists would be most effective. That job of responsibility falls to folks within the agencies. It is also not my job to make the ultimate decision about whether or not those methods would in fact meet the requirements of the anti-torture statute. That would be a job for the Department of Justice. And I never influenced or pressured the department to bless any of these techniques. I viewed it as their responsibility to make the decision as to whether or not a procedure or method of questioning of these terrorists that an agency wanted would, in fact, be lawful."

As I understand it, your view is that although the White House Counsel may have opinions as to the interpretation of a law, it is not his role to assert those opinions with any force if the Department of Justice has a different interpretation, even if the Department is blatantly mistaken, as it was in the case of the August 2002 memorandum. It would seem inconsistent with this position for you to have had any involvement with the decision to reconsider the August 2002 memorandum. Please explain the role you played in the decision to reconsider the August 2002 memorandum and the development of the December 2004 memorandum, in light of your view that it was "their responsibility to make the decision" and that you "never influenced or pressured the department" on this issue.

Response: I do not agree that it is not the role of the Counsel to the President to assert his opinions "with any force." As I said in my previous answer, lawyers should debate and question the analysis of hard questions of law. I think it is perfectly appropriate, and consistent with the practice of White House Counsels for Democrat and Republican Presidents, to talk to lawyers at the Department about questions of law. Having and asserting strong opinions about an issue, however, does not change the fact that, as I said at the hearing, the ultimate decision about the requirements of the anti-torture statute was one for the Department of Justice to make. The Department of Justice made the decision to reconsider the August 2002 memorandum as a result of concerns from the Office of Legal Counsel about portions of the analysis. That memorandum was withdrawn and the record clarified that the President has never authorized torture and does not condone torture. This was not an issue of deciding which techniques would be most effective in obtaining information from terrorists. Instead, there was a discussion that some of the issues discussed in the August 2002 memorandum were unnecessary and irrelevant and could lead some to make incorrect assumptions about the authorities exercised by the President.

7. A group of former Assistant Attorneys General and other officials for the Office of Legal Counsel recently issued a statement underscoring the duty of the OLC, and in turn the Attorney General, to provide the President "an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies." In this statement, the former OLC officials noted that the "OLC should maintain internal systems and practices to help ensure that OLC's legal advice is of the highest possible quality and represents the best possible views of the law." If confirmed, what internal accountability systems will you put in place in order to ensure that the highest quality legal advice comes out of OLC?

Response: I completely agree that it is, and has always been, the duty and function of the Office of Legal Counsel to provide the President and the Executive Branch with an accurate and honest analysis of the law, even if that analysis would constrain the pursuit of policy goals. If confirmed as Attorney General, I would work with the Assistant Attorney General for the Office of Legal Counsel to ensure that OLC continues to employ the practices necessary to meet the highest standards of legal analysis.

8. Most of the leaked memos on torture and the Geneva Conventions were produced by the Justice Department's Office of Legal Counsel. The State Department apparently opposed many of these arguments blurring the definition of torture and the meaning of the Geneva Conventions. You told Senator Sessions at the hearing that OLC has institutional expertise in these matters, but of course the Departments of State and Defense have much greater expertise on international law and the laws of war. As the former OLC officials recommend in their statement, the Justice Department and the Office of Legal Counsel should seek out the views of affected agencies before rendering its final advice. Yet, the OLC bypassed the State Department and Defense Department, the two agencies with relevant international legal expertise, in preparing its legal advice on torture.

If confirmed as Attorney General, would you continue the practice of bypassing the State Department and Defense Department when the OLC is called on to provide advice to the

President on sensitive international matters like torture? What steps will you take to ensure that agencies with relevant legal expertise are consulted by OLC officials?

Response: There is no practice of bypassing the State Department and Defense Department regarding certain issues. In the case of the August 2002 opinion, OLC was asked to interpret a statute in Title 18 of the U.S. Code dealing with our criminal laws. If confirmed as Attorney General, I would direct OLC to coordinate closely with colleagues at the State Department, Defense Department, and elsewhere in government to ensure that it has the benefit of all relevant legal expertise in those agencies.

9. In a January 25, 2002 memo to the President, you recommended that the President declare that the Geneva Conventions did not apply to the conflict in Afghanistan. If the President had agreed with your recommendation, and declared that the Geneva Conventions did not apply to the conflict, under what legal authority could the United States have sought prosecution of members of the Taliban who committed war crimes against American soldiers or Afghan civilians?

Response: The document to which you refer is a draft that was never sent to the President in that form. There is ample basis under the law of war, without relying on the Geneva Conventions, to prosecute unlawful combatants for war crimes. As the Supreme Court made clear in *Ex parte Quirin*, 317 U.S. 1 (1942), military commissions may try enemy fighters for violations of the common law of war.

10. It has been reported that you were deeply involved in the creation of the administration's policy on treating U.S. citizens as enemy combatants. Until the Supreme Court stepped in, the Administration claimed the power to detain U.S. citizens with no hearing based on the President's unreviewable determination to classify them as "enemy combatants." In the *Hamdi* case, the Supreme Court rejected the Administration's theory of absolute executive power, and said Hamdi must be given a hearing, so that he could have a chance to prove that he was not a combatant. How has the Administration adjusted its policies to comply with the Court's ruling?

Response: Contrary to reports, the Administration has never taken the position that an American citizen has no habeas right to challenge his detention as an unlawful combatant. The Supreme Court concluded in *Hamdi* that under Congress's September 2001 Authorization for Use of Military Force, the President has authority to detain U.S. citizens as enemy combatants so long as they have an opportunity, consistent with due process, to contest the factual basis for that detention. Citizens who are held as enemy combatants, such as Jose Padilla, have an opportunity to exercise their rights to challenge the government's case and to be heard by an impartial adjudicator in the course of habeas corpus proceedings before a district court judge.

11. As you know the Supreme Court remanded the *Padilla* case because it had been filed in the wrong jurisdiction. The case is now working its way back through the courts, and could very well end up in the Supreme Court again. In light of the *Hamdi* ruling and your study of U.S. law and the Constitution, do you believe that the government has the power to

hold a U.S. citizen arrested in the United States in detention indefinitely without charge or access to counsel?

Response: The government has long been providing Mr. Padilla with access to counsel, so as the Supreme Court itself observed in similar circumstances in *Hamdi*, questions about access to counsel are no longer posed. Whether a U.S. citizen can be detained as an enemy combatant depends on the facts and circumstances of the particular case. In light of the facts in the *Padilla* case, the government has argued that the President has authority as Commander in Chief and under the Authorization for Use of Military Force enacted by Congress in response to the September 11 attacks to detain Mr. Padilla as an enemy combatant. The matter is currently being litigated, and I do not want to prejudice the litigation in any way. The government's legal arguments appear to be sound, but if confirmed, I would intend to monitor this litigation closely to ensure that the government's position continues to take account of any legal developments.

12. Speaking recently before the Federalist Society, Attorney General Ashcroft called for curtailing the role of the federal judiciary as a check on the President during times of war or national emergency and came close to impugning the integrity of the federal judiciary. He declared that "dangerous and constitutionally questionable" rulings by federal judges that challenge the President's powers in the war on terror are jeopardizing national security. It is clear the Attorney General was referring, in part, to the Supreme Court's rulings in *Hamdi* and *Rasul*, which were the first tests before the highest court of the President's claim of unchecked power in this post-September 11th era.

Do you agree with Attorney General Ashcroft's assessment that recent decisions by the Supreme Court are putting our national security at risk? Do you agree with Attorney General Ashcroft's characterization of the federal judiciary as improperly interfering with the war on terrorism? What is your view of the role of the courts in our constitutional system to review executive branch actions that touch on national security matters?

Response: Historically, the Supreme Court has shown significant deference to the President when reviewing Executive Branch actions that touch on national security matters, and I believe that such deference in this area is appropriate. At the same time, there are limits upon presidential power, and I agree with Justice O'Connor's statement in *Hamdi* that "a state of war is not a blank check for the president of the United States" with respect to the rights of American citizens. The Administration fully intends to comply with the decisions of the Supreme Court in this area.

Racial Profiling

1. In 2001, in his first address to a joint session of Congress, President Bush declared that racial profiling is wrong and pledged to end it in America. Two years later, the Civil Rights Division issued guidelines to federal law enforcement banning racial profiling. While this guidance is useful, it still falls short of fulfilling the President's pledge. Federal legislation banning racial profiling, if enacted, would apply to state, local, and federal law enforcement. A bill I have developed with Rep. John Conyers would provide the comprehensive law that is needed.

a. If confirmed, what steps will you and the Department take to implement the Civil Rights Division's guidance and to ensure that federal agencies are complying with it?

Response: It is my understanding that the Civil Rights Division already has taken substantial steps to ensure that covered federal law enforcement agencies have incorporated the racial profiling guidance into their policies and are abiding by it. If confirmed as Attorney General, I would ensure that the Division continues to take the lead in coordinating with responsible agency officials to ensure that the prohibition on racial profiling is respected.

b. These guidelines only apply to federal law enforcement, not state and local law enforcement. What steps will you take to end and prevent racial profiling at the state and local level?

Response: Although the Civil Rights Division's Guidelines address federal law enforcement, local law enforcement agencies often look to their federal counterparts for guidance and models. I fully expect that the Guidelines will provide such a model. Moreover, State and local law enforcement remain bound by the strictures of the Constitution. The Civil Rights Division is also responsible for investigating patterns or practices by State and local law enforcement of depriving individuals of federal rights, including constitutional rights. If confirmed, the enforcement of civil rights laws would be a priority for me. To the extent that a State or local law enforcement agency violates federally protected rights, the Department would seek appropriate charges.

c. Will enacting federal legislation on racial profiling be a priority item on your agenda? Will you commit to working with Rep. Conyers and me on our bill, the End Racial Profiling Act?

Response: If confirmed as Attorney General, I would review your bill and ensure that the Department provides comments on legislation at the appropriate time and in the appropriate manner. I would look forward to working with you and Representative Conyers on this important matter.

2. Last spring, the FBI's involvement in assisting the Spanish authorities with investigating the Madrid bombings resulted in the mistaken arrest of an American, Brandon Mayfield. The government's handling of this case suggests that Mr. Mayfield's religion and religious practices were a factor in the Department's decision to investigate him and later seek his detention. If confirmed, what steps will you take to ensure that religion will not be used as the basis for criminal investigation or prosecution by the FBI or Department of Justice?

Response: I understand that the Inspector General of the Department of Justice is currently investigating the FBI's conduct in connection with the erroneous identification of Mr. Mayfield. When the Inspector General completes his investigation, if confirmed I would certainly review

his conclusions closely. Religion *per se* should never be used as the basis for criminal investigation by the FBI or the Department of Justice.

3. Since shortly after September 11, 2001, the Justice Department's Community Relations Service office has organized training workshops to educate law enforcement officials about the religion and culture of Arab and Muslim Americans. These programs have been conducted by Connecting Cultures and are entitled, "Building Cultural Competency: Understanding Arabs and Muslims in America." I understand that these workshops have sometimes included FBI agents and federal prosecutors, but there has apparently been no directive from or concerted effort by the Attorney General or FBI Director requiring FBI counterterrorism agents and federal prosecutors working on counterterrorism to participate in such educational workshops.

Would you be willing to require all counterterrorism FBI agents and federal prosecutors and all federal, state and local members of the Joint Terrorism Task Forces to participate in training to learn about the religion and culture of Arab and Muslim Americans, such as the workshop conducted by Connecting Cultures?

Response: If confirmed, I would certainly consider whether it would be appropriate to require participation in such workshops as a part of the many duties and responsibilities undertaken by members of JTTFs. Department officers and employees should always act with respect toward the civil rights and liberties of all Americans as they discharge their important professional duties.

Hate Crimes and Post-9/11 Civil Liberties

1. Since September 11, 2001, there has been a rise in violence against or harassment of Arab and Muslim Americans, or those perceived to be such, and their places of worship. As Attorney General, what would you do to prevent such acts from occurring? Will you use the power of your office to command the public's attention when it comes to the important matter of condemning hate violence and highlighting hate crime prosecutions?

Response: Both President Bush and Attorney General Ashcroft have strongly decried such actions, and the Civil Rights Division has prosecuted such crimes. If confirmed as Attorney General, I would continue this effort. Moreover, I would ensure that components of the Department of Justice, including the Civil Rights Division, the Community Relations Service, United States Attorneys Offices, and the FBI, continue to reach out to national organizations representing these groups and to local communities and community leaders to forge the good relationships necessary both to adequately protect these individuals and successfully defend the nation from further terror attacks.

2. As you know, in the weeks and months following the September 11th attacks, the Justice Department rounded up and detained hundreds of mainly Arab and Muslim men, most of whom were detained for immigration violations. None of these men had participated in the 9/11 attacks, and only a few of them had even a remote connection to a terrorist. When jailed, the men were frequently prevented from contacting their lawyers or families and

were not informed of the reasons for their detention. For the first time in our history, the Justice Department refused to tell the American public the names of the individuals it detained and refused to confirm to family members of those detained whether their loved one was in fact imprisoned.

a. In your view, what are the circumstances under which the Department of Justice may refuse to make public the identity of individuals arrested in the United States and the legal basis for the arrests?

Response: Among the limited circumstances that may merit the withholding of information about aliens in immigration proceedings are the protection of witnesses, parties (including abused spouses and children), or the public interest, pursuant to 8 CFR 1003.27. Additionally, the confidentiality of the asylum process is preserved by withholding information about hearings where that relief (and relief under the Convention Against Torture) is requested pursuant to 8 CFR 1208.6.

b. What steps will you take as Attorney General to ensure that the conduct of the FBI, U.S. Attorneys, and others participating in Joint Terrorism Task Forces comports with constitutional guarantees of due process and access to counsel?

Response: If confirmed as Attorney General, I would work with the senior leadership of the Department of Justice, and other agencies participating in the Joint Terrorism Task Forces, to ensure that all participants fully understand and comply with the constitutional requirements of due process and access to counsel as well as the Attorney General's investigative guidelines, Federal Bureau of Investigation investigative guidelines, and all relevant statutes.

3. In 2001, the Department of Justice ordered immigration judges to close all hearings related to the hundreds of Muslim and Arab men detained in the United States during the course of the 9/11 investigation. Will you give us your commitment that, if confirmed, you and your Department will not close immigration proceedings, unless the government can show an individualized compelling privacy or national security interest?

Response: If confirmed as Attorney General, I commit that any decision to close immigration proceedings to the public would be reviewed closely and would be made only upon appropriate grounds, such as national security interests.

4. The Justice Department's Inspector General has been highly critical of the length of detention experienced by those held for immigration violations during the course of the 9/11 investigation. The lengthy detention periods were apparently the result of the FBI's "hold until cleared" policy. According to this policy, the FBI delayed the release of an individual despite having no legal basis related to a terrorism investigation to continue their detention. Under this policy, the average person was detained for 80 days and in some cases as long as 244 days before their release. Will you give us your commitment that in the event of another emergency investigation, you will ensure that the FBI does not detain individuals indefinitely for violations of the immigration laws to further a terrorism

investigation? What steps will you take as Attorney General to ensure that the conduct of the FBI, U.S. Attorneys, and others participating in Joint Terrorism Task Forces comports with constitutional guarantees of due process?

Response: Based upon the lessons we have learned since the attacks of September 11th, the Department is in a better position to respond if the Nation should ever be subjected to another terrorist attack. It is important that we be aggressive in our investigation and use all appropriate law enforcement tools at our disposal without overstepping the boundaries of legality or constitutionality. As I noted above, if confirmed as Attorney General, I would work with the senior leadership of the Department of Justice, the FBI, and other agencies participating in the Joint Terrorism Task Forces, to ensure that all participants fully understand and comply with the law.

5. In 2002, the Department of Justice and the FBI revised guidelines for domestic surveillance that had been in place since the 1970s. What is your view of the new guidelines, known as the Attorney General's Guidelines on General Crimes, Racketeering Enterprises and Terrorism Enterprise Investigations? As Attorney General, will you leave the new guidelines in place or will you undertake a new review of them? Will you consult with Congress before making further changes in these guidelines?

Response: I have not had the opportunity to study the Attorney General's Guidelines on General Crimes, Racketeering Enterprises and Terrorism Enterprise Investigations in sufficient detail to describe what action, if any, might be appropriate to take with respect to those Guidelines. Should I be fortunate enough to be confirmed as Attorney General, I would be happy to familiarize myself with the Guidelines and would take into account a full range of views in determining whether changes to them might be necessary.

DOJ Employment Policies

1. As you know, federal laws prohibit discrimination in employment based on race, ethnicity, national origin, religion, gender or disability. In 1996, then-Attorney General Janet Reno implemented a policy at the Justice Department prohibiting discrimination on the basis of an employee's sexual orientation, as well as race, gender, religion and disability. If confirmed as Attorney General, would you continue and enforce the DOJ's policy of nondiscrimination based on sexual orientation? Will sexual orientation be a factor in the hiring or firing of employees?

Response: It is the Department's policy not to discriminate in hiring on the basis of sexual orientation, and I would continue that policy. If confirmed, consistent with the Department's policy, I would not consider sexual orientation in the hiring or firing of employees.

2. In June 2003, the Department of Justice cancelled an annual employee event celebrating Gay Pride Month. After protests from DOJ employees and members of Congress, the DOJ later clarified that the event could take place, but that the Department would not sponsor or subsidize it. It is my understanding that although other employee associations are

granted free use of DOJ facilities and security services, DOJ Pride is not. It is also my understanding that the Department explained this disparity by citing the President's decision not to issue a proclamation designating a Gay Pride month. It has never been explained why the DOJ chose the existence or absence of a proclamation as the test for determining whether employee groups should be treated the same as other employee groups with regard to event sponsorship. If you are confirmed as Attorney General, will you ensure that gay employee groups have equal consideration for funding and access to DOJ facilities as other DOJ employee groups, regardless of whether the President has issued a proclamation?

Response: If confirmed, I would treat all DOJ employees and employee groups in a lawful manner and in accordance with the Department's established policies.

3. As you know, the Justice Department hires entry-level lawyers, in part, through the Attorney General Honors' program, which traditionally has looked to hire the best lawyers in the country, independent of politics. In 2002, for the first time in the history of the Justice Department, Attorney General Ashcroft took control of this program away from career lawyers, and gave it to political appointees.

Critics have argued that this has resulted in the Justice Department being politicized at all levels, down to the very lowest level of hiring decisions. I understand that many career counselors at top law schools are advising students not to bother applying for a job at Justice unless they are members of conservative organizations like the Federalist Society. If you are confirmed as Attorney General, what do you plan to do about this? Will you return responsibility for the Honors' Program to career lawyers in the Department and make it clear that top law graduates are encouraged to apply to work for the Department even if they are not conservative Republicans?

Response: I want the best and brightest working at the Department. If confirmed, I would ensure that the Honors Program and other avenues of employment at the Department continue to focus on recruiting the best legal talent available.

Federal Sentencing

1. In a recent speech, Supreme Court Justice Anthony Kennedy criticized what he described as, "the inadequacies and the injustices in our prison and correctional systems." He remarked that we do little to rehabilitate prisoners or give them job skills, and there are reports that physical and sexual abuse in US prisons is widespread.

a. What do you see as the federal government's role in ensuring that conditions in the nation's prisons are not degrading or inhumane?

Response: This is an important problem to address here and abroad. I believe that the federal government must protect the civil rights of all people in the United States, including persons who have been incarcerated. If confirmed as Attorney General, I would work to ensure that federal prisons are maintained in humane conditions, and I

would vigorously enforce federal civil rights law to ensure that state prisons meet appropriate standards as well.

- b. How can we ensure that our correctional systems are preparing prisoners to participate productively in society upon their release, so they are less likely to engage in further criminal activity?**

Response: I agree that our corrections systems must adequately prepare prisoners for re-entry to civil society in order to help prevent recidivism. I understand that the Department of Justice has played a leading role in pursuing novel prisoner re-entry programs through its Serious and Violent Offender Reentry Initiative. If confirmed as Attorney General, I would ensure that the Department of Justice continues to focus its efforts on improving prisoner re-entry and contributes creative ideas and programs to the prisoner re-entry initiative that the President announced in his 2004 State of the Union Address.

- c. What can the federal government do to help communities deal with returning prisoners in a manner that is likely to reduce recidivism and enhance public safety?**

Response: Helping communities deal with returning prisoners requires a seamless process beginning when offenders are incarcerated through the period immediately before release, immediately after release, and through the mid-term. It requires a comprehensive approach that includes mentoring, job training and placement services, transitional housing, and alcohol and substance abuse counseling. If confirmed as Attorney General, I would ensure that the Department of Justice contributes to such an approach in coordination with other Federal departments, State and local law enforcement and social service agencies, and community and faith-based organizations.

- 2. After decades of passing stiffer and stiffer sentencing laws, many states are experimenting with alternatives to incarceration for nonviolent offenders, particularly those in need of treatment for substance abuse, to lessen the fiscal impact of long prison sentences, reduce recidivism, and mitigate the social costs of incarceration. Yet, for many reasons, including controversial mandatory minimum sentencing laws, the federal prison population continues to grow at a faster rate than that of any state. What steps would you support to develop alternatives to long prison sentences for nonviolent federal offenders in need of treatment for substance abuse, and do you believe such steps can be taken without compromising public safety?**

Response: I believe that effective crime fighting requires a range of options for dealing with offenders. There can be little doubt, however, that our sentencing policies have contributed to the significant decreases in crime that the nation has experienced over the last decade. I am not aware of the scope of the problem of having "nonviolent" offenders in Federal prison. I understand that the Department of Justice calculates that two-thirds of the inmates in Bureau of Prisons facilities have been convicted either of a violent crime or of multiple offenses. Similarly,

of those in Federal prison for “nonviolent” offenses, almost 80 percent have previous criminal records, averaging six arrests and two convictions. In addition, it is often the case that the treatment these offenders require is provided most effectively in a penal institution. If confirmed, I would be pleased to work with this Committee and Congress to determine whether we can achieve the same public safety benefits of imprisonment through various alternatives to incarceration.

Ethical Issues

1. During your service as Justice of the Supreme Court of Texas, it has been reported that you on occasion accepted donations from parties interested in cases before you. For example, in 2000, you reportedly accepted a \$2,000 donation from the Texas Farm Bureau, which ran the defendant insurance company in *Henson v. Texas Farm Bureau Mutual Insurance*, in the period between oral arguments and decision. You also reportedly accepted a \$2,500 donation from the law firm defending the insurer in another case, *Embrey v. Royal Insurance*, just before oral arguments.

a. Are these reports accurate?

Response: In Texas, the voters elect the Justices of the Supreme Court. My contributors, as well as those of every other Justice, are a matter of public record. I am confident that during my service as a Justice on the Supreme Court of Texas, I complied with all legal and ethical requirements regarding acceptance of campaign contributions.

b. Do you think it is ethical or appropriate for a judge to accept donations from parties appearing before him?

Response: Please see my response to 1a, above.

2. The Department of Justice is currently pursuing multiple prosecutions related to Enron’s collapse into bankruptcy. Currently, voluminous evidence related to Enron’s manipulation of Western electricity markets remains under a Department of Justice sought protective order, out of public view. This includes thousands of hours of Enron audiotapes as well as reams of emails from the files of traders and senior executives. Based on the small amount of materials publicly released thus far, it is reasonable to conclude this evidence will provide more insight into the inner-workings of Enron’s schemes to manipulate Western power markets. While there may be reasons to withhold some of this evidence in light of ongoing Department criminal prosecutions, this material is also of extreme importance to regulatory agencies such as the Federal Energy Regulatory Commission and to parties attempting to secure financial relief from power prices resulting from Enron’s schemes. Likewise, it is of interest to Congress, as we attempt to craft legislation that would prohibit future Enrons from defrauding American investors and ratepayers.

a. Please detail your previous contacts with Enron Corp. and its executives, both in your previous career in Texas as well as in your role as White House Counsel?

Response: As an attorney at Vinson & Elkins, I did some legal work for Enron over ten years ago. I am told the work was totally unrelated to the collapse of the company seven years later. I had contacts with certain Enron executives in connection with my election to the Texas Supreme Court. I also had contact with Enron officials in connection with my civic work in the Houston community. I do not recall any contacts with Enron and its executives in my role as White House Counsel.

b. Given these contacts, do you plan to recuse yourself from involvement in ongoing Enron prosecutions?

Response: If confirmed, I would take very seriously my obligation to recuse myself from any matter whenever appropriate. I would also treat with equal seriousness the charge that the Attorney General has to enforce the law fairly and equally on behalf of all Americans. It would be premature for me to commit to recuse myself from ongoing Enron prosecutions without knowing all of the facts and without consulting with Department personnel about recusal practice and history.

c. If you do intend to recuse yourself, who will be the point of contact for Members of the Senate interested in exercising oversight of the Department's handling of this matter?

Response: If confirmed, I would consult the attorneys at the Department handling this matter regarding congressional oversight.

d. Will you commit to releasing to Congress and the public the maximum amount of evidence now under seal at the earliest possible date?

Response: If confirmed, I would consult the attorneys at the Department handling this matter regarding the release to Congress of any sealed evidence.

**Responses of Alberto R. Gonzales
Nominee to be Attorney General
to the Written Questions of Senator Dianne Feinstein**

Question 1. A group of esteemed former uniformed military leaders—including generals and admirals, and even a former Chairman of the Joint Chiefs of Staff—earlier this week released a statement raising concerns about your legal opinions regarding the war on terror, the war in Afghanistan, and the war in Iraq. They ask five questions, which I put to you to answer:

(1) Do you believe the Geneva Conventions apply to all those captured by U.S. authorities in Afghanistan and Iraq?

Response: Providing a clear answer to your question requires distinguishing between two concepts: first, whether the Geneva Conventions apply to a particular armed conflict; and second, whether particular individuals in that conflict are entitled to a particular protected status under one of the Geneva Conventions. The mere fact that the Geneva Conventions apply to a conflict between two nations does not mean that all persons involved in that conflict qualify for a particular status – such as prisoner of war (POW) status – under the terms of the Conventions.

As for Afghanistan, the President has determined that the Third Geneva Convention Relative to the Treatment of Prisoners of War (GPW) applies to the conflict with the Taliban because Afghanistan is a High Contracting Party to the GPW. That does not mean that Taliban fighters captured by the United States qualify for POW status under Article 4 of the GPW. To the contrary, the President has determined that the Taliban as a group failed to meet the criteria of Article 4. Among other things, the Taliban failed to wear an insignia distinguishing them from the civilian population and failed to conduct their operations in accordance with the laws of war. Thus, even though the GPW applies to the conflict with the Taliban, Taliban fighters are not entitled to POW status. GPW does not apply to al Qaeda because it is not a state party to the Conventions.

The GPW also applies to the conflict between Iraq and the United States because Iraq is also a High Contracting Party to the Convention. Members of the Iraqi military who satisfied the criteria of Article 4 are thus entitled to POW status under the GPW. Others who take up arms without complying with the criteria of Article 4 (such as insurgents) may not be legally entitled to protections under the GPW. While the United States was an occupying power in Iraq, prior to the transfer of sovereignty in the summer of 2004, the Fourth Geneva Convention Relative to the Protection of Civilian Persons also provided protections to many persons detained by the United States.

(2) Do you support affording the International Committee of the Red Cross access to all detainees in U.S. custody?

The International Committee of the Red Cross (ICRC) fulfills a noble function in conflicts throughout the world, and the United States has long supported its mission. As I noted at the hearing, the ICRC has in the past played a role in ensuring the safe treatment and health of U.S. soldiers who are captured by the enemy. Therefore, as a general matter, I support granting the ICRC access to detainees in U.S. custody.

In the current conflicts with al Qaeda and the Taliban, however, enemy combatants detained by the United States do not have POW status under the Geneva Conventions; the United States therefore has no legal obligation to provide the ICRC with access. Nevertheless, in recognition of the important role that the ICRC plays and in keeping with our broad support for its mission, the United States has voluntarily provided the ICRC unmonitored access to the vast majority of enemy combatants detained in U.S. custody.

I recognize, however, that considerations of national security or military necessity may counsel for denying the ICRC access to a small number of detainees. For example, where ICRC visits to a detainee with a high intelligence value would disrupt vital efforts to protect American lives by obtaining information, ICRC access might justifiably be denied where it is not legally required.

(3) What rights under U.S. or international law do suspected members of Al Qaeda, the Taliban, or members of similar organizations have when brought into the care or custody of U.S. military, law enforcement, or intelligence forces?

Response: When an individual is detained for prosecution in the federal criminal justice system and a criminal proceeding has commenced against him in federal court, he has all the same rights as any other defendant in the criminal justice system (subject to some modifications if he is initially detained overseas, until he is brought to the United States, *see, e.g., United States v. Yunis*, 859 F.2d 953 (D.C. Cir. 1988)).

As detained enemy combatants, removed from the fight as authorized under the law of armed conflict, al Qaeda and Taliban detainees do not enjoy the rights afforded by our criminal justice system. Nor do they qualify for POW status under the Geneva Conventions. If they were later charged in a criminal proceeding, such detainees would, of course, be afforded procedural rights applicable to the criminal proceeding in which they were charged. As the Administration has repeatedly made clear, other laws still apply to regulate the conduct of U.S. personnel with respect to detainees. Detainees are protected by the prohibition on torture the United States undertook in the Convention Against Torture and by the criminal prohibition against torture, 18 U.S.C. §§ 2340-2340A. They also may be protected by criminal prohibitions against assault, maiming, and murder that apply in the special maritime and territorial jurisdiction of the United States and that apply under the Military Extraterritorial Jurisdiction Act. In addition, those under the control of the U.S. Armed Forces are protected by express prohibitions

under the Uniform Code of Military Justice (UCMJ) against assault (Article 128 UCMJ (10 U.S.C. § 928)), maiming (Article 124 UCMJ (10 U.S.C. § 924)), and cruelty and maltreatment (Article 93 UCMJ (10 U.S.C. § 893)). All of these sources of law provide criminal prohibitions against detainee abuse.

(4) Do you believe that torture or other forms of cruel, inhuman and degrading treatment – such as dietary manipulation, forced nudity, prolonged solitary confinement, or threats of harm – may lawfully be used by U.S. authorities so long as the detainee is an “unlawful combatant” as you have defined it?

Response: The President has repeatedly condemned torture and made clear that the United States will not condone torture. The criminal prohibition on torture in 18 U.S.C. § 2340 & § 2340A does not make any exception for “unlawful combatants.”

The United States also has committed under Article 16 of the Convention Against Torture (CAT) that it will undertake to prevent cruel, inhuman, and degrading treatment. In providing its advice and consent to ratification, the Senate provided that “the United States considers itself bound by the obligation under Article 16 . . . only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.” Congress did not incorporate the United States’ international law obligation under Article 16 into any domestic law. For a fuller explanation of U.S. obligations under Article 16, please see my answers to questions 14 and 20, below.

(5) Do you believe that CIA and other government intelligence agencies are bound by the same laws and restrictions that constrain the operations of the U.S. Armed Forces engaged in detention and interrogation operations abroad?

Response: The CIA and other intelligence agencies are fully bound by the prohibition on torture contained in 18 U.S.C. § 2340 & § 2340A and, depending on the circumstances, by other criminal statutes such as those defining crimes in the special maritime and territorial jurisdiction of the United States. Those statutes prohibit, for example, assault (18 U.S.C. § 113) and maiming (18 U.S.C. § 114). These criminal prohibitions prevent abuse of detainees by intelligence officers. In fact, the Department of Justice is currently prosecuting a CIA contract employee for various charges of assault under 18 U.S.C. § 113. See *United States v. Passaro*, No. 5:04-CR-211-1 (E.D.N.C.).

This does not mean, however, that intelligence agencies are bound by precisely the same laws as the armed forces. Members of the armed services are subject to the Uniform Code of Military Justice (UCMJ), which, among other things, includes a specific offense of cruelty or maltreatment. See 10 U.S.C. § 893. Congress has at times provided that different laws apply to different people in different situations.

To the extent your question goes beyond *laws* to encompass “restrictions” that might be embodied in regulations or standing orders for the military, there may be further differences in the “restrictions” that apply to the conduct of the military.

Question 2. The Army Field Manual on Intelligence Interrogation says that harsh and unlawful interrogation techniques yield bad intelligence. Specifically, the manual 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.” (Page 8)

Are you concerned that, by advising the President that Geneva Convention protections did not apply in Afghanistan, you have harmed the nation’s ability to gather accurate intelligence?

Response: The President’s decision not to afford POW status to al Qaeda and Taliban fighters was both correct under the law and, in my view, correct as a matter of policy to ensure that those who do not abide by the requirements of the law of armed conflict, including the Geneva Conventions, do not benefit from the protections afforded by that law to lawful combatants. A decision to afford POW legal protections to terrorists who ignore the laws of war would place our soldiers in greater danger and would be inconsistent with longstanding U.S. policy.

The President’s decision did not harm our ability to gather accurate intelligence. The President’s directive to the armed forces made clear the requirement “that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.” The interrogation techniques authorized for Guantanamo meet this standard.

Moreover, the President has been clear that the United States will not resort to “torture” or “other illegal methods.” The passage you quote notes that “torture” and “other illegal methods” may produce unreliable results. But the United States does not use torture nor does it employ “illegal methods.” Interrogation practices are carefully structured both to adhere to the requirements of the law and to ensure the maximum possibility of securing accurate intelligence that may save American lives.

Finally, to ensure that there is no misunderstanding, I want to clarify that the President did not conclude that the GPW does not apply to the conflict with the Taliban in Afghanistan. Rather, he concluded: (i) that the GPW did not apply to the conflict with al Qaeda because al Qaeda is a non-state that is not a party to the GPW; and (ii) that, although the GPW applied to the conflict with the Taliban, Taliban detainees as a group do not qualify for POW status under Article 4 of the Convention.

Question 3: Do you believe, and as Attorney General will you clearly express, that the U.S. remains committed to the provisions of the Geneva Conventions and the Conventions Against Torture?

Response: Yes. The President has made clear that the United States remains committed to adhering to its obligations under the Geneva Conventions and the Convention Against Torture and has unequivocally condemned torture. I have repeatedly emphasized the President's statement of these commitments on behalf of the United States, and I will continue to do so if confirmed as Attorney General.

Question 4: According to the Schlesinger Report that investigated abuses at the Abu Ghraib prison, General Sanchez, the commander of our forces in Iraq, used "reasoning from the President's Memorandum of February 7, 2002" in order to approve the use of interrogation techniques, described elsewhere in the report, including sleep deprivation, painful stress positions, and threatening prisoners with unmuzzled dogs. Do you believe that U.S. law allows America to use those practices in interrogations? Also, do you believe that any international treaties that America has signed, such as the Geneva Conventions and the Convention Against Torture, allows America to use those practices in interrogations?

Response: Please see the answer to question 15, below.

Question 5: Your memo to the President of January 25, 2002, states "In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questions of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e., advances of monthly pay), athletic uniforms, and scientific instruments." If the Geneva Conventions do not apply to our conflict in Afghanistan or against Al Qaeda, what law does apply?

Response: The document to which you are referring was a draft document leaked to the press. It does not represent the final advice given to the President. As other members of the Administration and I have made clear repeatedly, the fact that al Qaeda and Taliban detainees do not have POW status under the GPW does not mean that there is no law governing their treatment. To the contrary, there are several sources of law that may apply, depending upon the precise circumstances. First, the United States has committed under the CAT not to engage in torture. Congress embodied that commitment in a criminal statute, 18 U.S.C. §§ 2340 & 2340A, which prohibits torture outside the United States (conduct amounting to torture inside the United States is prohibited by various federal and state laws). Second, for those held by the armed forces, the UCMJ applies to the members of the armed forces everywhere. It defines specific offenses, including maiming, assault, and cruelty or maltreatment that would apply to conduct with respect to detainees. (It is my understanding that court martial proceedings under these provisions have been instituted in response to the abuses at Abu Ghraib in Iraq). Third, various criminal statutes prohibiting, for example, assault (18 U.S.C. § 113), maiming (18 U.S.C. § 114), manslaughter (18 U.S.C. § 1112), and murder (18 U.S.C. § 1111), apply within

the special maritime and territorial jurisdiction of the United States, which, except for certain persons (particularly the armed forces and those employed by or accompanying them, who are generally covered by other statutes), generally includes overseas U.S. facilities. *See* 18 U.S.C. § 7(9). Fourth, under the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261, the same criminal prohibitions that apply in the special maritime and territorial jurisdiction of the United States are applied to persons employed by or accompanying the armed forces abroad.

Question 6: Again, regarding your January 25, 2002 memo to the President—do you still agree with what you wrote in that memo? Do you have plans to disavow that memo, in the same manner that the Department of Justice has disavowed its own previous memo of August 1, 2002?

Response: The memorandum to which you refer was a draft memorandum. Because it does not embody my final views as provided to the President, I have not endorsed, nor do I have any occasion to disavow, the tentative judgments about certain provisions of the Geneva Conventions reflected in that draft. It would of course not be appropriate for me to discuss any advice I actually provided to the President with respect to the issues discussed in the draft to which you refer.

Question 7: What do you plan to do as Attorney General to ensure that all agencies dealing with terrorism understand and respect domestic and international laws and treaties that govern the treatment of prisoners and detainees, and will abide by the Department of Justice’s new understanding of U.S. law prohibiting torture?

Response: Throughout the current Administration, the Department of Justice has maintained a close working relationship with all agencies of the Executive Branch dealing with terrorism and has provided critical legal advice on novel issues in a timely manner. As several Senators noted at the hearing, one of the statutory responsibilities of the Attorney General under 28 U.S.C. § 512 is to provide legal advice to the heads of other agencies. If confirmed as Attorney General, I would build on the foundation already in place and ensure that components of the Department, including the Criminal Division and the Office of Legal Counsel (OLC), make affirmative efforts to reconfirm for decision makers in other agencies that the Department is available as a resource for answering legal questions and to encourage decision makers to seek advice from the Department before embarking on courses of action that may raise legal questions. As for the Department’s understanding of the prohibition on torture in 18 U.S.C. §§ 2340 & 2340A, I think a very significant – and uncommon – step already has been taken to ensure that the Department’s views are widely understood by making an OLC opinion public as soon as it was finalized.

Question 8: In response to a question to Senator Leahy, you said at your hearing that you have made mistakes in the war on terror, but you did not say what those mistakes were. Can you please describe those mistakes, and state what you have done to correct them?

Response: With respect, I do not think it is fruitful in this context to specify or catalogue mistakes that have been made in the war on terror. I can assure you, however, that I continually evaluate and reflect on not only the results of legal determinations that have been made and policies that have been adopted, but also on criticisms that have been made of, and court decisions involving, those determinations and policies. I commit that if I am confirmed as Attorney General, that process will continue.

Question 9: Do you agree with the statement of former heads of the Office of Legal Counsel, released on December 21, that the office “should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration’s pursuit of desired policies”? As the Attorney General, how would you insulate the office from any undue influence that might come from the policy sections of the Executive Branch?

Response: I completely agree that it is, and always has been, the duty and function of the Office of Legal Counsel to provide the President and the Executive Branch with an accurate and honest analysis of the law, even if that analysis would constrain the pursuit of policy goals. If confirmed as Attorney General, I would work with the Assistant Attorney General for the Office of Legal Counsel to ensure that OLC continues to employ the practices necessary to meet the highest standards of legal analysis.

Question 10: According to *The Washington Post*, “Administration officials are preparing long-range plans for indefinitely imprisoning suspected terrorists whom they do not want to set free or turn over to courts in the United States or other countries, according to intelligence, defense and diplomatic officials.” (January 2, 2004) What is your view on this matter? What role do you think the Congress should play in considering whether the United States should adopt a policy to indefinitely detain prisoners? Will you commit to including Congress, and the Judiciary Committee in specific, in any Justice Department planning that occurs on this issue?

Response: It would be irresponsible for the Administration not to consider the long-range implications of its policies. Under the laws of war, the United States may rightly detain our enemies for the duration of the conflict in part to prevent our enemies from rejoining the fight against the United States. While this conflict may be a long one, it surely will be longer if we release our enemies and they rejoin the fight. It would not be appropriate for me to comment on speculation in the press about internal policy deliberations within the Executive Branch. Currently, the United States is detaining persons as enemy combatants under the laws of war in a global armed conflict with al Qaeda. Among those detainees, those who have been held the longest have been in U.S. control for approximately three years. Given that many wars, including World War I,

World War II, and Vietnam, lasted for much longer than that period (and prisoners in those wars were held for much longer than three years), I think it is premature to be speaking of “indefinite” detention. When and if the time comes to develop a new policy or approach for detaining dangerous combatants captured in this conflict, I can assure you that, if confirmed as Attorney General, I would consult as appropriate with the Congress.

Question 11: Last March and April, I wrote to Attorney General Ashcroft asking for a “comprehensive review” of each of the sixteen provisions of the USA-Patriot Act subject to “sunset” provisions. After much delay, I understood from Department of Justice staff that such a review would be provided to the Committee at the end of December. But no report was provided. Why was the report not provided as I was told? If confirmed as Attorney General, what steps will you take to ensure that this request is met, and that similar requests in the future are not ignored or delayed?

Response: If confirmed, it will be among my highest priorities to ensure that you are provided with the information you need concerning the USA PATRIOT Act. In the meantime, I have relayed your concerns to the Department of Justice and understand they are actively working on your request.

Question 12: Do you know, or do you have any information leading to you to suspect, who provided the name of a CIA undercover officer to columnist Richard Novak? If so, who? What steps have you taken to ensure that the White House fully cooperated with the Department of Justice investigation into this matter?

Response: This is a matter under investigation by the Department of Justice, and I refer all your inquiries regarding it to the Department. To comment publicly on this matter might in some way interfere with this investigation.

Question 13: In the *Hamdi* case that the Supreme Court decided last year, the Bush Administration argued for powers to detain an American citizen that the Supreme Court refused to grant. As Justice O’Connor wrote, “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.” Have you changed your views about the position that the Administration took in that case and the other detention cases the Supreme Court decided last year?

Response: In *Hamdi*, the controlling four-Justice plurality opinion authored by Justice O’Connor, as well as Justice Thomas’s dissenting opinion, concluded that the President, acting as Commander in Chief during ongoing hostilities, has the authority to detain as an enemy combatant an individual, including a United States citizen, who was “‘part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan and who ‘engaged in an armed conflict against the United States’ there.” 124 S.Ct. at 2639. The plurality explained, consistent with the government’s position, that by authorizing the President to use “all necessary and appropriate force” in response to the September 11 attacks, Congress “clearly and unmistakably authorized detention” of individuals falling

within that category, “[b]ecause [such] detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war.” 124 S. Ct. at 2641. The plurality in *Hamdi* went on to hold that citizens detained as enemy combatants were entitled to certain procedural guarantees, and remanded the case to the court of appeals to ensure that those procedural guarantees were satisfied. The government then settled the *Hamdi* litigation. The government certainly does not take issue with the procedural aspects of the *Hamdi* decision. The government never suggested that the courts lacked jurisdiction over a habeas petition filed by a citizen, and voluntarily extended certain procedural protections, such as access to counsel, before the Court ruled.

In the *Padilla* litigation, the government’s position, that the petition was filed in a judicial district that lacked jurisdiction over the suit, was upheld by the Supreme Court. The decision of the U.S. Court of Appeals for the Second Circuit embracing the contrary rule was reversed.

The Supreme Court in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), also held that a United States court had jurisdiction under the habeas statute to consider challenges to detention brought on behalf of several alien enemy combatants detained at Guantanamo Bay Naval Base in Cuba. That decision was contrary to the position of the government and the unanimous holding of a distinguished panel of the U.S. Court of Appeals for the District of Columbia composed of Judges appointed by Presidents of both parties. The Administration has complied with the guidance provided by the Supreme Court by implementing procedures for the detention of enemy combatants consistent with those decisions.

Question 14: At the hearing, Senator Durbin asked you, “whether or not it is legally permissible for U.S. personnel to engage in cruel, inhumane, or degrading treatment that does not rise to the level of torture.” You did not give an unequivocal “yes” or “no” answer. Can you please do that here, and can you please explain your answer?

Response: United States personnel are not permitted to engage in torture or cruel, inhuman or degrading treatment as defined in the Convention Against Torture (CAT), subject to the reservation taken by the Senate. In the CAT, the United States undertook two distinct commitments relevant to your question. First, the United States agreed to prohibit torture. In doing so, the Senate attached an understanding to its advice and consent to ratification of the CAT to further define the concept of torture and expressly provided that torture means an act “specifically intended to inflict severe physical or mental pain or suffering.” Congress also passed criminal legislation to carry out this commitment and criminalized torture under 18 U.S.C. §§ 2340 & 2340A.

Second, in Article 16, the United States agreed to “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.” The Senate also attached a reservation to this provision to further define and expressly limit the commitment the United States was undertaking. The Senate made clear that “the United States considers itself bound by the obligation under Article 16 . . . only insofar as the term ‘cruel, inhuman or degrading treatment or

punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." Congress did *not* embody this undertaking from the CAT in a separate criminal statute. Thus, the only legal prohibition on cruel, inhuman or degrading treatment comes from the international legal obligation created by the CAT itself.

The Senate's reservation, however, limited Article 16 to requiring the United States to prevent conduct already prohibited by the Fifth, Eighth, and Fourteenth Amendments. Those amendments, moreover, are themselves limited in application. The Fourteenth Amendment does not apply to the federal government, but rather to the States. The Eighth Amendment has long been held by the Supreme Court to apply solely to punishment imposed in the criminal justice system. *See, e.g., City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983); *Bell v. Wolfish*, 441 U.S. 520, 536 n.16 (1979). Finally, the Supreme Court has squarely held that the Fifth Amendment does not provide rights for aliens unconnected to the United States who are overseas. *See, e.g., Johnson v. Eisentrager*, 339 U.S. 763, 783-85 (1950); *see also United States v. Verdugo Urquidez*, 494 U.S. 259, 269 (1990). Thus, as a direct result of the reservation the Senate attached to the CAT, the Department of Justice has concluded that under Article 16 there is no legal prohibition under the CAT on cruel, inhuman or degrading treatment with respect to aliens overseas.¹

Nevertheless, the Administration also wants to be in compliance with the relevant substantive constitutional standard incorporated into Article 16 by virtue of the Senate's reservation, even if such compliance is not legally required. I had been advised that approved interrogation techniques were analyzed under that standard and satisfied it, and since that time, the Administration has undertaken a comprehensive legal review of all interrogation practices. Part of that review was completed when the Office of Legal Counsel released its memorandum addressing 18 U.S.C. §§ 2340 & 2340A on December 30, 2004. The analysis of practices under the standards of Article 16 is still under way.

Question 15: At the hearing, you repeatedly denounced the use of torture. Yet you never defined what methods you consider to be torture, and the devil is in the details. There have been press reports, for instance, of simulated drowning referred to as "water boarding," of forced nudity, and of threatening detainees with dogs. Do you consider these practices to constitute torture? Do you consider them to be inhumane? Would you ban them, if you are confirmed as Attorney General? What other interrogation practices reported in the press would you ban?

Response: Yes, I do denounce torture, and if confirmed as Attorney General, I will prosecute those who engage in torture. I do not think it would be prudent for me to address interrogation practices discussed in the press and attempt to analyze them under the prohibitions of 18 U.S.C. §§ 2340 & 2340A. In 18 U.S.C. §§ 2340 & 2340A,

¹Of course, the criminal prohibitions discussed in my answer to Question 5 may apply to criminalize some conduct that might otherwise be considered "cruel, inhuman, or degrading."

Congress defined torture as an act that is “specifically intended to inflict severe physical or mental pain or suffering.” Analyzing whether a particular practice meets that test is a highly fact-intensive inquiry. I do not think it would properly reflect the gravity of that inquiry or the seriousness with which the Administration has treated it for me to try to undertake that analysis with respect to speculative press accounts of supposed interrogation practices. In addition, were the Administration to begin ruling out speculated interrogation practices, by virtue of gradually ruling out some practices in response to repeated questions and not ruling out others, we would fairly rapidly provide al Qaeda with a road map concerning the interrogation that captured terrorists can expect to face and would enable al Qaeda to improve its counter-interrogation training to match it.

Instead, I can give you the same assurance that I have provided in the past and that has recently been confirmed in the new OLC memorandum. The Department of Justice has been asked to review specific interrogation practices used in the conflict with al Qaeda and the Taliban and has concluded that they are lawful under the torture statute.

Question 16: At your hearing, Senator Graham stated that “the world is watching.” What ideas do you have, with as much specificity as you can offer, to make the world take notice that the United States will fully honor the letter and spirit of all laws involving interrogations and detentions?

Response: In my judgment, the best way we can make the world take notice that the United States will fully honor laws involving interrogations and detentions is to investigate alleged violations of those laws and to prosecute those responsible for such violations. As you know, there have been multiple investigations of allegations of abuse, numerous briefings and hearings in the Congress, and prosecutions of those responsible. If confirmed, I commit to vigorous enforcement of the law concerning interrogations and detentions; this will continue to demonstrate that our nation takes those commitments seriously.

Question 17: At your hearing, you stated that “As a general matter, I very much support the work of the Red Cross, and as a general matter would agree that they should be provided access” to detainees. Please state the specific instances or circumstances where you think that the Red Cross should *not* have access to detainees.

Response: As explained in the answer to Question 1(2), because al Qaeda and Taliban detainees do not have POW status under the GPW, the United States is under no legal obligation to provide the ICRC with access. Nevertheless, the United States has voluntarily granted the ICRC access to the vast majority of such detainees. Where, however, ICRC access to detainees with particularly high intelligence value would interfere with vital interrogation efforts needed to obtain intelligence that could save American lives, ICRC access has not been granted.

Question 18: In the past year, the issue of lost, stolen and fraudulent passports has been thrust into the spotlight with reports of the high numbers of lost and stolen passports, particularly from countries participating in the Visa Waiver Program. The prosecution of passport fraud by U.S. Attorneys should therefore be a priority of the Justice Department. Will you commit to evaluating the Department of Justice's priorities to determine if the prosecution of travelers seeking to enter the United States with a lost, stolen or fraudulent passport is a priority?

Response: If confirmed, the protection of the United States from terrorists would be my highest priority as Attorney General. Prosecuting travelers who use lost, stolen, or fraudulent passports has been an important tool used by the Department of Justice to protect the safety of the United States. The U.S. Attorneys' Offices have brought a number of cases concerning the fraudulent use of passports, and I would encourage the U.S. Attorneys to continue to focus on this issue.

Question 19: Will you commit to reviewing the current procedure of "streamlining" at the Board of Immigration Appeals which, although having reduced the number of pending appeals at the administrative level, has dramatically increased the number of pending cases within the federal Circuit Courts of Appeals?

Response: If confirmed, I would review the current regulations for the Board of Immigration Appeals (BIA) and consult with the experts within the Department of Justice on this issue.

Question 20: During your testimony before the Senate Judiciary Committee, you explained the meaning of domestic law which implemented the Convention Against Torture. You described a Congressional reservation as ensuring that the only conduct made criminal under this law would be conduct which would violate the 5th, 8th or 14th amendments the U.S. Constitution. In explaining the meaning of this provision, you implied that, because these amendments have been held to have no force outside the geographic United States with respect to non-U.S. persons, no conduct occurring overseas could ever violate the criminal prohibition against torture unless a U.S. person was the subject of the torture. A contrasting interpretation is that only conduct which would violate the amendments if committed within the U.S. would also violate of the criminal statute. Please explain your view of this provision with respect to this issue in detail.

Response: In addition to the response below, please see my answer to question 14, above.

I believe this question confuses to some extent the criminal prohibition on torture, which applies outside the United States and is not in any way limited by the reservation the Senate attached to Article 16 (limiting that Article to conduct prohibited by the 5th, 8th, and 14th Amendments to the U.S. Constitution), and the prohibition on cruel, inhuman or degrading treatment or punishment in Article 16. I wish to be very clear: the criminal

prohibition on torture in 18 U.S.C. §§ 2340 & 2340A applies by its terms without regard to the nationality of the victim. I should also reemphasize here that the domestic criminal law implementing the CAT criminalizes only torture. In referring to “conduct which would violate the 5th, 8th, or 14th amendments,” your question seems to be referring to the definition the Senate used for cruel, inhuman, or degrading treatment or punishment under Article 16 of the CAT, and there is no criminal prohibition implementing that article of the CAT.

Question 21: In testimony earlier this year, Attorney General Ashcroft refused to answer certain questions put to him by this Committee, but did not assert any recognized legal privilege as the basis for his refusal. As Attorney General, would you commit to answer any question that Congress puts to you at a hearing, except when you assert a recognized privilege?

Response: As I testified, I greatly respect the oversight role of the Committee and commit to be responsive to the Committee’s requests for information, whether during a hearing or otherwise. When such requests seek confidential information, my goal will be to work with the Committee to try to find a way to reach an accommodation that satisfies the Committee’s information needs while at the same time protecting the institutional interests of the Executive Branch. The longstanding policy and practice of the Executive branch is to work to achieve such mutually acceptable resolutions.

**Responses of Alberto R. Gonzales
Nominee to be Attorney General
to the Written Questions of Senator Lindsey Graham**

1. Do you agree with the Office of Legal Counsel opinion to Attorney General Ashcroft (submitted in August but released in December) that the Second Amendment protects an individual right?

Response: The opinion issued by the Office of Legal Counsel represents the definitive views of the Executive Branch and establishes that the Second Amendment protects an individual right to bear arms.

2. During the campaign, the President also supported the individual rights interpretation -- do you agree?

Response: Yes.

3. Given the Second Amendment's inclusion in the Bill of Rights and discussion of the right to keep and bear arms in the writings of the framers, do you agree that it's a fundamental individual right?

Response: I believe that the right recognized in the Second Amendment is an individual right equally as important and fundamental as other rights identified in the Bill of Rights.

4. Currently ATF often takes the most restrictive possible interpretation of firearms laws. For example:

•ATF argues that a firearm "designed" as a machinegun can never be converted or "redesigned" into anything else, even when the government itself has done so in the past and even when the final product is identical to legal, commercial semiautomatic firearms (i.e. removing the ability of M14 rifles to fire more than one shot for each pull of the trigger).

•ATF argues that licensed dealers from different states can't do business with each other face-to-face away from their licensed premises, even when they could do the exact same transaction by mail.

Would you order a more flexible approach, obviously without compromising law enforcement needs?

Response: I have not previously considered ATF's determination regarding firearms "designed" as machine guns or its position against off-premises firearms transactions for licensed dealers from different States. Should I be confirmed, I would be happy to study these ATF interpretations and take any action that I believe necessary to ensure their fidelity to statutes and constitutional principles.

5. Four years ago, when the Congress granted Permanent Normal Trade Relations to the People's Republic of Congress, many of us in the Congress were assured that despite our objections, this agreement contained important safeguard mechanisms that would prevent China from destroying jobs in our states and communities. We were also assured that the safeguards contained in the agreement, safeguards which China agreed to, would be aggressively enforced.

Last week, a judge on the U.S. Court of International Trade issued an injunction preventing the Department of Commerce from proceeding on a group of textile and apparel safeguard cases. Will you assure me that the Department of Justice will appeal this decision and do so in as aggressive and expeditious manner as possible?

Response: I understand that the Department is coordinating closely with the agencies involved and is in the process of making an appeal decision. At the same time, the Department is vigorously defending the case in the trial court. I assure you that if I am confirmed, I would confer with the lawyers in the Department and would carefully look into this matter.

6. Should the Department of Justice aggressively defend before the Court of International Trade enforcement actions by the United States Customs Service to protect the intellectual property of US manufacturers?

Response: Yes. United States Customs & Border Protection (CBP) is required by law to enforce the general exclusion orders of the International Trade Commission that address the rights of intellectual property holders. If I am confirmed, the Department would continue to aggressively defend CBP's enforcement of the Commission's orders when and if that enforcement is challenged in litigation.

7. More specifically, are you committed to defending Customs regulations prohibiting the further importation of one-time-use or disposal cameras from China that have been determined by the International Trade Commission to be patent infringing?

Response: As a general proposition, I am committed to defending Customs regulations. My understanding is that the Department is aggressively defending CBP's enforcement of the Commission's general exclusion order regarding single-use cameras, in both the United States Court of Appeals for the Federal Circuit and in the United States Court of International Trade. I anticipate that the Department will continue to defend the interests of this client agency.

**Responses of Alberto R. Gonzales
Nominee to be Attorney General
to the Written Questions of Senator Grassley**

False Claims Act Questions

A) The False Claims Act and the *qui tam* provisions of that Act are of great importance to me. Whistleblowers usually are the key to uncovering waste, fraud and abuse, and they are the ones that can explain why something is wrong and provide the best evidence to prove it. The False Claims Act is the act under which whistleblowers can sue those who defraud the federal government or otherwise improperly get money from the federal government by filing false claims. Because the Justice Department can file its own suits or join *qui tam* suits, as Attorney General you would be in charge of a good bit of litigation involving the False Claims Act. It's important to me that the next Attorney General sees the benefits that a vigorously enforced False Claims Act can produce.

1) If you are confirmed, what actions will you take to support and strengthen the Justice Department's programs to prosecute False Claims Act cases?

Response: Enforcement of the False Claims Act has appropriately been a high priority for the Department and, if confirmed, I would ensure that vigorous and fair False Claims Act enforcement remains a priority for the Civil Division and the Affirmative Civil Enforcement Units in the U.S. Attorneys' offices. The False Claims Act and its *qui tam* mechanism are vital to the protection of the public fisc. The False Claims Act is the principal civil tool to recover federal funds that have been fraudulently paid out. Those who do business with or receive grants or other payments from the government must deal with the government scrupulously and the provisions of the False Claims Act both encourage that behavior and impose liability against those who do not meet that standard.

B) I have some ideas about how to upgrade enforcement of the False Claims Act. I hope that you'll commit to upgrading the Justice Department's False Claims Act program and see it through, even though there may be elements within the Department that would prefer not to see such changes.

Ever since the 1986 amendments, I have watched the False Claims Act develop and gather steam. It was slow off the mark and we did not get many results for about five years. In truth, there seemed to be a bias in the late eighties against the act at the Department of Justice. Finally, we got the False Claims Act up and running and now we are getting back about a billion dollars a year through False Claims Act cases. However, I do not believe that the False Claims Act is being used to its full potential and the promise of the act has not yet been fulfilled as Congress intended.

I believe that the inadequate use of the False Claims Act stems directly from the fact that the Department of Justice's administration of the Act is woefully inadequate. There are not enough cases taken on by the Department. There are not enough resources allocated to the cases the Department is pursuing, and this is very troubling in some areas, such as the cases involving drug-pricing fraud. We in Congress cannot get adequate information from the Justice Department to determine if their False Claims Act settlements are adequate. Cases are kept under seal for years and it takes years, sometimes ten or more, for a False Claims Act case to work its way through the system. I don't believe that the Justice Department fully embraces whistleblowers and their counsel, though they bring the Department 85% of their cases. In a nutshell, I believe that the Department's administration of the False Claims Act lacks vision, transparency, energy, authority, goals and resources —almost everything a program should have to succeed.

So, Judge Gonzales, that brings me to what I would like you to do for the False Claims Act if you are confirmed as Attorney General.

1) I would like you to strengthen the management of the False Claims Act program by elevating the Civil Division's anti-fraud program to the branch level. We need a new anti-fraud branch headed by a dedicated Deputy Assistant Attorney General with extensive experience with civil fraud cases. Preferably the Deputy Assistant Attorney General should come from one of the U.S. Attorney offices with a track record of winning civil fraud cases. An Anti-Fraud Branch could bring the False Claims Act program up to where it should go. I would like you to study whether the Justice Department could go even further—that is, create a new Affirmative Civil Enforcement Division. With the high level of fraud of various kinds we've been plagued with of late, this could be the Department's best way of taking action. But for the moment, I would be satisfied with a new branch. The False Claims Act must not remain buried in the Commercial Litigation Branch. Would you agree to these kinds of upgrades?

Response: As you note in your question, the False Claims Act and its *qui tam* provisions have been responsible for typically bringing in over \$1 billion per year in the recent past. There are 70 attorneys in Washington and many more throughout the country who investigate and litigate False Claims Act cases on a full-time basis. As I understand it, substantial energy has gone into joint training and coordination between those in Washington and in the field. At this time, I do not know whether better results are obtainable through a reorganization like the one you suggest. I can commit to you, however, that if I am confirmed as Attorney General, I would discuss this matter with the Assistant Attorney General for the Civil Division and would carefully examine whether the current structural organization within the Department for dealing with False Claims Act cases is optimal. Finally, of course, I would look forward to the opportunity to discuss this further with you.

2) I would like you to agree to a bigger False Claims Act program, i.e. more cases and more resources.

- a) **Resource Allocation:** i) On the resource front, it's partly a matter of allocation. The Justice Department gets millions of dollars for healthcare fraud from the HCFCC fund. That money is distributed widely to the various U.S. Attorney offices, but most of the big False Claims Act cases seem to be concentrated in only a few of the U.S. Attorney offices. What may be needed is a reallocation of HCFCC resources to the U.S. Attorney offices with the big caseloads. Would you look into this?

Response: Yes, if confirmed, I would always consider the most appropriate way to deploy monetary resources made available by Congress.

- ii) In addition, I am particularly concerned that not enough resources are being allocated to drug-pricing fraud cases. I understand there are at least 100 such cases on the docket and that they are big cases. It may be that drug-pricing fraud cases are the biggest and most important class of cases the Department has ever developed under the False Claims Act. Will you make sure that these cases get the resources and attention they deserve?

Response: As you indicated, the Department has announced that it is looking at over 100 drug-pricing *qui tam* cases. I am informed that both in the districts where the cases have been filed, as well as at Main Justice, numerous attorneys have been assigned to these cases. Indeed, as I understand it, the Civil Division has hosted two conferences for its attorneys, Assistant United States Attorneys from around the country, FDA personnel, state representatives, and HHS attorneys and investigators to coordinate and move these cases along. In addition, substantial monetary resources have been set aside to establish databases accessible by government personnel working on these cases and for other investigative and litigation functions. If confirmed, I would consult with the Assistant Attorney General for the Civil Division and the head of the Executive Office for United States Attorneys to consider any request for additional resources.

- b) **Increased Cases:** I am also concerned that the Justice Department is not involving itself in enough cases. I am told that in FY 2003, the Department only joined 17% of the cases whistleblowers brought to it. While I understand that 100% of the cases brought to the Department may not be worth pursuing, I am certain more than 17% of them are. As such, I am asking you to expand the False Claims Act effort. Will you agree to do that?

Response: The number of cases that the Department joins is a function of the strength of the cases filed by relators and the investigative results in those cases. I understand that over a lengthy period of time that number has been in the 20 to 25 percent range, and it

necessarily varies from year to year. In FY 2003 it was 18 percent. In FY 2004 it was 25 percent. In large part, the Department's judgment as to intervention has been borne out by the statistics; I have been told that there have been extremely few cases that were declined by the Government that produced significant recoveries.

3) I want the Department of Justice to embrace the whistleblowers and their attorneys. I would like you to take the lead in doing that and set the tone for your Department. Increase the use of relators; use their attorneys in investigations, litigation and settlement negotiations. Pursue interpretations of the laws that foster *qui tam*. Publicize whistleblowers' role in fighting fraud. Foster their awards. Keep relators informed about their cases. Encourage more whistleblowers to come forward. Will you do that?

Response: If I am confirmed, part and parcel of the Department's overall False Claims Act enforcement effort would continue to be a commitment to *qui tam* and the cases identified and brought by whistleblowers. I accept that this means filing briefs in support of vigorous and appropriate interpretations of the False Claims Act and publicizing significant False Claims Act recoveries, both for the deterrent effect and to encourage whistleblowers to bring forward information they have about fraud on government programs. The *qui tam* provisions were designed to provide a monetary incentive to those aware of fraud against the government to bring that information forward and to work with the Department of Justice in investigating that fraud. The Department, the Civil Division, and the U.S. Attorneys offices have embraced that purpose. It is my understanding that many of the Department's cases involve the full integration of relators' counsel with government counsel. This includes the sharing of work product and analysis between the government and relators based on the experts or consultants hired by each, the sharing of litigation tasks such as covering depositions, reviewing documents and the drafting of pleadings and other court documents, and the joint participation in settlement meetings with defendants where appropriate. Based on the successful results in these matters, I would encourage cooperative relationships with relators and their counsel who show the expertise and willingness to provide such assistance without interfering with the government's law enforcement responsibilities.

4) I would like you to be visible in organizing anti-fraud efforts under the False Claims Act. Give initiatives that are developed using the False Claims Act your public imprimatur. Also, communicate with us up here in Congress about your False Claims Act program and the initiatives you take under the False Claims Act. Will you do that?

Response: Principal day-to-day responsibility for False Claims Act cases and policies rests with the Assistant Attorney General for the Civil Division and the various United States Attorneys. I can commit to you that, if I am confirmed, where they believe it appropriate to involve the Attorney General in embracing or publicizing an initiative, I would be involved. Similarly, where we can provide Congress or any of its committees with useful information about False Claims Act policies and practices, we would do so.

Congressional Oversight Questions

A) You're probably familiar with my longstanding position on Congressional oversight of the Executive Branch of government. The Constitution grants Congress the important responsibility of conducting oversight of the Executive Branch's operations, and I take those responsibilities very seriously. Oversight is critically important in helping to make government more transparent, more accountable and more effective for the taxpayers, program participants and beneficiaries. Government truly is the people's business, and Americans have a right to know what their government is doing and how it spends their money.

1) Judge Gonzales, I hope that you will appreciate and be responsive to my oversight activities. To that end, I expect that my questions and document requests will be answered in a timely and complete manner. I also want to be sure that you know that delays, ducking or just plain ignoring my requests are not acceptable. Do I have your assurance that you will assist me with my oversight activities and help me make the Justice Department more accountable to the American public?

Response: I can assure you that, if I am confirmed, the Department would make every effort to assist in the Committee's legitimate oversight activities. I recognize the importance of oversight in the legislative process and would work with the Committee to accommodate its information needs in this area. I agree that the Department is and should be accountable to the American people, whom we all serve.

2) As a senior member of the Senate Judiciary Committee, it is my constitutional obligation and duty to conduct thorough and extensive oversight of the executive branch including the Department of Justice. However, I have found this process to be difficult to say the least due to a seemingly growing problem of receiving responses from the Department that are often late. For instance, in September 2004, I requested a briefing into issues surrounding the Office of the Chief Immigration Judge and a proposed settlement. To date, my office has not yet received this briefing. What assurances can you provide to me that the Justice Department will respond in a timely fashion to my requests?

Response: If I am confirmed, I would ensure that the best effort is made to respond to your requests in a timely way, understanding that those efforts must be informed by the Justice Department's law enforcement and litigation responsibilities on behalf of the American people.

3) On April 23, 2004, I requested the creation of an inter-agency task force of DOJ, HHS-OIG and CMS to target fraud, waste and abuse within the Medicare drug program. To date, I have still not received a response. Please update me as to the status of this proposal.

Response: I appreciate your interest in the Department of Justice's law enforcement efforts relating to Medicare fraud. I am advised that your letter, sent in your capacity as

Chairman of the Senate Finance Committee, was received at the Department and a response, dated September 17, 2004, was directed to you at the Finance Committee.

B) The Constitution established a system of checks and balances intended to ensure the American people of fair, honest and transparent government. Congressional oversight of executive branch operations is a linchpin of the checks and balances system. In recent years, Congress has given the Department of Justice significant new investigative and enforcement authorities, such as those contained in the USA Patriot Act. It is important for Congress to know how well the Justice Department has implemented these and other authorities available to the Department. In furtherance of our oversight responsibilities, we often ask Government Accountability Office to evaluate Department of Justice programs and activities. These evaluations require the General Accounting Office to review documents, talk to agency officials and judge program effectiveness. It is critical that the Government Accountability Office have timely access to documents and agency officials to inform their work.

- 1) **Will you commit to working with the Government Accountability Office in a timely and constructive manner to address the oversight and other needs of the Congress, and will you encourage others to do so?**

Response: Yes, if I am confirmed, I intend to work constructively with GAO to provide timely information in response to appropriate requests and to encourage others to do the same.

- 2) **What specific steps will you take to ensure that Government Accountability Office receives access to the information and agency officials it needs to carry out reviews of Department of Justice programs and activities, and to ensure that information is provided in a timely manner?**

Response: It is difficult to identify particular steps in the absence of any context, but I understand the Department has established an Audit Liaison Office, the primary purpose of which is to coordinate responses to GAO requests for information. I can assure you that, if I am confirmed, the Department would make every effort to respond to GAO in a timely manner, consistent with our law enforcement and litigation responsibilities.

- 3) **Do you foresee any issues in providing particular categories of Department of Justice information to Congress or Government Accountability Office? If so, what are the issues and how will you address them?**

Response: I expect that, in the oversight arena, the Department will continue to make every effort to accommodate the Committee's information needs and through that process, will resolve any issues that may arise. Similarly, I do not foresee any issues that will arise from GAO requests that cannot be resolved.

C) Judge Gonzales, many assurances have been provided over the past number of years regarding the actions to be taken by the FBI to ensure integrity within the Office of Professional Responsibility (OPR). Specifically, and given the longstanding internal problems facing OPR, including retaliation against those within the FBI who publicly address problems with the agency, would you please address what safeguards you will put in place and when? What initial actions will you take personally to abate any fears of retaliation of FBI employees who are publicly critical of certain procedures, practices or policies that do not properly guarantee or execute the primary mission and goals of the agency?

Response: If confirmed, I would pursue the following measures to ensure that the FBI's Office of Professional Responsibility (OPR) operates with integrity and that FBI employees know that retaliation for lawful disclosures will not be tolerated. Because there have recently been significant changes in both OPR personnel and policy, I would assess the effectiveness of these changes. I would also make it clear through communications to senior FBI leadership that this is a matter of great importance to me and to the Department of Justice, because both improper retaliation and employees' perceptions of such retaliation chill their willingness to make appropriate disclosures regarding FBI policies and practices. Finally, because the Director of the DOJ Office of Attorney Recruitment and Management is the deciding official with respect to whistleblower retaliation claims, I would seek the assessment of that office as to whether there are systemic problems requiring attention, or whether the mechanisms in place are adequate to ensure that retaliation does not occur.

D) Judge Gonzales, the February 2004 study of the Office of Professional Responsibility highlighted several additional areas of internal improvement in order to better serve and protect those who work within the agency. In addition, the study suggested several specific recommendations in order to help remedy the identified problems. What steps will you take to ensure that each recommendation in that study is thoroughly given consideration and/or executed and how long will it take for changes to be implemented?

Response: I am not yet familiar with the 2004 study to which you refer. Thank you for bringing it to my attention. If confirmed, I would carefully consider the recommendations made and the most effective means of responding to them.

E) Judge Gonzales, the FBI Foreign Language Program has received heightened scrutiny over the past year. Department of Justice, Office of Inspector General reports and inquiries, in addition to highly publicized allegations from various whistleblowers, have identified grave deficiencies including, but not limited to: overwhelming backlogs of un-translated foreign language material; quality assurance problems of already translated material; hiring of unqualified permanent and contract linguists; and indications of "back door" hiring of persons with close personal ties to upper-level management. What will you do to address these specific problems during your tenure with the Department of Justice?

Response: If confirmed, I would make review of the FBI linguist program, including the quality of both the linguists employed and the translations and analysis they produce, a high priority. I understand that the FBI has recently developed national Translation Quality Control Policy and Guidelines, and I would be anxious to explore the efficacy of this policy in improving translation accuracy. I would additionally explore whether translation and analytic quality might be enhanced by the development of a linguist workforce dedicated solely to quality control reviews, and what additional resources might be needed to institute such a program. Regardless of the precise form of the quality control measures taken, I would ensure that they place proper focus on the recommendations offered by the Inspector General, and that the Committee is kept informed of the progress made.

F) Judge Gonzales, in March 2004, the Committee on Finance conducted hearings into the incremental occurrence of health insurance fraud and scams. Americans taxpayers are constantly scammed by buying into these fraudulent deals. What action will you direct the Department of Justice to take in order to investigate and prosecute these cases? Furthermore, what steps has the Department taken to thoroughly investigate these instances?

Response: I am committed to the prosecution of corrupt employee health insurers who market bogus employee health care coverage to small and mid-sized employers. The operation of these unauthorized insurers has an enormous impact on employers, employees, and individuals who purchase health coverage, only to discover that the promised benefits will not be delivered. As I understand it, to avoid state insurance regulation, corrupt insurers falsely claim to be employee health plans that are exempt from state insurance regulation by the Employee Retirement Income Security Act ("ERISA") as entities called multiple employer welfare arrangements ("MEWAs") under ERISA. They operate without regulatory oversight, selling benefits through the use of false pretenses and promises.

While these cases are complex and involve schemes that reach into many different jurisdictions, the Department of Justice has emphasized investigation and prosecution of the operators of these unauthorized entities. Since the Senate Finance Committee hearings in March 2004, the operators of Employers Mutual were indicted in the Central District of California. U.S. v. Graf et al., (Cr. No. 04-00492, C.D. Ca.). Employers Mutual purported to provide health care benefits to more than 20,000 people across the country but failed to pay more than \$30 million in medical claims to participants covered by its programs. In April 2004, operators of American Heartland Health Administrators ("AHHA") were indicted in the Southern District of Texas on fraud and conspiracy charges alleging a scheme to obtain \$45 million in premiums through the sale of fraudulent employee health care coverage resulting in more than \$13 million in unpaid medical claims. U.S. v. Claro et al., (Cr. No. 04-126, S.D. Tex.). In September 2004, the operator of an entity that sold health care coverage to thousands of people throughout the country pled guilty to a 64-count indictment charging fraud and money laundering. U.S. v. Hyde (N.D. Ca). In addition to these cases, a July 2004 memorandum from the Criminal Division issued guidance to the United States Attorney's Offices, the Civil

Division, and the Tax Division highlighting the importance of pursuing criminal investigation and prosecution of such employee health insurance scams, and encouraging increased emphasis on this area of abuse.

Should I be fortunate enough to be confirmed, I intend to continue the Department's efforts to combat these scams. I look forward to working with the Department of Labor, which is responsible for the enforcement of ERISA as well as for investigation of civil and criminal violations of ERISA, to ensure that we aggressively pursue corrupt insurers.

G) There is a constant concern to the American taxpayers that a large number of resources are being used in Justice Department related settlement cases with a return of a little more than pennies on the dollar. This is a slap in the face to American taxpayers. What actions do you believe can be initiated to insure that the American taxpayer is made as "whole" as possible in health related settlements?

Response: If I am confirmed, recovering money defrauded from government funded health care programs would continue to be one of the Department's priorities. There have been major civil recoveries from large hospital chains and pharmaceutical companies. The statute principally used in these efforts has been the False Claims Act, which is premised on the belief that to be an effective deterrent and tool more than what has actually been defrauded must be sought in a recovery. While individual cases have to be evaluated on their merits and appropriate litigation risk must be factored in, I am not aware that federal healthcare fraud cases have been settled for pennies on the dollar. The Department's goal in cases where fraud can be established is to obtain substantial recoveries, and I reaffirm that goal to you today.

H) Recently, the Department of Justice, Office of Inspector General stated that agency in-fighting has stalled the development of a unified fingerprint database that would enable a visitor's fingerprints to be matched with a database of terrorist and criminals. Specifically, the "in-fight" is over an issue of semantics on the actual procedure that will be used to take fingerprints. Given the mounting threats we receive each day in the war on terror, incidents and turf battles such as these only inhibit our ability to forcefully and effectively fight terrorism. What will you do to ensure that these types of incidents no longer stall developments in the war on terror? What will you do to ameliorate the constant in-fighting and turf battles that seem to plague the Department of Justice?

Response: The Department of Justice is a strong supporter of the use of biometrics to identify terrorists and other criminals seeking entry into the United States. The Criminal Justice Information Services (CJIS) Division of the FBI manages the Integrated Automated Fingerprint Identification System (IAFIS). IAFIS is the largest biometric database in the world and contains the fingerprints and corresponding criminal history information for more than 47 million subjects. The fingerprints and corresponding criminal history information are submitted voluntarily by state, local, and federal law enforcement agencies. IAFIS fingerprint records consist of 10 rolled fingerprints taken by the submitting law enforcement agencies.

As an interim measure, the Department of Justice is providing the Department of Homeland Security (DHS) with an extract of the records of known or suspected aliens with active wants and warrants contained in IAFIS. This extract is incorporated into US-VISIT and is used by DHS to help identify visitors with criminal records. For the sake of expediency, DHS only captures 2 prints when it enrolls a visitor into US-VISIT. In order to best match an individual against IAFIS, however, it is necessary to submit 10 prints. The Department of Justice is working with DHS and the Department of State to move to a truly interoperable system in which the fingerprints of visitors are run against the entire IAFIS, and not just an extract. This goal is supported throughout the Department of Justice. I believe that such an approach will best protect the security of the United States, and would plan to continue to focus the Department's efforts in that direction if confirmed.

Justice Assistance Grant Program and Other Justice Department Program Questions

A) Law enforcement officers in Iowa tell me that since September 11th, their agencies have been tasked with more homeland security missions in addition to all the other duties they must perform. However, the assistance from the federal government has not increased to help pay for the costs of these missions. What assistance is being provided to those agencies by the federal government to help offset the expense of homeland security missions?

Response: The recently appropriated Byrne Justice Assistance Grant (JAG) provides assistance to state and local law enforcement agencies. Other initiatives spanning public safety and homeland security functions specifically designed by the Department of Justice for local law enforcement include the State and Local Anti-Terrorism Training Program, the Global Justice Information Sharing Program, and the Regional Information Sharing Systems. The Department of Homeland Security also makes grants to first responders, including law enforcement, for certain homeland security expenses.

B) What is your philosophy on the federal government's role in providing resources to local law enforcement and insuring coordination of information among federal, state and local law enforcement agencies?

Response: All Department of Justice programs strive to maximize the coordination of information through information sharing with state and local law enforcement. Local law enforcement data is key to comprehensive public safety and homeland security efforts involving all levels of government. Department initiatives such as the Global Justice Information Sharing Program and the Regional Information Sharing Systems (RISS) facilitate this information exchange among agencies nationwide. The Department must, of course, always be sensitive to resource needs of local law enforcement and should keep the Congress fully advised when it appears that the demands of coordination and effective law enforcement are unduly straining local resources.

C) The Justice Department is in the process of implementing the recently established Justice Assistance Grant (JAG) program. The JAG program consolidates two similar funding streams within the Justice Department. This consolidation happened within the Appropriations process, and without a thorough review by the Judiciary Committee, something I'm hopeful Chairman Specter will do this year. As Attorney General, I hope that you will ensure that a better job is done to explain the effects of these changes to state and local law enforcement than has been done to date.

1) My constituents tell me this consolidation has cut important program funding, without any recognizable gains in efficiency, effectiveness or coordination. If confirmed, I hope you will spend some time looking at how the JAG program, as well as all grant programs within the Justice Department, can be used to promote increased coordination, utilize better communications and ensure that efficiencies are gained, and that the customers – those who are receiving the grants, not the Washington bureaucrats – receive the benefits of any programmatic changes. If the objective is to cut funding, then we have an obligation to be up front and honest about it, and I expect you to insist on such accountability. Do you agree?

Response: If I am confirmed, the Department would continue to encourage open dialogue with our state and local law enforcement partners. With input from state and local leaders, performance measures for the recently appropriated JAG are already being developed for law enforcement, courts, corrections, treatment, and prevention projects to measure the anticipated benefits of consolidation.

2) As you know, the Byrne and LLEBG grant programs have been combined to create the JAG program. Some of these funds will pass through the states, while other funds will be direct awards. Constituents in Iowa tell me that they are uncertain how to go about applying for the direct awards. There is also some confusion about the JAG formula in determining how much money each state will receive.

a) Please explain the overall JAG formula, the formula used in determining the pass through versus the amount that will be directly awarded to each state, and the process by which agencies in each state must go through to receive direct awards.

Response: I am informed that the JAG formula includes a *state allocation* and a *direct allocation* to units of local government. In general terms, once the state allocation is calculated, 60 percent of the funding is awarded to the state and 40 percent to eligible units of local government.

b) Please explain how the money awarded to each agency or project by the state will be coordinated with the applications submitted for direct awards through BJA.

Response: I am informed that, based on the requirements of the FY 2005 Omnibus Appropriation Act, the JAG application will be completed and online by the first week of February 2005. The application kit, including the solicitation and program guidance is currently in draft form and is being reviewed by Department of Justice staff as well as state and local partners. Conference calls, e-mails, and other communications through national organizations representing state and local interests serve to update and educate the field on the progress and added features of the new program.

Antitrust Questions

A) As you know, I've been extremely concerned about increased agribusiness concentration. I believe that the Justice Department's Antitrust Division needs to dedicate more time and resources to agriculture competition issues. The Justice Department must play a key role in limiting monopsonistic and monopolistic behavior in agriculture.

1) I'd like to get a commitment from you that the Antitrust Division, under your watch, will pay heightened attention to agribusiness transactions. Can you give me an assurance that agriculture antitrust issues will be a priority for the Justice Department if you are confirmed?

Response: I am committed to maintaining the Department's active involvement in the agricultural sector and to protecting competition through aggressive antitrust enforcement as warranted. I take concerns expressed by agricultural producers about competitive problems very seriously. I am informed that the Department has brought a number of enforcement actions in the agricultural sector in recent years and has undertaken special outreach to the agricultural community. In particular, I know the Antitrust Division has a Special Counsel for Agriculture who closely monitors the agricultural sector for possible antitrust violations. If confirmed, I would direct the Antitrust Division to remain on the lookout for and investigate possible antitrust violations and to take appropriate enforcement action when warranted. I am also committed to maintaining the Department's long-standing positive working relationship with USDA on competition matters in the agricultural sector.

B) Another area of concern for my constituents is airline competition, and I want to make sure that the Antitrust Division will carefully evaluate all airline mergers, as well as airline alliances, predatory pricing, slot limitations, and hub and gate access arrangements. It is important that the Antitrust Division monitor activity in the airline industry, because smaller states and rural communities are the ones that lose out the most when anti-competitive mergers go through and illegal business practices are not prosecuted. Do you agree?

Response: I agree that preventing anticompetitive mergers and stopping illegal anticompetitive business practices are important to all consumers, including consumers in smaller states and rural communities. With respect specifically to airlines, I understand that the Department monitors the airline industry closely for possible anticompetitive

agreements or conduct, including potential predatory and exclusionary practices – and that would continue if I am confirmed. The Antitrust Division has conducted a number of investigations and enforcement actions in this industry in recent years, including investigations or enforcement actions involving airline mergers, online joint ventures, other kinds of joint marketing arrangements, and allegations of predatory conduct. I fully support these efforts and think it is important that the Department remain vigilant in its enforcement efforts in this industry.

Bankruptcy Questions

A) Although comprehensive bankruptcy reform bills have passed both the House and Senate over several Congresses, a bill has still not been signed into law. I plan to reintroduce the comprehensive bankruptcy reform bill in the 109th Congress. I anticipate that bankruptcy reform will continue to enjoy broad support in Congress.

1) Do you believe that the bankruptcy system should be reformed to ensure that it is not abused by those who have the ability to repay some or all of their debts?

2) Can I count on you to be an ally in getting the Executive Branch to support this bill, and to work with us in Congress to finally get it enacted into law?

Response: The Administration has supported and continues to support comprehensive bankruptcy reform. As has been stated in several Statements of Administration Policy on this bill, the Administration believes these common sense reforms will curb many of the abuses of the current bankruptcy system. If confirmed, I would look forward to working with you to enact this important legislation.

B) Even without a reform bill, the Justice Department, through the Executive Office of the United States Trustees has the power to dismiss bankruptcies that are abusive under section 707(b) of the Bankruptcy Code. Will you make enforcement of section 707(b) of the Bankruptcy Code a top priority for the U.S. Trustee's Office? How will you support and encourage greater enforcement actions by the U.S. Trustee's Office to prevent abusive or fraudulent bankruptcy filings?

Response: If confirmed, I would ensure that enforcement of section 707(b) continues to be a top priority of the United States Trustees. I would support and encourage greater enforcement actions by restating that combating bankruptcy fraud and abuse is a top priority and by monitoring the various enforcement reports and statistics that the United States Trustees periodically provide as part of the management and budget processes.

C) Do you believe that Chapter 11 of the Bankruptcy Code is sometimes used to avoid paying debts to defrauded investors? If so, how do you believe that the Justice Department can use its resources to prevent this?

Response: It is critically important that the Department address corporate and business fraud in all forms, including by companies that defraud investors and then file for Chapter 11 protection. I pledge continued support for the President's Corporate Fraud Task Force, which includes the Justice Department, SEC, and other agencies. The Task Force has proved to be a very effective mechanism to promote interagency cooperation and to achieve successful prosecutions. In addition to seeking criminal penalties, I also pledge continued emphasis on taking civil actions to ensure the integrity of the bankruptcy system and to ensure the investing public that corporate misconduct will not be tolerated.

Obscenity Questions

A) Illegal obscenity is more available now than ever before. Obscenity is abundant on the Internet and on cable and satellite television. In fact, there have been recent news reports that some people are having pornography sent directly to their cell phones and Palm Pilots. If you are confirmed as Attorney General, will you agree to review the Department of Justice's strategy on obscenity prosecutions and assure us that in the future the Department will prosecute the major producers and distributors of illegal obscenity and make such prosecutions a priority?

Response: If confirmed, I intend to make the investigation and prosecution of obscenity one of my highest criminal enforcement priorities. To that end, I plan to review the Department's investigative and prosecution resources and its strategy in combating obscenity. While I understand that the Department has significantly increased the number of obscenity prosecutions it has brought during President Bush's Administration, I will seek to strengthen its efforts in order to make the Department more effective in combating obscenity and its proliferation.

**Responses of Alberto R. Gonzales
Nominee to be Attorney General
to the Written Questions of Senator Orrin Hatch**

- 1. Many committed citizen groups across the county are waging a battle against pornography in their communities. Many of these groups are meeting with success and have innovative ideas for combating pornography. Would you be willing to meet personally with community leaders and anti-pornography activists to exchange ideas and discuss ways to more effectively combat pornography on the local, state, and federal levels?**

Response: Yes, I would welcome the opportunity to hear about innovative ideas to battle the scourge of pornography.

- 2. I am appreciative of some of the recent efforts of DOJ in prosecuting child exploitation and pornography cases. Many of us would like to see more being done. I was disturbed to learn that one leading pornography defense attorney has been quoted as saying that DOJ is generally not prosecuting mainstream pornography, which constitutes the vast majority of the pornography trade and much of which easily qualifies as obscenity.**

Can we count on the department of Justice to aggressively prosecute so-called mainstream pornographers who violate obscenity laws under your leadership?

One of the critical areas in which the Dept. of Justice works is that of defending and promoting civil liberties. One of our most important liberties – perhaps the most important, as it was the reason for America’s founding – is religious liberty.

Response: If confirmed as Attorney General, I intend to make the investigation and prosecution of obscenity one of my highest criminal enforcement priorities. As I understand it, the Department has significantly increased its investigations and prosecutions of obscenity during this Administration. In addition, if confirmed as Attorney General, I would ensure that the Department continues to aggressively investigate and prosecute child exploitation and child pornography cases.

- 3. Over the past 4 years, DOJ has admirably devoted increased attention and resources to defending and promoting religious liberty; in fact, after having been long ignored, religious liberty has again become a central focus of the Civil Rights Division. The division has actively brought cases against the New York and Los Angeles subway systems for their policies which would bar Sikhs from wearing their turbans on the job. The Division has actively defended in court the federal Religious Land Act and fought local zoning boards which have harassed, in a discriminatory fashion, synagogues and churches from constructing or expanding their facilities.**

Could you please tell us about your perspective on religious liberty and in what fashion you would like to see the Department continue this work?

Response: If confirmed, I would seek to have the Department continue its efforts to protect religious freedom. The Framers included constitutional protection for the free exercise of religion in the Bill of Rights. Many of the major civil rights statutes, including the Civil Rights Act of 1964 and the Fair Housing Act, in addition to prohibiting discrimination on the basis of sex and race, also prohibit discrimination on the basis of religion. Protections against religious discrimination should be fully enforced with those protecting other classes.

- 4. Another critical aspect of religious liberty in the United States is not only defending the religious liberties of individuals or groups to exercise their religion without interference, but to ensure that the government – especially the federal government – does not discriminate against religious entities. President Bush has made the government’s “equal treatment” for faith-based organizations a central feature of his Administration and DOJ plays an important role in this effort. The Office of Legal Counsel has rendered key legal opinions on such issues as treating faith-based entities equally and without discrimination in programs ranging from federal disaster relief administered by FEMA to historic preservation grants made by the Interior Department. We’ve now seen lawsuits filed by some activist groups challenging these kinds of programs and seeking a return to policies that exclude faith-based groups from these and other government grant programs.**

Could you please give use your perspective on the ways in which faith-based entities ought to be included or excluded in government programs and the role DOJ will play in this issue under your leadership?

Response: I support the President’s faith- and community-based initiative and, if confirmed as Attorney General, would seek to build on the Department of Justice’s accomplishments in this area. On January 21, 2004, the Department promulgated a regulation to ensure that no organization or beneficiary is discriminated against in a Department-funded social services program on the basis of religion. The final rule reflects the principles of Executive Order 13279 that religiously affiliated organizations should be able to compete on an equal footing with other organizations for funding. Faith- and community-based organizations are important to the Department’s mission of keeping communities safe by controlling and responding to crime, providing aid to victims of crime, combating violence against women, and reducing recidivism.

- 5. The Congress has just passed – and the President has signed into law – sweeping intelligence reforms.**

The Intelligence reform and Terrorism Prevention Act implements many of the recommendations of the 9/11 Commission, including the creation of a Director of National Intelligence and a National Counterterrorism Center.

The Act also institutionalizes many of the reforms made by Director Mueller at the FBI, such as the creation of a Directorate of Intelligence and a permanent career track for FBI analysts.

As attorney General, you will be responsible for overseeing the FBI's transformation from a reactive criminal investigative agency to a proactive intelligence agency, charged with preventing another terrorist attack on U.S. soil. You will be responsible for ensuring that this transformation takes place with constitutional boundaries and with due respect for civil liberties.

Are you prepared to continue the [re]forms initiated by Director Mueller and ensure the FBI's adherence to constitutional principles?

Response: To the best of my ability, I am prepared to assume these responsibilities. Director Mueller's reforms of the FBI have placed intelligence collection, analysis, and dissemination at the very core of the FBI's mission. The FBI is cultivating a deep expertise in intelligence and national security, in part through the establishment of a specialized and integrated national security work force within the FBI. This transformation is essential to our common goal of preventing another terrorist attack on U.S. soil. But it must be accompanied with constant vigilance that the transformation respect constitutional boundaries and that Americans' civil liberties be duly protected.

- 6. Will you and the Department continue to work closely with me and other members of the Judiciary Committee and other Senators to see that DOJ efficiently and equitably administers the Radiation Exposure Compensation Act? I am very concerned that the funding level is inadequate and that eligible beneficiaries will receive IOUs rather than compensation. This issue is of tremendous to me and other members of congress that represent citizens who were injured do to our nations nuclear testing program. Will you commit to work with us on helping to see that the funding is adequate for all beneficiaries of RECA.**

Response: If confirmed, I would of course work with you on this issue. As I understand it, over the past few years, ensuring that the Radiation Exposure Compensation Act (RECA) Trust Fund was able to pay approved claims during each fiscal year was the critical issue facing the program. Annual funding caps provided \$65 million for the Trust Fund for FY 2005, an insufficient amount for the number of anticipated approved claims. To address the deficiency, the Ronald W. Reagan National Defense Authorization Act for 2005 directed that RECA claimants characterized as uranium workers be paid out of the Energy Employees Occupational Illness Compensation Fund, a program for Department of Energy workers. This will ease the burden on the RECA Trust Fund for FY05. Further relief was contained in the Consolidated Appropriations Act of 2005, which ensured present and future Trust Fund solvency. That bill includes an increase of \$28.7 million to cover the FY05 shortfall and confers permanent and indefinite funding status on the Program for subsequent years. With enactment of this bill on December 8, 2004, solvency issues have been resolved through the life of the program.

The Department is committed to the success of this important and unique law. If confirmed, I would ensure that the Department continues to work closely with Congress to see that we meet the needs of Americans adversely affected by our Nation's nuclear testing program who seek relief through RECA.

7. **Since 9/11, the FBI has made important strides in improving its translation capabilities. Among other things, the FBI has added nearly 700 new translators, including more than 135 new Arabic speakers.**

Despite these improvements, just last September, the Justice Department's Inspector General issued a report saying that the FBI still has a backlog of hundreds of thousands of hours of untranslated audio recordings from terrorism and espionage investigations. The Inspector General found that the FBI still lacks the necessary language personnel to do all the needed translation work. At Senator Leahy's urging, we included new reporting requirements on the FBI's translation program in the recently-passed Intelligence Reform Act. Of course, reporting requirements are only useful if they are accompanied by committed leadership.

Will you work with the Committee to identify and correct any remaining obstacles to a fully successful translation program at the FBI, to enhance its ability to stop terrorists before their plans take shape?

Response: If confirmed, I intend to see that the FBI's translation program is effective in its efforts to detect and impede terrorist schemes, and I would look forward to working with this Committee to identify and correct the remaining obstacles to this success. I am pleased to hear that the FBI has substantially increased its number of linguists by almost 70% since September 11, 2001, and I believe the National Virtual Translation Center, which will serve as a clearinghouse to facilitate the timely and accurate translation of foreign intelligence for all elements of the Intelligence Community, will offer broad benefits in the fight against terrorism. The FBI currently has sufficient translation capability to address promptly all translation needs with respect to high priority counterterrorism intelligence, often within 12 hours, but I am aware that there are instances when translation needs cannot be addressed within 12 hours. If confirmed, I would be anxious to learn from the FBI what must be done to prevent such delays and to work with the FBI and this Committee to ensure that the FBI has the resources and authorities it needs to meet these remaining challenges.

8. **Thankfully, in recent years, we have seen a substantial decline in teen drug use. Just last month, the Office of National Drug Control Policy announced the most recent survey results, which showed a 6 percent decrease in illegal drug use by teenagers between 2003 and 2004. This continues a three-year trend. In fact, over the past three years, there has been a 17 percent decrease in teenage drug use.**

Despite these encouraging statistics, we all know that illegal drugs continue to be a scourge on too many of our communities.

Without a doubt, the fight against terrorism is – and must be – the Department's number one priority. But, as Attorney General, you will also oversee the Drug Enforcement Administration, the FBI's Criminal Division, and scores of federal prosecutors who are actively engaged in the ongoing battle against illegal drugs.

Can you assure the Committee that you will give your personal attention to this problem, and work to develop cooperative relationships with State, Local and Tribal officials to ensure that – despite necessary reallocations of federal resources – the drug problem is aggressively addressed?

Response: I share your concern regarding the battle against illegal drugs and commit that if I am confirmed as Attorney General, it would continue to be a priority of the Department of Justice. I would continue to promote the many cooperative relationships that the Department of Justice has with other agencies, as well as state and local law enforcement, which include, among others, the Organized Crime Drug Enforcement Task Force Program and Fusion Center and the High Intensity Drug Trafficking Area Program.

9. **As you are no doubt aware, there has been periodic concern expressed by some that – after a period of seeming convergence – there is a growing divergence between the U.S. and various other countries on a variety of issues involving enforcement, fundamental policy assumptions, and the development of substantive law in the areas of antitrust and intellectual property. These range from aspects of coordination in the interest of efficiency to the more emerging substantive differences that could result in significant legal burdens on – and result in a competitive disadvantage to – U.S. companies competing in the international arena. Some respected voices have suggested the conflicting decisions in the GE-Honeywell merger and significantly different results in the EU and U.S. antitrust cases involving Microsoft signal an increasing divergence in competition policy and antitrust enforcement. Others argue that such occasionally inconsistent results and differing enforcement priorities merely reflect longstanding differences among distinct nations and – as such – do not suggest any significant or troubling divergence. In a similar vein, it has also been suggested that there is a growing trend in some countries toward forced licensing of intellectual property rights in the context of regulating competition or as a principal remedial tool in antitrust enforcement actions. In your view, how significant are the burdens and inefficiencies on U.S. companies operating in international markets? What additional steps – if any – do you believe should be taken by the U.S. to assess potential trends toward divergence (or convergence) and, where possible, work toward addressing them? How does the Department plan to coordinate with the Congress as well as other federal agencies such as the USTR, Department of Commerce, and the Patent and Trademark Office to share information and develop strategies for addressing these types of concerns?**

Response: It is important that burdens and inefficiencies on United States companies operating in international markets as a result of divergence in competition policy and antitrust enforcement be as low as possible and that the Department, in conjunction with other agencies and with Congress's assistance, work hard to achieve that end. Coordination and substantive and procedural convergence internationally on antitrust and intellectual property issues must continue to be a high priority for the Department. Along those lines, the Department has been working with many foreign antitrust agencies in a variety of contexts, including the International Competition Network and the Organization for Economic Cooperation and Development and antitrust and intellectual property working groups, to achieve international consensus on sound antitrust and intellectual property enforcement.

The Department also works closely with foreign antitrust agencies, particularly the European Commission, in order to achieve the greatest possible coordination with them on particular matters. Antitrust Division lawyers at both staff and policy levels have worked closely with their European Commission counterparts on those matters and have publicly criticized them when unwarranted divergent outcomes have been reached. The Department must and will continue its efforts to engage foreign antitrust agencies at both the staff and policy levels to limit the risk of significantly divergent outcomes in particular cases.

- 10. The Department has indicated a commitment to Intellectual Property enforcement by increasing the number of CCIP units and prosecutors, creating an IP Task Force to assess problems and potential legislative and enforcement solutions, and by elevating the attention and resources devoted to copyright and trademark issues. Are you committed to continue to build on this record in the enforcement arena?**

Response: The Department of Justice under Attorney General Ashcroft has demonstrated a clear appreciation of the importance of intellectual property rights and has taken substantial steps over the past year to enhance its effectiveness in helping to protect those rights. I share the commitment to enforcing the nation's intellectual property laws and would, if confirmed, diligently strive to improve on the Department's record whenever possible.

**Responses of Alberto R. Gonzales
Nominee to be Attorney General
to the Written Questions of Senator Edward Kennedy**

I. HUMAN RIGHTS ISSUES INVOLVED IN THE WAR ON TERRORISM

1) Did you participate in meetings in which specific interrogation techniques were discussed?

Response: As I noted in my testimony before the Committee, I recall participating in some discussions regarding the manner in which we could question enemy combatant terrorists for information that might save American lives.

- If so:**
- i. Please provide details, including the specific interrogation techniques that were mentioned at such meetings.**
 - ii. Did you raise any objection – either during any such meeting or afterwards – to the use of these techniques? Please provide details.**

- If not:**
- i. Why didn't you raise objections to the use of these techniques?**
 - ii. In retrospect, do you believe you should have raised objections at the time those techniques were discussed?**

Response: I believe that during these discussions, representatives from agencies raised concerns that certain terrorists had information that might save American lives. There was a desire to explore certain methods of questioning these terrorists, but there was concern that nothing be done that would violate the law. I do not have a specific recollection about each individual method of questioning discussed. It is quite likely that not all the methods were discussed since our discussions were not intended to provide approval of certain methods of questioning. I have no specific recollection of raising objections to the use of particular methods of questioning. But my role was not to decide whether or not certain methods of questioning should be adopted as a policy matter; it was for others to decide whether a particular method of eliciting information from terrorists was something to employ under the directives of the President that we should do everything that we lawfully can to win the war against the terrorists. Nor was it my role to make the ultimate decision whether a particular method was legal. That responsibility rested with the Department of Justice. For me to provide details about the method of questioning terrorists mentioned in meetings that I attended would entail discussing classified information, which I am not at liberty to do.

(a) Please identify all notes, memoranda, e-mail, audio-recordings, or documents of any kind which reflect:

- i. The occurrence and substance of such meetings;**

ii. The positions taken by the individuals present at the meetings on the topic discussed;

(b) Please provide all materials identified in (a).

Response: I do not have notes of such meetings, and I do not believe there are audio-recordings. I do not know what notes, memoranda, e-mails, or other documents others may have about these meetings, nor have I conducted a search. Any meetings of the type you describe and any records reflecting the information you specify would involve predecisional deliberations that I am not at liberty to disclose.

2) During the hearing, you did not provide clear answers to my questions about the scope of your involvement in the creation of the August 1, 2002 Bybee Memorandum on torture. Now that you have had time to reflect and check other sources of information, please answer the following:

(a) Describe your exact role in formulating the reasoning and conclusions contained in the memorandum, including whether you offered suggestions or opinions on the conclusions that OLC was to reach. If you offered suggestions or opinions, describe them. (It is not enough to merely say, as you did during the hearing, that you participated in a difficult effort.)

Response: As I explained in my testimony to the Committee, I and other lawyers in the White House participated in some discussions regarding the August 1, 2002, memorandum. I did not draft or author the document, and I do not recall making any specific suggestions or opinions regarding the conclusions that OLC reached, though it would not be unusual for the Counsel's Office to provide comments and suggested edits to a draft opinion that OLC had asked us to review. This is particularly true in reviewing a statute that has never been interpreted by our courts. However, it was not the role of the Counsel's Office to direct OLC how to analyze a statute nor did we order a specific legal conclusion. Although the President has the authority to make final interpretations of law, as a general matter he relies upon the Justice Department for this function. It was for the Department of Justice, specifically OLC, to interpret the law for the Executive Branch. That is a role that Congress has given to the Justice Department and it is a role that has traditionally been honored.

i. Did you indicate in any way to OLC that its conclusions should be "forward leaning" or expansive or any words to that or similar effect?

Response: The President has directed that we should do everything that we lawfully can to win the war against terrorists who kill innocent civilians and do not fight according to the laws of war. Although I have from time to time used the phrase "forward leaning," I do not recall ever using that or a similar phrase to suggest that OLC should stretch its interpretation of the law. To the contrary, I presume that every opinion issued by the Justice Department represents its considered views, and that the Department is comfortable with its analysis.

ii. Did you ever indicate in any way that OLC should reach a particular position or result?

Response: I did not urge OLC to reach any particular position or result in its analysis of the anti-torture statute or the other matters discussed in the August 1, 2002, memorandum. Although the Counsel's office engaged in discussions with OLC about the subject matter of the memorandum, it was for OLC to advise the Executive Branch how to interpret the law.

(b) During the hearing, you did not deny that the CIA made the request for legal advice on how far it could go in conducting interrogations or which interrogation methods it could use. Did the CIA request a legal opinion on the legality of highly coercive interrogation and/or an evaluation of the legal exposure of those who conducted such interrogations?

Response: As I explained in my testimony to the Committee, I do not have a specific recollection of the request for the legal opinion coming from the CIA. It may be, as I explained, that CIA or Department of Defense initially sought the views of OLC on the matters discussed in the memorandum. But as the memorandum was finalized, it was addressed to me. As I said in an earlier response, the President had directed that we do everything that we lawfully could do to win the war against terrorists. In doing so, the agencies certainly did not want to do anything unlawful, and therefore appropriately asked questions about the limits of permissible conduct.

i. Please describe in detail all the steps in the process which led to production of the August 1, 2002, Office of Legal Counsel opinion on torture signed by Jay Bybee.

Response: As I have explained, I do not recall specifically how or where within the government the request for the advice in the memorandum initially arose. I do recall that there were discussions between OLC and lawyers at the White House regarding at least some of the issues addressed in the memorandum, although what specifically was discussed I do not recall.

ii. Identify all notes, memoranda, e-mail, and documents of any kind which reflect the CIA's request and any responsive actions by your office and the Department of Justice.

Response: I have no such notes and I have no present knowledge of any such notes, memoranda, e-mails, or other documents and I have not conducted a search. Any records reflecting the information you specify would involve predecisional deliberations that I am not at liberty to disclose.

iii. Please provide all materials identified in (ii).

Response: Any records reflecting the information you specify would involve predecisional deliberations that I am not at liberty to disclose.

3) During the hearing, you did not respond to my statements regarding the likely existence of records that document the process by which: the Bybee Memorandum was requested; the request was forwarded to OLC; the request was implemented; the extent to which you participated in the policy formulation; and the responses to the finished product.

(a) In preparation for your hearing, or since the hearing, did you review documents related to the Bybee Memorandum and its history? If so, identify and provide them.

Response: I reviewed the memorandum as well as summaries and talking points of that document. I have no present knowledge of any documents that would indicate how it was requested or the extent of my participation in the analysis. There are, of course, many documents in the public domain that could be described as responses to the finished product. I have no present knowledge of any non-public documents that meet that description. However, I have conducted no search. To the extent the documents requested may exist, moreover, they would involve deliberative material that I am not at liberty to disclose.

(b) In preparation for your June 22, 2004, press conference or in the aftermath of the Abu Ghraib revelations, did you review documents relating to the Bybee Memorandum? If so, identify them and provide them.

Response: At the time, I reviewed the memorandum, summaries, and talking points relating to the memorandum, and some of the news reports or opinion pieces that discussed it. I did not review any documents of the type referred to in your previous question.

(c) In addition to the documents identified in (a) and (b), were there other correspondence, e-mails, reports, memos or other documents which reflected, mentioned, or resulted from your participation in the creation, formulation, assessment, approval, and dissemination of the Bybee Memorandum? If so, identify each item and provide it.

Response: I have no present knowledge that there are any documents of the sort requested in the question, although I have not conducted an independent search for such documents. Any records reflecting the information you specify would involve deliberative material that I am not at liberty to disclose.

(d) Describe the steps you and those working on your behalf took to identify all material described in (a), (b), and (c).

Response: Please see my responses to 3(2),(b), and (c), above.

4) Please answer the following questions separately with respect to subparts I (A), (B), (C), V, and VI (A) and (B) of the August 1, 2002, Bybee Memorandum. Upon your receipt of the Memorandum:

- (a) Did you agree with the conclusions?**
- (b) Did you agree with its reasoning?**
- (c) Did you believe it was appropriate policy?**
- (d) If there were portions with which you disagreed at that time, identify those portions in detail and provide the reasons for your disagreement.**

Response: I have no specific recollection of my reaction to the conclusions, reasoning, or appropriateness as a matter of policy of any of the particular sections of the memorandum at the time that I received it two-and-a-half years ago. It would not have been unusual for there to be discussion between OLC and the Counsel's Office about the opinion. I did believe at the time that it was a good-faith effort to interpret the statute and to explore other matters potentially relevant to its application and understood then, as I do now, that the views of the Office of Legal Counsel ordinarily constitute the definitive views of the Executive Branch on matters of law.

Please:

- i. Identify all notes, correspondence, memoranda, e-mail, audio-recordings, documents, or materials of any kind which reflect any positions, advice, assessments, analysis or recommendations you made or received regarding the contents of the Memorandum, and any dissemination of the Memorandum by you or anyone in your office.**
- ii. Provide all items identified in (i).**

Response: I have no recollection of any such position, advice, assessment, analysis, or recommendation, and I have no present knowledge of any such documents or materials, although I have not conducted a search. Any records reflecting the information you specify would involve predecisional deliberations that I am not at liberty to disclose.

5) Please answer the following questions separately with respect to subparts I (A), (B), (C), V, and VI (A) and (B) of the August 1, 2002 Bybee Memorandum. After you received the August 1, 2002, Bybee Memorandum, did your views on its conclusions, reasoning, or appropriateness change?

If so, please describe in detail the time and nature of the change in your views and the basis for the change.

Response: After the memorandum became public in the spring of 2002, I came to the view that it should be withdrawn, for two essential reasons: first, questions had been raised at OLC and elsewhere about some of its analysis; and second, some of its

discussion regarding the President's authority as Commander-in-Chief and potential defenses to prosecution was overbroad, unnecessary, and capable of being misconstrued to suggest that the President may have decided to authorize torture—which he emphatically did not.

Please:

- i. Identify all notes, correspondence, memoranda, e-mail, audio-recordings, or documents of any kind which reflect any positions, advice, assessments, analysis or recommendations which reflect the change in your views.**
- ii. Provide all items in (i).**

Response: I have no present knowledge of any such records, although I have not conducted a search. Any records reflecting the information you specify would involve deliberative material that I am not at liberty to disclose.

- 6) Was your approval required or requested before the August 1, 2002, Bybee Memorandum could be used as the legal basis for policy implementation by any agency of the Administration?**

Response: Not to my knowledge.

- i. Whether or not your approval was required, did you (a) approve, (b) acquiesce in, or (c) otherwise assent to dissemination of, the August 1, 2002 Bybee Memorandum? Please provide details.**

Response: Once OLC finalized its legal advice, I did not object to the dissemination of its views to interested agencies.

- ii. Identify all notes, correspondence, memoranda, e-mail, audio-recordings, documents, or materials of any kind which reflect your approval or other actions identified in (i).**
- iii. Provide all items described in (ii).**

Response: I have no present knowledge of any such records, although I have not conducted a search. Any records reflecting the information you specify would involve deliberative material that I am not at liberty to disclose.

- 7) When did you become aware that high-level JAG officers disagreed with the legal and policy positions taken in your January 25, 2002 Memo on the application of the Geneva Convention (and the corresponding February 7,**

2002, Presidential Directive) and/or the Bybee Memorandum? Please provide details, including any responses by you or your office.

Response: The January 25, 2002, memorandum to which you refer was a draft memorandum. I do not recall when I learned that some military officers disagreed with the legal and policy positions in that draft, but I was aware prior to drafting the memorandum that – as the draft makes clear – there were differences of views within the Administration on some of the matters that the memorandum addressed. And it is important to note that, with respect to the decision that the President ultimately made, everyone involved, including the Secretary of State, the Chairman of the Joint Chiefs of Staff, and the other principals who had equities in the decision about the application of the Geneva Convention, had an opportunity to present their views and their concerns directly to the President.

- (a) Please:**
- i. Identify all notes, correspondence, memoranda, e-mail, audio-recordings, documents, or materials of any kind which reflect notice to you of the JAG opposition and your response to it.**
 - ii. Provide the items described in (i).**

Response: I have no present knowledge of any such materials, any records reflecting the information you specify would involve deliberative material that I am not at liberty to disclose.

- (b) Were you asked to meet with or hear from JAG officers who opposed the policies? If so, did you meet with or hear from any of these officers or their representatives? If not, why not? Please provide all notes, correspondence, memoranda, e-mail, audio-recordings, documents, or materials of any kind which reflect any meetings or conversations with any JAG officer or representative who expressed opposition to the policies.**

Response: I have no recollection of being asked to meet with JAG officers on the subjects indicated. I did meet with lawyers from the Defense Department and the Joint Chiefs of Staff.

- (c) Are you aware of any effort by any person or agency to retaliate against any of the officers who made their opposition known inside or outside the government? If so, please describe the efforts at retaliation, the people involved, and the results.**

Response: I am not aware of any efforts of retaliation against any officers who expressed views on the matter, either within or outside the government.

- 8) During the hearings, you did not disagree with my statements that the Bybee Memorandum significantly contributed to the recommendations of the Pentagon Working Group Report on Detainee Interrogation, which later**

affected operations in Guantanamo Bay and Iraq. In order to be as clear as possible, please indicate whether you agree or disagree with the following statements, and explain in detail the basis for any disagreements:

(a) The White House forwarded the Bybee Memorandum to the Defense Department.

Response: I do not know how or when the memorandum was forwarded to the Defense Department, but I am aware that it was received by the Defense Department. The memorandum was intended to provide legal guidelines so that in soliciting information from terrorists that might save American lives, government personnel would avoid violating the criminal anti-torture statute.

(b) Portions of the Bybee Memorandum on specific intent, the scope of the President's authority to detain and interrogate detainees and the defenses to a prosecution for violating 18 USC 2340A were incorporated into the Working Group report nearly verbatim.

Response: I am aware that the Working Group reviewed the memorandum. Rather than attempt to confirm your characterization that particular subjects that you attribute to the memorandum were incorporated "nearly verbatim" into the Working Group's analysis, I would respectfully submit that the document speaks for itself.

(c) Given the Bybee Memorandum's legal analysis, the Working Group concluded that the following techniques were lawful: placing a hood over detainees during questioning, 20 hour interrogations, four days of sleep deprivation, forced nudity to create a "feeling of helplessness and dependence," increasing "anxiety" through the use of dogs, quick glancing slaps to the face or stomach, and the threat of transfer to another nation that might subject the detainee to torture or death.

Response: I would respectfully submit that the Working Group report speaks for itself on the subjects you describe and the basis for any such conclusions.

(d) As indicated in the Schlesinger, Fay, and Jones reports examining abuses at Abu Ghraib:

- **Interrogators at Guantanamo Bay were confronted with conflicting and confusing directives from the Pentagon (Schlesinger, page 9).**
- **The Pentagon directives which were applicable to detainees at Guantanamo Bay circulated in Iraq.**
- **Lt. General Sanchez approved techniques that went beyond those approved for Guantanamo Bay, "using reasoning" from the President's February 7, 2002 directive on unlawful combatants (Schlesinger, page 10).**

- **The existence of confusing and inconsistent policies on interrogation techniques and the fact that personnel involved in interrogation in Guantanamo Bay and Afghanistan were called upon to establish and conduct interrogations in Abu Ghraib contributed to the belief that additional interrogation techniques were condoned in order to gain intelligence (Jones, pages 15-16; Fay, pages 8, 10, 22).**
- **The lines of authority and the prior legal opinions became blurred (Fay, page 10).**
- **The existence of multiple policies on interrogation operations for use in different theatres confused Army and civilian interrogators at Abu Ghraib (Fay Finding No. 7).**
- **CIA detention and interrogation practices in Iraq (conducted under authority of the Bybee Memorandum) led to a loss of accountability, abuse, reduced interagency cooperation, and an unhealthy attitude that poisoned the atmosphere at Abu Ghraib (Fay, pages 52-53).**
- **The CIA techniques and practices (in accordance with the Bybee memo) led to a perception that such techniques and practices were suitable for Defense Department operations (Fay, pages 118-119).**

Response: I would respectfully submit that the Schlesinger, Fay, and Jones reports speak for themselves on the subjects you indicate. However, the Fay and Jones reports conclude there is no single simple explanation for why the abuses at Abu Ghraib occurred. The primary causes are misconduct (ranging from inhumane to sadistic) by a small group of morally corrupt soldiers and civilians, a lack of discipline on the part of the leaders and soldiers of the 205th MI BDE, and a failure or lack of leadership by multiple echelons within CJTF-7. The reports went on to conclude that contributing factors can be traced to issues affecting command and control, doctrine, training, and the experience of the soldiers we asked to perform this vital mission. The reports also say the abuses at Abu Ghraib primarily fall into two categories: a) intentional violent or sexual abuse and, b) abusive actions taken based on misinterpretations or confusion regarding law or policy. Finally, the reports say that neither the Department of Defense nor Army doctrine caused any abuses; that abuses would not have occurred had doctrine been followed and mission training conducted. The Schlesinger report stated that the "Panel accepts the proposition that these terrorists are not combatants entitled to the protections of Geneva Convention III."

- 9) **In his report on the abuse at Abu Ghraib, General Antonio Taguba concluded that the process of maintaining "ghost detainees" – holding and moving prisoners to avoid review by the International Red Cross – was deceptive and contrary to Army doctrine and a violation of international law.**

(a) Do you agree with General Taguba's conclusions about the practice of maintaining ghost detainees?

(b) Are you aware of any investigations that have been, are being, or will be conducted into the practice of maintaining ghost detainees?

If so please:

- i. Identify the agency or person responsible for the investigation, the title of the investigation, and whether it has been completed.**
- ii. Provide a copy of all completed or provisional reports of those investigations.**

Response: I believe the work of the International Committee of the Red Cross is vitally important, and I honor this important group for its continuing efforts. Assessments of whether particular practices were consistent with Army doctrine is a matter for determination by the Department of Defense. I am not familiar enough with the facts of the particular instances you cite to have a view whether they represent violations of any law. In any event, I would consult with appropriate lawyers in the Department of Justice before reaching such a conclusion. I am not aware of what investigations may have been, are being, or will be conducted concerning allegations involving "ghost detainees."

10) On March 19, 2004, the Office of Legal Counsel provided a Memorandum, signed by Jack Goldsmith, in response to your request for an opinion on whether the CIA was permitted to relocate prisoners from Iraq to "facilitate interrogation."

- (a) Why did you ask OLC for that opinion?**
- (b) Was it your intent to justify the practice of maintaining ghost detainees?**
- (c) Why would it ever be necessary to hide a detainee from the International Red Cross?**

Response: The memorandum to which you refer was a draft memorandum that was never finalized nor signed. The draft was prepared to assist U.S. personnel abide by all applicable legal requirements. I believe the United States has complied with all of its legal obligations to notify the ICRC.

- (d) Do you agree that one consequence of the OLC opinion was to permit abusive interrogation practices to occur without outside monitoring?**

Response: No.

- (e) Was this and is this the intent of our policy?**

Response: The policy of the United States is to comply with all of our legal obligations under the Geneva Conventions.

(f) What do you know about actions conducted under the authority of that opinion?

Response: I do not know whether any actions were conducted in reliance on the draft memorandum.

(g) Do you agree with the legal analysis interpreting Article 49 of the Fourth Geneva Convention contained in the March 19, 2004 Goldsmith Memo?

Response: Because the draft memorandum was never finalized, I did not have occasion to come to definitive views concerning the analysis contained in the draft. I recall believing at the time that the draft presented a reasonable and scholarly interpretation of the terms of the Geneva Convention.

(h) Please identify and provide all notes, correspondence, memoranda, e-mail, audio-recordings, documents of any kind which reflect your request for the Goldsmith memo, requests made to you for opinions on the meaning of Article 49, your positions, advice, assessments, analysis or recommendations after your receipt of the Goldsmith memo, and any objections provided by any Administration personnel to the substance and/or conclusions in the Goldsmith memo.

Response: I have no present knowledge of any such documents, although I have not conducted a search. Any records reflecting the information you specify would involve deliberative material that I am not at liberty to disclose.

(i) Please describe in detail the discussions between you and Mr. Goldsmith on the Bybee Memorandum.

Response: Any discussions between me and Mr. Goldsmith concerning the August 1, 2002 memorandum would involve internal deliberations of the Executive Branch that I am not at liberty to disclose.

11) The United States is a party to the Convention Against Torture, which provides that "No Party shall expel, return or extradite a person to another State where there are substantial grounds for believing he would be in danger of being subjected to torture." This prohibited process is also referred to as "extraordinary rendition."

(a) Do you agree that extraordinary renditions are illegal for any agency of the United States under applicable American and international law?

Response: The United States is bound to honor and comply with its obligations under Article 3 of the Convention Against Torture, subject to the Senate's reservations and understandings applicable to Article 3.

If not:

- i. Please describe the circumstances and supporting law which would lawfully permit an agency of the United States to engage in extraordinary rendition.**
- (b) To your knowledge, has any member of the Executive Branch provided authorization to conduct extraordinary rendition?**

Response: No.

If so, please:

- i. Identify the person, the authority relied upon, and all documentation reflecting the authorization.**
- ii. Provide all documents reflecting the authorization.**

12) When and how did you first become aware of allegations of abuse of detainees in Guantanamo, in Afghanistan, and in Iraq? Did you take any action in response to each allegation? Please provide details.

Response: I became aware of the allegations of abuse at Abu Ghraib when they were made public. Although I may have been aware of other allegations of abuse prior to the time they became public, any reports I received concerning such allegations always included a description of the actions being taken by the Department of Defense and others in response to such allegations. I am confident that all credible allegations of abuse of detainees are being taken seriously by the appropriate agencies and are being investigated vigorously.

13) When did you first learn that the International Committee of the Red Cross (ICRC) had complained about the treatment of prisoners in Afghanistan? Iraq? Guantanamo Bay?

- (a) How and from whom did you learn about the ICRC reports?**
- (b) Please describe in detail the responsive actions taken by you after learning about these reports.**
- (c) Please describe in detail any role or knowledge you had relating to providing Senate access to the ICRC reports.**
 - i For each Red Cross report complaining of detainee abuse, please identify all notes, correspondence, memoranda, e-mail, audio-recordings, documents, or material of any kind which**

reflect the actions you took or the positions you asserted upon learning the substance of the reports.

ii. Please provide all items identified in (i).

Response: I take seriously any allegation that a detainee is being mistreated. I do not recall when I first became aware of the ICRC reports to which you refer, although I believe I first learned of the most recent allegations when they were reported in the press. Any reports I received concerning such allegations always included a description of the actions being taken by the Department of Defense and others in response to such allegations. I am confident that all credible allegations of abuse of detainees are being taken seriously by the appropriate agencies and are being investigated vigorously.

15) The President's February 7, 2002 directive indicated that United States Armed Forces were obligated to treat detainees "humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."

(a) On its face, the directive does not apply to the CIA or other intelligence agencies or contractors not under control of the Armed Forces. Why are these intelligence agencies and contractors excluded from the directive?

Response: The President's directive was designed to provide guidance to the United States Armed Forces. However, other government agencies are governed by several other laws, including the Convention Against Torture, as ratified by the Senate, and various other criminal statutes in certain contexts.

(b) Why does the directive state that the detainees should be treated in a manner consistent with the "principles" of Geneva rather than the "provisions" or "text" of Geneva? Where are the "principles" of Geneva set forth, if not in its text?

Response: The principles of Geneva are embodied in its provisions and text. The directive, however, made clear that as a matter of law the Taliban and al Qaeda were not legally entitled to such treatment, and therefore it would not have been appropriate to direct compliance as a matter of law with the "provisions" or the "text" of Geneva.

c) On December 30, 2004 OLC released its revised interpretation of the Legal Standards Applicable under 18 U.S.C. 2340-2340A. In footnote 8 of the Memo, OLC refers to a review of prior OLC opinions (other than the August 1, 2002 Memo) involving the treatment of detainees. What were the subjects of the memos referenced in the footnote? Did they relate to standards applicable to the CIA and other intelligence agencies? Did you have any role in initiating, creating, or advising OLC on the

substance of those memos? Please provide the memos referred to in footnote 8 of the December 30, 2004 OLC opinion.

Response: The Executive Branch has a substantial need for confidentiality with respect to non-public OLC opinions, in order to protect the deliberative processes of the Executive Branch and the attorney-client relationship between Administration officials and OLC. The longstanding practice is that non-public OLC opinions are not disclosed outside the Executive Branch. Based on this policy, I respectfully must decline to provide a copy of the opinions.

- d) On January 13, 2005 the New York Times reported that the Administration lobbied to remove a measure included in the recent Intelligence legislation which would have imposed restrictions on the use of extreme interrogation measure by American intelligence officers. Did you lobby anyone in Congress on the issue? What role did you play in reaching the decision to lobby Congress on the issue? Why was the administration opposed to the measure? Did the Administration want to leave an escape hatch for the CIA to use torture?**

Response: No, I did not lobby Congress on this issue. However, the Administration stated in its October 18, 2004, letter to the conferees on the intelligence reform legislation that it opposed a provision in the draft legislation that would have provided legal protections to foreign prisoners to which they are not now entitled. The President has repeatedly stated that his Administration does not authorize or condone torture under any circumstances by U.S. personnel. I, of course, fully support the President's policy in this area.

- e) The same New York Times story reported that the Defense Department opposed a measure in the military authorization bill which would have explicitly prohibited the use of torture, and cruel, inhuman and other degrading treatment by Defense Department personnel? Why did the administration oppose that provision? Did you participate in the decision to oppose the decision? Did you lobby anyone in Congress on the issue? Do you think the provision should have been included in the legislation?**

Response: I am not familiar with the matters referred to in the New York Times story.

16) The trial of Army Specialist Charles Graner for mistreating detainees at Abu Ghraib recently began in Ft. Hood, Texas. Specialist Graner's defense is that the abuse he committed was authorized by his supervisors. As I indicated at the hearing, and as corroborated by the Fay and Schlesinger reports, the policy memos on the Geneva Conventions, torture, and ghost detainees that you wrote, requested, authorized, endorsed, or implemented appear to have contributed to detainee

abuses in Afghanistan, Guantanamo Bay, and Iraq, including those at Abu Ghraib prison.

(a) Do you agree that you should personally be disqualified from any investigation or inquiry into detainee abuses due to the appearance of, or actual, conflicts of interest that your past activities as White House Counsel may create?

Response: In a press briefing on August 24, 2004, the Schlesinger Panel clearly concluded that there was no government policy that called for the torture or inhumane treatment of detainees. "But a series of failures across the Department of Defense, the Army, and U.S. Central Command contributed to an atmosphere that allowed some of these abuses to occur." (Congresswoman Fowler) If confirmed, I would take extremely seriously my obligation to recuse myself from any matter whenever appropriate, and would consult with other lawyers with experience and expertise at the Department of Justice if any such question arises. I would do my best to ensure that the Department does not become politicized. I would treat with equal seriousness my responsibility to enforce the law fairly and equally on behalf of all Americans.

17) When did you first become aware that FBI personnel had observed, and/or complained about, and/or departed various locations because of, such abuses by military, intelligence, or contractor personnel? How were you informed? What did you do in response to that discovery? Please provide details.

Response: I became aware of the reports to which you refer when they were reported in the press. I am confident that all credible allegations of abuse are being vigorously investigated by the appropriate agencies.

18) During the hearing, you made specific reference to the possibility of your having a role in investigating the substance of the FBI e-mails produced by the ACLU that reported interrogation abuses at Guantanamo Bay. You called the accuracy of the e-mails into question due to a claimed erroneous reference to an "Executive Order." I am disturbed that you expressed skepticism about the general veracity of FBI agents reporting human rights violations at Guantanamo Bay because of a possible mistake in bureaucratic terminology.

(a) Do you really believe that FBI agents would falsely describe serious criminal activities by other government agents that they witnessed at Guantanamo Bay in their official, internal correspondence?

Response: I did not express skepticism about the "general veracity of FBI agents." An Executive Order of the type referenced in the e-mail you have cited simply does not exist, and it is, in my view, appropriate to make that fact clear. I have no reason to believe that FBI agents would knowingly provide false descriptions; that does not mean that they are not mistaken.

(b) Don't your comments serve to discourage the reporting of abuses and contribute to an environment that values secrecy above candor?

Response: No. I encourage anyone with information regarding abuses to make that information known to the appropriate authorities.

(c) The skepticism in your remarks suggests that you do not believe the FBI reports that serious abuses have occurred at Guantanamo Bay. Doesn't this skepticism reinforce the need for you to disqualify yourself from involvement in any investigation into the allegations of abuse?

Response: No. Commenting that a factual assertion in an e-mail is false when that is, in fact, the case should provide no basis for disqualification. If confirmed, I would take seriously my obligation to recuse myself from any matter whenever appropriate, and would consult with other lawyers at the Department of Justice if any such question were to arise. I would treat with equal seriousness my responsibility to enforce the law fairly and equally on behalf of all Americans.

19) The FBI e-mails produced in the ACLU lawsuit include reports that detainees in Iraq and Guantanamo have suffered from the following abuses:

- Detainees were bound hand and foot and left in urine and feces, for 18-24 hours
- Cigarette burns were inflicted on detainees.
- Detainees were exposed to extreme temperatures for prolonged periods
- Enemas were forced on detainees.

Do you believe that any of these practices were or are lawful interrogation techniques or lawful detainee management?

Response: I found these e-mails to be shocking and deeply troubling. While I share a revulsion to the use of practices such as those described above, I do not think it would be appropriate for me to address reports of interrogation practices discussed in the press and attempt to analyze whether such reported practices are lawful. In 18 U.S.C. §§ 2340 & 2340A, Congress defined torture as an act that is "specifically intended to inflict severe physical or mental pain or suffering." Analyzing whether a particular practice meets that test is a highly fact-intensive inquiry. With respect to speculative press accounts of supposed interrogation practices, I do not think it would properly reflect the gravity of that inquiry or the seriousness with which the Administration has treated it for me to try to undertake that analysis in this setting. In addition, were the Administration to begin ruling out speculated interrogation practices in public, by virtue of gradually ruling out

some practices in response to repeated questions and not ruling out others, we would fairly rapidly provide al Qaeda with a road map concerning the interrogation that captured terrorists can expect to face, and would enable al Qaeda to improve its counter-interrogation training to match it.

I can, however, give you the same assurance that I have provided in the past that has recently been confirmed in the new OLC memorandum. The Department of Justice has been asked to review specific interrogation practices used in the conflict with al Qaeda and the Taliban and has concluded that they are lawful under the torture statute.

If so:

- i. Which of the above do you believe are lawful?**
- ii. Please provide the legal and factual basis for concluding that the practices are lawful.**

20) Regardless of your personal beliefs on the alleged abusive acts or their legality:

- i. Do you support a comprehensive investigation, beyond the past and current internal Defense Department inquiries, into all of the allegations of abuse?**
- ii. Describe the form of investigation that you would recommend, including, but not limited to, the agency that should conduct the investigation, whether the results should be publicly available, the powers of the investigators, and the timing of such an investigation.**
- iii. Given the possibility of criminal proceedings in which you might be a witness, would you follow Attorney General Ashcroft's example and allow the Deputy Attorney General to appoint a special prosecutor?**
- iv. If Congress decides to create a 9/11-type commission to make a comprehensive investigation into the reports of abuse, will you urge the President to sign such legislation?**

Response: There have been eight completed investigations, including one each by the Army and Navy Inspectors General into allegations of abuse. There are three investigations still ongoing. I understand that Secretary Rumsfeld has testified four times and that the Deputy Secretary and numerous other Department of Defense officials have testified 18 times before Congress. I understand there have been over 40 briefings to staff. There have been numerous trials, courts martial, and administrative proceedings looking into detainee abuse. (As you know, some people are going to jail for their criminal conduct.) These investigations and proceedings should be allowed to continue. I am confident that all credible allegations of abuse are being investigated by the appropriate agencies. If confirmed, I would take extremely seriously my obligation to recuse myself from any matter whenever appropriate, and would consult with other

lawyers at the Department of Justice if any such question were to arise. I would treat with equal seriousness my responsibility to enforce the law fairly and equally on behalf of all Americans.

- 21) Did you or your office have any role in the decision-making or preparations for the testimony of Attorney General Ashcroft before this committee in June 2004, at which time he refused to give us various documents without invoking any privilege? If so, please describe that role in detail, including whether you or the President authorized or directed him to refuse our requests for certain materials.**

Response: Although I have no specific recollection of participating in preparation for General Ashcroft's June 2004 testimony, I recall as a general matter that I was involved in discussions regarding what documents should be disclosed and which should remain confidential to protect the deliberative process, national security, or other vital interests.

- 22) Did you or your office have any role in the decision-making or preparations for the testimony of FBI Director Mueller before this committee in May 2004, at which time he was unresponsive to our questions about the FBI's knowledge of and response to reported abuses of detainees at various detention facilities. If so, please describe that role in detail, including whether you or the President authorized or directed him not to be responsive to our questions.**

Response: I have no recollection of participating in preparation for Director Mueller's May 2004 testimony, and I am not aware that anyone in my office participated in such preparation.

- 23) Were you or the President aware before it was reported in the New York Times in October 2004 that the vast majority of the fingerprints taken from prisoners and detainees in the field and at prisons, and from persons applying for jobs with the military or the CPA could not be checked against FBI and other terrorist databases because the field systems were not compatible with those databases? Do you know how many such prints went unchecked, and whether the problem is a continuing one? Did you take any action relating to this problem? Please provide details.**

Response: I was not aware prior to reports in the press of the information you describe.

II. DEATH PENALTY -- FUTURE ROLE AS ATTORNEY GENERAL

Attorney General Ashcroft has repeatedly rejected recommendations by U.S. Attorneys not to seek the death penalty. In fact, on some occasions, federal prosecutors have been required to seek the death penalty even though defendants were willing to plead guilty in return for life imprisonment.

Attorney General Ashcroft required his approval in all cases in which the death penalty is taken off the table. He required notice to him in all prosecutions where the death penalty was a possibility, even if the local U.S. Attorney believed the case did not merit it. As of last September, Attorney General Ashcroft had directed U.S. Attorneys to pursue the death penalty in 41 cases in which U.S. Attorneys had specifically recommended against it. Of these 41, only 3 resulted in the penalty actually being imposed.

- i. Please describe how you see your role in the federal death penalty approval process. What weight will you give to the recommendations of the U.S. Attorneys on this subject?**

Response: Obviously, the view of the U.S. Attorney in a capital case is important. But as a society we must ensure that the death penalty is administered consistently and fairly throughout the country. That is possible only through some type of centralized decisionmaker such as the Attorney General. If confirmed, it would be my decision whether to seek the death penalty in each potential capital case, but that decision would be made with the benefit of the advice and analyses of the U.S. Attorney and the Attorney General's Capital Case Review Committee. The recommendations and advice of the U.S. Attorneys will carry great weight and be carefully considered, but they will not be controlling if following the recommendations would result in disparate application of the capital sentencing laws in comparable cases.

- ii. Where a federal prosecution occurs in a state without the death penalty, should the state's position play a role in the federal decision to seek it? Why or why not?**

Response: In my judgment, the federal capital sentencing laws should be consistently applied nationwide in appropriate cases, irrespective of local sentiment or predisposition in favor of or against the death penalty.

- iii. What principles should the federal government apply in deciding whether to seek the death penalty?**

Response: Clearly, the circumstances under which it is appropriate to seek the death penalty are largely circumscribed by the definitions of the substantive offenses and the considerations mandated by the capital sentencing statutes. Within the pool of capital offenders, the death penalty should be reserved for the worst offenders and offenses.

III. HATE CRIMES

A significant issue on which the Department has been unfortunately silent: the need to expand the ability of federal officials to prosecute hate crimes. Hate crimes are a violation of all our country stands for. They send the poisonous message that some Americans deserve to be victimized solely because of their race, religion,

sexual orientation, or other kinds of bigotry. They are crimes against entire communities.

In the last Congress, the Senate approved bipartisan legislation against hate crimes by a vote of 65 to 33. The House voted 213 to 186 to instruct its leadership to support the Senate bill. Nevertheless, House conferees on the Defense Authorization Bill had the legislation stripped out of conference.

- a) Did you have any role in communicating to the House leadership or House or Senate conferees any Administration opposition to the legislation?
 - i. If so, how can you justify such a position?
 - ii. Why wasn't it done publicly?

Response: No.

- b) If confirmed to be the Attorney General, will you publicly support the expansion of the hate crime statute? Will you support the specific legislation introduced by Senator Smith, Senator Specter, and myself: S.966 in the 108th Congress?

Response: I agree that hate crimes are a violation of all our country stands for. Violent crime motivated by prejudice or animus against a particular class or group of citizens should never be tolerated. If confirmed, I would commit the Department to investigating and prosecuting bias-motivated crimes at the federal level to the fullest extent of the law.

IV. SENTENCING

A. Guideline Reform

As you know, the Supreme Court recently declared the mandatory application of the Federal Sentencing Guidelines to be unconstitutional (United States v. Booker and United States v. Fanfan). I believe that the goals of fairness and consistency, which led to the enactment of the Sentencing Reform Act of 1984, should continue to guide our efforts as we consider what modifications, if any, are necessary to adapt the current sentencing system to meet the constitutional requirements outlined by the Court.

I hope that we will approach this issue with the same kind of careful deliberation and bipartisan cooperation that led to the enactment of the Sentencing Reform Act itself. Congress, the Administration, and the United States Sentencing Commission need to work together to resolve the important questions that arise from the decisions. However, I am concerned that some in the Administration and Congress may try to rush ahead and enact unnecessary and ill-advised changes to our sentencing system.

- 1) Do you agree that the ability of the Sentencing Commission to hold in-depth hearings and analyze the data it has accumulated for 15 years will be especially useful to Congress as we consider proposed changes to the federal sentencing system?**

Response: The United States Sentencing Commission represents an important organization with expertise in the administration of the sentencing reforms that were enacted by the Sentencing Reform Act of 1984 and I do believe they have a role to play in this process. If confirmed, I pledge to work with Congress, the United States Sentencing Commission, the Judicial Conference, the victims of crime, and all Americans who have a stake in our system of justice to consider the appropriate response to the decision in *Booker/Fanfan*.

- 2) Do you agree that the United States Sentencing Commission has the resources and expertise to lead the effort in addressing proposed changes to the Guidelines?**

Response: I do not have sufficient knowledge about the Commission's resources and expertise to make a decision as to whether the Commission can lead the effort to consider the changes to the guidelines, but I do believe they have a role to play in this process. As I noted above, the Sentencing Commission represents an important organization with expertise in the administration of the sentencing reforms that were enacted by the Sentencing Reform Act of 1984. If confirmed, I pledge to work with Congress, the Sentencing Commission, the Judicial Conference, the victims of crime, and all Americans who have a stake in our system of justice to consider the appropriate response to the decision in *Booker/Fanfan*.

- 3) Do you agree that we should take care not to act in haste, even for the purpose of enacting short-term fixes, since they may themselves have constitutional problems under the Court's evolving Sixth Amendment jurisprudence? Do you agree with Chief Justice Rehnquist that before Congress enacts comprehensive legislation in the area of federal sentencing, "there should, at least, be a thorough and dispassionate inquiry into the consequences of such action?"**

Response: Rushed policy is often bad policy. I understand that the Department of Justice is interested in continuing to promote the principles of sentencing reform that have served this country well for the past 17 years. These principles, including fairness, deterrence, incapacitation, just punishment, accountability, and transparency, are integral to any fair and proportional system of justice. If confirmed, I pledge to work with Congress, the United States Sentencing Commission, the Judicial Conference, the victims of crime, and all Americans who have a stake in our system of justice to consider the appropriate response to the decision in *Booker/Fanfan*.

- 4) In November 2004, Assistant Attorney General Chris Wray testified to the United States Sentencing Commission that a "topless guidelines**

system” (also known as the “Bowman fix”) would solve challenges to the Guidelines while maintaining their mandatory nature. Yet the Court’s ruling in Booker and Fanfan leaves the Guidelines in place as advisory in a way similar to that requested by the Department in its Supreme Court briefs. Without the benefit of Commission hearings and analysis, do you agree that it would be premature for Congress to enact “the Bowman fix” now?

Response: I am not aware of any formal position taken by the Administration with respect to the *Booker/Fanfan* decision. It is my understanding that Assistant Attorney General Wray was commenting on some of the benefits of the “topless guidelines” approach, but he did not endorse that approach or any other as a solution in the event the guidelines were struck down. Now that the Supreme Court has ruled, the Department of Justice and the Administration are reviewing the opinion and evaluating how to proceed.

5) If any of your answers above are not “yes,” please explain in detail.

Response: Please see my responses to Questions 1 through 4, above.

B. Mandatory Minimum Penalties

On November 17, 2004, U.S. District Court Judge Paul Cassell (D.Utah) sentenced defendant Weldon Angelos to 55 years in prison based on mandatory sentence requirements associated with carrying a handgun during two marijuana sales. Angelos was a first-time offender.

Judge Cassell was appointed to the bench by President Bush in July 2002. His “conservative” credentials are unassailable. Yet, after an exhaustive 67 page opinion analyzing the sentence he was required to give under the law, Judge Cassell described the sentence as “unjust, cruel, and irrational,” and he noted that the sentence required by the law for this first-time offender was higher than sentences handed out to hijackers and kidnappers. Judge Cassell explicitly recommended that “the President commute this unjust sentence and Congress modify the laws that produced it.”

In December, the New York State Legislature voted to relax the state’s notoriously strict Rockefeller-era drug laws. The adjustments were widely viewed as bringing the state’s drug sentencing ranges more into line with sentences for other offenses. Even Frank Clark, the president-elect of the state district attorney’s association, recognized that reducing the excessive punishment for non-violent offenders in New York was “probably long overdue.”

1) Do you agree with Judge Cassell that Congress and the Administration should modify mandatory-minimum laws that result in unjust sentences?

a) If not, how do you answer his concerns that mandatory minimum sentences, are often cruel and unjust?

Response: Congress, this Administration, and prior Administrations – including the Clinton Administration – have consistently supported mandatory minimum sentences for specific serious offenses and offenders. This widespread support for mandatory minimums reflects their effectiveness. Indeed, I also understand that crime rates have been steadily decreasing for a number of years. If confirmed, I pledge to carefully examine the current system of mandatory minimums with the focus on protecting society and appropriately punishing culpable offenders.

2) Do you agree that, like New York, Congress should reconsider the severity of drug sentences for non-violent offenders which are out of proportion to existing sentences for violent offenses? If not, why not?

Response: It is my understanding that mandatory minimums are designed for the most serious offenders, including sexual predators of children, drug traffickers, those who use guns to commit violent crimes, and certain repeat offenders. For nearly two decades, Congress has reserved the application of mandatory minimums for high-priority areas of national concern that most affect public safety, such as drug offenses. As I stated above, if confirmed, I pledge to examine carefully the current system of mandatory minimum sentencing with the focus on protecting society and appropriately punishing culpable offenders.

C. Mandatory Minimums / Sentencing Alternatives for Drug Offenses

Great injustices result from by the application of mandatory minimum sentences for drug offenses. In particular, the application of mandatory minimums against low-level drug users and sellers is disproportionately harsh. In 1986 Congress created mandatory minimum penalties in the Controlled Substances Act and directed Department Of Justice to focus on high-level drug trafficking cases. Triggers for five-year mandatory minimum sentences were set at 500 grams of powder cocaine and 5 grams of crack cocaine.

1) Are you concerned that the current triggers for five-year mandatory minimum sentences contribute to the type of inequities described by Judge Cassell? Do you have any concerns about our current mandatory minimum sentences for drug offenders?

Response: As I stated, Congress has reserved the application of mandatory minimums for high-priority areas of national concern that most affect public safety, such as drug offenses. It is my understanding that mandatory minimums provide a clear deterrent and have been effective. I also understand that the Guidelines and federal law provide two ways – substantial assistance and the “safety valve” – by which a defendant can prevent a mandatory minimum from applying to his or her case. If confirmed, I pledge to carefully

examine the current system of mandatory minimum sentencing with the focus on protecting society and appropriately punishing culpable offenders.

2) Why shouldn't we reform our drug sentencing policy to employ creative alternatives to lengthy mandatory incarceration, like the use of specialized drug courts?

Response: I believe that effective crime fighting requires a range of options for dealing with offenders. There can be little doubt, however, that our sentencing policies have contributed to the significant decreases in crime that the nation has experienced over the last decade. I understand that the Department of Justice calculates that two-thirds of the inmates in Bureau of Prisons facilities have been convicted either of a violent crime or of multiple offenses. Similarly, of those in Federal prison for offenses characterized as "nonviolent" offenses including drug offenses, almost 80 percent have previous criminal records, averaging six arrests and two convictions. In addition, it is often the case that the treatment these offenders require is provided most effectively in a penal institution. If confirmed, I would be pleased to work with this Committee and Congress to determine whether we can achieve the same public safety benefits of imprisonment through various alternatives to incarceration.

D. Racial Disparity in Crack Cocaine – Powder Cocaine Sentencing

There is serious concern that minorities receive disproportionately harsher punishment than others for commission of certain drug offenses. The Sentencing Commission recently released its 15-year study on the Federal Sentencing Guidelines. It concluded that certain mandatory minimum penalties have increased the gap in average sentences between African-American and other offenders. The Commission specifically criticized the harsher penalties imposed for crack cocaine compared to powder cocaine.

1) Do you agree it is time to reform policies which lead directly to racial disparity in sentencing?
a) If not, why not?

Response: I do worry whenever our laws or policies seem to have disparate racial impact and would look into such allegations carefully. I understand that after careful study and consultation, the Department of Justice concluded, as former Deputy Attorney General Larry Thompson testified before the United States Sentencing Commission in 2002, that current federal sentencing policy established by Congress for crack cocaine trafficking is appropriate and that the statutory differential between crack and powder cocaine is justified. As Deputy Attorney General Thompson explained in his testimony, research shows that crack is a more addictive and dangerous substance and that trafficking in crack is more closely associated with violence and homicide trends than is trafficking in powder cocaine. The higher penalties for crack cocaine reflect the greater harm from crack to users and to the communities in which it is most often trafficked and sold. I have not myself studied the issue carefully. I understand that Congress has previously

considered legislation on this subject. I would be pleased to look further at this issue if I am confirmed.

- 2) **Do you agree with the Sentencing Commission that it is time to end the powder/crack cocaine disparity that has led directly to severe racial disparity in sentencing?**
 - a) **If not, why not?**

Response: As I stated above, I understand that after careful study and consultation, the Department of Justice concluded, as former Deputy Attorney General Larry Thompson testified before the United States Sentencing Commission in 2002, that current federal sentencing policy established by Congress for crack cocaine trafficking is appropriate and the that statutory differential between crack and powder cocaine is justified. As Deputy Attorney General Thompson explained in his testimony, research shows that crack is a more addictive and dangerous substance and that trafficking in crack is more closely associated with violence and homicide trends than is trafficking in powder cocaine. The higher penalties for crack cocaine reflect the greater harm from crack to users and to the communities in which it is most often trafficked and sold. I have not myself studied the issue carefully. I understand that Congress has previously considered legislation on this subject. I would be pleased to look further at this issue if I am confirmed.

V. FIREARMS

A. Enforcement

It is often been stated by some that we do not need new gun laws, and that we should instead enforce the laws already on the books more effectively. Yet the enforcement of gun laws by this Administration has clearly been inadequate. It has all but ignored illegal gun trafficking. According to Department statistics, 9 out of 10 guns used in crime show signs of illegal trafficking, such as obliterated serial numbers. Yet federal prosecutions targeting this problem declined by 5% in 2003, compared to 2002. For the first time, trafficking cases made up less than 2% of total gun prosecutions.

- 1) **Will you take a stronger approach as attorney general?**
- 2) **Why hasn't this been a priority for the Administration?**
- 3) **Will you commit to prosecuting related crimes, such as lying on a background check form, which are easiest to prove?**
 - a) **If so, what efforts do you foresee taking?**

Response: In my hearing, I introduced my brother, Tony, who is a SWAT officer and 26-year veteran of the Houston Police Department. I care about his safety and I care about the types of guns on the streets in the hands of criminals. Yes, I hope to take a stronger approach if confirmed as Attorney General. Since the inception of Project Safe Neighborhoods (PSN), federal firearms prosecutions have increased 76 percent. During

that period, violent crime has fallen to 30-year lows, and crimes committed by offenders armed with a firearm have fallen to record low levels. It is the case that federal prosecutions of all types of crimes associated with firearms and firearms trafficking have increased during President Bush's Administration. Furthermore, it is important to remember that federal enforcement of the criminal laws remains a relatively small portion of criminal enforcement throughout the United States. States prosecute the vast majority of criminal cases, as has been their traditional role, and PSN has supported the States' efforts by funding State prosecutors. All that said, there may always be room for improvement. I understand that the Department of Justice recommended last year to the Sentencing Commission some amendments to the Sentencing Guidelines to strengthen the Department's prosecution of firearms trafficking cases. I can assure you that, if confirmed, I would continue the Administration's aggressive efforts to combat violent crime with all means and resources Congress makes available to the Department.

B. Project Safe Neighborhoods

The Republican leadership in Congress recently used the budget process to undermine one of the President's most highly praised enforcement programs – Project Safe Neighborhoods. This program provided grants to local and state law enforcement agencies to investigate and prosecute gun crimes. The National Rifle Association supported this project, and the President requested \$45 million for it. Instead, the Republican leadership gave it no funds.

- 1) **Why didn't the Administration insist that this program be funded? Why is it backing away from this obvious way to fight gun crimes? Were you aware of that decision? Will you support realistic funding for the project as Attorney General?**

Response: If I am confirmed, I intend to continue Project Safe Neighborhoods (PSN). While the Administration was disappointed that Congress failed to fund some aspects of PSN, given the success the program has enjoyed in increasing firearms prosecutions, the Department of Justice's efforts to enforce federal firearms laws will not be adversely affected by the elimination of the funding you reference. Congress provided funding for federal PSN efforts, including the federal prosecutors and investigators dedicated to the program. My understanding is that Congress failed to fund only certain elements of PSN, specifically research and State and local grants. I am informed that the impact of the failure to fund these elements of PSN for fiscal year 2005 will be minimal because the Department of Justice had only recently awarded PSN funding from the fiscal year 2004 appropriation and these funds should last through the current fiscal year.

C. Gun-Show Loophole

It's frightening that in most states any convicted felon or domestic abuser can walk into a gun show, go to a booth operated by an unlicensed gun dealer, and buy whatever guns he wants, without having to pass any background check. This serious matter is often referred to as the "gun-show loophole." The Bureau of

Alcohol and Firearms says that gun shows are the second-leading source of firearms recovered in illegal gun trafficking operations.

The NRA has agreed that unlicensed firearm sales at gun shows represent “hundreds of thousands of additional transactions each year.” We know that foreign terrorists operating in the United States have used the gun show loophole to buy guns. A Hezbollah terrorist in Michigan, an IRA terrorist in Florida, and a suspected al-Qaeda member in Texas have all bought guns at gun shows in those states without undergoing background checks.

States like Massachusetts have closed the loophole, but they bear the burden of guns crossing their borders from states with unregulated gun shows. Each of the top fifteen states responsible for flooding other states with guns used in crimes has the loophole. 75% of the out-of-state guns recovered in Massachusetts crimes originated in gun-show loophole states. The five leading sources of guns used in crimes in Massachusetts are Georgia, Florida, New Hampshire, Virginia, and Maine, and each have the gun-show loophole.

- 1) Do you agree that under current law, the gun-show loophole exists and should be closed?**
- 2) Does the Bush Administration support closing the loophole? Will you support closing it as Attorney General?**

Response: Yes, the Administration supports closing the loophole, and, if confirmed as Attorney General, I would support closing the loophole. As I understand the law, federal firearms licensees who transact business at a gun show must contact the background check system operated by the Federal Bureau of Investigation prior to transferring the firearm, just as if they were making the transaction at their licensed premises. Private persons seeking to sell firearms at gun shows are not required by law to contact the FBI’s background-check system prior to transferring a firearm to the transferee. The President has expressed his support for requiring instant background checks for purchases at gun shows. I understand that the FBI has made great strides in improving the response time of its background-check system, but gaps in the records on which it relies can create delays in processing transactions and responding to inquiries. The President has consistently requested funds for the National Criminal History Improvement Project, and Congress has appropriated hundreds of millions of dollars to improve the quality of the nation’s criminal history records. I believe the need exists to continue to seek such improvements in the quality and completeness of the data on which the FBI must rely so that an instant background check for all firearms transactions at gun shows can be implemented.

VI. PRISONS

In a major recent speech Supreme Court Justice Anthony M. Kennedy criticized “the inadequacies and the injustices in our prison and correctional

systems.” In particular, he stated that we do little to rehabilitate prisoners or give them job skills. He also called attention to reports that physical and sexual abuse in United States prisons is widespread.

1) What do you see as the federal government’s role in ensuring that conditions in the nation’s prisons are not degrading or inhumane?

Response: I believe that the federal government must protect the civil rights of all people in the United States, including persons who have been incarcerated. Although individuals may have committed crimes, they are still entitled to respect for their dignity as human beings. If confirmed as Attorney General, I would ensure that federal prisons are maintained in humane conditions, and I would work with state and local officials to ensure that state prisons meet appropriate standards as well.

2) How can we assure that federal prisons are preparing prisoners to participate productively in society after their release, so they are less likely to engage in further criminal activity?

Response: I agree that our corrections systems must adequately prepare prisoners for re-entry to civil society in order to help prevent recidivism. I understand that the Department of Justice has played a leading role in pursuing novel prisoner re-entry programs through its Serious and Violent Offender Reentry Initiative. If confirmed as Attorney General, I would ensure that the Department of Justice continues to focus its efforts on improving prisoner reentry and contributes creative ideas and programs to the prisoner re-entry initiative that the President announced in his 2004 State of the Union Address.

In the past, the Civil Rights Division’s criminal enforcement efforts have included a priority on law-enforcement abuse, including abuse by prison officers against inmates. Recently, many of the Division’s resources have been redirected toward other priorities.

1) Do you agree that it is time to renew our country’s commitment to prosecuting law-enforcement abuse in prisons and elsewhere? What actions you would take as Attorney General?

Response: No one is above the law, especially not those who are sworn to uphold it. If confirmed as Attorney General, I would ensure that the Department of Justice’s Civil Rights Division investigates and prosecutes abuses by law enforcement officers wherever and whenever necessary.

Immigration Questions

I. State and Local Law Enforcement of Immigration Laws

During your confirmation hearing I asked you to release the 2002 OLC opinion which reversed longstanding policy and supported the “inherent authority of the states” to enforce federal immigration laws. As you know, many members of Congress have been asking for this opinion. Interested parties have asked for it too, and the refusal to disclose it has been the subject of a lawsuit.

You said that since it was the subject of litigation you could not release it. You also said that the administration has released its conclusion but did not want to release the analysis used by OLC to reach its conclusion.

This response is unsatisfactory. There is no good reason why the Department continues to keep this opinion and its legal analysis secret, especially since it reverses a long-standing policy.

Question: Judge Gonzales, why the secrecy? Why do you not support releasing the OLC opinion on the authority of the states to enforce federal immigration law so we may understand its analysis?

Response: From what I understand, the OLC opinion you reference has not been published and remains an internal advice document within the Department. In addition, the disclosure of the opinion is subject to a FOIA lawsuit in U.S. District Court for the Eastern District of New York. Because the matter is in ongoing litigation, it would not be appropriate for me to discuss the merits of the case here. However, I understand that the opinion is of great interest to various groups and to certain members of the Committee. If confirmed as Attorney General, I will talk with the lawyers in the Department, review the litigation, and decide whether disclosure is the right approach.

Were you consulted as the opinion was developed? If so, what role did you play? Did you agree with its analysis and conclusion?

Response: I was involved in discussions concerning the OLC opinion, and my role was to offer comments for its consideration. It would be improper for me to discuss the specifics of views I offered in my capacity as Counsel to the President. It would also be improper for me to discuss internal Administration deliberations. Disclosing either would chill the ability of Administration lawyers and officials to provide the President with the frank and candid advice and recommendations necessary for the President to carry out his duties in the most effective manner.

Scores of police chiefs and police departments around the country, including many in Texas, have opposed the idea of involving state and local police in federal immigration enforcement. Just last month, the International Association of Chiefs of Police issued a report expressing concern. They and others believe it will destroy the remarkable success they’ve had with community policing, in which local police work closely with the public, including immigrant communities, and develop productive bonds of trust.

The concerns raised by law enforcement around the country are shared by many conservatives and security experts. James Carafano, Grover Norquist, David Keene, Bob Barr, the Heritage Foundation – all say that the policy could impose an unmanageable burden on local law enforcement and would violate the basic purpose of community policing.

Question: Are all of these people wrong? Do you support state and local law enforcement of federal immigration laws?

Response: As I understand, there is no obligation for state and local officials to enforce federal immigration laws, it is voluntary on their part. Additionally, there may be state laws prohibiting such cooperation, and we would not expect state and local officials to violate those laws to be honored. I am very sympathetic to the concerns that have been expressed by some in the law enforcement community. State and local law enforcement vastly outnumber federal law enforcement and carries the lion's share of the load when it comes to keeping the public safe. Congress, through various amendments to the Immigration and Nationality Act, has broadened the authority of state and local law enforcement officials to enforce immigration law. Alabama and Florida have entered into agreements with U.S. Immigration and Customs Enforcement (ICE) to allow their respective state and local law enforcement agencies to perform new, limited duties relating to immigration enforcement. Having strong relationships with state and local law enforcement is critical to the success of our federal efforts. And so, if confirmed, I would reach out to state and local law enforcement and seek to understand better their concerns.

I also personally have heard on several occasions the concerns of the immigrant community, and I am especially attuned to the problems they have expressed with regard to state and local law enforcement of federal immigration laws. Again, if confirmed, I would carefully review this policy, and the manner in which it is being implemented, to see if the concerns you mention might somehow be mitigated.

II. Actions Affecting Arabs, Muslims and Other Immigrant Communities

In the war on terror, it's very important to obtain accurate and timely intelligence on suspected terrorists. If Al Qaeda sleeper cells exist here, a likely source of intelligence will come from Arabs and Muslims in the U.S. They may know about potential terrorists and have valuable evidence.

Yet, after September 11, thousands of immigrant men from Arab and Muslim countries were fingerprinted, photographed and interrogated under Justice Department programs to increase national security. Individuals were targeted based on their religion or national origin, instead of evidence of danger. The result was massive fear in many Muslim and Arab communities and cooperation, and anti-terrorism efforts were undermined. At a time when we needed critical intelligence, members of Arab and Muslim communities were unfairly stigmatized and were

discouraged from coming forward to assist law enforcement and counter-terrorism efforts.

Question: Judge Gonzales, isn't it outrageous that we've been holding job fairs in the morning in Arab and Muslim communities and fingerprinting them in the afternoon? Do you believe that targeting persons based on their religion or national origin, rather than on specific suspicion or connection with terrorist organizations, is effective in fighting terrorism? Will you make a commitment that as Attorney General you will review these so-called "anti-terrorism" programs that have an inordinate and unfair impact on Arab, Muslim, and other immigrant communities?

Response: I believe that basing investigations on specific suspicion or connection with terrorism is generally a more effective way to fight terrorism and is consistent with our laws and traditions. If confirmed, I look forward to reviewing all of the Department of Justice's counter-terrorism programs to see if there are opportunities to make them more effective or more fair. I also would continue, if confirmed, the Department's success in protecting Arab-American, Muslim, and other communities by aggressively investigating and prosecuting backlash crimes and other types of discrimination against them.

III. Post 9/11 Abuses – Secret Hearings and Detention without Charges

After 9/11, the Justice Department enacted other policies, including abusive detention practices that denied immigrants due process of law. The Administration approved searches and detention without warrants or probable cause, incarcerated citizens and non-citizens without hearings or counsel, and conducted secret proceedings.

In June 2003, Glenn Fine, the Inspector General for the Justice Department, found "significant problems in the way the detainees were handled" following 9/11. He found a failure to distinguish detainees suspected of a connection to terrorism from detainees with no such connection. He found inhumane treatment of detainees at federal detention centers, unnecessarily prolonged and often secret detentions without formal charges, interference with access to counsel, and closed hearings.

The list of such Justice Department actions goes on for several pages. These policies have not been effective, legal, or fair, and ignored basic rights in our society.

Question: Will you assure us that your Justice Department will uphold constitutional rights and protections, and uphold civil rights laws. Detainees should receive access to counsel and other constitutional safeguards they are entitled to. What steps will your Justice Department take to prevent such abuses from occurring in the future?

Response: If confirmed as Attorney General, I would have a responsibility to pursue justice for all the people of our great nation; and to see that the laws are enforced in a fair

and impartial manner for all Americans. If confirmed, it would be my duty to see that the nation's civil rights laws and constitutional protections are upheld.

The Department of Justice should not stand for abuse or mistreatment of anyone in the Department's custody. Any such allegations should be appropriately investigated. The Inspector General's report discussed allegations that specific detainees were abused and other problems with the conditions of their confinement at the Metropolitan Detention Center in Brooklyn. I understand that the Department of Justice and Bureau of Prisons have reviewed their policies with respect to the treatment of detainees and have revised or clarified policies where appropriate. If confirmed, I commit that I would ensure that these policies are strictly followed and violations are investigated.

IV. Board of Immigration Appeals

In recent months, we've seen many reports that the federal courts are inundated with immigration cases. Immigration appeals accounted for 3 percent of the federal circuit court workload in 2001. By 2003, that percentage had soared to 15 percent, and in certain courts of appeals, the percentage is 30 percent. Increases have been so large that many federal judges have expressed grave concerns about their ability to properly review these cases.

This problem traces back to 2002, when Attorney General Ashcroft issued regulations ordering the Board of Immigration Appeals to reduce its backlog of asylum and deportation cases. To speed up the process, the regulations allowed one Board Member to review cases, rather than three-member panels. A single member could issue a decision, without any explanation. The regulations also reduced the size of the Board from 23 members to 11. The federal courts are left with the task of sorting through the cases. Critics of this "streamlining process" say that meaningful administrative review has been eliminated. One federal judge said that the immigration decisions by the Board as are "so inadequate as to raise questions of adjudicative competence."

Mr. Ashcroft claimed that this streamlining will save money, yet, the cost burden has now shifted to the federal courts. These courts are now remanding more cases to the Board for further review, finding erroneous decisions, or finding that the Board impeded judicial review by failing to indicate the basis for affirming an immigration judge's decision.

Question: As Attorney General, how would you address this problem? What changes will you propose to restore the integrity of the Board of Immigration Appeals?

For example, what types of transparency or quality control, if any, will you build into the system to ensure that appeals subject to single member summary affirmances conform to the regulations?

What standard, if any, should determine whether a single member may simply affirm the immigration judge decision, or must issue a brief opinion as permitted under the regulations?

How will you deal with criticism by the federal courts of the quality of decisions made by the Board and immigration judges? What steps will you take to correct the legal errors by some immigration judges, and correct the Board streamlining errors?

Response: If confirmed, I plan to review the procedures being followed by the Board of Immigration Appeals (BIA). I understand the importance of the BIA's work and the need for prompt and fair adjudications. Given the very large volume of immigration proceedings, the significant consequences for the aliens in those proceedings, and the public interest in effective administration of the immigration laws, it is important to ensure that the adjudicatory processes are working fairly, effectively, and efficiently. The BIA is now adjudicating a larger number of appeals each year as a result of its new procedures, but the new "streamlining" rules are not the only reason for the unprecedented number of new immigration cases in federal court. From what I understand, that increase is based on a variety of factors including the advent of the widespread use of habeas corpus petitions in immigration proceedings, and a much higher rate of appeal from BIA decisions than in the past. If confirmed, I would look at all of the issues you raise as part of a general review of the adjudicatory processes for the immigration judges and the BIA.

V. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW REFORMS

It is anticipated that the Justice Department will soon issue regulations to reform immigration removal proceedings at the Executive Office for Immigration Review (EOIR). The proposed reforms bear a striking resemblance to how Justice reformed appellate proceedings before the Board of Immigration Appeals under Attorney General Ashcroft. The EOIR reforms reportedly consist of drastically limiting the time in most cases to a maximum of 21 days for individuals to obtain counsel and prepare for their merits hearings. Such reforms will undoubtedly result in greater numbers of individuals appearing without representation before immigration judges. Substantially more than half of detained individuals are now unrepresented in these proceedings due to indigence and limited pro bono resources. Additionally, attorneys from both the private bar and the non-profit organizations will be deterred from accepting pro bono cases before EOIR because of the 21 day limit. Asylum claims, for example, are particularly time and labor-intensive for attorneys, requiring on average of over 100 hours to gather evidence and prepare witnesses and briefs. Statistics show that represented individuals are four times more likely to prevail on asylum claims than those who are unrepresented.

Question: Were you previously informed of the Justice Department's proposed regulations affecting EOIR, and if so, when? Please explain in detail your views of these proposed regulations?

As Attorney General, what will you do to guarantee that individuals are able to enjoy their fundamental due process rights to obtain counsel, and be represented effectively by counsel in their claims for relief from removal?

What value do you place on having the benefit of counsel in immigration hearings? Do you agree that the cornerstone of protection is legal representation?

If you are confirmed, are you willing to revisit these or other proposed changes that diminish access to counsel?

What efforts will you make to work with EOIR to increase pro bono representation in immigration proceedings?

Response: I do not believe I was previously informed of the Department's proposed regulations. I firmly believe in the importance of immigration proceedings that are fair and adequate. Although it is not established that there is a constitutional right to counsel in immigration proceedings, I believe that the availability of counsel can play an important part in many immigration proceedings. I have not had the opportunity to familiarize myself with the details of existing or proposed procedural changes to immigration proceedings, but I would look forward to doing so if confirmed.

VI. REPRESENTATION FOR UNACCOMPANIED MINORS

In recent years, increasing numbers of foreign-born children have come into the United States, unaccompanied by parents or guardians. Last year, more than 5,000 arrived, and the numbers are likely to rise this year. Some are fleeing from armed conflict or other dangerous conditions in their home countries. Others are fleeing from human rights abuses, including forced recruitment as soldiers, slaves, or child labor, or for prostitution, or forced marriage. Still others flee to the United States because they have been abused or abandoned by parents or care givers. Additional immigrants are brought to the United States by family friends or relatives, by paid smugglers, or by traffickers involved in organized crime.

Regardless of how they arrive, these children often enter our country after traumatic experiences, speaking little or no English, and unaware of their rights under U.S. law. They may well be candidates for asylum, but they have no way to apply for it, and are left to represent themselves in an immigration court against experienced trial lawyers for INS.

Access to legal representation is essential for these children, who range from toddlers to teenagers. Pro bono networks currently exist to represent children in immigration proceedings. But, according to administration officials, about 60% of these children still remain unrepresented in immigration court and have no way of articulating and understanding events relevant to possible claims for asylum.

Access to representation also results in a more efficient immigration court process that saves time and money for the government while also benefiting the child.

Question: Federal funding is now used by the Justice Department to provide grants to faith-based and private non-profit organizations to provide legal services to victims of domestic violence and sexual assault. Will you support federal funding to award grants to non-profit organizations to provide legal representation to these most vulnerable children? If not, why shouldn't we provide the same authority to award grants to nonprofit organizations so they may represent unaccompanied immigrant minors.

If you do not support such funding, what changes will you propose to ensure that the best interests of these children are fully protected and respected?

Response: The plight of unaccompanied minors who are sent to the United States is an extraordinarily heart-rending issue. Many of these abandoned children arrive in the United States after having suffered abuse, neglect, and violence. If confirmed, I would carefully review and consider any proposal, whether regulatory or legislative in nature, to ensure that unaccompanied minors receive the services they need and are not further victimized after they arrive in the United States.

VII. LEGAL ORIENTATION PROGRAMS

In 2002, Congress appropriated \$ 1 million for legal orientation programs in order to increase the efficiency and effectiveness of immigration removal proceedings. The programs are funded through appropriations to DHS, which are then transferred to EOIR.

Legal orientation presentations provide immigration detainees with essential information about immigration court procedures and the availability of legal remedies. The programs help identify immigration detainees with meritorious cases that can be referred to legal assistance agencies, at no cost to the government. The programs also help convince detainees without relief not to challenge their removal, thereby needlessly protracting their immigration proceedings and deportation. These programs have resulted in greater judicial efficiency, fewer detention expenses, and greater access for aliens to legal information. EOIR has calculated that these programs result in an annual saving of approximately \$8 million dollars by reducing detention by more than 4 days per alien in sites with these programs. In its first full year, these programs reached 17,000 detainees, comprising approximately 20% of the detention proceedings completed by immigration judges in fiscal year 2003. Despite the benefits and efficiencies generated by the programs, DHS failed to transfer the FY 2003 appropriations to EOIR, and I understand may not transfer the funding for fiscal year 2005.

Question: As Attorney General, what will you do to ensure that DHS transfers the \$2 million owed to EOIR for these programs? What will you do to increase funding

for these highly successful programs so they reach even greater numbers of detainees?

Response: If confirmed, I would work with my colleagues at the Department of Homeland Security to ensure that any money that is owed to EOIR is transferred and to determine the extent to which funding may be increased in future years.

VIII. USE OF SECRET EVIDENCE

In the past, the Department of Justice has used classified evidence in immigration proceedings, and not made it available to the defendant and or to defense counsel. In some cases where classified evidence was used to deport an individual, it was later discovered that the evidence was incorrect or discredited.

Question: Will the Department of Justice again use classified evidence in immigration proceedings? What step will you take to avoid the types of mistakes made in the past?

Response: Current federal law specifically permits the use of classified evidence in immigration proceedings with respect to detention decisions and decisions on applications for various forms of immigration relief, such as asylum or cancellation of removal. However, my understanding is that this is done only rarely and that immigration judges have not used classified evidence for purposes of determining whether or not an alien is deportable. I know that the issues relating to the use of classified evidence in immigration proceedings have been the subject of considerable attention both in Congress and among the affected federal agencies in the past, and, if confirmed, I would conduct a review of the Department's policies in this regard.

CIVIL RIGHTS

I. Voting Rights Act

The Voting Rights Act is critical to ensuring ballot access for all Americans, regardless of race, ethnicity or proficiency in English. Private citizens can enforce the Act's non-discrimination provisions, but Justice Department enforcement is critical to its effectiveness. Unfortunately, in recent years the Department has cut back its enforcement actions. In 2004, the Civil Rights Division did not file a single case alleging racial or ethnic discrimination against minority voters. In 2003, the Division filed only one such case, and only two in 2002. That is not a satisfactory record, given the widespread discrimination against minority voters in state, local and federal elections across the country.

1. During your hearing, you stated that you believe strongly in protecting voting rights. Will you commit that if you are confirmed as Attorney General, the Department will vigorously enforce Section 2 of the Voting Rights Act while also maintaining its role in enforcing other voting and civil rights laws?

Response: As I indicated at my hearing, voting rights are extremely important. If confirmed as Attorney General, I would enforce the Voting Rights Act and all other voting and civil rights laws.

2. If you are confirmed as Attorney General, what will you do to ensure that the Department once again vigorously enforces Section 2 of the Voting Rights Act? In particular, how will you ensure that the Civil Rights Division increases its investigation and enforcement actions under section 2?

Response: As I am not presently with the Department of Justice, I am unfamiliar with steps the Department has already taken, and is currently taking, to enforce Section 2 of the Voting Right Act. Not knowing present levels of investigation and enforcement, I am not in the position to address specific increases. However, I can commit that if confirmed as Attorney General I would vigorously enforce Section 2 of the Voting Rights Act. I would talk to the lawyers in the Department and understand what we are doing and why. I would make sure they understand that this is a priority.

3. As we discussed during the hearing on your nomination, in addition to reducing its enforcement under Section 2 of the Voting Rights Act, the Civil Rights Division has actually opposed voters' interests in several court cases. For example, in Bay County Democratic Party v. Land, the Division opposed attempts by the Michigan NAACP and others to ensure that all provisional ballots cast by eligible Michigan voters were counted in the 2004 election.

In Bay County, the Division argued that the Help America Vote Act's creation of provisional ballots did not give private citizens any legal rights that they could enforce in court. The Department took similar positions in Sandusky County Democratic Party v. Blackwell and Florida Democratic Party v. Hood. In effect, the Department was supporting attempts by certain states not to count the votes of some eligible voters. This position completely disregards the fact that Congress passed the Act – including the provisional ballot requirement – precisely because members of the House and Senate were concerned about violations of individual voting rights in the 2000 election.

The Division's argument that individuals have no right to enforce the provisional ballot provisions of the Help America Vote Act has been rejected by every court that heard it.

I'm troubled that the Department has used its limited resources to prevent citizens from enforcing their right to vote, particularly given its failure to vigorously enforce Section 2 of the Voting Rights Act. As you know, the Civil Rights Division was created to champion civil rights for all Americans, not to oppose voting rights and keep votes from being counted. If you are confirmed as Attorney General, will you ensure that the Civil Rights Division again becomes a champion for voting rights, instead of resisting them?

Response: I think that my life tells the story of America's promise. It is a promise of opportunity and hope. That vision is reflected in our laws and it falls upon the Attorney General to ensure that America's promise is available to future generations of American children. A cornerstone of that promise is the right to vote. As I indicated at my confirmation hearing, I take voting rights with the utmost degree of seriousness. I believe this Administration shares that view, as underscored by the fact that the Department this past year mounted the largest election-monitoring program in its history. If confirmed as Attorney General, I would fully enforce all voting rights laws.

4. If you are confirmed, will you provide to the Judiciary Committee, within two months after your confirmation, the following information on the Department's section 2 enforcement:

- a. The number of formal investigations the Department is currently conducting into possible violations of section 2 of the Voting Rights Act, and a brief summary of the nature of the potential violation, including the ethnic, racial and/or language minority group affected.**
- b. The number of formal investigations the Department has opened into possible violations of section 2 of the Voting Rights Act since January 1, 2001, and a brief summary of the nature of the potential violation, including the ethnic, racial and/or language minority group affected.**

Response: If confirmed, I would work with the Committee to provide information regarding the Department's enforcement of the Voting Rights Act. I am not presently in a position to evaluate whether provision of the material you request within two months is feasible.

5. Several key provisions of the Voting Rights Act will expire in August 2007 unless they are reauthorized by Congress, including the pre-clearance requirements of section 5 and the requirements regarding bi-lingual election materials in section 203. If you are confirmed, will you ensure that the Department assists Congress in conducting the thorough hearings needed to evaluate the reauthorization of the Voting Rights Act, including providing Congress with information and documents about the Department's enforcement of the Act?

Response: If confirmed, I look forward to working closely with Congress as it considers reauthorization of the Voting Rights Act, and to ensuring the Department's cooperation with Congress in conducting thorough hearings.

II. Employment Discrimination

I am concerned that the Department's Civil Rights Division has reduced enforcement of the landmark law against employment discrimination, Title VII of the Civil Rights Act of 1964. As I noted during your hearing, I am particularly troubled that, during this Administration, the Civil Rights Division has filed so few cases alleging a pattern or practice of discrimination. Pattern or practice cases let

the Department challenge widespread discrimination that affects large numbers of people, rather than just individual instances of discrimination. But under the current Justice Department, the number of pattern or practice cases has dropped. Under Presidents Reagan, George H.W. Bush, and Clinton, the Civil Rights Division filed an average of 13 employment discrimination cases per year, most of which were pattern or practice cases. However, according to the Department's website, under President Bush the Division filed only 17 cases in four years, or just over four cases per year.

Since January 21, 2001, the Department's Civil Rights Division has filed only five pattern or practice cases alleging job discrimination, and only two of them have included claims of racial or national origin discrimination.

1. It is vital that our employment discrimination laws are vigorously enforced. If you are confirmed as Attorney General, will you ensure that the Civil Rights Division increases the number of pattern or practices cases it brings under Title VII, and that the Division does its job of protecting Americans from job discrimination?

Response: As I have indicated, if confirmed as Attorney General, enforcing civil rights laws would be one of my priorities. This includes enforcement of the non-discrimination provisions of Title VII. As Attorney General, I would ensure that the Civil Rights Division fully enforces these provisions. I cannot, however, commit in the abstract to increasing the number of pattern or practice cases; enforcement of the non-discrimination laws, like other areas of law enforcement, should not be subject to potentially artificial goals and mandates. Rather, we should enforce the law with vigor and let the results speak for themselves.

2. One of the Department's most important means of enforcing Title VII is through "disparate impact" analysis. In a disparate impact case, if an employer uses a facially neutral employment practice that has a disparate impact based on race, sex, or other prohibited factors, the employer must show that its practice is required by business necessity and that there is no less discriminatory way of achieving its purpose. Congress added the disparate impact provisions to Title VII in order to address many of the unfair barriers to employment opportunity. Will you ensure that, if you are confirmed as Attorney General, you will vigorously pursue disparate impact cases?

Response: It is well established that Title VII prohibits practices that, while not intentionally discriminatory, have a disparate impact on members of particular racial groups. If confirmed, I would enforce Title VII, and all other Civil Rights Statutes, as written.

3. In 2004, the Department shifted the responsibility for enforcing the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) to the Civil Rights Division's Employment Litigation Section, which is also enforces Title VII. USERRA provides important protection for men and

women in our armed forces, including reservists, and requires fair and equal treatment in the workplace. For some time, the federal government has not adequately enforced the Act, particularly because the number of USERRA complaints filed with the Department of Labor has increased each year since 2000. I have asked the General Accountability Office (GAO) to review the activities of the Department of Justice and other federal agencies under USERRA. Because it is vitally important that both Title VII and USERRA are adequately enforced, I ask that you provide the following information:

- a. **As noted above and during your hearing, the Civil Rights Division must improve its enforcement of Title VII. If you are confirmed, how will you ensure that the Division increases its Title VII enforcement and also actively pursues its responsibilities under USERRA?**

Response: As you note, responsibility for enforcing USERRA was recently reassigned from the Civil Division to the Civil Rights Division. As I am not presently with the Department, I am not familiar with what steps the Civil Rights Division has taken to implement its USERRA enforcement responsibilities. If confirmed as Attorney General, I would make sure that the Civil Rights Division takes appropriate steps to fully enforce both Title VII and USERRA.

- b. **If you are confirmed, will you direct the Department's employees to fully cooperate with the GAO review of the Department's role under USERRA?**

Response: If confirmed as Attorney General, I would commit to ensuring that the Department cooperates with GAO inquiries consistent with the GAO's authority.

4. **If you are confirmed, will you provide the Judiciary Committee, within two months after your confirmation, the following information?**

- a. **The number of current Title VII pattern or practice investigations authorized by the Assistant Attorney General for Civil Rights and a brief summary of each potential violation, including whether it is based on race, national origin, gender, color, or religion.**
- b. **The number of current Title VII disparate impact investigations authorized by the Assistant Attorney General for Civil Rights and a brief summary of the potential violation, including whether it is based on race, national origin, gender, color, or religion.**
- c. **The number of formal investigations of individual charges filed under Title VII, and a brief summary of each alleged violation, including whether it is based on race, national origin, gender, color, or religion.**
- d. **The number of USERRA complaints which the Department of Labor has referred to the Civil Rights Division.**

- e. **The number of USERRA complaints on which the Civil Rights Division has filed suit, the number it has settled, and the number it has dismissed.**
- f. **The number of USERRA complaints currently pending in the Civil Rights Division.**

Response: If confirmed, I would work with the Committee to provide information regarding the Department's enforcement of Title VII. I am not presently in a position to evaluate whether provision of the material you request within two months is feasible.

III. Title VI Enforcement

I am concerned by the Department's lack of enforcement of Title VI, which prohibits race and gender discrimination in federally funded programs and activities. Under Attorney General Ashcroft, the Civil Rights Division hasn't filed a single Title VI case, and it intervened in only one case.

This is particularly troubling because, in 2001, the Supreme Court ruled in Alexander v. Sandoval, that private citizens cannot bring certain kinds of cases, known as disparate impact cases, under Title VI. As a result, only the federal government can use Title VI to challenge practices in federally funded programs that seem neutral, but that disproportionately harm racial and ethnic minorities. Thus, people with limited proficiency in English can no longer use this law to challenge practices that deny access by many ethnic minorities to basic public services such as health care.

Now more than ever, because there is no longer a private right to bring certain kinds of Title VI cases, the public depends on the Justice Department to protect against discrimination with taxpayer dollars. So the Department's failure to file any Title VI cases is disturbing. Moreover, it's clear that the need to enforce Title VI hasn't gone away. The Department of Education's Office for Civil Rights receives thousands of discrimination complaints every year – including Title VI disparate effect complaints. Although the Department relies on other federal agencies to review Title VI complaints in the first instance, the Department of Justice has unique expertise in Title VI.

1. Do you agree that the Department must take an active, leadership role in ensuring that the federal government vigorously enforces Title VI? If you are confirmed, will you ensure that this occurs?

Response: I agree that the federal government must vigorously enforce Title VI. I am unfamiliar with the Department's specific efforts to bring Title VI actions. It is my understanding, however, that the Department's Title VI jurisdiction depends entirely on the referral of cases from other Departments. If confirmed as Attorney General, I would

encourage other Departments to refer actions to the Department for enforcement as appropriate.

2. If you are confirmed as Attorney General, will you ensure that the Department enforces the Title VI regulations prohibiting practices with a disparate effect based on race and national origin?

Response: As I have indicated elsewhere, a number of federal statutes and regulations are written to provide a cause of action based on disparate impact. If confirmed, I would enforce Title VI, and all other statutes, as written.

IV. Grant Program of Civil Rights Division's Office of Special Counsel

The Civil Rights Division's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) is charged with enforcing the anti-discrimination provisions of the Immigration and Nationality Act, which prohibit discrimination based on citizenship and national-origin and document abuse in hiring and firing. The public education grant program administered by OSC funds programs to educate both workers and employers about immigration-related job discrimination, and this public outreach is a vital part of OSC's work. When workers receive adequate information about legal protections against such discrimination, they can take more effective steps to protect their rights.

In July 2004, the Civil Rights Division informed 13 nonprofit agencies that they would receive a total of \$745,000 in OSC grants to administer this important program, and many of these organizations relied on this announcement in making hiring decisions and other resource allocations. Inexplicably, in September 2004, the Division abruptly decided to postpone the OSC grant program, without prior explanation or notice to Congress. To our knowledge, this is the first time the grants have ever been postponed.

As shown in the attached correspondence, Senators Leahy, Durbin, and I contacted the Civil Rights Division upon learning of the postponement, and were assured that it would resume after the position of OSC Special Counsel was filled. The Special Counsel nominee was confirmed in December 2004, and I am hopeful that the Department will honor its commitment to support this program, which is so important in OSC's mission to protect the rights of immigrant workers. Given the program's importance, I ask that you provide further information about it. Specifically:

1. Were you previously informed of the Department's decision to postpone the OSC grant program, and if so, when?

Response: It is my understanding that the grant program was temporarily suspended. I was not informed of that suspension prior to its occurrence.

2. **Please explain in detail the reasons for postponing disbursement of the fiscal year 2004 OSC grants.**

Response: I am unfamiliar with the reasons for the suspension.

3. **Do you agree that the OSC grant program is a vital part of OSC's outreach and public education? If you disagree, please explain in detail why.**

Response: I agree that educating employers and employees regarding their obligations and rights under the anti-discrimination provision of the Immigration Reform and Control Act of 1986 is an important part of OSC's mission.

4. **If you are confirmed, will you ensure that the 13 non-profit organizations selected for OSC grants in June 2004 promptly receive those grants? If not, please explain in detail your reasons for not doing so.**

Response: If confirmed as Attorney General, I would look into this matter. If, as you note, the Department previously committed to resume the program upon confirmation of the Special Counsel, now that the Special Counsel has been confirmed, I am confident that the Department will honor its pledge.

5. **If you are confirmed, will you ensure that the OSC grant program is continued during your service as attorney general?**

Response: As I noted above, I agree that this program is important, and if confirmed, I would ensure that it continues during my tenure as Attorney General consistent with congressional funding.

MEDICAL PRIVACY

In defending the federal abortion ban under Attorney General John Ashcroft, the Justice Department asked courts to provide the medical records of over 1000 women who had had an abortion. These women were not even parties to the lawsuit challenging the abortion ban. The attorneys representing Attorney General Ashcroft justified these actions by arguing that "individuals no longer possess a reasonable expectation their histories will remain completely confidential."

1. **Do you agree that "individuals no longer possess a reasonable expectation their histories will remain completely confidential?"**

Response: I share your concerns about the sensitivity of medical records and the need to keep them confidential. The Department should be especially sensitive to the privacy

rights of every citizen. At the same time, the Department has an obligation to defend the constitutionality of the laws enacted by Congress, including the Partial Birth Abortion Ban Act. I understand that in the litigation challenging that Act, the plaintiffs put their clinical experiences at issue in the case and therefore, the Department subpoenaed certain medical records, as the best available documentation of the plaintiffs' clinical experience, in order to assess their assertions that the banned procedure is medically necessary to preserve a woman's health. In light of the sensitivity of these records, the Department took measures to ensure patient confidentiality by agreeing to protective orders requiring that all patient-identifying information be stripped from the subpoenaed records, and that all such records, even in that redacted form, be treated confidentially and filed under seal. Accordingly, the subpoenaed medical records would have contained no patient identifying information and would have been subject to a strict court-entered protective order prohibiting disclosure to the public.

2. Can you assure us that if you're confirmed, you will not authorize such sweeping invasions of medical privacy?

Response: I share your concern about the appearances of this action. I can assure you that, if I am confirmed as Attorney General, the Department would continue to be sensitive to medical privacy issues within applicable constitutional, statutory, and regulatory parameters.

Freedom of Access to Clinic Entrances Act

- 1. Currently, the Department of Justice administers the Task Force on Violence Against Health Care Providers. Its purpose is to: coordinate national investigations and prosecutions of incidents of violence against health clinics and health professionals who provide abortions, with a special focus on connections that may exist between individuals involved in criminal anti-abortion activities; serve as a clearinghouse for information relating to acts of violence against abortion providers, and collect and coordinate data identifying national trends related to such violence; make security recommendations to enhance the safety and protection of providers; assist the work of the U.S. Attorneys' local working groups on clinic violence; enhance training of federal, state, and local law enforcement personnel on issues relating to clinic violence; and support federal civil investigation and litigation of abortion-related violence.**

If you are confirmed, will you keep the Task Force in place, and will its mission remain the same? Will you ensure that the Task Force has the resources necessary to carry out its mission?

Response: If confirmed, I would maintain this Task Force and ensure that the level of resources necessary to its mission is maintained.

2. **In your view, is the Freedom of Access to Clinic Entrances Act a valid exercise of Congressional authority? Were the appellate court decisions upholding the Act were correctly decided? If a future Supreme Court accepted for review a case involving the constitutionality of the Act, would you defend the Act's constitutionality?**

Response: If confirmed, it would be my responsibility to enforce and defend all of Congress's enactments, which enjoy a presumption of constitutionality, where reasonable arguments can be made in support of those statutes. This Administration has previously defended FACE against constitutional challenge and I would continue that policy if confirmed.

Oversight; Change in Role; Special Role of Justice Department; Judicial Selections; Kerik; Computergate, Plame

1. Congressional Oversight

I was encouraged by your testimony that, if you are confirmed, you will work cooperatively with the Congressional Committees having jurisdiction over the Department. Will you commit that, if you are confirmed, you will make every reasonable effort to ensure that all Presidential appointees in the Department appear before the Senate Judiciary Committee when requested, and are responsive to inquiries from individual members?

Response: If confirmed, I would make every reasonable effort to ensure that the Department is responsive to Committee oversight requests and that the appropriate Department officials appear before the Committee when requested. The Department would also, of course, respond to inquiries from individual Members. At the same time, I would respectfully ask for consideration from the Committee and its Members of the potential burden that can be placed on appointees by multiple requests to appear. I am sure you share my concern that the needs of the Committee should be balanced with the imperative for the Department to perform the many important tasks given to it by Congress and the Administration.

2. Responsibility as Attorney General

Your actions as Counsel to Governor Bush in Texas and as White House Counsel to President Bush suggested that you see the role of Counsel to the Chief Executive as being that of legal advocate for his decisions – a justifier of his positions rather than a legal analyst. As you yourself have frequently said, you consider your one and only client to be the President and you consider your role to be to what the President requests.

As Attorney General, however you will be responsible not solely to the President, but also to the laws and the Constitution of the United States.

You will, for example, supervise the Solicitor General of the United States, often called the “Tenth Justice” of the Supreme Court, because that Court frequently relies on the Solicitor General to provide a dispassionate and independent analysis of the law, rather than a one-sided justification of the Executive Branch position on important issues.

You will also supervise the Office of Legal Counsel, which traditionally has provided the White House and other Executive Branch agencies with its best judgments as to what the law is on vital issues that may go to court, rather than just the arguments for sustaining the Administration’s desired legal result.

To do your job properly as Attorney General, you will sometimes have to say “no” to the President – to tell him that he cannot do, or ought not do, what he would like to do, even if there are legal arguments for his position which might possibly be accepted a court.

Q: The shift from lawyer and protector for the President to lawyer for the nation, and protector of the Constitution will require a major change in your priorities and attitudes. How will you make this change and what makes you confident that you can distance yourself from the person who has been your sponsor and chief and sole client for many years?

Response: As I said in the hearing, I understand there is a significant difference between being Counsel to the President and Attorney General. The Counsel has limited resources and staff, primarily advises one client. The Attorney General’s primary allegiance is to the Constitution and our laws. He is accountable to the American people through the oversight role of the Congress. I would do everything in my power to reassure the career professionals at the Department and the American people that I would not politicize the Department. I demonstrated I would act independent of my political considerations as a member of the Texas Supreme Court. If confirmed, I would enforce the law fairly and equally on behalf of all Americans. I believe that my relationship with the President would assist me in carrying out this core function of the Attorney General, and I am inspired by the excellent precedent set in this respect by prior Attorneys General who had strong relationships with the Presidents who appointed them.

Q: As we have seen, at times when you could have and should have said “no” to the President or his appointees, you didn’t. For example, when you first saw the Bybee memo, with what you now concede were its outrageously wrong logic and conclusions, you let it stand for almost two years without saying or doing anything.

To compound the error, knowing the clear documentation of Bybee’s poor legal judgment, you rewarded him for his loyalty in telling the President what you and the President wanted to hear by re-nominating him for an important lifetime Circuit Court judgeship. I hope it’s clear to you now that you should have told the President then and there, “No, we can’t do that.

This man is on the record with a position that will not stand the light of day, and some day it will probably come to light.”

How can we be sure that your role as a cheer-leader and enabler for the President will end when you become Attorney General? How can you show us that you will truly become an advocate for the nation, its constitution, its freedoms, and for justice?

Response: If confirmed I would enforce the law fairly and equally on behalf of all Americans. I believe that my relationship with the President would assist me in carrying out this core function of the Attorney General, and I am inspired by the excellent precedent set in this respect by prior Attorneys General who had strong relationships with the Presidents who appointed them.

The memorandum you reference has been withdrawn and replaced by the Department of Justice, but I do not agree with your characterization of it or its author.

3. Appreciation and Acceptance of the Special Role of the Justice Department

Last month, two dozen former attorneys in the Department’s Office of Legal Counsel delivered to you a document consisting of detailed guidelines for the operations of the Department in general, and the Office of Legal Counsel in particular, in providing legal counsel to the President and the other agencies of government. The ten principles in this document, “Principles to Guide the Office of Legal Counsel,” carefully describe the special role of the Department and the Office of Legal Counsel over the decades in answering legal questions for the other Departments and for the White House..

The first principle is perhaps the over-arching one:

“ When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration’s pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients’ desired actions, inadequately promotes the President’s constitutional obligation to ensure the legality of executive action.”

Other key principles include the need for OLC’s opinions to be published unless there are strong reasons not to do so, which was not followed by your predecessor. The number of published OLC opinions dropped from 32 in 1998 and 1999, to 6 in 2002 and 1 in 2003. The guidelines also emphasize the need for the Department to “seek the views of all affected agencies and components of the Department of Justice before rendering final advice.” Again, the case of the all-important Bybee memo illustrates that this practice was not followed under Mr. Ashcroft, and shows why it is so important.

Q: I assume that by now you have read these guidelines carefully.

Do you disagree with any of these Principles, and if so in what way?

Response: I generally agree with the principles outlined in the memorandum and specifically agree with those you have quoted above.

Do you agree that the performance of the Justice Department has not met those standards during the past four years?

Response: No.

Did you understand when you received the Bybee memo, and do you understand now, that it violates all of the major standards set forth in those guidelines?

Response: No. The August 1, 2002, memorandum has been withdrawn and superseded, but I do not agree with that characterization of that memorandum.

Are you ready to commit to us that you will operate the Department in accordance with those standards? Please explain to us how you will do so.

Response: If confirmed, I would do my best to ensure that the Department operates in accordance with the highest ethical standards. I would note for the record that some former attorneys in OLC disagree with certain portions of the guidelines.

4. Procedures for Selecting Judicial and Other Nominees:

Judges:

For many of his most important judicial nominations, it is clear that President Bush decided to pick a fight rather than pick a judge.

By selecting – and now announcing his intention to re-nominate ideological candidates for key appellate judgeships, he has consciously decided to throw red meat to his right wing constituency, instead of selecting candidates of such overwhelming quality, experience and judiciousness that they would have had broad support in the Senate and in the nation. As White House Counsel, you played a central role in that process, and you will have a central role in that process as Attorney General.

The history of the advice and consent process makes clear that the “advice” part of the “advice and consent” function of the Senate should not be taken lightly. The Founders made the appointment power a joint power between the President and the Senate, precisely because they did not want the President to be able to pick judges and other high officials to suit only himself.

Senators of both parties have frequently warned Presidents that their prospective choices would be unacceptable to many Senators and that they should instead choose nominees who could gain a broad consensus in the Senate. Presidents who ignored that advice have frequently found themselves in pitched battles with the Senate. The Presidents who followed that advice have accomplished prompt and broadly welcomed confirmations.

Senator Hatch has written of his own role in helping select the two most recent Supreme Court nominees, and we know President Clinton frequently consulted with Senators on both sides of the aisle before making judicial nominees. President Reagan also consulted with Democratic members of the Judiciary Committee on his judicial nominations. The current President Bush has done so on many nominations, enabling him to appoint over 200 judges without serious controversy. But other times he has ignored the clear warnings that his intended nominees could not be confirmed easily.

Q: As Attorney General are you prepared to request and consider the advice of Senators on both sides of the aisle?

Response: I have tried hard to consult and seek views in connection with judicial nominations and would be pleased to continue the process of consultation with Senators on both sides of the aisle, if confirmed. This Administration has always been willing to consider judicial candidate recommendations made by Senators. If confirmed as Attorney General, I would remain willing to talk to you or other Senators about any recommendations of judicial candidates.

5. Assurances Regarding Senate Computer Thefts

As you know, an inquiry by the Senate Sergeant at Arms found that for a period of years during the Bush Administration, a Republican Senate staffer who worked closely with the White House and Justice Department on Judicial selections improperly obtained, and in some cases disseminated, information from thousands of Democratic computer files.

Last year Senator Leahy wrote to you asking whether your office had received any information from the perpetrator that appeared to come from Democratic files. Your answer to Senator Leahy was not responsive, so I will ask the question again, perhaps with more specificity:

Q: Can you assure us that neither you nor anyone in your office nor anyone working with your office on judicial nominations received any information about the activities, plans or communications of Democratic Senators, with respect to judicial nominations or other issues, which at the time, or after the fact, or even now, appeared to have come from Democratic computer files or other confidential Senate materials?

If you believe someone in the above categories did receive such information, please state that fact now, and provide the details in a committee confidential document.

If you have not made inquiries on that subject, despite Senator Leahy's letter requesting you to do so, please affirm that you will do so promptly, and provide your answers before your nomination is considered by the Committee.

Response: I am unaware of any facts that would be responsive to your question and this matter is being investigated by the Department of Justice. It would therefore be inappropriate for me to comment further at this time.

6. White House Procedures on Valerie Plame

You have acknowledged to a member of the Committee that your own prior involvement in the Valerie Plame matter precludes you from having any role in it as Attorney General.

Unless you indicate otherwise, we will assume that the absence of any disclosure by you that you are or have been a subject or target of the current investigation on that matter means that you have not at any time been a subject or target.

Originally, the White House stated that it had no knowledge that anyone on the staff had placed any calls to Robert Novak or to other reporters before Mr. Novak's column on Plame was distributed. However, it is difficult to believe that in the many ensuing months, you have not discovered who placed those calls.

Q: Did you, and when and how did you come to know who in the White House made any of those calls?

Did you participate in the White House decision not to disclose that the previous White House disclaimers were inaccurate? Why was that decision made? (I am not asking you for the substance of your knowledge of the matter, just when you knew, who made the decision not to disclose promptly that the White House did know, and why you decided to keep it secret from the public.)

Months ago, counsel for at least one White House official stated publicly that his client was not then a "target" of the inquiry. Do you know whether he or any other White House employees are subjects or targets, and if so when did you find that out?

Response: This is a matter under investigation by the Department of Justice, and I refer all your inquiries regarding it to the Department. To comment publicly on this matter might in some way interfere with this investigation. I have been told by the Special Counsel that I am a witness in this matter.

**Responses of Alberto R. Gonzales
Nominee to be Attorney General
to the Written Questions of Senator Herb Kohl**

1. **During the January 6th hearing, I asked whether you believed that torture could ever be productive. You answered, "Sir, I don't have a way of reaching a conclusion on that." You participated in discussions where specific interrogation techniques were discussed; oversaw the drafting of a Department of Justice, Office of Legal Counsel memo on the legality of torture; and developed this Administration's legal parameters for the detention and interrogation of enemy prisoners. It is hard to believe that you have not thought about or formed a personal opinion on this. As I mentioned during the hearing, Attorney General Ashcroft was able to reach a conclusion, telling this Committee, "I condemn torture. I don't think it's productive, let alone justified."**

Once again, do you believe torture is a productive method of interrogation, in terms of producing reliable information?

Response: I hoped I made clear in the hearing that I likewise condemn torture. I was being as honest as I could be in saying that I do not have sufficient expertise and experience to judge whether torture is a productive method of interrogation. I accept as valid views, held by many, that torture is not productive. I have no reason to question such a conclusion. I know that the President has directed that the United States will not engage in torture. This direction applies whether one concludes that torture is a valuable or a poor technique for gathering reliable information.

2. **Critics of Attorney General Ashcroft and this Administration's war on terrorism have been concerned that, under his watch, the balance between prosecuting the war on terrorism and protecting our civil liberties has been skewed. Your record as White House counsel and the role you played in developing the Administration's interrogation and detention policies create a perception that you have also been on the wrong side of this balance.**

Do you understand and appreciate why your critics feel this way? Do you think that there is any merit to their perceptions? How do you plan to change the public impression of your actions in the war on terror?

Response: I regret the perception – however wrong it may be – that this Administration may not be committed to the rule of law and to basic fundamental American values. As I said in the hearing, part of winning the war on terror is winning the hearts and minds of the Muslim community. The wrong perception that we do not value human dignity or the rule of law makes the job of winning their hearts and minds more difficult. So, I care very much about America's image. The war on terrorism has presented the Administration, the Congress, the judiciary, and the American people as a whole with very difficult challenges. During this war, the Administration has sought both to protect the safety and security of the American people and at the same time preserve their civil rights and civil liberties. I strongly believe

that we have not sacrificed one goal for the other. Given the novelty and complex nature of the issues that the Administration has faced since the attacks of September 11, 2001, however, I can certainly understand how well-intentioned individuals could disagree with some of the decisions that we have made. Our democracy is made stronger by vigorous debate, and I applaud those who voice their concerns about government policies, even if I disagree with their criticisms. If confirmed, I pledge to treat any critics of the Administration's counterterrorism policies with the dignity and respect to which they are entitled. It is also my hope that I can play a part in toning down the rhetoric surrounding these issues and instead engaging in a debate conducted with mutual respect that is based on the facts rather than hyperbole. I also pledge to keep an open mind regarding any criticism of actions taken by the Administration to protect the American people.

- 3. If confirmed, you will be responsible for a \$20 billion budget. How you allocate that budget will provide us with a strong indication of your priorities. Thus far, this Administration's choices have been very disappointing, especially with the abandonment of popular initiatives like juvenile justice funding.**

Surely we can agree that juvenile justice initiatives are very important to children and their families across the country. Positive intervention and treatment at an early stage of delinquency can prevent further violent behavior and steer a young person in the right direction before it is too late. Time and again, we see that investing in prevention programs saves money. Some studies show that for every dollar spent on prevention, we save three or four dollars in costs attributable to juvenile crime.

Yet, despite the success of juvenile justice programs, your predecessor's budget proposals decreased funding for these measures year after year. Whereas overall funding for juvenile justice programs was roughly \$550 million in Fiscal Year 2002, the Administration's FY05 budget requested \$200 million for these same programs – that's almost a two-thirds cut.

Can you provide us some idea of whether or not this sort of funding will be a priority of yours? Will you, at the very least, support funding these programs at \$380 million, which is what Congress appropriated last year?

Response: Effective prevention of delinquent or criminal behavior must be a high priority. And when, in spite of our best efforts, a juvenile must be sent to residential treatment, we must provide the best rehabilitation and re-entry plans that our research can identify. If confirmed, I would work with the Office of Justice Programs to establish effective public and private partnerships to reduce the cost and improve the sustainability of effective delinquency prevention programming. At the same time, I would work with the Congress to ensure that an appropriate level of funding is identified to support these efforts.

- 4. We were very disappointed with the practical elimination of the COPS Universal Hiring program in last year's budget. Though the Administration requested the total elimination of the Universal Hiring program, the Omnibus Appropriations bill**

allocated a paltry \$10 million for this nationwide initiative – one that has added tens of thousands of police officers to police departments across the country. Not surprisingly, the COPS program has been overwhelmingly popular among our local police departments in Wisconsin and beyond. Moreover, crime has been steadily decreasing in the past decade thanks, in part, to the COPS program.

Almost three years ago, Attorney General Ashcroft came before Congress and said that the COPS program was a “good thing”, that it “worked very well”, and that it had been one of the “most successful programs” we have ever heard. Yet, the Administration still proposed its elimination. It doesn’t make sense to wipe out a program that has worked so well.

If you are confirmed as Attorney General, can we expect further requests for eliminating this popular and successful program?

Response: I am told that this has been a hugely successful program. When the program was created, the goal was to have 100,000 new law enforcement personnel trained and on the streets. That goal has now been met. I believe this program has been important and that we should continue to explore alternative ways to provide additional law enforcement to our communities. Through the Community Oriented Policing Services (COPS) hiring programs, 118,000 community police officers have been added to our nation’s streets and schools. The Department’s COPS Office continues to invest in efforts to improve public trust with law enforcement, fight methamphetamine, assist the development of law enforcement infrastructure in Indian Country, and increase community policing training and technical assistance.

5. **Last year, Senator Hatch and I introduced the Prevent All Cigarette Trafficking (PACT) Act, S. 1177, to help crack down on cigarette smuggling. Illegal cigarette trafficking worldwide is a multibillion dollar a year industry. The people doing this are often terrorist groups. It is estimated that Hezbollah earned approximately \$1.5 million between 1996 and 2000 by engaging in tobacco smuggling. In recent years, the number of ATF investigations into cigarette trafficking have increased substantially. But, the tools used by federal, state and local law enforcement to combat this problem are outdated. Though it passed the Senate unanimously, the PACT Act stalled in the House. Every day we delay passage of this bill, terrorists raise more money, states lose more tax revenue, and kids continue to have easy access to tobacco products. This is a very serious problem.**

If confirmed, will you join us in our effort to give law enforcement important new tools to fight cigarette trafficking by supporting this legislation?

Response: I share your concern about how terrorist groups fund their activities, such as through smuggling endeavors. If confirmed, I would continue the Department’s commitment to aggressively investigate and prosecute all forms of terrorist financing.

I am not familiar with the specifics of the bill to which you refer. However, if confirmed, I would look forward to working with you to address this problem by strengthening and improving the current federal statutes prohibiting illicit tobacco trafficking.

- 6. In March, Senator Hatch and I urged the Justice Department to complete a rulemaking that would require all imported explosive materials to be marked in the same way domestic explosives are marked. When testifying before Congress, Director Mueller said that he believes "markings assist investigators in solving crime." The Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) gave notice of this proposed rulemaking in October 2002. More than two years has passed, but the Department of Justice has failed to finalize this important rulemaking. After patiently awaiting action, Senator Hatch and I introduced legislation last summer to require that markings be placed on all imported explosives.**

If confirmed, can we count on the support of the Justice Department in passing this legislation?

Response: I am unaware of the reasons for the delay. The issue of marking imported explosives is an important and difficult one. As you note in your question, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) issued a notice of proposed rulemaking in October 2002. I understand that the rulemaking process is ongoing, that the ATF has submitted the final rule to the Office of Management and Budget (OMB) for review, and that if OMB approves the final rule, ATF could publish it promptly. To the extent the Department's proposed rule is reflected in proposed legislation, I assume the Department would support passage of such legislation if it is otherwise consistent with the President's program.

- 7. American consumers continue to suffer from unacceptably high gas prices. Much of the blame rests with the activity of the OPEC oil cartel, a collection of oil producing nations that agree to supply limitations in order to raise the price for crude oil on the world market. These actions would be unquestionably violate antitrust law – indeed would constitute criminal acts of price fixing – if engaged in by private companies rather than foreign nations. For this reason, Senator DeWine and I, along with eleven other cosponsors, introduced a bill last Congress which would strip nations that engage in price fixing as part of an oil cartel of the protection of sovereign immunity and make them subject to U.S. antitrust law. This legislation passed the Judiciary Committee without dissent last year.**

Do you support the idea of holding foreign nations to account under U.S. antitrust law when they participate in a cartel to raise the price of oil?

If our bill was enacted into law, would you support bringing an antitrust action against members of the OPEC oil cartel?

Response: I understand that both the Department and the FTC have in the past noted the legal hurdles and uncertainties in bringing an antitrust suit against an organization comprised of

foreign nations. As far as I am aware, the Administration has not taken a position on the proposal you mention. Bringing an antitrust enforcement action against OPEC would certainly involve more than just the legal and policy considerations ordinarily involved in an antitrust enforcement action against private parties. There are inherent diplomatic and international comity considerations that would have to be taken into account. Therefore, even if it were clear that the antitrust laws applied here, the decision to bring an enforcement action could not be made by the Department of Justice alone. I would look forward if confirmed as Attorney General, to discuss this issue with you.

- 8. One of my priorities is to see that the Justice Department's Antitrust Division is strongly and vigorously enforcing our nation's antitrust laws to protect competition and consumers.**

The antitrust agencies have suffered three major defeats in merger cases in recent months. Most significantly, the Justice Department's challenge to Oracle's acquisition of Peoplesoft was rejected by a federal district court in California. The magazine "The Deal" has written that "political changes and the failed merger challenges [will] embolden companies to take a more aggressive posture with antitrust enforcers." This speculation raises serious concerns. During the last quarter of 2004, merger activity was at its highest level in more than four years.

If confirmed, what will be your approach to antitrust enforcement of mergers and acquisition, and can you assure us that, despite these recent developments, the Justice Department's scrutiny will not be lessened?

Response: Based on my current limited knowledge, I believe the Department's approach to merger enforcement, as set forth in the Merger Guidelines, is a sound one. I do not believe that the Department should decrease its scrutiny of mergers and acquisitions. Merger analysis is a very fact-specific evaluation and always depends on specific details about the transaction itself, the participants, and the markets involved. I can assure you that, if I am confirmed, the Department would continue to take its merger enforcement mission very seriously and examine significant mergers carefully as to all potential impacts on competition in any affected markets.

- 9. Another issue that has arisen in the last few years relates to international antitrust enforcement, especially European review of mergers and business activities involving American companies. This issue has grown increasingly important given the increasing globalization of the world's economy and the increasing numbers of American business transactions that affect the European and other world markets. There have been several prominent instances in the last four years of the EU's antitrust authorities reaching decisions involving American companies inconsistent with the conclusion reached by U.S. authorities. Prominent examples have included the EU's blocking of the GE-Honeywell merger after it was approved by the U.S. Justice Department, and last year's decision of the EU in the Microsoft case.**

Do you believe that European antitrust authorities are properly scrutinizing mergers and other antitrust issues involving American companies? And what can the Justice Department do to better harmonize its antitrust review with European and other international antitrust authorities?

Response: The underlying basis for antitrust action should be appropriate legal and economic analysis. Antitrust laws should promote competition; they should not be used to defend a country's own home companies or to try to exclude competitors from other nations. I understand that the Department does not believe that protectionism was a factor in the decisions you mention. The EU has embarked on an aggressive modernization program substantially to reform its competition enforcement system. Those changes should help improve EU enforcement efforts. Greater coordination and substantive and procedural convergence internationally on antitrust issues must continue to be a high priority for the Department. Along those lines, I understand that the Department has been working with many foreign antitrust agencies in a variety of contexts, including the International Competition Network and the Organization for Economic Cooperation and Development, to achieve international consensus on sound antitrust enforcement. The Department also works closely with foreign antitrust agencies, particularly the European Commission, in order to achieve the greatest possible coordination with them on particular matters. If confirmed, I would seek to ensure that the Department continues its efforts to engage foreign antitrust agencies at both the staff and policy levels to limit the risk of significantly divergent outcomes in particular cases.

Responses of Alberto R. Gonzales
Nominee to be Attorney General
to the Written Questions of Senator Patrick Leahy

Treatment of Detainees

1. You testified at the hearing, “It has always been the case that *everyone* should be—that *the military* would treat detainees humanely, consistent with the President’s February order” (emphasis added).

- (A) Does the President’s February 7, 2002, directive regarding humane treatment of detainees apply to the CIA or any other non-military personnel?

Response: No. By its terms, the February 7, 2002, directive “reaffirm[s] the order previously issued by the Secretary of Defense to the United States Armed Forces.” However, the CIA and other non-military personnel are still subject to the legal obligations of the United States under Article 16 of the Convention Against Torture regarding cruel, inhuman or degrading treatment, as subject to understandings and reservations by the Senate at the time of ratification.

- (B) Has the President ever directed or otherwise instructed the CIA and other non-military personnel to treat detainees humanely?

Response: The President has repeatedly condemned torture and made clear that the United States will not condone torture. The CIA and other non-military personnel are fully bound by this clear policy set forth by the President. All U.S. personnel are also bound to abide by the terms of the Convention Against Torture as subject to understandings and reservations attached by the Senate at the time of ratification.

- (C) Are the CIA and other non-military personnel under any legal obligation to treat captured al Qaeda and Taliban humanely and, if so, what is the source of that legal obligation?

Response: The CIA and other non-military personnel are fully bound by the prohibition on torture that the United States undertook in the Convention Against Torture and by the criminal prohibition on torture contained in 18 U.S.C. § 2340 & § 2340A. Depending on the circumstances, they are bound by other criminal statutes as well, such as those defining crimes in the special maritime and territorial jurisdiction of the United States, which generally includes overseas U.S. facilities (except for certain persons, particularly members of the armed forces and those employed by or accompanying them, who are subject to the United

States Code of Military Justice and the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261). *See* 18 U.S.C. § 7(9). Those statutes prohibit, for example, assault (18 U.S.C. § 113), maiming (18 U.S.C. § 114), manslaughter (18 U.S.C. § 1112), and murder (18 U.S.C. § 1111). These criminal prohibitions prevent abuse of detainees by the CIA and other non-military personnel. In fact, the Department of Justice is currently prosecuting a CIA contract employee for various charges of assault under 18 U.S.C. § 113. *See United States v. Passaro*, No. 5:04-CR-211-1 (E.D.N.C.).

2. **The President's February 7, 2002, directive stated that humane treatment should be accorded as a matter of values and policy, including to "those who are not legally entitled to such treatment." Is it your view that some detainees are not legally entitled even to humane treatment?**

Response: The President's February 7, 2002, directive addressed the legal status of al Qaeda and Taliban detainees under the Geneva Conventions. It did not address other legal obligations of the United States with respect to these detainees. As other members of the Administration and I have made clear repeatedly, the fact that al Qaeda and Taliban detainees do not have POW status under the GPW does not mean that there is no law governing their treatment. To the contrary, there are several sources of law that may apply, depending upon the precise circumstances. For example, the United States has committed under the CAT not to engage in torture. Congress embodied that commitment in a criminal statute, 18 U.S.C. §§ 2340 & 2340A, which prohibits torture outside the United States. (Conduct constituting torture within the United States is subject to the Constitution and various federal and state criminal laws.) In addition, for those held by the armed forces, the UCMJ applies to the members of the armed forces everywhere. It defines specific offenses, including maiming, assault, and cruelty or maltreatment, that would apply to conduct with respect to detainees. (It is my understanding that court martial proceedings under these provisions have been instituted in response to the abuses at Abu Ghraib in Iraq). Furthermore, various criminal statutes prohibiting, for example, assault (18 U.S.C. § 113), maiming (18 U.S.C. § 114), manslaughter (18 U.S.C. § 1112), and murder (18 U.S.C. § 1111), apply within the special maritime and territorial jurisdiction of the United States, which generally includes overseas U.S. facilities (except for certain persons, particularly the armed forces and those employed by or accompanying them, who are subject to other statutes). *See* 18 U.S.C. § 7(9). Also, under the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261, the same criminal prohibitions that apply in the special maritime and territorial jurisdiction of the United States are applied to persons employed by or accompanying the armed forces abroad.

3. **When you were asked at the hearing if other world leaders might have the authority to authorize the torture of American citizens if they deemed**

it necessary for their national security, you stated that you did not know what laws they might be bound by.

(A) Do you believe that neither the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment, nor the International Covenant on Civil and Political Rights, nor the Geneva Conventions, nor any other law absolutely prohibits other nations from torturing an American citizen, regardless of whether such nations deem it necessary for their national security?

Response: Thank you for the opportunity to clarify my answer. All parties to the CAT have committed not to engage in torture and to ensure that all acts of torture are offenses under their criminal laws. The CAT makes clear that “[n]o 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.” These provisions protect American citizens from torture. Depending on the circumstances, American citizens may also be protected from torture by other treaties as well as by the domestic laws of the country holding them. Finally, I would add that American soldiers are taught to fight in accordance with the laws of war. They do not intentionally target innocent civilians. Because they fight according to the rules, they are entitled to the protections of the rules. Our enemy does not fight according to the rules, as evidenced by the beheadings of Danny Pearl and Nick Berg.

(B) If you believe that such treaties and laws do absolutely prohibit the torture of Americans abroad under any and all circumstances, do you acknowledge that they bind the President of the United States as well?

Response: As a party to CAT, the United States is subject to the same obligations, subject of course to the understandings and reservations of the Senate at the time of ratification.

4. **On December 2, 2004, in a case reviewing the detention of foreigners as enemy combatants at Guantanamo Bay (*Boumediene v. Bush, et al.*, CV04-1166), U.S. District Court Judge Richard J. Leon asked if a detention would be illegal if it were based solely on evidence gathered through torture. According to the press, the government attorney responded that “nothing in the due process clause prohibits” military combatant status tribunals “from relying on it.” (A) Do you agree that evidence obtained through torture may be relied upon to detain enemy combatants, even when the torture-generated evidence is the *only* evidence against the detainee? (B) As Attorney General, would you support the position articulated by the government in the *Boumediene* case, regarding the use of evidence obtained through torture?**

Response: As the government attorney emphasized at the argument, the United States abhors torture, has committed, through the CAT, not to practice or condone it, and is investigating all such allegations for possible criminal prosecution or other discipline. Moreover, the attorney emphasized that while counsel for the detainees have sought to rely on allegations of mistreatment for various purposes, the specific allegations made by the detainees themselves before the Combatant Status Review Tribunals do not remotely resemble acts of "torture." The additional discussion reported in the press concerned the hypothetical question whether the military could rely on information of "questionable provenance," such as that obtained from a foreign source that is known to use questionable methods of gathering intelligence, to defend the country against an imminent attack (e.g., to intercept enemy aircraft or foil a bombing plot). The attorney answered that there was no provision of law that would prevent the military from using force – including the detention of would-be combatants – to block an imminent attack in this situation just because the attack was betrayed to the United States through information of this character. That answer, with which I agree, does not detract from the United States' longstanding opposition to torture of any kind or from its commitment to criminally punish acts of torture committed by U.S. persons or others within its jurisdiction.

5. Numerous press articles have discussed memoranda that authorize the transfer or rendition of terrorist suspects and other detainees to third nations or other secret locations for interrogation.

(A) On December 27, 2004, the *Washington Post* reported that the CIA has the authority to carry out renditions under a presidential directive. Did President Bush sign or renew a presidential directive or other document authorizing rendition? If so, please provide this document to the Committee. If not, under what authority is the CIA and/or other government entities transferring, or rendering, individuals.

Response: It is my understanding that the United States does not render individuals to countries where we believe it is more likely than not they will be tortured. A presidential directive to the CIA of the sort you describe would, if it exists, be subject to the oversight of the Intelligence Committees.

(B) On January 6, 2005, the *Washington Post* described an OLC memo dated March 13, 2002, titled "The President's Power as Commander-in-Chief to Transfer Captive Terrorists to the Control and Custody of Foreign Nations." The article states that you were involved in the development of the policy reflected in the memo. Will you provide us with a copy of that OLC memo? What did OLC conclude, and do you agree with its conclusion(s)?

Response: As a general matter, it is not the role of Counsel to the President to develop policy. The role of Counsel is to determine which legal issues should be examined by the Justice Department. OLC, as a general matter, provides the definitive legal views of the Executive Branch. The Executive Branch has a substantial need for confidentiality with respect to non-public OLC opinions, in order to protect the deliberative processes of the Executive Branch and the attorney-client relationship between Administration officials and OLC. The longstanding practice is that non-public OLC opinions are not disclosed outside the Executive Branch. Based on this policy, I respectfully must decline either to provide a copy of the opinion or to reveal its conclusions.

6. **As you noted in your testimony, several DOD investigations into U.S. detention policies are now complete. However, the narrow mandates and limited scope of these investigations prevented them from addressing critical issues. Key inquiries into issues like contractor abuses and “ghost detainees” were left unexplored. The on-going investigations are similarly constrained. In a letter to President Bush dated September 7, 2004, eight retired generals and admirals called for a comprehensive, independent commission to investigate U.S. detention and interrogation practices at Abu Ghraib and other U.S.-operated detention facilities. Do you support the creation of such a commission? If not, why not?**

Response: There have been a number of completed investigations into issues relating to detainee operations and interrogations. I understand that a number of investigations are still ongoing, and those should be allowed to proceed. Additionally, there have been numerous trials, courts martial, and administrative proceedings examining individual conduct relating to detainee operations and interrogations. These too should be allowed to proceed. Congress has held numerous hearings and received numerous briefings. Finally, I have read in press accounts that there are several ongoing criminal investigations and those should be allowed to proceed. Relatedly, wherever there is reason to believe that crimes may have been committed that are within the authority of the Department of Justice, you can be assured that if I am confirmed, the Department under my leadership would investigate and, where appropriate, prosecute such crimes. Because there is so much ongoing review, I do not currently have reason to believe that the proposed commission is advisable, but I reserve judgment on that question.

7. ***Newsweek* reported on January 8, 2005, that the Defense Department was considering a plan to recruit, train and deploy “death squads” as part of a decapitation operation targeting Iraqi insurgents. Under the proposed plan, insurgents could be assassinated or targeted in so-called “snatch” operations, in which the individuals are sent to secret facilities for interrogation. (A) Were you consulted about this plan? (B) Did the**

President make a determination of any kind authorizing assassinations in Iraq? (C) Was there an amendment or modification to Executive Order 12333 to implement this program or any other program authorizing assassinations?

Response: I do not recall being consulted about any such plan, nor am I aware of any Presidential determination of the sort described or modification of the Executive Order.

Geneva Conventions

8. You implied at the hearing that had the United States applied the Geneva Conventions to the conflict in Afghanistan, as Secretary Powell recommended, all persons detained there, including members of al Qaeda, would have been entitled to all the benefits of POW status.

(A) Do you acknowledge that had the United States applied Geneva broadly to the conflict, it could still have denied suspected terrorists the privileges of POW treatment, even while retaining its legal obligation to treat them humanely?

Response: Afghanistan as a nation state and signatory is a party to the Geneva Conventions, and the President determined that the Geneva Conventions apply to the United States' armed conflict with the Taliban. The President determined that members of the Taliban were not entitled to the privileges of POW status, in part because they did not fight in accordance with the laws of war. By contrast, al Qaeda plainly is not a party to those Conventions, and thus the United States has no legal obligation under the Geneva Conventions to al Qaeda or its terrorist fighters.

Al Qaeda operatives would not qualify for POW status even if the Geneva Conventions applied, however, because among other things they (like their Taliban allies) do not wear an insignia distinguishing them from the civilian population or conduct their operations in accordance with the laws of war.

(B) What advantage did we gain as a nation in not going through the process set forth by Article 5 of the Geneva Convention relative to the Treatment of Prisoners of War ("GPW") and U.S. military regulations for affording or denying POW status to individual detainees?

Response: The Geneva Conventions are treaties; they are contracts between nation-states. And as a general proposition, words and terms in contracts and agreements mean something. The provisions of a treaty are

carefully crafted by the Executive Branch. Treaties are signed by a President with a clear understanding of its terms and ratified by the Senate, subject to certain restrictions, understandings, and declarations. For these reasons I believe that in declaring our legal obligations under a treaty, one has to follow the words of the treaty, irrespective of possible conflicting views of an Executive Branch official, an international organization, or another country. The process set forth in article 5 applies only “[s]hould any doubt arise” as to whether captured belligerents satisfy the requirements set forth in article 4 for POW status. The President determined that there was no doubt as to the status of belligerents captured in Afghanistan because al Qaeda plainly was not a party to the Conventions and since the Taliban militia plainly did not satisfy the requirements for POW status because, among other things, they did not distinguish themselves from the civilian population or comply with the laws of war. It is widely recognized that if a group does not satisfy the requirements of article 4, its members are not qualified for POW status, and the United States has made group-based decisions as to POW status in other conflicts, including World War II and Vietnam. Accordingly, article 5 hearings to determine whether individual Taliban or al Qaeda belligerents were eligible for POW status would have been futile. Combatant Status Review Tribunals, the procedures of which are in many ways patterned after article 5 tribunals, are currently conducting individual reviews of the separate question of whether the al Qaeda and Taliban detainees at GTMO are enemy combatants subject to detention under the laws of war.

9. **What were the practical consequences of the President’s different determinations regarding the applicability of GPW to captured members of al Qaeda and the Taliban? Must al Qaeda and Taliban detainees be treated any differently as a result of the decision to apply GPW to the latter and not the former? Have they been treated any differently in fact?**

Response: Neither al Qaeda nor Taliban detainees are entitled to POW status. Both types of detainees are protected by the President’s February 7, 2002, directive, by the United States’ clear policy against torture, and by various other treaty and statutory provisions. See answers to Question 1 and 2, above.

10. **In your draft memo to the President dated January 25, 2002, you identified a number of “positive” ramifications of a presidential determination that GPW does not apply to the Taliban, including “[s]ubstantially reduces the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441).” Elaborating on this ramification, you wrote, “[I]t is difficult to predict the needs and circumstances that could arise in the course of the war on terrorism.” What did you mean by that? Please give examples of “needs and**

circumstances” that could, in your view, justify violations of the War Crimes Act by U.S. personnel.

Response: The document to which you refer is a draft that was leaked and never sent to the President in that form. I cannot envision needs or circumstances that would justify violations of the War Crimes Act by U.S. personnel.

11. Defense Secretary Rumsfeld and former CIA Director Tenet have admitted to hiding individuals from the Red Cross in Iraq.

(A) Would you agree that this practice violates GPW?

Response: It is my understanding that our legal obligations with respect to the ICRC are derived from the Geneva Conventions. As to specific individuals, my understanding is that there are investigations ongoing into these matters which presumably will determine whether there were any violations of the Geneva Conventions or any other law or treaty.

(B) Do you believe that those who willfully violate GPW should be punished for doing so?

Response: Yes. Pursuant to article 1 of GPW, the United States has undertaken “to respect and to ensure respect for the present Convention in all circumstances.” Pursuant to article 129, the United States has undertaken to bring persons who commit grave breaches of GPW “before its own courts” for prosecution, and to “take measures necessary for the suppression” of other violations of the Convention.

(C) When did you first learn that U.S. forces were hiding prisoners from the Red Cross? What did you do about it?

Response: I do not recall when I became aware of issues surrounding ICRC access to certain detainees, but I would have gained such awareness as an attendee at meetings of senior administration officials. I recall understanding that the Department of Defense was investigating the issue.

12. You testified that you relied upon OLC in advising the President because it had “the expertise, the institutional history, [and] the institutional knowledge about what the law is.” In January 2002, who did you think had greater expertise and experience in interpreting the Geneva Conventions: John Ashcroft and the lawyers at OLC, or Colin Powell and the lawyers at the State Department? Who did you rely upon more in advising the President regarding GPW’s applicability in Afghanistan?

Response: I considered the views of both the State and Justice Departments and, more importantly, made sure that the President was fully advised – both directly and indirectly – of the views of all relevant Departments and agencies. By statute and executive order, however, the Department of Justice is charged with responsibility for interpreting the law for the Executive Branch. I understand that the Attorney General, OLC, and the legal advisors at State and defense all agree that the President's decisions regarding the application of the Geneva Conventions are correct as a matter of law.

13. **In response to a question by Senator Coburn, you indicated that OLC had issued guidance with respect to whether non-Iraqis who came into Iraq as part of the insurgency would enjoy the protections of GPW. Will you provide us with a copy of that OLC guidance? What did OLC conclude and do you agree with its conclusion(s)?**

Response: The Executive Branch has a substantial need for confidentiality with respect to non-public OLC opinions, in order to protect the deliberative processes of the Executive Branch and the attorney-client relationship between Administration officials and OLC. The longstanding practice is that non-public OLC opinions are not disclosed outside the Executive Branch. Based on this policy, I respectfully must decline either to provide a copy of the opinion or to reveal its conclusions.

14. **During the hearing, you denied responsibility for the OLC opinion dated August 1, 2002, interpreting the anti-torture statute, stating repeatedly that it is OLC's responsibility to say what the law requires.**

- (A) **Would you agree that the President could have asked the Attorney General to reconsider that opinion if he disagreed with the legal analysis? Isn't that what eventually happened?**

Response: The President always has authority to ask the Attorney General to reconsider a legal opinion, although that is rarely done. As I testified before the Committee, there were discussions between my Office and the Department of Justice at the time about various aspects of the analysis in the August 1, 2002, memorandum. In the end, I accepted the final memorandum as representing the considered views of the Department of Justice. This approach is consistent with tradition and practice and consistent with the law. Finally, this approach is consistent with good government. It makes sense as a general matter to try to take the ultimate decision making about interpretation of law out of the politics of the White House and leave it to the professionals at the Justice Department.

- (B) **As White House Counsel, isn't it your job to question a legal analysis that you requested if you believe that it may be erroneous, especially**

if you know that the President or other senior Administration officials may rely upon it in formulating national policy?

Response: During the drafting of some legal opinions by the Department of Justice, Department lawyers have consulted me and my staff for our input regarding their analysis. We have provided that input where appropriate. By statute and regulation, the Department of Justice provides definitive legal advice for the Executive Branch.

Enemy Combatants and Military Commissions

15. **Please explain your assertion in a *New York Times* op-ed published November 30, 2001, that the President's Military Order "preserves judicial review in civilian courts." What civilian court judicial review did you believe the Order preserved? If your response is federal habeas corpus review, how do you reconcile your assertion with the Government's position in *Rasul* – rejected by the Supreme Court – that federal courts lacked jurisdiction to issue a writ of habeas corpus to individuals detained at Guantanamo Bay?**

Response: In the referenced op-ed, I was writing concerning the President's Military Order of November 13, 2001, authorizing the establishment of military commissions to try enemy combatants for violations of the laws of war. That Order contained language identical to language in an order issued by President Franklin D. Roosevelt on July 2, 1942, establishing a military commission, which was interpreted by the Supreme Court in *Ex parte Quirin*, 317 U.S. 1 (1942), to permit federal habeas corpus review for enemy combatants tried by military commission in the United States. The President's Order of November 13 thus preserved the same role for federal habeas corpus review outlined by the Supreme Court in *Quirin*. The *Rasul* case, by contrast, concerned the question whether the federal courts' statutory habeas jurisdiction could be invoked by aliens being detained as enemy combatants outside the United States. (Because the enemy combatants at issue in *Rasul* were not being tried under the President's Military Order, that Order was not involved in the case at all).

16. **In your remarks to the ABA in February 2004, you identified three available options for dealing with a U.S. citizen captured within the United States who may be an al Qaeda operative: "[C]riminal prosecution, detention as a material witness, and detention as an enemy combatant." (A) Under what circumstances do you think it is appropriate to detain suspected terrorists as material witnesses? Isn't the purpose of the material witness statute, 18 U.S.C. §3144, to compel testimony from reluctant witnesses? (B) Is it your view that Section 3144 may appropriately be used as a broad preventative detention law, to hold suspects indefinitely while investigating them, without filing charges? If**

not, would you support amending Section 3144 to limit the “reasonable period of time” that a witness may be detained to a time certain (e.g., no more than 3 days, consistent with the requirements of Section 3142(f)(2)) or, alternatively, to require that the witness’s testimony be taken, whether by grand jury or deposition, at the first available opportunity?

Response: It is my understanding that, as provided in the material witness statute, 18 U.S.C. 3144, a person, including a suspected terrorist, may be detained as a material witness when it can be shown that the person’s testimony is material to a criminal investigation or case and that it is impracticable to secure the presence of the person by subpoena.

Of course, the Government is not free to detain a person as a material witness simply because it believes that the circumstances fall within the reach of the statute. On the contrary, the Government must marshal the facts in written pleadings that then are submitted to a federal judge for review. Only if the judge agrees that the requirements of the statute have been met may the Government arrest and detain a person as a material witness.

Under such circumstances, the purpose of the material witness statute is not to compel the testimony of a person. Rather, it is to ensure the presence of the person so the Government has an opportunity to attempt to obtain and preserve the person’s testimony either voluntarily or through a separate compulsion order.

The material witness statute should not be used as a broad preventative detention law, to hold suspects indefinitely while investigating them without filing charges. Nevertheless, the fact that the person who is detained as a material witness also is a suspect in the underlying criminal investigation should not prevent the Government from attempting to obtain the person’s testimony through lawful means.

With respect to any proposed changes to the material witness statute, I would have to consult with the experts in the Department of Justice to assess the impact the amendments would have on the administration of justice.

Acree v. Republic of Iraq

17. **I am sure you are aware that the Senate has twice unanimously requested the Administration to sit down and negotiate with 17 POWs who were brutally tortured by Saddam Hussein during the first Gulf War (see S.Amdt. 1836 to S.1689, and S.Amdt. 2194 to H.R.2861). I, along with many Americans, continue to be dismayed that this Administration has led the fight against their effort in court (*Acree v. Republic of Iraq*).**

(A) As Attorney General will you pledge to at least meet with these brave men so that we can honor their commitment to this country and better hold Iraq accountable for its actions?

Response: If I am confirmed as Attorney General, I assure you that I will give fresh and full consideration to meeting with any individuals or groups who wish to meet with me. Beyond providing that assurance, I cannot commit to any particular meetings at this time.

(B) Do you support the use of civil litigation against terror states as provided by Congress in its 1996 anti-terror legislation?

Response: Congress' 1996 enactment of 28 U.S.C. § 1605(a)(7) eliminates the immunity from suit of foreign states that sponsor terrorism. By imposing liability on foreign states for injuries they cause through terrorism, Congress has not only given victims of terrorism an opportunity to obtain compensation for their injuries, it has given rogue states an incentive to refrain from supporting terrorism. Thus, civil litigation that is properly brought under that provision is an important tool in the government's efforts to combat global terrorism. If I am confirmed as Attorney General, I will continue the government's policy of supporting civil litigation that is properly brought under section 1605(a)(7), and I will also continue to defend the Nation's vital foreign policy interests, consistent with the proper interpretation of applicable legislation.

(C) Article 131 of the Third Geneva Convention provides that no state party – including the United States – can “absolve” a torturing state of “any liability” for the torture of prisoners of war. As Attorney General, will you fully support our national obligation under this provision to hold states that torture American service personnel accountable for their torture of Americans?

Response: If confirmed, I would fully support our Nation's interest in ensuring that foreign states live up to their obligations under the Geneva Conventions. Specifically, I believe it is of the utmost importance to hold accountable states that torture our American service personnel, in a manner that is consistent with applicable laws, treaties, and executive orders.

Executive Power

18. **The Administration sought to have included in the recently-passed Intelligence Reform and Terrorism Prevention Act a provision stating that all of the oversight provisions for covert actions and other intelligence activities in Title V of the National Security Act of 1947 were applicable only to the extent that they did not interfere with the**

President’s constitutional authority for national defense and foreign affairs. Do you view any of these oversight provisions, such as requiring that Congress be notified of covert actions, as unconstitutional? As Attorney General, would you ever advise the President that he is not bound by any of the requirements in Title V of the National Security Act?

Response: I would be reticent to conclude that statutes passed by Congress – including statutes containing the type of provisions to which you refer – are unconstitutional, and would make every reasonable effort if I am confirmed as Attorney General to uphold and defend those statutes. As I discussed at the hearing on January 6, whether the application of a given statute in particular, extraordinary circumstances might unduly interfere with the President’s constitutional authorities is a question that should only be approached with the greatest care and caution.

Role of OLC

19. I attach to these questions a memorandum dated December 21, 2004, prepared by former senior Justice Department lawyers, setting forth ten guiding principles for the Office of Legal Counsel (“OLC”).

(A) Do you agree with the principle that states: “When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration’s pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients’ desired actions, inadequately promotes the President’s constitutional obligation to ensure the legality of executive action.”

Response: I agree that OLC lawyers—like all government lawyers—should always provide an accurate and honest appraisal of the law, even if that will constrain the Administration’s pursuit of desired policies.

(B) Do you agree with the principle that states: “OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.”

Response: I agree that absent legitimate reasons for delay or nondisclosure, OLC should publicly disclose any written legal opinions of general interest or applicability in a timely manner, with the consent of its client agencies. I understand that OLC has a longstanding and established process for the review and publication of its opinions—a process that was in place when Walter Dellinger and Randolph Moss, two of the signers of the quoted memorandum, headed the office during the Clinton Administration—and I commit that, if confirmed, I would keep that process in place.

Legal Experience

20. **In your questionnaire responses, you say that with one exception, during your years working as counsel to then-Governor Bush and now as White House Counsel for President Bush, you did not personally appear in court. What was that one exception? Please describe in detail the subject and substance of that court appearance. Why did you feel it was necessary to handle this particular matter personally?**

Response: I appeared in Texas state court in 1997 in connection with a jury summons received by Governor Bush which potentially implicated his official duties. The Governor asked me to accompany him as he went to court prepared to serve on a jury. During my appearance in court, I recall that I observed the defense counsel make a motion to strike the Governor from the jury panel, to which the prosecutor did not object. I was asked by the Judge whether the Governor had any views on this and recall stating that he did not.

Death Penalty

21. **In 2001, Attorney General Ashcroft changed the Department's death penalty protocol to require that U.S. Attorneys clear all plea bargains with him.**

- (A) **As Attorney General, would you continue that policy, or would you restore the former policy whereby U.S. Attorneys had autonomy in this area?**

Response: I believe the views of the U.S. Attorney are very important in a capital case. But we have an obligation to ensure that the application of the death penalty is fair and consistent no matter who the defendant is or where the crime occurs. This requires some type of central decision maker, such as the Attorney General. I will carefully study this issue if I am confirmed. I can say that, based on my limited knowledge, I support the basic goals of the policy instituted by Attorney General Ashcroft, which furthers nationwide consistency in decisions to seek the death penalty and take into account the views of the U.S. Attorney.

- (B) **If you plan to continue the policy, how would you decide whether to accept a U.S. Attorney's recommendation against the death penalty in cases where the defendant agreed to plead guilty? To what extent would you defer to the U.S. Attorney's recommendation?**

Response: Although I will have to study this issue more carefully if I am confirmed, I believe the initial issue would be whether the case was one in which it would be appropriate to seek the death penalty in the first place. Other considerations would include the relative culpability of the defendant who would plead guilty to the capital offense as compared to the remaining capital defendants in the case, the terms of the plea agreement, whether the agreement calls for the defendant's cooperation, and the need for that cooperation in prosecuting the remaining defendants.

The U.S. Attorney's recommendation would be given serious consideration as well.

(C) What if the defendant also agreed to cooperate with the government? Would your policy be any different?

Response: Please see my response to subsection (B), above.

22. **Attorney General Ashcroft also changed the Department's death penalty protocol with respect to cases in which concurrent jurisdiction exists with a State or local government. Before 2001, the protocol protected the interests of non-death penalty states like Vermont by ensuring that the absence of a state death penalty statute did not by itself establish a sufficient federal interest for capital prosecution.**

(A) In deciding whether to authorize a U.S. Attorney to seek the death penalty, what consideration if any will you give to the fact that the offense occurred in a state that does not have capital punishment?

Response: Once there has been a decision to exercise federal jurisdiction, death penalty-eligible cases should be treated consistently, irrespective of the state in which the crime occurred.

(B) Would you consider restoring the pre-2001 version of section 9-10.070 of the U.S. Attorney's Manual? If not, why not?

Responses: I am not familiar with the details of the regulations to which you refer, but I will carefully consider this issue if I am confirmed.

23. **As General Counsel to then-Governor Bush, you exchanged correspondence with the U.S. State Department in June 1997, in connection with the impending execution of Mexican national Irineo Tristan Montoya. You informed the State Department that local officials in Brownsville, Texas, never notified Montoya of his rights under the Vienna Convention on Consular Rights; that at the time of Montoya's arrest in 1985, there were no guidelines in place in Brownsville relative to the Convention's consular notice requirements; and that there were still no guidelines in place. You added that approximately 1,200 to 1,500 Mexican nationals were arrested in the Brownsville area every month, and noted the "serious implications associated with concluding that a violation of ... the Vienna Convention alone could serve as a basis to reverse or remand a criminal conviction," as it could call into question the arrests and convictions of many other Mexican nationals. Upon learning of the systematic failure of Texas law enforcement authorities to comply with the Vienna Convention, did you advise the Governor to take steps to correct the problem? If not, why not? If so, what steps did you propose, and were those steps taken?**

Response: In 1997, the State Department received a diplomatic note from the Government of Mexico concerning whether its national Irineo Montoya was informed of his right under the Convention to have a Mexican consular official notified of his detention. The State Department wrote to Governor

Bush seeking “a proper investigation to be conducted with respect to the allegations that . . . authorities breached the consular notification obligation,” and requesting that the response “address the consequences and materiality of any breach.”

On behalf of the Governor, I provided a detailed factual recitation and timeline of the Montoya matter in response to State’s request. I also advised the State Department that Governor Bush was generally familiar with the Convention’s requirement, aware of the circumstances surrounding Montoya’s arrest and conviction, and had been advised that Montoya did not receive consular notice. On behalf of the Governor, I wrote to “assure [the State Department] that these matters will be considered in his decision regarding clemency.” The Governor was apprised of and considered the dispute involving consular notification when he made his clemency decision in this matter.

The Acting Legal Adviser at the State Department concluded an inquiry into the matter with a letter to Governor Bush expressing his appreciation for the assurances he had received and his concurrence that the issue should be considered in the clemency decision. He also noted that the State Department “appreciate[d] your cooperation in this case.” As I recall, the State Department assumed responsibility to take steps to correct the problem.

24. **As General Counsel to then-Governor Bush you helped devise a two-part standard for considering clemency in capital murder cases. Under this standard, Governor Bush would consider clemency only where there was evidence of innocence or evidence that the defendant had not had full access to the courts. (A) Is this the standard that you would use as Attorney General in advising the President on matters of clemency? (B) Under what circumstances would you say that a defendant has not had full access to the courts? For example, has a defendant had full access to the courts if his lawyer missed a filing deadline that caused the courts to dismiss his claims on procedural grounds, without considering the merits? (C) According to the U.S. Attorney’s Manual, appropriate grounds for considering clemency have traditionally included “disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner.” Would you agree that these and other equitable factors may provide a basis for recommending clemency, regardless of any doubts about the defendant’s guilt or the fairness of the legal proceedings in the case?**

Response: How the President chooses to execute his constitutional authority to grant clemency is a matter for the President to determine in his discretion. I have had not direction from the President regarding his expectations of me as Attorney General regarding this issue.

Drug Policy/Mandatory Minimums

25. Under current law, someone who is apprehended with 5 grams of crack cocaine faces the same five-year mandatory minimum sentence as someone with 500 grams of powder cocaine. This 100:1 disparity in threshold quantity creates a gulf between sentences for powder and crack cocaine offenses. Two days before taking office in 2001, President Bush said we should address the cocaine sentencing issue “by making sure the powder cocaine and the crack cocaine sentences are the same.” He also said, “I don’t believe we ought to be discriminatory.” The Justice Department, however, took the position once President Bush was in office that current criminal penalties for crack offenses are appropriate, even as the US Sentencing Commission unanimously recommended substantial changes to reduce the disparity. (A) What changes do you believe should be made to our cocaine sentencing laws, if any? (B) Do you believe that current penalties for powder cocaine offenses are inadequate?

Response: I understand that after careful study and consultation, the Department testified before the United States Sentencing Commission in 2002 that current the federal sentencing policy established by Congress for crack cocaine trafficking is appropriate and the statutory differential between crack and powder cocaine is justified. As Deputy Attorney Thompson explained in his testimony, research shows that crack is a more addictive and dangerous substance and that trafficking in crack is more closely associated with violence and homicide trends than is trafficking in powder cocaine. The higher penalties for crack cocaine reflect the greater harm from crack to users and to the communities in which it is most often trafficked and sold. I have not myself studied the issue carefully. I understand that Congress has previously considered legislation on this subject. As I stated during the hearing in response to Senator Sessions, I would be pleased to look further at this issue if confirmed.

26. As you know, the Supreme Court recently heard arguments in a case challenging the authority of the Federal government to regulate marijuana grown to be used for medicinal purposes. This case stems from the repeated attempts by the Department of Justice to arrest and prosecute the users and distributors of medical marijuana in states that have chosen to legalize the practice.

(A) Do you believe that the Drug Enforcement Administration should use its limited resources to mount raids targeting the medicinal use of marijuana over the objections of local law enforcement officials?

Response: If confirmed as Attorney General, I would be mindful of the need to maintain effective, cooperative working relationships with our state and local counterparts and strive to continue to work closely with them in all types of investigations, including those involving marijuana.

Marijuana is the most abused drug in the United States. As a Schedule I controlled substance under the Controlled Substances Act, marijuana has no currently accepted medical use in the United States and may not be used outside of FDA-approved, DEA registered research. Thus, there is no basis under federal law to distinguish “medical” marijuana traffickers from marijuana traffickers in general. If confirmed as Attorney General, I would ensure that the Department of Justice and DEA are committed to the uniform enforcement of the federal drug laws of our nation.

(B) Will you pledge at least to conduct a review of the DEA’s medical marijuana enforcement practices and consider whether any changes would be appropriate?

Response: If confirmed, and the circumstances warrant, I would not hesitate to reevaluate these practices.

Immigration

27. **The asylum case of Rodi Alvarado, known as *Matter of R-A-*, is today on the desk of the Attorney General. Ms. Alvarado fled brutal spousal abuse in Guatemala, a country where she was unable to gain the protection of the authorities. The issue presented by her asylum claim is whether the United States will offer asylum protection to women fleeing severe human rights violations in their home countries. It will affect not only Ms. Alvarado and other victims of spousal abuse, but also women and girls fleeing trafficking for prostitution, sexual slavery, ‘honor’ killings and other serious harms. The Department of Homeland Security has filed a brief with the Attorney General asking him to support its position that Ms. Alvarado is a refugee, and support for her case comes from such diverse organizations as Concerned Women for America, Human Rights First and the Anti-Defamation League. I and many other Senators have written to urge the current Attorney General to concur in the DHS position – including colleagues across the aisle such as Senators DeWine, Collins and Brownback. (A) Are you aware of the Alvarado case? Do you believe that victims of domestic violence are eligible for asylum under U.S. law? (B) Will you pledge to work closely with DHS to finalize regulations that have been in the works now for years to ensure that women who flee from domestic abuse can, in appropriate cases, receive asylum in the United States?**

Response: As the question correctly states, this matter is currently pending before the Attorney General for decision. Accordingly, it would be inappropriate for me to comment on the merits of the case. I commit to working closely with the Department of Homeland Security to finalize regulations concerning this serious issue if I am confirmed.

28. **If confirmed as Attorney General, you would oversee the Executive Office of Immigration Review, including the Board of Immigration Appeals and the immigration courts. One of the highly controversial policies that the**

Department of Justice used for the “special interest” immigration detainees who were detained in the wake of the 9/11 attacks involved overriding judicial decisions to release detainees on bond after an individual hearing. This policy remains in place in the form of a rule authorizing the automatic stay of decisions by immigration judges to release an individual detainee. The policy gives the Department veto power over the decisions of judges who have heard individualized evidence before arriving at their decision. The Department’s own Inspector General issued a highly critical 200-page report on the Department’s treatment of these detainees. Will you keep this flawed “automatic stay” rule in place? If so, how do you justify overriding an immigration judge’s decision that is based on individualized evidence, and can you explain why you believe the current standard for release on bond in immigration proceedings – risk of flight or danger to the community – would not be adequate to address concerns about the detention of a suspected terrorist who is charged with immigration violations?

Response: I do intend to review the adjudicatory processes for the immigration judges and the Board of Immigration Appeals, including the detention issues you mention. Although the Homeland Security Act transferred substantial authority to the Secretary of Homeland Security for immigration applications and enforcement, the Attorney General remains responsible for adjudication of proceedings before the immigration judges and the BIA. Given the very large volume of immigration proceedings, the significant consequences for the aliens in those proceedings, and the public interest in effective administration of the immigration laws, it is important to ensure that the adjudicatory processes are working fairly, effectively, and efficiently.

My understanding is that the procedures for “special interest” cases adopted in the immediate aftermath of the attacks of September 11, 2001, which were the subject of the Inspector General report that you mention regarding the treatment of detainees after 9/11, are not the procedures involved in the “automatic stay rule.” Although I have not had the opportunity to familiarize myself with the details of immigration procedures, I look forward to looking into both of these issues if I am confirmed.

Civil Rights

- 29. The nonpartisan Transactional Records Access Clearinghouse at Syracuse University found last November that the number of defendants prosecuted for criminal violations of our civil rights laws dropped from 127 in FY 2000 to only 84 in FY 2003. Meanwhile, civil suits dropped from 740 in calendar year 2001 to 644 in 2002 to 576 in 2003. These reductions occurred even as complaints to DOJ about civil rights violations remained constant. What, if anything, would you do if**

confirmed to increase the number of civil rights cases brought by the Department?

Response: It is my understanding that the Department previously issued a response to the report demonstrating that its figures are inaccurate and that the Department this past year brought more criminal civil rights charges than in any prior year. That said, there is always room for improvement, and I am committed to vigorously enforcing the criminal civil rights statutes.

30. **National Public Radio reported last November on the physical and mental abuse of DHS immigration detainees housed at two state-run facilities in New Jersey, including the use of dogs for intimidation. The Justice Department is authorized under the Civil Rights of Institutionalized Persons Act to investigate and, where appropriate, prosecute such cases. (A) What is the appropriate role for DOJ to play in investigating allegations of abuse of federal detainees being held in state detention facilities? (B) Would you pledge to look into this matter, and ensure that DOJ either opens an investigation or coordinates with state authorities to ensure that appropriate charges are brought against anyone determined to have violated the detainees' rights?**

Response: As I am not presently with the Department I do not know what, if any, allegations the Department has received. Speaking more generally, the Civil Rights of Institutionalized Persons Act, or "CRIPA," authorizes the Attorney General to investigate patterns or practices by a state or state employee depriving persons residing in a state institution of federally protected rights. Denying persons committed to state institutions of their federal rights is wrong, and if confirmed as Attorney General I would ensure that this continues to be an enforcement priority.

31. **Ralph Boyd, who was the head of the Justice Department's Civil Rights Division for two years under Attorney General Ashcroft, stated early in his tenure that the Civil Rights Division would not bring disparate impact cases unless it had "additional evidence that is indicative of—or reflects disparate treatment, that is to say: intentional discrimination." This is contrary to the statutory language of Title VII, which says that disparate impact practices can be illegal even if they are not intentionally discriminatory. The effects of Mr. Boyd's hostility towards the disparate impact test were visible in the Department's record: during President Bush's entire first term the DOJ brought only one disparate impact Title VII case. This failure to enforce the law gives employers the wrong message, and lets them off the hook for an entire class of discriminatory actions. (A) Do you agree with Mr. Boyd that, despite the statutory language of Title VII, disparate impact cases should not be brought unless there is also "additional evidence" of "intentional discrimination?" (B) Can you assure me that as Attorney General you would vigorously pursue disparate impact cases?**

Response: I am not independently familiar with Mr. Boyd's comments or the context in which they were given, *i.e.*, whether he was speaking about Title VII or some other statute. With regard to Title VII, however, it is established that Title VII prohibits practices that, while not intentionally discriminatory, have a disparate impact on members of particular racial groups. If confirmed, I would enforce Title VII, and all other Civil Rights Statutes, as written.

32. **Do you believe that private employers with 15 or more employees – who are already prohibited from discriminating in employment decisions based on race or gender – should also be prohibited from discriminating against employees based on their sexual orientation?**

Response: It is the Department's policy not to discriminate in hiring on the basis of sexual orientation. If confirmed, I will continue that policy. To the extent that this question regards possible future legislative expansion of employment protections to sexual orientation, however, I do not believe the Administration has taken a position on this issue.

FBI Investigations

33. **There is deep concern that the Justice Department has cast an overly broad net in investigating potential terrorist leads, resulting in home raids and individual detentions that do not produce any evidence of wrong-doing, terrorist connection, or prosecution. In some cases the negative impact on these targeted individuals continues long after the investigation ends. The mere fact that they were once investigated becomes a basis for future denial of liberties – for example, being detained or delayed when they travel, ostracized by their communities, or fired from their jobs. I know of one person who – despite being a top municipal health official who has worked with the Centers for Disease Control and the U.S. military – has been routinely escorted from the plane at the end of international flights, which naturally causes him great embarrassment, and detained until calls are placed to FBI agents who then verify that he is not a terrorist suspect and free to go. What will you do to put a system in place for officially clearing, in a timely manner, individuals who have no proven terrorist connection and are no longer under investigation –and I do not mean the Department simply saying “he’s under investigation” year after year without ever producing any evidence – so their liberties are not indefinitely impinged for no legitimate reason?**

Response: I fully agree that we must ensure that those who pose no threat to our national security are not inconvenienced or embarrassed by erroneous identifications and, if confirmed, I would ensure that proper emphasis is placed on the institution of measures that prevent such errors. While I believe that the maintenance of a consolidated terrorist watchlist is essential to our protection against terrorist threats, and I applaud the efforts of the Terrorist Screening Center (TSC) to create and maintain such a list, if confirmed I would inquire into the TSC's plans for minimizing mistakes and correcting

those that may occur. It has been my understanding that the Terrorist Screening Database (TSDB) was developed to consolidate into one unclassified “law enforcement sensitive” database the disparate information regarding known and suspected terrorists held by multiple agencies. This consolidation was designed to ensure the appropriate centralization of terrorism-related information and to enable the federal government to address the complaints of those who believe they have been wrongly placed on this watchlist. If that process needs to be reviewed, or if additional authorities, capabilities, or resources are needed in order to ensure that the TSDB is used in a way that protects both our security and our liberties, if confirmed I would be pleased to work with this Committee to ensure that those needs are met.

Juvenile Justice

- 34. If confirmed, what will you do to support, and evaluate the effectiveness of enforcing, the four core protections Congress has provided for youth in the juvenile justice system: (a) keeping youth under juvenile court jurisdiction out of adult jails; (b) sight and sound separation from adult inmates for whatever brief period of time youth may be held there; (c) not incarcerating youth for status offenses such as truancy and running away; and (d) addressing the disproportionate contact of minority youth with the juvenile justice system?**

Response: I fully support the four core requirements set forth by Congress under the JJDP act. If confirmed, I would ensure that the Office of Juvenile Justice and Delinquency Prevention engages appropriate state agencies to ensure that all state juvenile justice systems meet these standards. Where necessary, I would work with the Office of Juvenile Justice and Delinquency Prevention to provide relevant analysis of compliance issues raised by the states and to provide appropriate technical assistance to help states resolve compliance issues.

- 35. Last November, an independent panel convened by the National Institute of Health found that group detention centers, boot camps, and other “get tough” programs are not only ineffective, but may actually be counter-productive. Last week, an Arizona boot camp director was convicted of second degree manslaughter for the death of 14 year-old Anthony Haynes. Meanwhile, the Justice Department continues to provide federal funds to juvenile residential programs. (A) Do you agree that no federal funds should be expended for the placement of juveniles in boot camps and other facilities where they are subjected to physical, mental, or sexual abuse? (B) If so, what steps would you be prepared to institute to ensure that no such expenditures occur?**

Response: While I cannot comment on any particular study, I am committed to the principle that federal program funding must be used to identify and promote only the best, most effective, research-proven plans of rehabilitation

and treatment. To that end, if confirmed, I would insist on a juvenile justice research agenda designed to accomplish those goals. In addition, if confirmed I would be committed to preventing the physical, mental, or sexual abuse of any child, including those placed in boot camps.

36. **While many juvenile residential facilities do receive federal funds, most do not. Tragically, many of these facilities have subjected juveniles to beatings, abusive treatment and other acts at the hands of ill-trained and poorly supervised staff. I am aware that Congressman George Miller wrote Attorney General Ashcroft urging a federal investigation into such facilities. The Attorney General denied the request on the ground that Department of Justice lacked authority to investigate “purely privately-owned facilities.” (A) What is the appropriate role of the Justice Department in protecting American children in such situations? (B) If you believe that further authority is required by the Department of Justice in order to intervene in such circumstances, would you support such legislation?**

Response: The Justice Department should engage state, local, and private directors of juvenile facilities positively on these issues. If confirmed, I would work with the Office of Juvenile Justice and Delinquency Prevention to ensure that these best practices are actively promoted and fully supported. In addition, it is my understanding that cases that the Department is unable to resolve inappropriate or abusive practices through positive engagement may be referred to the Civil Rights division, or in some cases, the Criminal Division, for action.

Reproductive Rights

37. **With regard to *Roe v. Wade*, you testified at the hearing, “As far as I’m concerned, it is the law of the land, and I will enforce it.” (A) Can you identify a single nominee for a judicial vacancy that you recommended to President Bush who was pro-choice? (B) Would you ever support such a nomination as Attorney General? (C) Do you believe *Roe v. Wade* was correctly decided? (D) Will the Justice Department under your leadership urge the Supreme Court to overturn *Roe*?**

Response: (A) In making judicial nominations, the President does not employ a litmus test on any specific issue, including abortion, and no inquiry is made concerning a prospective nominee’s views on this issue. Consequently, I do not know whether any of the President’s nominees are “pro-choice,” however that term is defined.

(B) I believe that the President’s determination not to employ litmus tests is appropriate. Accordingly, as Attorney General, I would support the nomination of individuals who have integrity, have a high level of

competence, and share the President's general philosophy with regard to the proper role of judges.

(C) The Supreme Court's decisions in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* are the law of the land. If confirmed as Attorney General, I would enforce the law on this and other issues without regard to my personal views.

(D) If confirmed as Attorney General, I would seek diligently to uphold my oath of office to protect and defend the Constitution and to carry out the Executive Branch's constitutional responsibility to "take Care that the Laws be faithfully executed." I pledge to do so irrespective of my personal views. That is the proper role of the Attorney General and one that I would seek to uphold. If there is a reasonable, good-faith basis for the Department of Justice to seek to uphold a law, then I would do as my predecessors have done and seek to uphold the law. In every instance, I would approach the issue with an open mind and work hard to understand fully all sides of the issue. I would review the Constitution, the statutes, and the legislative intent, and seek advice from the Department's lawyers.

Freedom of Information Act

38. **In October 2001, Attorney General Ashcroft reversed the prior Attorney General's Freedom of Information Act (FOIA) policy, which had directed that, where discretion allowed, agencies should make information available under FOIA unless disclosure would cause harm. Attorney General Ashcroft asserted the opposite position, informing agencies that the Department of Justice would defend the use of FOIA exemptions resulting in the greater withholding of unclassified documents. If confirmed as Attorney General, will you order a reverse in the Ashcroft FOIA policy and revert to a policy presumption based upon disclosure?**

Response: Open government is an important part of a free society. I have not had the opportunity to review Attorney General Ashcroft's policy position with respect to FOIA or the effects of this policy, but if confirmed, I would undertake an examination of the Department's policies and practices concerning FOIA disclosures.

39. **In the summer of 2002, Senators Bennett, Levin, and I agreed on language governing the protection of Critical Infrastructure Information ("CII"). That language was endorsed by the White House, and Senator Bennett stated at the time that industry groups had agreed that the compromise language would allow them to share information with the government without fear of the information being released to competitors or to other agencies that might accidentally release it. In the fall of 2002, however, an extremely broad exemption to FOIA for CII was quietly tucked into the Homeland Security Act, resulting in the greatest single**

rollback of FOIA in history. In the 108th Congress, with several other senators, I introduced S.609, the Restoration of Freedom of Information Act. The text of the bill is identical to the text of the compromise reached on CII in the summer of 2002. I will introduce an identical bill in the 109th Congress. If confirmed as Attorney General, will you support this legislation?

Response: This is not an issue with which I have great familiarity. I do, however, recognize the importance of both safeguarding critical infrastructure information that is submitted to the federal government by private industry so that the government may study that information in order to reduce our nation's vulnerability to acts of terrorism, while at the same time protecting the openness and transparency of government. Consistent with these values, it is my understanding that the Department of Homeland Security issued its interim rule on February 20, 2004, implementing the Critical Infrastructure Information Act of 2002, which was contained in the Homeland Security Act of 2002, and sought additional public comment on those regulations at this time. I believe that it would be wise both to gain more experience with the operation of these new regulations and to take into consideration the comments of both industry and concerned citizens before making changes to the Act. If confirmed as Attorney General, I would look forward to reviewing your legislation and working with you on this critical issue.

Privacy

40. The Consolidated Appropriations Act of 2005 requires that “[e]ach agency shall have a Chief Privacy Officer to assume primary responsibility for privacy and data protection policy,” including “assuring that the use of technologies sustain, and do not erode, privacy protections relating to the use, collection and disclosure of information in an identifiable form” and annual reporting to Congress. In addition, the recently-passed Intelligence Reform and Terrorism Prevention Act, included a sense of Congress that each Department with law enforcement or antiterrorism functions should create a privacy and civil liberties officer.

(A) Will you include as one of your top priorities the designation of a Chief Privacy Officer (CPO) for the Department of Justice, in keeping with the responsibilities and requirements outlined in these legislative actions?

Response: Yes. Protecting the privacy rights and civil liberties of our citizens is a top priority of this Administration, and I assure you it would remain so in the Department of Justice if I am confirmed. Given the magnitude of the responsibilities with which it is entrusted, the Department must constantly be at the forefront of privacy and civil liberties issues, and if confirmed would designate a Chief Privacy Officer (CPO) who will be charged with meeting that goal.

(B) Do you agree that the Department's responsibilities with respect to protecting privacy encompass, but extend beyond, implementation of the Privacy Act of 1974, and will you support the CPO in carrying out those responsibilities, including by involving the CPO in the deliberations and decision-making regarding Department policies and practices that will impact privacy?

Response: Yes. I understand the United States Government's privacy and civil liberties responsibilities extend beyond its technical compliance with the Privacy Act. It is my understanding that currently privacy and civil liberties issues are considered at the highest levels of the Department. The Department has a privacy officer in the Office of the Deputy Attorney General, and the President's Board on Safeguarding Americans' Civil Liberties, which consists of senior officials and privacy experts within the Executive Branch, is chaired by the Deputy Attorney General. Once he or she is designated, I would expect the new CPO to play a vital role in helping the Department carry out its mission.

CALEA

41. **In 1994 Congress passed the Communications Assistance for Law Enforcement Act (CALEA) to require telephone companies to design their networks in a way that ensured the technical feasibility of carrying out the wiretap authority Congress granted to law enforcement. Last year, the FBI petitioned the FCC to apply CALEA broadly to information services providers, arguing that such an application was necessary to ensure the FBI's ability to intercept Internet communications. (A) Do you agree that CALEA should not be applied in a manner that allows law enforcement to exceed the wiretap authority granted by Congress, and that, if any additional wiretap authority is necessary, the legislative process should be used to extend that authority and oversee its use? (B) Do you agree that to the extent Congress considers the application of CALEA (or a similar statute) to the Internet, Congress should be very careful to ensure that technical innovation is allowed to continue on the Internet, and that it is important to protect our country's leadership position in the development of new Internet technology?**

Response: I understand that CALEA was enacted in response to the threat and challenges posed to law enforcement by the then nascent cellular technology. Our laws have long provided law enforcement with the authority to intercept communications so long as a court of competent jurisdiction finds that law enforcement has met the statutory prerequisites to such an interception. These laws recognize the critical importance of lawful interception to public safety and national security. As communications technology has become more complex, the challenges for law enforcement in effectuating a lawfully obtained court order for interception have multiplied significantly – sometimes to the point of impeding the timely interception authorized by the courts. Thus, as I understand it, CALEA is focused on preserving law

enforcement's capability to carry out lawful court orders for interception in the face of increasingly sophisticated communications technologies.

It is my understanding that CALEA was enacted in direct response to difficulties law enforcement labored under at the time. Congress concluded that the technology posing challenges to law enforcement in 1993 and 1994 (cellular technology) would be eclipsed by other technology. Without the ability to predict the precise nature of the technologies to come or, importantly, the nature of the challenges to law enforcement posed by those technologies, Congress wisely chose for CALEA to be "technology-neutral."

According to the Department's petition before the FCC, the communications technology referred to as "voice over Internet protocol" (VOIP) poses significant challenges and, in some cases, complete impediments, to law enforcement's ability to capture the content and call identify information processed through those channels – despite the existence of a lawful court order authorizing the interception.

As you note, the Department of Justice filed a petition with the FCC asking the FCC to rule whether CALEA applies to VOIP communications technology. The Commission has tentatively concluded in a notice of proposed rulemaking that broadband access and *certain types of VOIP* are covered by CALEA's provisions. See Communications Assistance for Law Enforcement Act and Broadband Access and Services, 19 F.C.C.R. 15,676 (2004) (CALEA NPRM). The FCC has sought public comment on its tentative conclusions and, taking into account those public comments, will issue a final rulemaking.

In response to your specific questions:

(A) Do you agree that CALEA should not be applied in a manner that allows law enforcement to exceed the wiretap authority granted by Congress, and that, if any additional wiretap authority is necessary, the legislative process should be used to extend that authority and oversee its use?

Response: Law enforcement should not exceed the wiretap authority granted by Congress. It is my understanding, as I have relayed above, that CALEA does not confer law enforcement with *authority* to intercept communications. Rather, it works to ensure, in appropriate circumstances, that law enforcement will have the *technical capability* to effectuate a lawful court order for interception.

I am not in a position now to predict or opine on the possible need for legislation. In the event legislation is necessary, the Department of Justice would work with Congress to address the issues requiring legislation – to

come up with a law that continues to preserve law enforcement's capability to execute lawful orders while promoting technological innovation and guarding privacy.

(B) Do you agree that to the extent Congress considers the application of CALEA (or a similar statute) to the Internet, Congress should be very careful to ensure that technical innovation is allowed to continue on the Internet, and that it is important to protect our country's leadership position in the development of new Internet technology?

Response: I firmly believe that our nation needs to maintain a strong and vital information technology infrastructure. Thus, I agree that it is very important to promote technological innovation – on the Internet and off. The two important goals of protecting national security and enforcing criminal laws and promoting innovation should not be viewed as mutually exclusive.

It is my understanding that Congress was attuned to this issue when it enacted CALEA, and that CALEA balances those interests. I support such a balanced and thoughtful approach.

Antitrust

42. **The Department of Justice has made it a priority, at least since the Clinton Administration, to work with other countries in an effort to help create a global collaboration on promoting healthy and competitive markets, with clear and consistent rules on which businesses can rely. That effort has taken various forms, including assistance to countries that are just beginning to develop competition codes and agencies, as well as collaborative efforts with nations that have had more experience in this realm. The 1991 Antitrust Comity Agreement between the Department and the European Union stands as an obvious testament to this effort at collaboration, but it is not entirely clear that the comity envisioned has been achieved. In the last few years, we have seen several significant cases in which conduct or contracts are approved as lawful by the Department of Justice, but later condemned by regulators elsewhere. The European Union's rejection of the Boeing-McDonnell Douglas and GE-Honeywell mergers may be the harbingers of a troubling divergence in competition policy, and we have seen similar signs more recently in the EU's competition case against Microsoft. As Attorney General, would you reinvigorate the effort to work for greater coordination with the nations of the world in the area of antitrust enforcement? What steps will you take to defend determinations by the Department of Justice, and decisions of the United States courts, respecting the conduct or contracts of U.S. firms when that same conduct or contract is later subject to antitrust review by foreign regulatory authorities?**

Response: Coordination and substantive and procedural convergence internationally on antitrust issues must continue to be a high priority for the Department. Along those lines, the Department has been working with many foreign antitrust agencies in a variety of contexts, including the International Competition Network and the Organization for Economic Cooperation and Development, to achieve international consensus on sound antitrust enforcement. The Department also works closely with foreign antitrust agencies, particularly the European Commission, in order to achieve the greatest possible coordination with them on particular matters. If confirmed, I will seek to ensure that the Department continues its efforts to engage foreign antitrust agencies at both the staff and policy levels to limit the risk of significantly divergent outcomes in particular cases.

McCarran-Ferguson Act

43. **The Congress, and particularly the Senate, has long been embroiled in a troubling debate about the purported “crisis” of medical malpractice. While some who are claiming that awards to victims in medical malpractice suits are a cause of higher medical costs, the real problem is the fact that insurance companies are – thanks to the McCarran-Ferguson Act – largely exempted from the federal antitrust laws. These laws are designed and operate to create and maintain competitive markets, but the antitrust enforcers must stand aside, as it is left entirely to the States to regulate the “business of insurance.” As Attorney General, will you cooperate with efforts to ensure that the insurance industry is not permitted to continue to operate without the oversight of the federal antitrust enforcers?**

Response: To my knowledge, the Administration has not taken a position on any proposal to amend the McCarran-Ferguson Act. I understand that the general starting point for discussing any new industry-specific antitrust exemption is that such exemptions are generally not helpful and should be disfavored. The insurance industry has evolved for 60 years in the market environment created by this exemption, so it would be important to proceed very carefully in considering any alteration of this environment. If I am confirmed, the Department will remain vigilant in monitoring any anticompetitive conduct in this industry that falls outside the exemption.

Clean Air Act

44. **Last fall, the Environmental Protection Agency referred 22 new cases to the Department for further prosecution of alleged power plant violations of New Source Review (“NSR”) requirements. When combined with the ongoing NSR enforcement cases involving seven major utility companies and the Tennessee Valley Authority, these NSR actions have the potential to significantly reduce emissions faster and more deeply than the Administration’s regulatory or legislative approaches. Please provide an update on the status of Department’s NSR caseload, including a list of**

referrals where complaints have not yet been filed that includes both the date and the claims in the referrals. Also, please provide an estimate of how much it would cost for the Department to pursue these cases compared to the current budget for environmental enforcement.

Response: If confirmed as Attorney General, I would be committed to enforcing all of the nation's environmental laws and advancing environmental protection. I am not yet familiar with all of the Clean Air Act New Source Review cases that you mention. I have not received non-public information on cases that EPA has referred and the Department has not yet filed. I do, however, understand that the Department typically spends considerable time reviewing and developing the evidence in case referrals and conferring with the client agency and often has extensive pre-filing settlement discussions with proposed defendants before filing cases. However, that information is normally privileged and protected by confidentiality agreements. Similarly, I am not familiar with the Department's budget for the cases, the details of the cases, or whether additional money is necessary to support the litigation. If I am confirmed, I intend to familiarize myself further with these important issues.

Responses of Alberto R. Gonzales
Nominee to be Attorney General
to the Written Questions of Senator Patrick Leahy,
submitted on behalf of Senator Carl Levin

Torture

1. In your testimony before the Senate Judiciary Committee, you said that while there was “discussion between the White House and the Department of Justice as well as other agencies” and that while “I certainly gave my views” during “a give and take discussion about what does the law mean,” you do not recall whether or not you were in agreement with the Department of Justice interpretation of the torture statute expressed in its August 2002 memorandum that for an act to violate the torture statute it “must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function or even death.”
- A. Did your staff attend any of those discussions?
- B. If so, please check with your staff regarding your reaction to the DOJ interpretation and advise the Committee on their recollection of what your views were.
- C. Who, at the Department of Justice, were the discussions with?
- D. How many meetings or discussions did you participate in with persons outside of the White House related to the August 2002 memorandum, prior to it being finalized, excluding any meeting or discussion in which the President participated? For each such meeting or discussion, please provide:
- (a) the date on which it occurred;
 - (b) whether the meeting or discussion took place in person, by telephone, or by electronic means;
 - (c) who participated or was present, by name and agency affiliation; and
 - (d) copies of any entry in your appointment calendar related to the meeting or discussion.
- E. For each such meeting or discussion, please indicate:
- (a) whether you took any notes during the meeting or discussion;
 - (b) whether anyone else took any notes during the meeting or discussion and, if so, the name and agency of each person who took notes;
 - (c) whether anyone prepared a summary of the meeting or discussion and, if so, the name and agency of the person who prepared the summary.

Response: As I said at my hearing, there was serious discussion in various parts of the Administration about the scope of the anti torture statute in Title 18 of the U.S. Code. The

fact that there was discussion among lawyers about the interpretation of a statute concerning an issue as serious as torture is not surprising. Administration lawyers struggled to give meaning to a law that had never been interpreted by our courts. There were conflicting views and those conflicting views were aired, but ultimately it was the responsibility of the Office of Legal Counsel to provide an opinion on the meaning of the statute. Providing the detailed information and documentary evidence you have requested, if it exists, would involve disclosure of predecisional deliberations that I am not at liberty to disclose.

- 2. In your testimony, you said that you had some meetings in your office regarding interrogation techniques. However, when asked about your reaction to the interrogation techniques that were discussed, you said that you do not recall whether or not you raised an objection to any of the techniques discussed.**
- A. Did your staff attend the meeting?**
- B. Please check with your staff regarding whether or not you suggested that any of the interrogation techniques discussed were offensive and advise the Committee of their recollection.**
- C. How many meetings or discussions did you participate in with persons outside of the White House related to interrogation techniques, excluding any meeting or discussion in which the President participated? For each such meeting or discussion, please provide:**
- (a) the date on which it occurred;**
 - (b) whether the meeting or discussion took place in person, by telephone, or by electronic means;**
 - (c) who participated or was present, by name and agency affiliation; and**
 - (d) copies of any entry in your appointment calendar related to the meeting or discussion.**
- D. For each such meeting or discussion, please indicate:**
- (a) whether you took any notes during the meeting or discussion;**
 - (b) whether anyone else took any notes during the meeting or discussion and, if so, the name and agency of each person who took notes;**
 - (c) whether anyone prepared a summary of the meeting or discussion and, if so, the name and agency of the person who prepared the summary.**

Response: It is not the job of the Office of the Counsel to the President to decide which methods of obtaining information from terrorists that could save American lives would be most effective. Agencies have the responsibility and expertise to make those decisions. The Department of Justice advises the agencies as to whether approaches they believe may be necessary to save American lives satisfy statutory and constitutional requirements. I did not direct or suggest the use of any method of questioning, nor did I direct OLC to reach any specific conclusion regarding the legality of any particular method of questioning. Providing

the detailed information and documentary evidence you have requested, if it exists, would involve disclosure of predecisional deliberations that I am not at liberty to disclose.

- 3. In your testimony, you also said that you do not have a recollection as to whether or not you requested the August 2002 memorandum.**
- A. Please check with your staff and the Office of Legal Counsel staff as to whether you made the request and advise the Committee of their recollection.**
 - B. Are your requests for Office of Legal Counsel memoranda typically written requests?**
 - C. Was the request for the August 2002 Office of Legal Counsel memorandum made in writing? If so, please describe the type of document and who prepared and authorized it.**
 - D. In an article on January 5, 2005, the New York Times quotes White House spokeswoman Erin Healy, as saying that you personally requested the August 2002 opinion. Does that statement refresh your memory relative to this matter?**
 - E. The New York Times article also states that the request for this memorandum was “somewhat unusual” in that you made the request directly of OLC lawyers and bypassed the office of Deputy Attorney General Larry Thompson. Did you follow an unusual procedure in making the request for the August 2002 OLC memorandum? Please explain.**

Response: I believe that one of my responsibilities as White House counsel is to work with other lawyers in the Administration to ensure that as we fight against our terrorist enemies, we do so lawfully. A related duty is to identify legal issues that rightly should be reviewed by the Justice Department. By statute and regulation, the Department of Justice provides definitive guidance to the Executive Branch on matters of legal interpretation. Although I have no specific recollection of seeking the August 1, 2002 memorandum, I recognize that it is addressed to me and states, “You have asked for our Office’s views regarding the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by Sections 2340-2340A of title 18 of the United States Code.” A request for such guidance from me to the Office of Legal Counsel is consistent with our effort to ensure that the Executive Branch receives appropriate legal guidance from the Department of Justice, and we followed no unusual procedure in connection with a request for the August 2002 memorandum. Specifically, it would not have been unusual to make a request directly to OLC without going through the Office of the Deputy Attorney General. I am unaware of any written request to OLC for guidance on this issue and, indeed, the Office of Counsel to the President as a general matter does not put requests in writing when asking the Department for guidance on legal questions.

Presidential Authority:

4. In response to Senator Specter regarding the August 2002 memorandum asking whether or not you agreed with the statement, "Congress may no more regulate the President's ability to detain and interrogate enemy combatants that may regulate his ability to direct troop movements on the battle field," you answered, "I reject that statement, Senator."

- A. Did you reject it prior to December, 2004?
- B. If so, when?
- C. Why do you reject it?

Response: The August 2002 memorandum was withdrawn prior to December 2004. A press conference discussing the matter was held in June 2004 explaining the reasons for the withdrawal. The August 2002 memorandum contained statements that were hypothetical, unnecessary, and irrelevant, including the one cited above. The December 2004 memorandum discusses the applicable issues and represents the position of the Executive Branch.

5. In your testimony (pg 151-157), you stated that the so-called "Commander in Chief" power outlined in the August 2002 memorandum has been withdrawn and rejected. However, the December 30, 2004, OLC memorandum simply states:

"This memorandum supersedes the August 2002 Memorandum in its entirety. Because the discussion in that memorandum concerning the President's Commander-in-Chief power and the potential defenses to liability was - - and remains - - unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture."

Is it your opinion that the 12/30/04 memorandum is neutral regarding the "Commander-in-Chief power" described in the August 2002 memorandum or that "such authority" has been rejected in the memorandum?

Response: I believe the December 30 memorandum makes clear that the discussion was eliminated because any consideration of such matters would be inconsistent with the President's clear directive that the United States is not to engage in torture. Because the December 30 memorandum does not discuss the Commander-in-Chief power and the earlier memorandum has been withdrawn, there is no existing analysis that would support use of such power to override statutory prohibitions on torture. In any event, the President has made clear that he has no interest in exercising any such power if it were found to exist, because he has directed that the United States is not to engage in torture.

6. Do you agree with the statement in the Office of Legal Counsel memorandum to you dated January 22, 2002, that “Under Article II of the Constitution, the President has the unilateral power to suspend whole treaties or parts of them at his discretion?”

Response: Yes. It is generally recognized and confirmed by decades of practice that the President may unilaterally terminate treaty obligations on behalf of the United States. See, e.g., Congressional Research Service, Treaties and Other International Agreements: The Role of the United States Senate, S. Print No. 106-71, at 14, 205-08 (2001).

7. In an article on January 5, 2005, The York Times quotes Administration officials as saying that you “played a role in the decision to issue the new legal opinion” on torture in December 2004.

- A. What role did you play in that decision?
- B. What recommendations did you make and to whom?
- C. Did you recommend to the Department of Justice that portions of the August opinion which said that the President had authority to override statutory prohibitions against torture be deleted from the earlier opinion?
- D. If so, when did you make that recommendation?

Response: I made clear to the Department of Justice last year that the discussion in the memorandum you reference in part C of your question was unnecessary because of the President’s long-standing policy against torture. At the same time, I agreed with the Department’s conclusion that the statutory analysis in the earlier memorandum should be reconsidered and revised as the Department deemed necessary. That process resulted in the December 30, 2004 memorandum.

Your January 25, 2002 Memorandum For the President

8. In your January 25, 2002 Memorandum For the President, you stated “In my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e. advances of monthly pay), athletic uniforms, and scientific instruments.”
- A. Was this judgment based on an opinion issued by the Office of Legal Counsel or the Attorney General? If so, provide the date of the opinion and relevant quotations.
- B. Was it a legal or policy judgment?

- C. **If it was a legal judgment, was it submitted to the Office of Legal Counsel or the Attorney General? If not, why not?**
- D. **If it was a policy judgment, was it submitted to the National Security Adviser or any other policy adviser to the President? If not, why not?**
- E. **What are “Geneva’s strict limitations on questioning of enemy prisoners” that you referred to in that Memorandum?**
- F. **Are you concerned that U.S. military personnel might be denied some of the benefits of Geneva’s provisions by an enemy in a future conflict because of the judgments you reached in this Memorandum?**

Response: In February 2002, the President determined that neither al Qaeda nor Taliban fighters are entitled to Prisoner of War legal status under the Geneva Conventions. The President made his decision after he received the views of all his relevant advisers on this question, including the Attorney General, the Secretary of State, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff. The Attorney General, the Office of Legal Counsel, and the legal advisors at State and Defense all agree that the President’s February 7, 2002 determinations are correct as a matter of law. The memorandum you reference in your question was a draft and does not reflect the actual advice given to the President. I consider the Geneva Conventions neither quaint nor obsolete. United States Military personnel fight honorably according to the laws of war and therefore are legally entitled to the protections of the Geneva Conventions. Our terrorist enemies who target innocent civilians do not fight according to the laws of war and therefore are not entitled to the same protections under the Conventions. We are nothing like our enemy. There have been previous attempts to afford POW legal protections to terrorists and all have been rejected by this country because it would be an affront to the principles of Geneva and would make our war with the terrorist enemy more dangerous for our soldiers. In my judgment, granting POW legal protections to terrorists in contradiction of the words of our treaty obligations cannot be done by a bureaucrat, by an international organization, nor by another country. Altering the international legal obligations of the United States under our treaties is the responsibility and duty of the President.

- 9. **Do you consider provisions of the Geneva Convention to be “quaint” as distinguished from the inapplicability of the Convention to the situation in Afghanistan? If so, which specific provisions do you consider to be “quaint”?**

Response: The Geneva Conventions represent a great advancement in protecting human rights, even during times of war. I, along with all Americans, honor the Conventions and do not consider them either quaint or obsolete. By its own terms, Geneva does not accord prisoner of war status to terrorists who target civilian populations for mass death.

- 10. **During the hearing, you testified that you were “surprised and shocked” by the FBI documents describing prisoner abuses in Guantanamo and that, if confirmed, you**

would work to “ascertain the facts.” Will you commit to making a report on your findings within 90 days of your confirmation?

Response: If confirmed, I commit to ascertaining the facts and ensuring that appropriate action is taken as needed. Without knowing the facts, I cannot agree to any particular timeline that will ensure an appropriate review of the situation is completed.

Was the draft OLC memorandum dated 3/19/02 related to deportation and transfer of detainees ever finalized? If so, what is the date of the final OLC memorandum? If so, is that memorandum still in effect as the legal position of the Administration?

Response: The memorandum to which you refer was never finalized.

**Responses of Alberto R. Gonzales
Nominee to be Attorney General
to the Written Questions of Senator Charles E. Schumer**

1. **As Attorney General, you will be called upon every day to judge whether certain actions are constitutional or not. I am interested in learning more about your views on the Constitution. I understand that you believe the question regarding the constitutionality of filibusters of judges to be “an internal Senate matter.” However, as Attorney General, you may be called upon by the Vice President, serving as President of the Senate, for advice on this question. If Senator Frist decides to attempt to implement the “nuclear option” and your opinion is sought, how will you advise the Vice President as to the constitutionality of filibusters of judicial nominees?**

Response: President Bush has repeatedly urged the Senate to vote up or down promptly on a President’s judicial nominees. Whenever the President requests legal advice of the Attorney General, I would provide it, as is contemplated by section 511 of title 28, United States Code, which provides that “[t]he Attorney General shall give his advice and opinion on questions of law when required by the President.” It would not be appropriate for me to disclose any specific confidential legal advice that the Department of Justice might be called upon to provide. As Attorney General, I would also provide to the Vice President upon request legal advice with regard to the executive functions of the Vice President (see 3 U.S.C. 106). As Attorney General, I would not provide legal advice to the Vice President with regard to the legislative functions of the Vice President (see U.S. Const., art. I, sec. 3), which is a longstanding position of the Department of Justice. 39 U.S. Op. Atty. Gen. 343 (1939) (Attorney General does not render opinions to the Congress).

2. **I do not see why your advice to the Vice President would be any different from your advice to a Senator, but in case you see a distinction, I ask the following: If you were counsel to a United States Senator, and you were asked for your opinion as to the constitutionality of filibusters of judicial nominees, what would your opinion be?**

Response: President Bush has repeatedly urged the Senate to vote up or down promptly on a President’s judicial nominees. The Constitution explicitly requires a supermajority vote for such things as trying impeachments or overriding a presidential veto; it does not do so for confirming nominations. Article II, section 2, even mentions ratifying treaties and confirming nominees in the very same sentence, requiring a supermajority for the first but not for the second. Whether the Senate also concludes that the filibuster of judicial nominees is unconstitutional is an internal matter for the Senate to decide.

3. **We have worked well together to fill New York’s federal bench with well-qualified, mainstream judges. We have exchanged names of candidates, engaged in candid discussion about their merits, and in some instances each of us has rejected candidates we did not feel were appropriate nominees. In the end, we have reached**

agreement on nominees who are closer ideologically to the President than to me, but who are committed to fairness, not an ideological agenda.

Unfortunately, nationally, this White House has nominated more activist judges, carrying ideological agendas to the bench with them, than any in memory. If we were to use the New York model nationally, we could eliminate judicial confirmation battles altogether.

a. As Attorney General, will you work with me and other Senate Democrats to identify, nominate, and confirm mainstream judges to the Judiciary?

Response: Yes. In my role as Counsel to the President, I have worked with you and other Senators, both Democrat and Republican, to identify qualified candidates who will fairly and impartially interpret the law. If I am confirmed as Attorney General, I would continue to be willing to consult with home-state Senators, whether Democrat or Republican. I have tried to deal with each Senator the way that I have dealt with you. We have always tried to exchange names of candidates and in some instances we have not moved forward with candidates that a Senator finds objectionable. In some cases, however, the basis of the objections is quite frankly unfounded or inaccurate. In those cases involving a well qualified candidate, the President has elected to exercise his constitutional authority and nominate such a candidate.

b. Do you believe the White House should share with Senate Democrats the names of possible Supreme Court nominees and engage in meaningful consultation with us before making a nomination?

Response: As a general matter, I believe that consultation can be helpful. On decisions as important as Supreme Court nominations, more information is certainly preferred to less information. But sharing names in advance is a decision for the President to make. It is my understanding that historically, Presidents of both parties have for the most part not shared the identity of the nominee or individuals being considered prior to nomination. This Administration, however, always has been willing to consider judicial candidate recommendations made by Senators, and I believe that our willingness to consider recommendations from Senators would continue in the event of a Supreme Court vacancy.

c. The Administration has used the lack of Senate representation for the District of Columbia as a basis for not consulting with Senate Democrats on appointments to the DC Circuit, the second-highest court in the land. On several occasions, I have offered to work with the White House to identify mainstream, mutually acceptable nominees to this court. Thus far, those offers have been rejected. If confirmed as Attorney General, will you accept that offer and work with me to fill vacancies on that court?

Response: I am not personally aware of your previous offer to work with the White House regarding nominees to the D.C. Circuit. I hope you understand the inherent

difficulties and impracticabilities in soliciting the views of all 100 Senators for vacancies in the D.C. Circuit. I am not aware that this has ever been done and I could not recommend this practice. However, if I am confirmed as Attorney General, I would continue to be willing to talk to you and other Senators about any recommendations you may have for the U.S. Court of Appeals for the D.C. Circuit.

4. Will you commit to enforcing all of the nation's federal gun laws if confirmed as Attorney General?

Response: Yes. President Bush developed Project Safe Neighborhoods (PSN) to target firearms-related criminal conduct. Since PSN's inception, Federal firearms prosecutions have increased 76 percent. During that period, violent crime fell to 30-year lows, and crimes committed by offenders armed with a firearm also fell to record low levels. I can assure you and the Committee that I am committed to continuing, if confirmed, the Administration's aggressive efforts to combat violent crime through all means and resources that Congress makes available to the Department.

5. Do you believe reauthorization of the federal assault weapons ban would help prevent crime and terrorism in America?

Response: At my hearing I introduced my brother, Tony, who is a SWAT officer and a 26-year veteran of the Houston Police Department. I worry about his safety and the types of weapons he will confront on the streets. The President has made clear that he stands ready to sign a reauthorization of the federal assault weapons ban if it is sent to him by Congress. I, of course, support the President on this issue. Having said that, I believe the most effective means of continuing to reduce violent crime and crime committed with a firearm is through aggressive law enforcement and prosecution. This Administration has increased federal firearms prosecutions by 76 percent and has supported an increase in State and local resources devoted to prosecuting firearms-related crime. I am committed to ensuring the continued vigorous enforcement of federal firearms laws so that law-abiding Americans can benefit from a continuation in the reduction in violent crime experienced during President Bush's first term.

6. If you had the power to revise any one provision of the Patriot Act, what would it be and how would you revise it?

Response: First, I welcome a debate about protection of our civil liberties. We should all be diligent in monitoring the exercise of government authority as it relates to the civil liberties of everyone. I believe the USA PATRIOT Act has greatly improved our nation's ability to detect and prevent terrorist attacks. I am unaware of abuses under the USA PATRIOT Act. For this reason, I welcome an honest and real debate about the USA PATRIOT Act. Unfortunately, some of its provisions have been misunderstood. Section 215 of the Act amended the government's authority to obtain records under the Foreign Intelligence Surveillance Act (FISA). Under section 215, the government can ask a court to issue what amounts to a subpoena. Just as in the criminal context, where

investigators can use grand jury subpoenas to obtain evidence relevant to a criminal investigation, intelligence officials need to have the ability to request documents and evidence relevant to an ongoing foreign intelligence investigation. One aspect of section 215, however, could be amended to eliminate a common misunderstanding. Section 215 states that the documents requested through a section 215 must be “sought for” an ongoing foreign intelligence investigation. Some have expressed the concern that the “sought for” standard is less demanding than a relevance standard and is therefore too easy a hurdle for the government to surmount. Although I believe the “sought for” standard is essentially a relevance standard, there is no need for confusion, and therefore I would be happy for the statute to be amended to state that investigators may ask the FISA court for an order requesting the production of documents “relevant to” an ongoing foreign intelligence investigation. In addition, I believe the sunsets that apply to several provisions of the USA PATRIOT Act should be repealed.

7. **As you know, the State of Mississippi recently pressed charges against an alleged participant in the murders of James Cheney, Michael Schwerner, and Andrew Goodman. Last year, in response to inquiries from me, Senator Talent, Congressmen Rangel, and Congressman Rush, the Justice Department agreed to reopen the investigation into another landmark civil rights case: the murder of Emmitt Till. If confirmed as Attorney General, will you devote the attention and resources federal investigators need to follow up on new clues in this important unresolved matter? Do you believe the successful prosecution of Emmitt Till’s murderers should be a high priority for the Justice Department?**

Response: I applaud the responsible State officials in Mississippi for their willingness to take action with regard to the murders of James Chaney, Michael Schwerner, and Andrew Goodman. It is important and encouraging to see States take ownership of and responsibility for civil rights offenses, as they should as full partners with the federal government in fighting crime at all levels.

I consider all civil rights offenses priorities for the Department of Justice. With regard to the Emmett Till case, it is my understanding that the Department is investigating, in conjunction with State officials, to determine whether any State charges remain to be brought against individuals still alive who were involved in the kidnapping and murder. If confirmed, I would certainly see this investigation through to its conclusion.

8. **a. In your opinion, is the Freedom of Access to Clinic Entrances (“FACE”) Act a valid exercise of Congressional authority?**
- b. Do you think the decisions at the appellate level upholding FACE have been correctly decided?**
- c. If a future Supreme Court accepted for review a case involving the constitutionality of FACE, what position would you advise taking on behalf of the United States?**

Response: As Attorney General, it would be my responsibility to enforce and defend all of Congress's enactments, which enjoy a strong presumption of constitutionality. This Administration has previously defended FACE against constitutional challenge, and I would continue that policy if confirmed.

9. **As you know, the Northern Border gets scant attention compared to the border with Mexico, but presents a significant threat to our security from illicit drugs and terrorism. As Attorney General, will you ensure that the number of Customs and Border Protection officers on the Northern Border meet or exceed the USA PATRIOT Act's required 4,845 positions? As of May 2004, we were 1,428 officers short and we are losing ground due to a hiring freeze.**

Response: Securing both the Southern and Northern borders is critical to our national security. Because Customs and Border Protection officers are employed by the Department of Homeland Security and not the Department of Justice, I would have no direct authority over their hiring if I were confirmed as Attorney General. However, I would do everything possible to work with the Secretary of Homeland Security to ensure that all of our borders are secured.

10. **In 2003, the United States had an estimated 3.7 million fair housing violations and more than 25,000 fair housing complaints were filed (family status, disability, religion, color, race, sex and national origin). Yet DOJ reportedly brought only about 35 cases last year. In fact the entire Civil Rights Division of DOJ has brought only approximately 149 cases since January 2001. DOJ must be a strong advocate and enforcer when it comes to housing discrimination. What would you do as the new Attorney General to improve DOJ's record on this important issue?**

Response: Protections against housing discrimination are an important part of the fabric of civil rights laws. It is my understanding that the Department of Justice has greatly expanded its enforcement of such laws, exceeding historical averages spanning multiple administrations, which I applaud. If confirmed as Attorney General, I intend to ensure that the anti-discrimination provisions of the FHA are vigorously enforced. I would talk with the lawyers at the Department and learn how and why the Department has made decisions regarding fair housing complaints. I would ask what we can do to be more effective and efficient in prosecuting housing discrimination.

11. **In 2003, DOJ announced that it will no longer file disparate impact cases involving housing discrimination. DOJ's decision was a sharp break from decades-old bipartisan policy to aggressively litigate these cases.**

Disparate impact cases are crucial in the fight against housing discrimination. Many rental, sales, insurance, and related policies are not discriminatory on their face, but have a disparate impact on members of protected classes. Among those that are more subtly discriminatory, some have a discriminatory *intent* and others have a discriminatory *impact*. Even though there may not be any intent in the policy, it can have just as detrimental an effect on individuals and families trying to

find housing. The federal government is often the only entity with the capacity to investigate and litigate such fair housing complaints.

Will you, if confirmed as Attorney General, restore the Department's longstanding policy to litigate disparate impact cases?

Response: It is my understanding that where civil rights statutes permit lawsuits based on a disparate impact theory, this Administration has enforced them accordingly. If confirmed as Attorney General, I pledge to have the Fair Housing Act closely examined to ensure that the Department is properly enforcing its anti-discrimination provisions.

**Responses of Alberto R. Gonzales
Nominee to be Attorney General
to the Written Questions of Senator Jeff Sessions**

I. Questions for Judge Gonzales

1. In your response to a question from Senator Kennedy about whether state and local law enforcement officials should aid in the enforcement of immigration laws, you stated the following: “Personally, I would worry about a policy that permits someone, a local law enforcement official, to use this authority somehow as a club, to harass. They might be undocumented aliens, but otherwise lawful citizens.” Please clarify your statement by answering the following questions:

a. Do you believe that an undocumented (illegal) alien can be a “lawful citizen?”

Response: Thank you for the opportunity to clarify my statement. An undocumented alien cannot be a ‘citizen’ as that term is defined in the Immigration and Nationality Act. However, I did not intend to refer to that statutory definition in my response, and I apologize if my response created any confusion. What I meant was simply that the undocumented alien may not have committed any crime or violation of law other than his breach of immigration law.

b. Isn’t it true that if an alien is in indeed undocumented, they are by definition both unlawfully present and not a citizen?

Response: As I indicated in my answer to the previous question, I agree that an undocumented worker is not a citizen. The point I intended to make was that there are many individuals present in this country who, although their presence in this country is illegal, have not committed crimes or broken other laws.

c. In Alabama, State Troopers have been participating in the successful enforcement of immigration laws under the MOU between the Department of Homeland Security and the State of Alabama for more than a year. As Attorney General of the United States, part of your job will be to enforce our laws against illegal immigration, criminal immigrants, and immigration fraud. It seems to me that having the voluntary assistance of America’s more than 600,000 state and local law enforcement officers would be incredibly beneficial to the federal government’s immigration enforcement efforts. Can you assure this Committee that you will support the voluntary assistance of state and local law

enforcement officers such as the assistance they are providing in Alabama under the MOU?

Response: If confirmed as Attorney General, I would seek diligently to uphold my oath of office to protect and defend the Constitution and to carry out the Executive Branch's constitutional responsibility to "take Care that the Laws be faithfully executed," including the immigration laws. Congress, through various amendments to the Immigration and Nationality Act, has broadened the authority of state and local law enforcement officials to enforce immigration law. Alabama and Florida have entered into agreements with U.S. Immigration and Customs Enforcement (ICE) to allow their respective state and local law enforcement agencies to perform new, limited duties relating to immigration enforcement. Under the statute, ICE – a component of the Department of Homeland Security (DHS) – is the federal agency that would negotiate and enter into Memoranda of Understanding (MOUs) with any additional states.

- 2. Mr. Gonzales, the Attorney General is the nation's chief law enforcement officer. He is to faithfully execute the laws of the land, without regard to the benefits or detriments to special interests. Do you agree with this principle?**

Response: I agree that the Attorney General is responsible for the impartial enforcement of the laws of the land. This important responsibility reflects the President's obligation under Article II, Section 3 of the U.S. Constitution to "take Care that the Laws be faithfully executed." If I am fortunate enough to be confirmed, I would do my best to ensure that the Department of Justice enforces the law without regard to the benefits or detriments to special interests.

- 3. You served on the board of the Association for the Advancement of Mexican Americans in Houston. It is my understanding that this group is closely affiliated with the National Council of La Raza, which means "the race." The National Council of La Raza has a very definite position on a range of issues, and most especially on immigration issues. Are you aware of where La Raza stands on issues pertaining to the enforcement of our immigration laws? Are you aware of La Raza's position on illegal immigration?**

Response: I have not served on the AAMA board for over 13 years. As Counsel to the President, I have not had occasion to consult with or consider the particular views of La Raza on illegal immigration or enforcement of our immigration laws. If confirmed, I would enforce the immigration laws as written by the Congress without regard to the views of any particular organization concerning the wisdom of or possible amendments to such laws.

- 4. It is my understanding that La Raza is one of the more radical organizations on that side of the immigration issue. Did you know this at the time you joined the board of the La Raza affiliate? What was the exact relationship of the Association for the Advancement of Mexican Americans with the National Council of La Raza?**

Response: As I indicated in my answer to the previous question, I have not served on the AAMA board for over 13 years. I do not know whether 13 years ago AAMA was affiliated with La Raza, and if so, whether I was then aware of the affiliation. Likewise, I do not know what positions on immigration La Raza had 13 years ago. Finally, I am not aware of the exact relationship today, if any, between AMA and La Raza. If confirmed, I would enforce the immigration laws as written by the Congress without regard to the views of any particular organization concerning the wisdom of or possible amendments to such laws.

- 5. Did you have any personal knowledge of these groups' colluding on policy or legal issues? What was the nature of that collusion? Did you see or hear any advocacy of breaking American immigration laws by either of these groups or anyone associated with or employed by either group? What was your response?**

Response: I have not been affiliated with AAMA since 1992. I have no personal knowledge of any "collusion on policy or legal issues" between AMA and La Raza, and I am unaware of any advocacy by these groups of their associates or employees of breaking U.S. immigration laws.

- 6. As Attorney General of the United States, part of your job will be to enforce our laws against illegal immigration, criminal immigrants, and immigration fraud. Given your personal and professional association with a special interest group that is decidedly against law enforcement in this area, do you believe you can in good conscience take this position and serve faithfully in this position?**

Response: I do not have and have never had a personal or professional association with La Raza. If confirmed, I would enforce the law fairly and equally on behalf of all Americans.

- 7. What assurances can you give this committee, the Senate, and the American people that you will not hesitate to carry out fully our nation's immigration laws? What assurances can you give us that you will aggressively carry out your office insofar as immigration law enforcement is concerned, without partiality to advocates who share your ethnicity or national origin?**

Response: I believe in the rule of law and, if confirmed, would vigorously enforce all the laws within my jurisdiction. As you know, since enactment of Homeland Security Act, most immigration enforcement responsibilities are within the jurisdiction of the Department of Homeland Security. I am committed to ensuring that those immigration responsibilities that continue to be under the Attorney General's control, including the responsibility for litigating immigration appeals, are carried out fully and effectively.

8. What assurances can you give us that you will not give La Raza, its affiliates, and its allied groups preferential treatment?

Response: If confirmed as Attorney General, I do not intend to give any particular private group or organization preferential treatment.

9. The European Commission recently imposed sanctions on Microsoft – one of America's most successful companies and leading employers – that require the company to hand over some of its most valuable technologies to its competitors in Europe and to sell an inferior version of its Windows operating system to European consumers. I also understand that these sanctions run directly counter to the more balanced, pro-consumer remedies negotiated by the Department of Justice – remedies that were imposed after years of investigation and litigation, and which were recently upheld by the D.C. Court of Appeals.

Could you assure this Committee that, as Attorney General, your Department will work hard to persuade competition authorities in Europe and elsewhere that U.S. remedies imposed against U.S. companies and approved by U.S. courts are entitled to appropriate deference, and that these more radical sanctions of the type imposed against Microsoft harm U.S. economic interests and provide absolutely no benefits to consumers?

Response: With the globalization of markets, it is important to ensure that other enforcers rely on sound legal and economic analysis as the basis for antitrust enforcement. Antitrust laws should promote competition; they should not be used to defend a country's own home companies or to try to exclude competitors from other nations. I understand that the Department is working diligently with many foreign antitrust agencies in a variety of contexts, including the International Competition Network and the Organization for Economic Cooperation and Development, to achieve international consensus on sound antitrust enforcement. Those efforts must continue.

The Department also works closely with foreign antitrust agencies, particularly the European Commission, in order to achieve the greatest possible coordination on particular matters. Antitrust Division lawyers at both

staff and policy levels have worked closely with their European Commission counterparts on key matters and have publicly criticized them when unwarranted divergent outcomes have been reached. Divergent outcomes can sometimes occur due to different legal regimes and the possibility of different factual circumstances in different countries. When divergent outcomes do occur, the Department should engage with its foreign counterparts and see what can be done to minimize divergence in the future.

- 10. The Department of Justice recently obtained approval to negotiate a comity agreement with the Republic of Korea in the area of antitrust enforcement. Korea is, of course, not only a key strategic ally, but also an important trading partner. Although international trade and antitrust each occupies its own sphere, there is some concern among U.S. firms that foreign regulators are beginning to view antitrust enforcement as a means of achieving quite distinct trade-related goals, including to aid local industries. As Attorney General, would you support efforts to ensure that our trading partners do not use antitrust enforcement to erect trade barriers against U.S. firms? Would you make this a priority in the Department's negotiation of an antitrust comity agreement with Korea?**

Response: Antitrust laws should promote competition; they should not be used to defend a country's own home companies, or to try to exclude competitors from other nations. That is why it is critical that the Department work to ensure that other enforcers around the world rely on sound economics as the basis for antitrust enforcement. I would want this to be a priority in building the Department's relationship with the Korean antitrust agency and in all its international competition policy efforts.

**Responses of Alberto R. Gonzales
Nominee to be Attorney General
to the Written Question of Chairman Arlen Specter**

Question 1: Judge Gonzales, in October of 2004, the Department of Justice issued the "Report of the Department's Task Force on Intellectual Property." The Report recognized that the copyright industries play a vital role in this nation's economy, accounting for approximately 6 percent of the nation's Gross Domestic Product, and employing 4 percent of America's work force. The Report also makes specific recommendations for improving the Department's ability to deter and prosecute copyright piracy.

Judge Gonzales, do you plan on carrying out Attorney General Ashcroft's commitment: "to build the strongest, most aggressive legal assault against intellectual property crime in our nation's history?"

Response: I have great respect for intellectual property's role in the American economy and its importance to American consumers. As a result, I deeply appreciate the work of the Department's Intellectual Property Task Force and look forward to reviewing and acting on its recommendations if I am confirmed. As Attorney General, I would be committed to the aggressive enforcement of the nation's intellectual property laws as well as all other criminal laws duly enacted by Congress.

Question 2: Judge Gonzales, this Committee held hearings last year on certain "peer-to-peer" networks and services that go by names like "Kazaa," and "Grokster". The hearings revealed that, while peer-to-peer technologies provide legitimate uses, some of today's most popular services have created serious issues concerning copyright infringement.

We also received troubling testimony that these networks provided children with easy access to free pornographic content; exposed private information of Americans to total strangers, and left computer networks vulnerable to computer worms, viruses, and Trojan horses.

Judge Gonzales, if confirmed what will your Justice Department do to address the pornography, privacy, security, and copyright issues associated with peer-to-peer networks, and will you prosecute those who use peer-to-peer networks to distribute without authorization movies and music to millions around the world?

Response: I share the Committee's concern that new digital technologies, including peer-to-peer networks, will continue to facilitate criminal offenses. I believe that the Department of Justice must adapt to the emergence of these technologies and vigilantly enforce the nation's laws. As Attorney General, I would seek to ensure that large-scale criminal copyright violations are investigated and, where appropriate, prosecuted, be they committed over peer-to-peer networks or otherwise.

Question 3: Judge Gonzales, copyright piracy transcends our borders and is a global problem costing copyright owners billions of dollars in lost revenues every year. What are your plans to work with your colleagues in the Executive Branch and your counterparts in other countries to address this problem?

Response: I agree that copyright piracy and other forms of intellectual property theft are global problems that will require significant international cooperation to combat effectively. If confirmed, I would seek to enhance the Department's communication and cooperation with the law-enforcement agencies of other nations and with other federal, state, and local law-enforcement agencies within the United States. I would also seek to capitalize on opportunities to assist in educating and training foreign law-enforcement officials about investigating and prosecuting intellectual property crimes and the importance of doing so.

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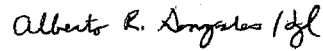
January 12, 2005

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Specter:

During my recent confirmation hearing several Senators indicated that I could provide a response to a question in writing. Attached are my responses to such questions from you, Mr. Chairman, as well as Senators Graham, Schumer, Durbin, Kennedy, and Feingold.

Sincerely,



Alberto R. Gonzales

**Written Response of Alberto R. Gonzales
Nominee to be Attorney General of the United States
to the Hearing Question of Senator Lindsey Graham**

Question: “Do you believe that a professional military lawyer's opinion that this [August 1, 2002] memo may put our troops in jeopardy under the Uniform Code of Military Justice was a correct opinion?”

Response: The August 1, 2002 memorandum has been withdrawn. That memorandum addressed only the federal criminal prohibition against torture codified in 18 U.S.C. 2340-2340A and did not address other possible sources of applicable law, including the Uniform Code of Military Justice (UCMJ). The memorandum did not address the question whether conduct that did not violate sections 2340-2340A might nevertheless violate the UCMJ.

**Written Response of Alberto R. Gonzales
Nominee to be Attorney General of the United States
to the Hearing Question of Senator Charles E. Schumer**

Question: "Are there any words [in the Constitution] that say 'only majority vote for judges'?"

Response: Although the Constitution imposes several supermajority requirements for certain congressional actions, the words "only majority vote for judges" do not appear in the Constitution. The Constitution gives the President the "Power, by and with the Advice and Consent of the Senate," to appoint federal judges. Art. II, section 2. President Bush has stated that the "Senate has a Constitutional obligation to vote up or down on a President's judicial nominees." Whether the Senate also concludes that the filibuster of judicial nominees is unconstitutional is an internal matter for the Senate to decide.

**Written Response of Alberto R. Gonzales
Nominee to be Attorney General of the United States
to the Hearing Questions of Senator Richard J. Durbin**

Question 1: “Do you believe there are circumstances where other legal restrictions, like the War Crimes Act, would not apply to U.S. personnel?”

Response: Because different legal provisions apply in different situations, it is difficult to answer that question in the abstract. For example, Congress provided that the prohibition against torture applies “outside the United States.” Similarly, the Uniform Code of Military Justice and the Military Extraterritorial Jurisdiction Act apply to certain people and in certain situations but may not apply in other settings. The War Crimes Act applies to certain forms of conduct that violate the Geneva Conventions or certain other agreements and, as such, the Act may apply in circumstances where those agreements apply. See 18 U.S.C. 2441. But I am not aware of any suggestion that the War Crimes Act does not apply to U.S. personnel where the terms of the War Crimes Act otherwise are satisfied. The President, moreover, has unequivocally directed that the United States not engage in torture, and that directive applies everywhere and without exception.

Question 2: “Can U.S. personnel legally engage in torture under any circumstances?”

Response: No. As the President has made clear, the United States will not engage in torture and U.S. personnel are prohibited from doing so. Conduct amounting to torture that occurs “outside the United States” as defined in 18 U.S.C. 2340A(a) and 2340(3) would violate the federal criminal prohibition against torture at 18 U.S.C. 2340-2340A. Conduct amounting to torture that did not occur “outside the United States” would violate various other state or federal laws.

**Written Response of Alberto R. Gonzales
Nominee to be Attorney General of the United States
to the Hearing Question of Senator Edward M. Kennedy**

Question: "The OLC concluded that Article 49 does not in fact prohibit the temporary removal from Iraq of protected persons who have not been accused of crimes.... Do you believe that this legal advice is sound?"

Response: The memorandum to which you referred at the hearing was a draft that was never finalized by the Office of Legal Counsel. As I said at the hearing, however, there has never been any question that the Geneva Conventions apply to the conflict with Iraq. The draft memorandum appears to be an attempt to interpret what Geneva requires by its language concerning treatment of protected persons. I have not had a sufficient opportunity to review these issues to draw a definitive legal conclusion concerning the view articulated in the draft memorandum, but if the issue arises again in connection with our conflict with Iraq I would consult with the attorneys in the Justice Department as well as those at the State Department and Department of Defense to ensure that the United States complies with the terms of the Geneva Conventions.

**Written Response of Alberto R. Gonzales
Nominee to be Attorney General of the United States
to the Hearing Question of Senator Arlen Specter**

Question: “Do you believe that the CIA and other governmental intelligence agencies are bound by the same laws and restrictions that constrain the operations of the U.S. armed forces engaged in detention and interrogations abroad? In what circumstances would the CIA have a broader latitude? Why don't you think about that one and give us a response in writing?”

Response: The CIA and other intelligence agencies are governed by numerous laws, including the federal criminal prohibition against torture at 18 U.S.C. 2340-2340A. While many such laws apply to all U.S. personnel overseas, not all laws applicable to the military apply to the CIA (some, such as the UCMJ, are specifically addressed to the armed forces). A determination whether any particular law applies by its terms to particular agents of the U.S. government would depend on the circumstances. But there should be no doubt about the fact that the CIA and other intelligence agencies – like all U.S. personnel – are bound by the prohibition against torture.

**Written Response of Alberto R. Gonzales
Nominee to be Attorney General of the United States
to the Hearing Question of Senator Russ Feingold**

Question: "If you could provide me in writing, after you've had a chance to look at the Texas legislation, your reaction to it."

Response: We must do more to realize the full potential of DNA technology to solve crime and protect the innocent. It is my understanding that there was legislation before the Texas Legislature in its last session to consider the establishment of a Commission empowered to investigate criminal cases that may have resulted in wrongful convictions. I believe that each state, including Texas, should be free to consider creative mechanisms and approaches to ensure that only the guilty are punished and to enhance public confidence in the administration of criminal justice.

01/25/2005 15:45 FAX

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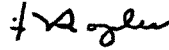
January 25, 2005.

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Specter:

Attached are my responses to the written follow-up questions from Senators Leahy, Feinstein, and Kennedy.

Sincerely,



Alberto R. Gonzales

**Responses of Alberto R. Gonzales
Nominee to be Attorney General
to the Written Questions of Senator Patrick J. Leahy**

- 1. Question 1(B) asked whether the President ever directed or otherwise instructed the CIA and other non-military personnel "to treat detainees humanely." You did not answer this question directly, but instead noted that the President had repeatedly condemned torture and that the CIA and other non-military personnel were bound by this policy. Was this meant to convey a "yes" or "no" answer to my question?**

Response: No, my response was not meant to convey a "yes" or "no" answer to your question. By way of clarification, it is my understanding that the President has not issued a directive on the treatment of detainees other than the February 7, 2002, directive "reaffirm[ing] the order previously issued by the Secretary of Defense to the United States Armed Forces." The President, however, expects all agencies to comply with their respective legal obligations. The President said – for example on March 31, 2003 – that he expects detainees to be treated humanely. As you know, the term "humanely" has no precise legal definition. As a policy matter, I would define humane treatment as a basic level of decent treatment that includes such things as food, shelter, clothing, and medical care. I understand that the United States is providing this level of treatment for all detainees. I have been told that we are also meeting the substantive standards of Article 16 of the Convention Against Torture ("CAT") regarding cruel, inhuman, or degrading treatment. As I have also explained in my responses to 1(A), (B), and (C), the CIA and other non-military personnel are fully bound by the prohibition on torture in the CAT and by the criminal prohibition on torture contained in 18 U.S.C. §§ 2340-2340A. In addition, depending on the circumstances, they are bound by other criminal statutes that may provide penalties for conduct constituting torture.

- 2. Your responses to questions 1(B), 1(C) and 2 appear to equate humane treatment with freedom from torture. Is it your position that detainees are being treated humanely so long as they are not being tortured?**

Response: No.

- 3. Given your response to question 3, would you agree that neither the U.S. President acting under his commander-in-chief authority nor any other foreign leader acting under comparable authority may override the Convention Against Torture and any implementing legislation and immunize the use of torture, under any circumstance?**

Response: No. I have said that the United States is not going to engage in torture, and the President does not intend to use any authority he might conceivably have to authorize use of torture. I have also said that Congress has

recognized the President's constitutional authority to deter and prevent attacks of international terrorism, and that it is theoretically possible for Congress to pass a law that infringes on the very authority that Congress has recognized. Thus, it is conceivable that Congress could in the future pass a law that a President might regard as unconstitutional in certain extreme circumstances. It should be emphasized, however, that the President has consistently stated that the United States will not use torture in any circumstances, so such a scenario will not occur during his Administration.

With respect to that part of your question concerning foreign leaders, all parties to the CAT have committed not to engage in torture and to ensure that all acts of torture are offenses under their criminal laws; these provisions (and others) protect American citizens from torture. Attached for your information is a letter I sent to Senator Kerry in response to his inquiry concerning my answer at the confirmation hearing to your question on this topic.

4. **Question 4(A) asked whether you believe that evidence obtained through torture may be relied upon "to detain enemy combatants." You did not answer this question directly, but instead noted that such evidence could be used "to block an imminent attack." Was this meant to convey a "yes" or "no" answer to my question?**

Response: No, my response was not meant to convey a "yes" or "no" answer to your question. By way of clarification, the President has never authorized anyone to engage in torture and to my knowledge the United States has not relied on evidence obtained through torture for any purpose. In addition, the United States does not take actions to encourage other countries to engage in torture. Finally, I would add that I have concerns that a policy that permits reliance upon evidence obtained through torture may encourage further torture.

5. **(A) Question 9 asked whether al Qaeda and Taliban detainees must be treated any differently as a result of the decision to apply GPW to the latter and not the former. You did not respond to this question directly, but instead noted that the President's February 7, 2002, directive, the United States policy against torture, and "various other treaty and statutory provisions" apply to both. Was this meant to convey a "yes" or "no" answer to my question?**

Response: No, my response was not meant to convey a "yes" or "no" answer to your question. By way of clarification, because the President has determined that neither al Qaeda nor captured Taliban fighters are entitled to POW status, Article IV of GPW does not require different treatment for Taliban fighters versus al Qaeda detainees.

(B) Question 9 also asked whether al Qaeda and Taliban detainees have been treated any differently in fact. You did not respond to this part of the

question at all. If this failure to respond was an oversight, please provide an answer now. If not, please explain why you refuse to answer this question.

Response: It is my understanding that Al Qaeda and Taliban detainees have not been treated any differently in fact by virtue of their membership in one or the other group.

- 6. Question 11(C) asked when did you first learn that U.S. forces were hiding prisoners from the ICRC, and what did you do about it? You responded to the first part of the question, but not the second. If this failure to respond was an oversight, please provide an answer now. If not, please explain why you refuse to answer this question.**

Response: In my response to your previous question, I indicated: "I recall understanding [at the time I learned of the issues regarding ICRC access] that the Department of Defense was investigating the issue." Based on that understanding, I believed that the Department of Defense would conduct an investigation and the Departments of Defense and State would address any issues regarding the ICRC, as it has been customary and, as it was appropriate for them to do. It was not within my authority or practical ability as Counsel to the President to conduct such an investigation into the actions of agencies outside the White House or to be a primary point of contact with the ICRC.

- 7. Responding to question 12, you asserted that "the legal advisor at State" agreed that the President's decisions regarding the application of the Geneva Conventions were correct as a matter of law. Can you point me to any document written by the State Department's legal advisor that supports your assertion? Did Mr. Taft's views on this issue change after February 2, 2002, when he wrote, in a memo addressed to you: "The [Geneva] Conventions call for a decision whether they apply to the conflict in Afghanistan. If they do, their provisions are applicable to all persons involved in that conflict -- al Qaeda, Taliban, Northern Alliance, U.S. troops, civilians, etc."**

Response: Prior to the time I received the memorandum from which you quote, I had been advised in a January 26, 2002 memorandum from the Secretary of State that has since been made public that "[t]he Secretary of State believes that al Qaeda terrorists as a group are not entitled to POW status and that Taliban fighters could be determined not to be POWs either as a group or on a case-by-case basis." The President's February 7, 2002 determinations were fully consistent with this view.

In addition, transmitted with these responses is a white paper that was transmitted by the State Department's Legal Adviser to the Department of Defense General Counsel in March 2002. The memorandum "concludes that the President's decisions are consistent with our treaty obligations and customary international law." I have been advised by the White House that, because it is not a

predecisional deliberative document or an attorney/client communication, providing this document does not implicate the concerns that have prevented the Executive Branch from providing certain other documents you requested and that I am therefore at liberty to provide it to you.

8. **Question 14(B) asked, "As White House Counsel, isn't it your job to question a legal analysis if you believe that it may be erroneous, especially if you know that the President or other senior Administration officials may rely upon it in formulating national policy." You did not answer this question directly, but instead noted, "During the drafting of some legal opinions by the Department of Justice, Department lawyers have consulted me and my staff for our input regarding their analysis. We have provided that input where appropriate." Was this meant to convey a "yes" or "no" answer to my question?**

Response: No, my response was not meant to convey a "yes" or "no" answer to your question. By way of clarification, as Counsel to the President, one of my primary responsibilities is to identify the issues that should be reviewed by the Department of Justice. As the Department conducts its legal analysis, I sometimes raise questions regarding the analysis when appropriate, such as where I believe it may be incomplete or unclear. Like every lawyer within the Administration, of course I care whether a legal analysis is accurate. As I responded earlier, however, by statute and regulation, the Department of Justice provides definitive guidance to the Executive Branch on matters of legal interpretation. Thus, while I sometimes provide comments, suggestions, and reactions to draft OLC opinions, it has not been my practice to direct OLC to alter materially its analysis or conclusions.

9. **Question 23 asked, "Upon learning of the systemic failure of Texas law enforcement authorities to comply with the Vienna Convention, did you advise the Governor to take steps to correct the problem?" Your response concludes, "As I recall, the State Department assumed responsibility to take steps to correct the problem."**

(A) Are you suggesting that the U.S. State Department assumed responsibility for instructing Texas law enforcement on its obligations under the Vienna Convention?

Response: No. In a letter to Governor Bush dated June 18, 1997 regarding the Montoya case, the State Department's Acting Legal Adviser expressed appreciation for the Governor's "cooperation in this case" and said that the Department was "committed to working with the officials of Texas and other states in the future to ensure a better understanding of and compliance with the requirements of the Vienna Convention." My understanding is that other officials in the Governor's office and in the Texas Attorney General's office subsequently worked with the State Department on this issue.

(B) Is it fair to infer from your response that you did not advise Governor Bush to take steps to correct the systemic failure of Texas authorities to comply with international law?

Response: No.

- 10. Question 27 discusses the Rodi Alvarado asylum claim and seeks your opinion whether victims of domestic violence are eligible for asylum. You decline to state your position on the general legal question on the grounds that the Alvarado case is pending before the Attorney General. Leaving aside the specifics of the Alvarado case, do you believe that victims of domestic violence are eligible for asylum under current U.S. law, which you would be responsible for enforcing if confirmed as Attorney General?**

Response: Yes, victims of domestic violence can be eligible for asylum under current U.S. law. As with any applicant for asylum, those individuals must satisfy the full range of requirements established by Congress before asylum can be granted. If confirmed as Attorney General, I would take very seriously my obligation to ensure that Congress's standard for asylum is applied fairly and equally to all asylum seekers.

THE WHITE HOUSE

WASHINGTON

January 21, 2005

Dear Senator Kerry:

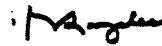
Thank you for your January 6, 2005 letter concerning an exchange I had with Senator Leahy during my confirmation hearing and for the opportunity to clarify my answer.

I understand your concern that my answer to Senator Leahy's question – which I had understood to seek information about laws that might apply to other world leaders – did not make clear that the United States would never accept the use of torture against Americans and would pursue every means to bring its perpetrators to justice. If I am fortunate enough to be confirmed as Attorney General, I commit that I would do all in my power to protect Americans from such treatment and to prosecute those responsible.

As you note, international law forbids the use of torture. All parties to the Convention Against Torture ("CAT") have committed not to engage in torture and to ensure that all acts of torture are offenses under their criminal laws. The CAT makes clear that "[n]o 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." These provisions protect American citizens from torture. Depending on the circumstances, American citizens may also be protected from torture by other treaties as well as by the domestic laws of the country holding them.

Again, thank you for your inquiry and for the opportunity to clarify my response on this important subject.

Sincerely,



Alberto R. Gonzales
Counsel to the President

The Honorable John F. Kerry
United States Senate
Washington, D.C. 20510

cc: The Honorable Arlen Specter
The Honorable Patrick Leahy

01/25/2005 15:47 FAX

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THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

March 22, 2002

NOTE FOR JIM HAYNES

Attached is a memorandum concerning the President's recent decisions about the applicability of the Geneva Conventions to the conflicts with al-Qaeda and the Taliban and the treatment of persons detained by the U.S. in those conflicts. The memorandum concludes that the President's decisions are consistent with our treaty obligations and customary international law. I hope the memorandum will be useful to you and others in responding to questions on this subject.



William H. Taft, IV

Attachment:
As stated.

**Responses of Alberto R. Gonzales
Nominee to be Attorney General
to the Written Supplemental Questions of Senator Edward M. Kennedy**

I. General Request:

Your answers repeatedly state that you do not recall certain key discussions on torture, that you do not know whether relevant documents and other materials exist, that you have not conducted a search for such materials, and that you would refuse to provide them because they involve "classified information," "predecisional" or "internal deliberations," "deliberative material," or "non-public" opinions.

As you certainly know, however, there is no legal bar to providing classified materials or any of the other materials to Congress, and such materials have in fact been provided regularly to Congressional committees in nomination and other proceedings. You yourself were directly involved in providing sensitive executive materials to the Intelligence Committees and the 9/11 Commission, and an incomplete selection of torture-related documents to the public last June. The only exception to the obligation to provide such materials is in the rare case where the President himself determines that his interest in secrecy outweighs the public interest in disclosure of the information or materials to Congress or the public, and he himself invokes executive privilege.

Refusal to provide the requested materials and information is inappropriate and unjustified in the present circumstances. It was clear at the time you were nominated that your involvement in the prisoner detention and interrogation issues would be a major concern of the Senate, and that the Senate would need full information and materials on this subject. Recent reports confirm serious abuses of detainees at several locations, and your role in the development of the legal justifications that many believe facilitated and encouraged these abuses is a central issue in the decision by the Senate on whether you should be confirmed as the nation's chief law enforcement officer.

I therefore request that you reconsider all of your answers at the hearing and in your written submissions and that you provide the materials and information requested.

For example, in your answer to 2(a) of my written questions to you, you do not describe your suggestions or opinions on the Bybee Memorandum, but you indicate that your office may have provided comments or suggested edits. Please identify and provide any materials containing or reflecting those comments or edits, and any materials reflecting your knowledge of them or your role in them.

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Please determine whether there are audio recordings, or other transcriptions or records of any kind, relating to any of the meetings, events, discussions or facts in question.

If any of the requested or relevant materials once existed but no longer exist, please describe what happened to them.

Response: Respectfully, I have provided a great deal of information through the answers I provided at the day long hearing on my confirmation and in the nearly 450 written responses I prepared over the Martin Luther King, Jr. holiday weekend to post-hearing questions from more than a dozen different Senators. In all of my responses, I have answered truthfully, based on my recollection.

With respect to the specific points raised in your question, I can reaffirm that, I in fact cannot recall with any specificity many of the discussions in which I participated concerning interrogations of detainees. I can in good faith try to provide you a general description of the process, of the issues with which I was concerned, and of my views concerning the role of Counsel to the President as part of that process. I have, through my responses to all of the Senators, attempted to provide such information to the Committee.

With respect to your requests for documents, I have since the time of my nomination not been involved in responding to requests for documents that may have been created during my tenure as Counsel to the President. Decisions regarding the release of White House or Department of Justice documents to the Committee are being made by other officials at the White House and I have provided all of the documents that I have been authorized to disclose. I do not agree, however, that the only "the only exception to the obligation to provide . . . materials [requested by a Member of Congress] is in the rare case where the President himself determines that his interest in secrecy outweighs the public interest in disclosure of the information or materials to Congress or the public, and he himself invokes executive privilege." Instead, it is generally not the practice of this or prior Administrations to provide all documents requested by a Member of Congress where those documents contain highly deliberative or Presidential communications. By longstanding practice, no claim of executive privilege is necessary to decline to produce such documents in response to such a request. It is on the basis of this practice, and in light of the nature of the documents at issue, that I understand the White House has respectfully declined to provide additional documents in addition to the many documents it has already made public or produced in response to inquiries from Senators.

I respect your interest in learning of my involvement in prisoner detention and interrogation issues, and have attempted to provide as much information as I am able to recall, identify, and provide. With respect, I reject the charge that I participated in "the development of the legal justifications" that "facilitated and encouraged" abuses of detainees.

In response to your specific inquiry, so far as I am aware, there have never been any audio recordings or transcriptions of any meetings in my office concerning these topics or any others.

II. Follow-up Requests on Specific Questions:

Question #1: Discussions of Interrogation Techniques.

Please provide the requested details of the meetings, including dates or timeframes, the persons present, and the recommendations, results, and assignments. In all answers, if your recollections are non-specific or incomplete, state what you do recall.

Response: Since shortly after September 11, 2001 until the present, the Administration has been involved in conducting the War on Terror by gathering as much information from terrorists as we possibly can within the bounds of law. During that time, I have participated in several meetings at which the possible use of methods of questioning were discussed. These meetings may have included, from time to time, representatives from the National Security Council, the Department of State, the Department of Justice, the Department of Defense, the Central Intelligence Agency, and others. In the meetings I attended, agencies' representatives raised concerns that certain terrorists had information that might save American lives; the participants shared a desire to explore whether there existed methods of questioning these terrorists that might elicit that information; and it was always very clear that we would implement such methods only within the bounds of the law. As Counsel to the President, my constant emphasis and interest was on the last factor – ensuring compliance with the law. It would not have been appropriate for me to comment on issues such as whether a particular individual may have information that would be helpful to the effort to save American lives or defeat terrorists, or whether a certain procedure for questioning that individual would be effective in eliciting that information. Others with more relevant experience, expertise, and information were responsible for making those judgments. Instead, it was my responsibility to ensure that any method they deemed appropriate and effective from an operational point of view was considered lawful by the Department of Justice. To the extent I was involved in recommendations, results, and assignments arising out of such meetings, my activities were directed toward ensuring that those with operational responsibility would act only after receiving the judgment of the Department of Justice that a proposed course of action was lawful.

Question #2: Your Role in the Bybee Memorandum.

Please explain what you meant when you used the expression "forward leaning," especially in any documents which contain that expression. Please make sure that the documents provided, and your refreshed recollections, specify the persons who requested the Bybee Memorandum, and the reason for the request.

Response: As I said in the hearing, I do not recall ever using the term "sort of leaning forward" in terms of stretching what the law is. The expression "forward leaning" generally means, in my view, to think creatively within the bounds of the law. In my judgment, and the President's, we should do everything we can to win the war against terrorists who kill innocent civilians and do not fight according to the laws of war, and this may well require that attorneys asked to give legal advice – like those persons responsible for unique military operations – explore the possibilities that the law permits different solutions than those that have been tried before. That is not to say one stretches or ignores the law to achieve a desired result, but rather that one should think creatively about whether the law might permit new approaches in this unique war. I do not believe that I used the phrase "forward leaning" in any documents concerning the August 1, 2002, memorandum.

Questions #3 - 6: Documents Relating to the Bybee Memo.

In these and other answers, when you use the phrases "no present knowledge of any documents" or "no present knowledge that there are any documents," does that mean that such documents existed or may have existed in the past? If so, please identify and describe them in detail and explain what happened to them. Do the two phrases have different meanings to you? Where you yourself did not search for documents, please detail the steps by others assisting you to locate them.

Response: In my responses to these questions, my use of the phrase "no present knowledge of any documents" or "no present knowledge that there are any documents" was intended to indicate that I presently do not know of responsive documents, regardless of whether they currently exist, and was not intended to indicate that I am aware of responsive documents that no longer exist. The two phrases do not have different meanings in my judgment.

Question #5: Your Change in Position on the Bybee Memorandum.

When, how and through whom did Justice's Office of Legal Counsel "raise questions" about the Bybee Memorandum? Please provide all relevant materials. The statement in the Bybee Memorandum that certain acts were not "torture" was adopted and disseminated in 2002 and remained Administration policy until June 2004. At that time you and the President decided that these actions were in fact torture. Was that decision retroactive? Or was it prospective, so that acts which became torture under the new interpretation continued not to be considered torture if committed before June 2004?

Response: Lawyers within the Office of Legal Counsel raised some concerns about the memorandum before it had been leaked to the press in June 2004. My general reaction expressed to staff and others in the Administration prior to the June 2004 press conference was that people would incorrectly assume from the hypothetical discussions contained in the August 1, 2002, memorandum that the President was somehow relying on those discussions as authority under our Constitution to engage in torture despite the statutory prohibition, when that was not, in fact, the case. The Executive Branch has a substantial need for confidentiality not only with respect to non-public final OLC

opinions, but also with respect to predecisional advice or discussions with OLC, in order to protect the deliberative processes of the Executive Branch and the attorney-client relationship between Administration officials and OLC. Just as the longstanding practice has been that non-public OLC opinions are not disclosed outside the Executive Branch, similarly discussions with OLC preceding the preparation of a final opinion are kept confidential. Based on this policy, I have been advised by the White House not to provide further details.

I appreciate the opportunity to clarify a misunderstanding. While your question suggests that the memorandum of August 1, 2002, concluded that "certain acts" were not torture and that subsequently a decision was made that "these actions were in fact torture," that is not the case. The memorandum of August 1, 2002, did not address specific actions and conclude that they were or were not torture. Rather, it sought to describe the standard Congress had set in defining torture in 18 U.S.C. § 2340 without addressing specific acts. In addition, in the memorandum released on December 30, 2004, providing OLC's current interpretation of the statute, OLC made clear that OLC had reviewed its "prior opinions addressing issues involving treatment of detainees" and did "not believe that any of their conclusions would be different under the standards set forth" in the December 30th memorandum. Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A*, at 2 n.8 (Dec. 30, 2004). The current interpretation of the statute is the one that the Executive Branch will apply, and it does not have solely prospective effect.

Question #7: Opposition of High-Level JAG Officers.

What did you do when you "learned" that high level officers experienced in military law "disagreed with the legal and policy positions" in your January 2002 document? Who were they? Did you make any changes that reflected the opposition within the military? Provide details and identify and provide all related materials. When you say the "principals who had equities in the decision" had a chance to present their concerns "directly to the President," does that include the dissenting high-level JAG officers? Did he meet with them or learn of their opposition? Please identify and provide any documents in which the "principals" or their lawyers who disagreed with your document or the President's decision expressed that disagreement at any time, and any other materials reflecting that disagreement.

Response: At all times throughout the process that led to the President's February 7, 2002, determination concerning humane treatment of al Qaeda and Taliban detainees, I attempted to ensure that the views of all parties with an interest in the matter – including those in the military – were fully and faithfully represented both in writing and otherwise. I do not recall, if I ever knew, the names of individual military officers who were concerned about the Geneva determinations. I do not believe that any "dissenting high-level JAG officers" presented their concerns directly to the President, as a matter of good management practice I believe it was for the Chairman of the Joint Chiefs of Staff and the Secretary of Defense to determine which of those concerns within DOD merited the

President's personal attention and to present those views to the President as they in their discretion saw fit.

Question #8: Connecting the Bybee Memorandum to Operations in the Field.
Please describe how, when and by whom the Bybee Memorandum, addressed to you, was disseminated to DOD and other agencies. Since the military was already subject to strict limitations under the Uniform Code of Military Justice, and was already subject to the President's previous mandate to treat prisoners humanely, what was the purpose of giving DOD detailed advice on when severely coercive interrogation techniques become "torture" under the Torture Act?

Response: As you note, the August 1, 2002, memorandum was not addressed to the Department of Defense. I do not recall when the memorandum was disseminated to that Department or other agencies. Therefore, I am unable to answer the second part of the question. In my experience, however, it is not uncommon for agencies to ask to obtain copies of legal opinions on questions of interest to them, even if the opinion might not directly govern their conduct.

(b) How did you become "aware" of what the DOD Working Group was doing with the Bybee memo? What was your role, and the role of your office and assistants, in or with the Working Group? Provide details, and identify and provide relevant documents.

Response: I believe I became aware that the DOD working Group reviewed the Bybee Memorandum because I was advised of that fact by the DOD General Counsel. Neither I nor anyone on my staff had any role in or with the Working Group. So far as I am aware, no employee of the Office of Counsel to the President ever met with the Working Group, provided any input into its consideration of the issues before it, reviewed or commented on any drafts of its report, or otherwise participated in the Working Group process.

Question #9: Ghost Detainees.
Does your answer to this question mean that the issue was never brought to the attention of or inquired into by your office?

Response: I do not recall when I became aware of issues surrounding ICRC access to certain detainees, but I would have gained such awareness as an attendee at meetings of senior Administration officials. I recall understanding that the Department of Defense was investigating the issue. Based on that understanding, I believed that the Department of Defense would conduct an investigation and the Departments of Defense and State would address any issues regarding the ICRC, as had been customary and as it was appropriate for them to do. It was not within my authority or practical ability as Counsel to the President to conduct such an investigation into the actions of agencies outside the White House or to be a primary point of contact with the ICRC.

Question #10: The Goldsmith Memo on "Relocating" Prisoners.
You did not answer (b), (c) or (e).

(b) Was it your intent to justify the practice of maintaining ghost detainees?

Response: No. It would never be appropriate to request a legal opinion with the intent to "justify" a practice or procedure. Articles 136 and 137 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War ("GC") require the United States promptly to notify the Red Cross, through the National Detention Reporting Center, "of any measure taken by it concerning any protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence, or who are interned." The policy of the United States is to comply with its obligations under the Geneva Conventions. As I indicated in my earlier response, the draft memorandum was prepared to assist U.S. personnel to abide by all applicable legal requirements.

(c) Why would it ever be necessary to hide a detainee from the International Red Cross?

Response: Article 143 of the GC provides that Red Cross visits to protected persons "may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure." Similarly, Article 5 of the GC provides that "[w]here in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention." These provisions may authorize some restrictions on Red Cross access to protected persons in certain exceptional cases. Conduct in accordance with these provisions does not constitute "hiding" detainees.

(e) Was this and is this the intent of our policy?

Response: No. The policy of the United States is to comply with all of our legal obligations under the GC.

If the purpose of the draft memo was "to assist US. personnel [to] abide by all applicable legal requirements," and the draft was never finalized or signed, what guidance did you provide to the CIA to fill that need? Please provide the detailed basis and any documents you relied on for your conclusion that the Administration has complied with all of its "legal obligations to notify the ICRC."

Response: I have been advised that although the memorandum was not finalized, CIA and DOD continued to consult with DOJ to make certain that any actions taken were consistent with all of our legal obligations, including any obligations to notify the ICRC.

(h) The Goldsmith memo indicates that the purpose of the proposed "relocation" of detainees out of Iraq was "to facilitate interrogation." In what way would the relocation materially "facilitate" interrogation? In what sense were facilities in Iraq inadequate to interrogate detainees in the manner permitted by law?

Response: I believe the memorandum to which you refer was a draft that was never finalized. With respect to your particular question, I do not know how those on the ground in Iraq believed that relocation might facilitate interrogation. Nor do I know whether anyone reached the conclusion that facilities in Iraq were inadequate to interrogate detainees in the manner promoted by law or, if anyone did so, what the basis for the conclusion was.

Question #11: "Extraordinary Renditions."

Do you believe that the Convention Against Torture prohibits any agency of the United States from turning over an individual in U.S. custody, but not within the territorial boundaries of the U.S., to a nation where he would be in danger of being tortured? Do you consider the U.S. Naval Base at Guantanamo to be United States territory for the purpose of the Convention Against Torture? Do you consider Iraq to be United States territory for the purposes of the Convention Against Torture? Has anyone in the Executive Branch authorized or facilitated the transfer of any person in U.S. custody outside the territorial boundaries of the United States to a nation where the person would be in danger of being tortured? If so, please identify each such person and the legal authority relied upon, and identify and provide all documents reflecting the transfer.

Response: The policy of the United States is not to transfer individuals to countries where we believe they likely will be tortured, whether those individuals are being transferred from inside or outside the United States. I am not aware of anyone in the Executive Branch authorizing any transfer of a detainee in violation of that policy. The precise legal question you ask about the legal application of the "refouler" provisions of Article 3 of the Convention Against Torture ("CAT") or other legal prohibitions is a complex one involving questions of extraterritorial effect, the Senate's declaration that Article 3 is not self-executing, case law such as the Supreme Court's decision in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), and the interplay of statutes such as the prohibition against torture at 18 U.S.C. §§ 2340-2340A, the conspiracy statute and other laws, and I have not personally studied it. However, United States policy is clear—the U.S. will not transfer a detainee to another country if it is likely that he will be tortured. Similarly, the question of whether Guantanamo is United States "territory" for purposes of the CAT is a complex legal issue. "Territory" is not a defined term in the Convention. Notwithstanding the complexity of the legal question, however, United States policy is clear—the President has directed that the United States is not to engage in torture anywhere in the world and is not to transfer detainees from anywhere in the world to other countries where they likely will be tortured.

Question #15: The February 2002 Presidential Directive on Humane Treatment.

(a) You say that the directive was limited to the Armed Forces because other agencies are governed by "several other laws." But the Armed Forces are also bound by other restrictions that guarantee humane treatment. Thus your answer is not persuasive. Please re-answer. Did the President intend to exclude the C.I.A., other civilian agencies and contractors from the requirement to treat detainees humanely? If not, how is that requirement enforced. Did you advise him on this issue?

Response: It is my understanding that the President has not issued a directive on the treatment of detainees other than the February 7, 2002, directive "reaffirm[ing] the order previously issued by the Secretary of Defense to the United States Armed Forces." The President, however, expects all agencies to comply with their respective legal obligations. The President said – for example on March 31, 2003 – that he expects detainees to be treated humanely. As you know, the term "humanely" has no precise legal definition. As a policy matter, I would define humane treatment as a basic level of decent treatment that includes such things as food, shelter, clothing, and medical care. I understand that the United States is providing this level of treatment for all detainees. I have been told that we are also meeting the substantive standards of Article 16 of the CAT regarding cruel, inhuman, or degrading treatment. As I have also explained in my responses to 1(A), (B), and (C), the CIA and other non-military personnel are fully bound by the prohibition on torture in the CAT and by the criminal prohibition on torture contained in 18 U.S.C. §§ 2340-2340A. In addition, depending on the circumstances, they are bound by other criminal statutes that may provide penalties for conduct constituting torture.

(c) Please answer these questions and provide the publicly cited OLC opinions.

Response: I have been advised by the White House that I must respectfully decline to provide a copy of the opinions or to answer the questions posed about them.

(d) Is your statement that the President does not condone torture "by US personnel" intended to mean that he would allow non-U.S. personnel to torture prisoners captured by the U.S.?

Response: No. The United States does not condone and would not permit torture by non-U.S. personnel of prisoners captured by the United States.

Question #20: Support for a Comprehensive Investigation.

You did not answer any part of this question. Unless you believe you have a conflict of interest in answering these questions, please answer each part.

i. Do you support a comprehensive investigation, beyond the past and current internal Defense Department inquiries, into all of the allegations of abuse?

Response: As I noted in my original response, there have been eight completed investigations, and there are three ongoing investigations. There have been numerous

trials, courts martial, and administrative proceedings. These investigations and proceedings should be allowed to continue. I have no reason not to believe that once completed, these proceedings will result in a complete and comprehensive investigation and adjudication of detainee operations. Once they are completed, the appropriate individual, whether that is the Secretary of Defense, the Attorney General, or some other individual, should make a decision as to whether an additional investigation is necessary.

ii. Describe the form of investigation that you would recommend, including, but not limited to, the agency that should conduct the investigation, whether the results should be publicly available, the powers of the investigators, and the timing of such an investigation.

Response: I would not be in a posture to recommend any such investigation until the current investigations and proceedings were complete. As indicated above, the completion of such proceedings and investigations may likely result in a complete and comprehensive investigation and adjudication of detainee operations. It is in my judgment premature to discuss an additional investigation.

iii. Given the possibility of criminal proceedings in which you might be a witness, would you follow Attorney General Ashcroft's example and allow the Deputy Attorney General to appoint a special prosecutor?

Response: As I said in my earlier responses, if confirmed, I would take extremely seriously my obligation to recuse myself from any matter whenever appropriate and would consult with other lawyers at the Department of Justice if any such questions were to arise. As I indicated above, the ongoing investigations and proceedings should be allowed to continue. Once completed, the appropriate individual, whether that is the Secretary of Defense, the Attorney General, or some other individual, should make a decision as to whether additional investigation is necessary.

iv. If Congress decides to create a 9/11-type commission to make a comprehensive investigation into the reports of abuse, will you urge the President to sign such legislation?

Response: As I indicated above, the ongoing investigations and proceedings should be allowed to continue. I could not commit to making a recommendation either way until all such investigations and proceedings are completed.

Question #21: Your Role in Attorney General Ashcroft's Committee Appearance. Did you tell the Attorney General that he could refuse to provide documents to the Committee without invoking any privilege? Did the President approve that decision?

Response: I recall that I participated in discussions regarding what documents should be disclosed and which should remain confidential to protect the deliberative process,

national security or other vital interests. I don't recall any discussion of whether any privilege should be invoked. It is my understanding that there has been a longstanding tradition of protecting the confidentiality of the deliberative process, a tradition that Congress has recognized.

**Responses of Alberto R. Gonzales
Nominee to be Attorney General to the
Written Supplemental Questions of Senator Dianne Feinstein**

Question 1. Putting aside legal interpretations, in your own personal view, should the United States use forced nudity, the threatening of detainees with dogs, or “water-boarding” when interrogating detainees? If yes, why? If no, what would you do as Attorney General to make sure that no one working for or on behalf of the United States uses these or similar tactics?

Response: I feel that the United States should avoid the use of such harsh methods of questioning if possible. The images of American soldiers appearing to engage in such conduct have created questions in the minds of some around the world whether we are committed to the rule of law. I believe such doubts may make it harder to win the war on terror. There may be extreme circumstances, however, where – in the judgment of those trained in interrogation, familiar with a particular detainee, and aware of the importance of the information that might be elicited – the use of lawful, but aggressive methods of questioning may be considered imperative to an effort to secure information that might save hundreds or thousands of lives. I am not in a position to judge whether, if ever, use of such methods would be effective and appropriate as an operational matter, but if confirmed would work to ensure that any questioning of detainees fully complies with all of our legal obligations. If conduct violates any of the legal obligations of the United States, and if it falls within the jurisdiction of the Department of Justice, you have my word that, if confirmed, I will aggressively prosecute such conduct.

Question 2. You wrote in your answers to my previous questions that “under Article 16 there is no legal prohibition under the [Convention Against Torture] on cruel, inhuman, or degrading treatment with respect to aliens overseas.” If this legal analysis is correct, then in your personal view, should Congress pass a law to categorically outlaw such treatment of aliens overseas? If yes, will you pledge to aggressively lobby Congress to enact such a law?

Response: While as a general matter I feel it would be appropriate as a matter of policy for the United States to enact a statute outlawing cruel, inhuman, or degrading treatment by its agents of aliens overseas, any effort to adopt such a statute would have to surmount the considerable hurdles that would be faced by attempting to articulate a workable definition of “cruel, inhuman, or degrading treatment.” As I understand it, the Senate’s reservation concerning Article 16 when it ratified the Convention Against Torture was in large measure a reaction to those definitional concerns. I do not have strong personal views whether such legislation is necessary or appropriate since I have been advised that the United States is meeting the substantive requirements of Article 16. But, if confirmed, I pledge to work with the Congress if it chooses to explore ways to enact such a law to the extent consistent with the Administration’s program and the anti-lobbying provisions of 18 U.S.C. 1913.

Question 3. Will you pledge to aggressively lobby Congress to reauthorize the ban on assault weapons that expired last year, which you have stated you support?

Response: If confirmed, I pledge to work with the Congress to explore ways to enact such a law to the extent consistent with the Administration's program and the anti-lobbying provisions of 18 U.S.C. 1913.

**Responses of Alberto R. Gonzales
Nominee to be Attorney General to the
Further Written Supplemental Question of Senator Dianne Feinstein**

Question 1. You wrote to me that your memo of January 25, 2002 is a "draft," that "it does not embody my final views as provided to the President," and that its judgments are "tentative." Yet you have declined to discuss with the Senate your final advice to the President, stating that such a discussion would "not be appropriate." So we can fully evaluate your final recommendation, will you please submit to the Senate the final version of the memo, and will you recommend to the President that he agree to release it?

Response: I have since the time of my nomination not been involved in decisions regarding responses to requests for documents that may have been created during my tenure as Counsel to the President. Decisions regarding the release of White House documents to the Committee are being made by other officials at the White House. I must respectfully advise you that, in response to a written request from Senator Leahy, the White House has declined to make available the document you have requested. In a letter to Senator Leahy dated December 17, 2004, Deputy Counsel to the President David G. Leitch explained:

I must respectfully advise you that we decline to make such a document available in order to protect the interests of this and future Presidents in receiving confidential and candid advice from senior advisors. The Supreme Court has long recognized "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." United States v. Nixon, 418 U.S. 683, 708 (1974).

In our view, these interests are at their zenith with respect to any memorandum prepared for the President by the Counsel to the President concerning issues such as application of the Geneva Convention to terrorists who have attacked our country and seek to do our citizens harm. While we recognize and respect the Senate's interest in exploring Judge Gonzales' views on important legal issues, we respectfully suggest that such exploration can and should take place without undermining "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking" that would attend public release of a confidential memorandum to the President.

Senator, I stand behind the advice I give to our President, and would otherwise not have a problem at least discussing the substance of my recommendations. But my own personal views on this matter must give way to the institutional interests of the Presidency. Other officials at the White House have decided not to release the final memorandum and I am told that this decision is final.

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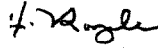
January 25, 2005

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Specter:

Attached are my responses to the written follow-up questions from Senator Durbin.

Sincerely,



Alberto R. Gonzales

**Responses of Alberto R. Gonzales,
Nominee to be Attorney General,
To the Written Supplemental Questions of
Senator Richard J. Durbin**

Torture Policy:

Question 1 parts (c) and (d): Please explain how your response to part (b) of this question is responsive to these two subparts which asked different questions.

Response: In Question 1(c), you asked whether U.S. personnel legally could engage in cruel, inhuman, or degrading treatment under any circumstances. In my response to 1(b), I attempted to clarify the obligations of the United States under the Convention Against Torture (CAT) and to explain United States policy. I appreciate the opportunity to further explain my response.

Question 1(c): At your hearing, I asked you whether U.S. personnel can legally engage in cruel, inhuman, or degrading treatment under any circumstances. You told me that "We are meeting our legal obligations," but you did not respond directly to the question. Can U.S. personnel legally engage in cruel, inhuman, or degrading treatment under any circumstances?

Response: As I stated in my earlier response, there are certain limitations in Article 16 of the CAT (subject to the Senate's reservation), which prohibits cruel, inhuman or degrading treatment. Thus, as a result of the Senate's reservation and the scope of Article 16, the Department of Justice has concluded that Article 16 does not impose additional substantive limitations, beyond those otherwise applicable, on treatment of aliens overseas. In Article 16, the United States agreed to "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture." The Senate's reservation provided that "the United States considers itself bound by the obligation under Article 16 . . . only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." Unlike the prohibition against torture in Article 1 of the CAT, Congress did *not* embody the Article 16 undertaking from the CAT in a separate criminal statute. Thus, the only legal prohibition on cruel, inhuman or degrading treatment comes from the international legal obligation created by the CAT itself.

As noted, the Senate's reservation defined the provisions of Article 16 in terms of conduct prohibited by the Fifth, Eighth, and Fourteenth Amendments. Those amendments, moreover, are themselves limited in application. The Fourteenth Amendment does not apply to the federal government, but rather to the States. The Eighth Amendment has long been held by the Supreme Court to apply solely to punishment imposed in the criminal justice system. *See, e.g., City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983); *Bell v. Wolfish*, 441 U.S. 520, 536 n.16 (1979). Finally, the Supreme Court has squarely held that the Fifth Amendment does not provide rights for aliens unconnected to the United States who are overseas. *See, e.g., Johnson v. Eisenrager*, 339 U.S. 763, 783-85 (1950); *see also United States v. Verdugo*

Urquidez, 494 U.S. 259, 269 (1990). Of course, there are various criminal prohibitions that may apply to criminalize some conduct that might otherwise be considered “cruel, inhuman, or degrading.” For example, various criminal statutes prohibiting assault (18 U.S.C. § 113), maiming (18 U.S.C. § 114), manslaughter (18 U.S.C. § 1112), and murder (18 U.S.C. § 1111), apply within the special maritime and territorial jurisdiction of the United States, which, except for certain persons (particularly the armed forces and those employed by or accompanying them, who are generally covered by other statutes), generally includes overseas U.S. facilities. See 18 U.S.C. § 7(9).

Question 1(d): You also told me at the hearing: “As you know, when the Senate ratified the Convention Against Torture, it took a reservation and said that our requirements under Article 16 were equal to our requirements under the Fifth, Eighth and 14th Amendment. As you also know, it has been a long-time position of the executive branch, and a position that’s been recognized and reaffirmed by the Supreme Court of the United States, that aliens interrogated by the U.S. outside the United States enjoy no substantive rights under the Fifth, Eighth and 14th Amendment. So as a legal matter, we are in compliance.” If I understand you correctly, you believe that the Torture Convention’s prohibition on cruel, inhuman, or degrading treatment imposes no affirmative obligations on the U.S. regarding aliens interrogated outside the U.S. Is that your view? Is that the U.S. government’s position? Is this consistent with the June 25, 2003 letter from Department of Defense (DOD) General Counsel William Haynes to Senator Leahy, which states, “‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States. United States policy is to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with this commitment”?

Response: As I stated in response to Question 1(c), as a result of the Senate’s reservation and the scope of Article 16, the Department of Justice has concluded that Article 16 does not impose additional substantive limitations, beyond those otherwise applicable, on treatment of aliens overseas. Nevertheless, the Administration also wants to be in compliance with the relevant substantive constitutional standard incorporated into Article 16 by virtue of the Senate’s reservation, even if such compliance is not legally required. I had been advised that approved interrogation techniques were analyzed under that standard and satisfied it.

Question 2(a): For information that you claim may be classified, are you willing to work with the Committee to agree on an arrangement whereby I and my cleared staff can view this information?

Response: It is my understanding that no information is being withheld by the White House on the basis that it is classified. I am always willing to work to seek accommodation of the Committee’s legitimate requests for information.

Question 3: Please respond specifically to my question, “Do you believe that the anti-torture statute or any other statute governing the treatment of detainees is unconstitutional?”

Response: No, I do not believe such statutes are unconstitutional. Having said that, it is important to note that Congress has recognized the President's constitutional authority to deter and prevent attacks of international terrorism, and that it is theoretically possible for Congress to pass a law that infringes on the very authority that Congress has recognized. Thus, it is conceivable that Congress could in the future pass a law that a President might regard as unconstitutional in certain extreme circumstances. It should be emphasized, however, that the President has consistently stated that the United States will not use torture in any circumstances, so such a scenario will not occur during his Administration.

Question 4: For information that you claim may be classified, are you willing to work with the Committee to agree on an arrangement whereby I and my cleared staff can view this information?

Response: It is my understanding that no information is being withheld by the White House on the basis that it is classified. As I said above, I am always willing to work to seek accommodation of the Committee's legitimate requests for information.

Question 7(a): Please respond specifically to my question, "Did you then and do you now believe that this definition is legally correct?"

Response: I do not recall forming a view regarding the correctness of every single part of the legal analysis in the August 1, 2002, memorandum. I accepted it as the view of the lawyers at the Department of Justice charged with the responsibility of providing definitive legal guidance to the Executive Branch and attempting in good faith to interpret the language of a statute passed by the Congress. The August 1, 2002, memorandum has been rejected by the Department of Justice and its analysis has been replaced in a memorandum dated December 30, 2004. I accept and agree with the analysis contained in the Department's replacement memorandum, which presents a more persuasive interpretation of the anti-torture statute. I reject the analysis of the August 1, 2002, memorandum.

Question 7(b): Please respond specifically to my question, "Did you then and do you now believe that the 8/1/2002 torture memo's definition of specific intent is legally correct?"

Response: I support and agree with the analysis regarding specific intent contained in the Department of Justice's December 30, 2004, replacement memorandum. I do not recall forming a view regarding the correctness of the specific intent analysis in the August 1, 2002, memorandum but instead accepted it as the view of the lawyers at the Department charged with the responsibility of providing definitive legal guidance to the Executive Branch on such questions. Having reconsidered the analysis and the replacement memorandum, I believe the latter presents a more persuasive interpretation of the specific intent aspect of the anti-torture statute. I reject the analysis of the August 1, 2002, memorandum regarding specific intent.

Question 8: Please respond specifically to my detailed questions, "Why did the Administration oppose these anti-torture amendments?" "Did you or your office review and comment on the amendments? If so, what were you or your office's recommendations?" "What are these legal protections to foreign prisoners to which they

are not now entitled under applicable law and policy?" "Why does the Administration oppose these legal protections?"

Response: As stated in an October 18, 2004, letter from National Security Advisor Condoleezza Rice and Office of Management and Budget Director Joshua Bolten to the conferees, the Administration opposed the provision in the draft legislation because it would have provided legal protections to foreign prisoners to which they are not now entitled. The letter also noted Section 1095 of the proposed National Defense Authorization Act for Fiscal Year 2005 (H.R. 4200) already addressed the issue. Although my office regularly participates in the review and approval of such Statements of Administration Policy, I do not believe I commented or was personally involved in the development of the Administration's policy position regarding these amendments.

Texas Clemency:

Question 1(a): Please respond specifically to my question, "Did you recommend that Governor Bush pursue any of these courses of action in any of the 59 cases you supervised?"

Response: I do not recall all of the specific advice I may have given to Governor Bush in each of the death penalty cases the Governor considered during the period I served as his General Counsel. I do know that the Governor reviewed each clemency petition carefully and listened carefully to the many oral briefings and discussions about each case, with a particular focus on whether there was any credible allegation of wrongful conviction that had not been fully and fairly reviewed by the courts. I also know that the process Governor Bush followed in reviewing clemency petitions was modeled on the one used by his predecessor, Governor Ann Richards.

Question 1(b): Please respond specifically to my question, "How were you able to rely on its determination on clemency petitions in every case you supervised, without ever asking the Board to conduct a hearing or investigation?"

Response: I have no reason to believe that members of the Texas Board of Pardons and Parole, nominated by Governors of both parties and confirmed by the Texas Senate, were derelict in their duties during the 25-year period you cite in your original question. In addition to the Board's recommendation, my office independently reviewed every petition, as I noted in my earlier response. During the period I served as his General Counsel, Governor Bush carefully reviewed the facts related to every death penalty case before making a decision whether to grant or reject clemency. Information was provided to him through a written summary of the case, an oral briefing, and, in most cases, through other detailed discussions.

Faith-Based Initiative:

Question 1(c) and Question 2(b): My question asked whether federal government contractors should be allowed to discriminate in hiring on the basis of religion, and why. Please respond specifically to federal contractors, not to the federal government generally.

Question 1(c): Do you believe that federal government contractors should be allowed to discriminate in hiring on the basis of religion? Why or why not?

Response: Title VII of the Civil Rights Act of 1964 prohibits selectivity in employment on the basis of religion. However, Section 2000e-1(a) of Title VII makes an exception from this prohibition for certain religious groups, specifically for any "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." Contractors ordinarily subject to Title VII remain subject to Title VII even when contracting with the Government. As your question notes, prior to 2002, Executive Order 11246, as amended, prohibited absolutely the consideration of religion in employment by Federal contractors. Thus, as written, the Executive Order exceeded Title VII, failing to make accommodation for religious corporations, associations, and other entities whose religious observances were protected under Title VII's religious exemption. In 2002, President Bush signed Executive Order 13279, which further amended Executive Order 11246 to exempt from its requirements any "religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." Thus, President Bush brought Executive Order 11246 into harmony with the judgment expressed by Congress in Title VII that a narrowly drawn set of organizations should not suffer legal detriment due to their religious nature. As I said previously, I agree with the President that the federal government should not discriminate against faith-based organizations or religiously motivated individuals in federal funding and programs, including government contractors. Such groups and persons should be allowed access to federal programs, including federal contracts, on the same basis as all other groups, rather than being singled out due to their religious nature. If confirmed as Attorney General, I would fully and faithfully enforce Title VII of the Civil Rights Act of 1964.

Question 2(b): Do you believe that faith-based organizations should be able to discriminate in hiring on the basis of religion, even for government-funded positions? Why or why not?

Response: As explained in response to 1(c), above, faith-based organizations that are federal contractors would be treated the same as any other federal contractor. Section 2000e-1(a) of Title VII makes an exception from Title VII's prohibition on selectivity in employment on the basis of religion for certain religious groups, specifically for any "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." Prior to 2002, Executive Order 11246, as amended, prohibited absolutely the consideration of religion in employment by Federal contractors. In 2002, President Bush signed Executive Order 13279, which further amended Executive Order 11246 to exempt from its requirements any "religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." Thus, President Bush brought Executive Order 11246 into harmony with the judgment expressed by Congress in Title VII that certain

narrowly drawn organizations should not suffer legal detriment due to their religious nature. If confirmed as Attorney General I would fully and faithfully enforce Title VII of the Civil Rights Act of 1964. To the extent that other federal statutes may make other provisions for grantees (as opposed to contractors), I would, of course, fully and faithfully enforce the applicable law with respect to those grantees, as well.

January 25, 2005

The Honorable Alberto R. Gonzales
Counsel to the President
The White House
Washington, DC 20500

Dear Judge Gonzales:

In written questions sent as a follow up to your hearing before the Judiciary Committee, I asked you to describe "in detail" the subject and substance of your one appearance in court as counsel to then-Governor Bush and now as White House Counsel for President Bush to which you referred in your Committee Questionnaire. You responded that you appeared in state court in Texas in 1997 in connection with a jury summons the Governor received. In your answer you described having observed defense counsel make a motion to strike the Governor and the prosecution not objecting. You further wrote that you were, "asked by the Judge whether the Governor had any views on this and recall stating that he did not."

It has been reported in the January 31st issue of Newsweek magazine that there was more detail to that day in court, and that in fact you appeared in chambers to argue there would be a conflict of interest if the Governor were to be on a jury where the defendant later petitioned for clemency from him. The magazine indicates that this account has been corroborated by the judge in the case, as well as by attorneys for the prosecution and the defense.

Can you please describe, in detail, all of your actions on behalf of then-Governor Bush, connected to his 1997 jury summons, including any and all actions on and off the record, any and all discussions with any party in the case, any counsel representing any party in the case, and any fact finder or judge in the case. Please explain as well why you did not include a complete account of this appearance in response to my written question. Finally, please respond to the suggestion in the Newsweek account that the idea of getting the Governor excused from jury service because of a "conflict of interest" was your idea, and was not initially brought up by any other counsel that day.

Sincerely,

PATRICK LEAHY
Ranking Democratic Member

01/26/2005 09:59 FAX
01/28/05 WED 08:51 FAX

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THE WHITE HOUSE
WASHINGTON

January 25, 2005

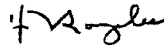
Dear Senator Leahy:

This responds to your letter, which I have just received, asking questions about my response to your written question concerning my court appearance as counsel for then-Governor Bush.

Your written question asked me to provide details about the one occasion when I "personally appeared *in court*" and to "describe in detail the subject and substance of that *court appearance*." My response to your question was accurate and complete; I respectfully disagree with your suggestion that I did not provide a complete response to your question. Although you cite an item in the January 31, 2005 issue of *Newsweek* to suggest that "there was more detail to that day in court," the very article you cite recognizes that "Gonzales's account tracks with the official court transcript."

With respect to other events surrounding that court appearance, you may be aware that prior to my hearing before the Judiciary Committee, I was interviewed by the Committee's majority and minority investigators. In response to their questions about the events surrounding my court appearance, I provided details of my recollections concerning "any and all actions on and off the record, any and all discussions with any party in the case, any counsel representing any party in the case, and any finder of fact or judge in the case."

Sincerely,



Alberto R. Gonzales
Counsel to the President

The Honorable Patrick J. Leahy
Ranking Member
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

cc: The Honorable Arlen Specter

Senator Sessions' Follow-up Questions from the Confirmation Hearing of
Judge Alberto R. Gonzales, Attorney General
Questions for Professor Harold Hongju Koh

I. Questions for Professor Koh

1. Can military recruiters currently recruit on the campus of Yale Law School? Yes. Please see link below to view the Yale Law School's policy

http://www.law.yale.edu/outside/html/Public_Affairs/576/yls_article.htm

2. In *FAIR v. Rumsfeld*, the Third Circuit held that law schools could discriminate against the military by preventing them from recruiting on their campuses. Were you a named plaintiff in *FAIR v. Rumsfeld*? No.
3. Do you agree with the Third Circuit's decision in *FAIR v. Rumsfeld*? Yes.

SUBMISSIONS FOR THE RECORD

Arizona Daily Star
January 8, 2005
Wrong for the job

George W. Bush understandably wants a trusted adviser to be his next attorney general. White House Counsel Alberto Gonzales enjoys that trust, but the president's nominee is the wrong man for the job.

With Republicans outnumbering Democrats by 55-45 in the Senate, Gonzales is likely to win approval for the position. Yet, the man who advocated the use of torture as an interrogation tool is not only unqualified, he is a threat to the rights of Americans.

Before Thursday's Senate hearing on his nomination, Gonzales was merely a legal adviser who was unqualified. But during the hearing he showed himself to be a man of questionable morality and ethics.

For example, his 2002 memo to the president stated that the war on terror "renders obsolete Geneva's strict limitations on questions of enemy prisoners and renders quaint some of its provisions." The Geneva Conventions outline how prisoners of war should be treated.

But when questioned by the Senate on Thursday, Gonzales said this: "Contrary to reports, I consider the Geneva Conventions neither obsolete nor quaint." He said his early interpretation applies only to organizations like al-Qaida that have no national affiliation and do not "fight according to the laws of war." And he said the Geneva Conventions' protections for terrorists would "honor and reward bad conduct." And he pledged to prosecute those who tortured terrorism suspects.

However, he noted that the White House is looking to change some of the Geneva Conventions' guidelines. There again, one has to question whether Gonzales is saying the right things in order to win the job.

His statements now and in the past are inconsistent at best. But more important, the legal opinion he forwarded to the president and this administration cannot be separated from the scandals of torture and death at Abu Ghraib prison in Iraq.

It is significant that among his Senate supporters, Gonzales' legal abilities and his leadership skills are hardly mentioned as top qualifications. Supportive senators instead promote the nominee's rags-to-riches story. Second among his qualifications is that he would become the nation's first Hispanic attorney general.

This administration has an affinity for those kinds of stories. But it should have learned from the Bernard Kerik nomination that they don't always make for good national leadership. Kerik withdrew his nomination as head of Homeland Security after questions arose about the immigration status of a housekeeper and nanny he employed.

Gonzales' ethnicity, his accomplishments and his role as adviser to the president for nine years are admirable but irrelevant. His background makes for great political theater but does not qualify him to be attorney general. And one would hope that Hispanics would not rush to blindly support a man who is clearly wrong for the job.

Alberto Gonzales has a history of bending the law to fit policy and the wishes of the president. Eagerness to please makes him a great adviser and confidant.

But as head of the Justice Department, the attorney general should answer only to the law.

Doubts About Gonzales, The Boston Globe, January 5, 2005

By nominating White House counsel Alberto Gonzales to be US attorney general, President Bush has made it more likely that the Senate will finally scrutinize the policies that lay behind the abuse of Afghan and Iraqi prisoners at Guantanamo and Abu Ghraib. In early 2002, Gonzales wrote that Geneva Convention protections for Afghan detainees were "obsolete," which helped set the stage for prisoner treatment that the International Red Cross has called "tantamount to torture." The Geneva Conventions are US as well as international law, and Gonzales's dismissal of them raises doubts about his fitness as attorney general.

Gonzales wrote his memo at a crucial moment in the formation of Bush administration policy toward detainees. Two Justice Department lawyers had written a 48-page paper that not only denied prisoner of war status and protections to Afghan war detainees but failed to offer them the hearing required under the Geneva Conventions to seek POW status. The State Department dissented from that view in a document that has been withheld from the Senate and the public. Gonzales took the Justice Department's position, telling Bush he thought it was "definitive."

To weigh the nominee's role in administration policymaking, senators should insist on release of that State Department document as well as several others that could shed light on how and why the administration chose policies that led to the death and torture of detainees and damaged the international reputation of the United States. Judiciary Committee members should also quiz Gonzales on his role in supervising a task force that decided that neither an international treaty nor US law kept Bush from authorizing torture if he thought it necessary to protect the nation.

Yesterday, a dozen retired US generals and admirals expressed their concern about Gonzales's opinions on torture and the Geneva Convention limits on prisoner interrogation. Military officers worry about US departures from international norms because they undermine protections that US soldiers need when they are captured.

A likely explanation for Gonzales's view that the Geneva Conventions are obsolete is that he believed it is what Bush wanted to hear. At a point when Bush needed wise counsel he got toadying loyalty instead. This may also be behind the shoddy review Gonzales did of Bush's thoroughly unsuited nominee for secretary of homeland security, Bernard Kerik. Gonzales appears to have done as little homework on Kerik as he did on the capital punishment clemency appeals he dispatched for Bush when he was governor of Texas.

Bush did not get good advice on prisoner treatment issues or civil liberties from the Justice Department led by John Ashcroft. Based on Gonzales's record, he will do little better. Unless he can allay these concerns, the Senate should reject his nomination.

Boston Globe
January 18, 2005

Editorial: Unfit as attorney general

TWO MEMOS on the US treatment of detainees from Afghanistan and Iraq stand in the way of Alberto Gonzales becoming the next attorney general of the United States. At his confirmation hearing earlier this month, he neither disavowed the memos nor showed an understanding of how their denial of international protections to detainees could lead to the many cases of prisoner abuse reported by both the FBI and the International Red Cross. The Senate should reject his nomination.

In his testimony, Gonzales made frequent reference to the much-photographed instances of prisoner humiliation and abuse at Abu Ghraib, as though the naked-body pyramid and other abuses that Specialist Charles Graner was justifiably convicted of Friday were the worst of what has occurred. But the FBI and Red Cross reports as well as the military's own investigations of killings of prisoners make clear that some interrogators and guards crossed the line into torture or homicide. It is disingenuous of Gonzales not to acknowledge the link between permissive torture policies from Washington and acts of abuse that occurred not just at Abu Ghraib but in Afghanistan and Guantanamo as well.

In 2002 as White House counsel, Gonzales wrote a memo in which he called provisions of the Geneva Conventions regarding prisoners of war "obsolete" and "quaint" and said the United States could operate as though the conventions did not apply to the Afghan war. Indeed, some of the fighters captured during the 2001 war against the Taliban and Al Qaeda in Afghanistan might not have deserved the status of POWs.

But the Geneva Conventions -- and American law -- make clear that any battlefield detainee has that status until a "competent tribunal" puts him in the less protected category of "enemy combatant." As US Judge James Robertson noted in a ruling last November, the Geneva Conventions do not give any individual, including the president, the authority to say who deserves POW status. The White House counsel certainly lacks that authority.

The second memo that has damaged the US reputation worldwide was written in 2002 by a Justice Department official as a guide to interrogation techniques. The memo, which Gonzales discussed with administration officials, said a president has the power to authorize torture despite a 1994 US law banning it. At the confirmation hearing, Gonzales declined chances to repudiate that view.

The Sept. 11, 2001, attacks thrust the United States into a new kind of conflict in which useful intelligence from detainees is crucial. But Gonzales has been at the center of administration policy-making that set aside tried and true US and international rules governing the collection of this information. His blindness to the consequences of those policies makes him a poor choice for chief law enforcement officer of the nation.

U.S. Senate Committee on the Judiciary
U.S. Senator John Cornyn (R-TX)

Nominations Hearing

**Alberto R. Gonzales
to be Attorney General of the United States**

Thursday, January 6, 2005, 9:30 a.m., Hart Senate Office Building Room 216

Thank you, Mr. Chairman, for convening today's hearing.

I am very pleased to introduce Judge Alberto Gonzales to this committee. He is a talented lawyer, a dutiful public servant, and a good man. He is a great Texan and an inspiring American success story. I am honored to call him my friend.

I should also mention that Senator Hutchison, the senior Senator from Texas, had wanted to be here to express her strong support – but is away due to a preexisting commitment. I ask that her statement of support be entered into the record.

I have known the Judge for many years, and I can tell you that the media is absolutely right to refer to him as the “Man from Humble.” Now if you're not from Texas, that refers not just to Humble, Texas, where he grew up, but also to the fact he is a modest, self-effacing man. The son of migrant workers, his childhood home – where his mother still lives today – was built by his father and uncle. As a child, he sold soft drinks at Rice University football games – where he dreamed of one day going to school.

Gonzales is the first person in his family to go to college. Because of the love and support of his family, and hard work and determination on his part, he graduated from Rice and Harvard Law School, and then joined a prestigious international law firm where he became one of its first minority partners. He eventually caught the eye of a Texas governor, who saw a uniquely talented yet modest man – and appointed him general counsel, secretary of state, Texas supreme court justice, and eventually, counsel to the President.

Judge Gonzales is truly an inspiration to everyone who still believes in the American dream. And so, his nomination to become our nation's 80th Attorney General – and our first Hispanic Attorney General – should by all accounts have a perfectly happy ending.

But that's not how Washington works, unfortunately. It appears that today's hearing will prove, once again, that our Senate's confirmation process is unnecessarily partisan, even cruel to some who selflessly offer themselves for public service.

Only in Washington would this good man get raked over the coals for simply doing his job. This must all be a little disorienting for one whose very life story testifies to the fact that America should always be a place where honesty, diligence, and determination are rewarded.

Take the harsh criticism about the Geneva Convention. Judge Gonzales has been harshly attacked for advising the President that all detainees be treated **humanely**, but that, as a legal matter, al Qaeda and Taliban fighters are not covered by the Geneva Convention.

Now, I hate to ruin a good story for the President's political opponents. But there is one important problem with this criticism: *Judge Gonzales is right.*

You don't have to take my word for it.

First of all, al Qaeda has never signed the Geneva Conventions.

Moreover, the Red Cross's own guidelines state that, to be entitled to Geneva protection as a prisoner of war, combatants must satisfy all four conditions of lawful combat: (1) being commanded by a person responsible for his subordinates, (2) having a fixed distinctive sign recognizable at a distance, (3) carrying arms openly, and (4) conducting their operations in accordance with the laws and customs of war. ***Does anyone on this committee seriously argue that al Qaeda terrorists comply with the laws of war?***

By the way, Judge Gonzales's legal advice has also been **affirmed by three federal courts** across the country.

It has also been endorsed by numerous legal scholars and international legal experts across the political spectrum – as well as both the 9/11 commission and the final Schlesinger report. A brief filed in a recent U.S. Supreme Court case by former Carter Administration officials, State Department legal advisers, judge advocates general and military commanders, and liberal international law scholars concluded that “[t]he President's conclusion that the members of al Qaeda, and the Taliban, are unlawful combatants is clearly correct.” Even Washington advocacy director for Human Rights Watch, Tom Malinowski, a vocal Bush Administration critic, has grudgingly conceded that the Administration interpretation was “probably correct.”

The Administration's Geneva position is not just right as a legal matter – it is also essential as a matter of national security. I recently published an op-ed which explained that extending Geneva Convention protections to al Qaeda would (1) threaten the security of our soldiers, (2) dramatically disable us from obtaining the intelligence needed to prevent further attacks on U.S. civilians and soldiers, and (3) badly undermine international law itself. [I ask that that op-ed and supporting documents be entered into the record.]

Just take a look at all of the numerous privileges provided by the Geneva Convention. For example, questioners could not entice detainees to respond by offering creature comforts or other preferential treatment – even though that is standard operating procedure in police stations across our country. And because the convention prohibits the holding of detainees in isolation, al Qaeda fighters would be able to coordinate with each other to thwart effective questioning. POW status even confers broad combat immunity against criminal prosecution before civilian and military tribunals alike.

Surely, no member of this committee actually believes that an al Qaeda terrorist deserves to be treated better than an American citizen accused of a crime?

President Reagan and his successors didn't. Nearly two decades ago, President Reagan, and every President since that time, has rejected a proposed amendment – known as Protocol I of 1977 – to extend the Geneva Convention to cover terrorists. As President Reagan rightly argued, “we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.” Notably, even both the *New York Times* and the *Washington Post* agreed with the Reagan-Bush-Gonzales position. The *Times* called the position “sound,” while the *Post* said it was “right” and even accused opponents of that view of “hijacking the Geneva Conventions.”

All this support – from multiple federal courts, the 9/11 commission, the Schlesinger report, liberal international legal scholars, Carter Administration officials, even the *New York Times* and the *Washington Post*. Yet Judge Gonzales is criticized for taking precisely this same position? *Only in Washington.*

Take another issue. Take the Justice Department memos construing the federal torture statute. Judge Gonzales is being attacked for a memo he didn't write – analyzing a law he didn't draft. It was Congress – not Judge Gonzales – that enacted a strict definition of torture. It was Congress – not Judge Gonzales – that specifically provided that only *specific intent* to inflict “*severe* physical or mental pain or suffering” would constitute torture.

President Bush and Judge Gonzales have both unequivocally, clearly, and repeatedly rejected the use of torture. But is there anyone here today who would fail to use every *legal* means to collect intelligence from terrorists that can save American lives? I certainly hope not.

Finally, I imagine that we're going to hear a lot about Abu Ghraib today. I think it's safe to say that everyone agrees that Abu Ghraib was a shameful episode in our nation's history. Yet some people actually want to exploit that tragedy to score political points.

Abu Ghraib should be treated seriously – not politically. The Defense Department has been vigorously investigating the misconduct and prosecuting the violators. And the independent Schlesinger report has concluded that “[n]o approved procedures called for or allowed the kinds of abuse that in fact occurred. There is no evidence of a policy of abuse promulgated by senior officials or military authorities.” If there is no evidence whatsoever that Judge Gonzales was in any way responsible for this, why are we talking about this at Judge Gonzales's confirmation hearing? This is a confirmation hearing for the top post at the Justice Department – not an oversight hearing for the Defense Department.

I am proud of my friend, Judge Alberto Gonzales. He is a source of great inspiration and pride to his family and friends, and to the great state of Texas. Time and time again, Judge Gonzales has done his duty in the war on terrorism. It disheartens me to see him held up to ridicule, distortions, and outright lies, just for being the patriot that he is.

To my colleagues I say: Let's confirm this great man from Humble.

Major newspapers on prisoners of war and the 1949 Geneva Convention

New York Times

In 1987, the *New York Times* editorialized that it would be wrong to extend the protections of the Geneva Convention to terrorists and other categories of unlawful combatants, and supported President Reagan's decision not to do so through an amendment to the convention, stating:

President Reagan has faced more important but probably no tougher decisions than whether to seek ratification of revisions to the 1949 Geneva Conventions. If he said yes, that would improve protection for prisoners of war and civilians in wartime, but at the price of new legal protection for guerrillas and possible terrorists. He decided to say no, a judgment that deserves support.

The 1949 Geneva Convention on laws of war needs updating. The lines have blurred separating civilians and combatants and regular and irregular troops. In 1977, a protocol packed with valuable additions was signed by a hundred nations, including the United States, pending Senate ratification. The new provisions strengthen procedures for extraditing and prosecuting terrorists, make it easier to punish the taking of hostages and the indiscriminate use force, enhance rights to check on troops missing in action and prisoners of war, and add protection for medical personnel.

Article 1 of the protocol, however, says that the provisions apply to nations and "peoples" who "are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination." Nice words, but also possible grounds for giving terrorists the legal status of P.O.W.'s. The protocol also provides that regional groups like the Organization for African Unity and the League of Arab States could decide which "peoples" constituted a legitimate party in armed conflict.

The President could have asked the Senate to ratify with reservations. But that would have opened the door to all signatories to pick and choose what to obey. Nations might also have read that as legitimizing terrorists. So Mr. Reagan made the sound choice. He notified the Senate that he would not submit the revision or protocol because it was "fundamentally and irreconcilably flawed."

Apparently many nations are having second thoughts. Only about 40 signatories have ratified the protocol, not including the Soviet Union, France or Israel. Another international meeting is in order to plug the dangerous loopholes and reaffirm the important new benefits.

Washington Post

The next day, the *Washington Post* likewise editorialized that it would be wrong to extend the protections of the Geneva Convention to terrorists and other categories of unlawful combatants, stating:

IN THE 1970s, selected Third World political causes were on a rhetorical roll, and their sponsors were alert to new international forums in which to advance them. In this spirit the PLO and some other organizations arrived at a conference that the International Committee of the Red Cross had called to revise the Geneva Conventions on the protection of victims of armed conflicts. They not only arrived at the conference, they hijacked it, taking a forum ostensibly devoted to extending the reach of humanitarian concerns and turning it to political use. The result was two agreements or "Protocols," of which Protocol I, dealing with "international" armed conflicts, was the Third World priority.

What the Third World proponents of this policy wanted was status and recognition for their favorite "national liberation movements." To this end they wrote a tendentious new definition of armed conflicts to include challenges to Israel and South Africa and to exclude challenges to Iraq, Ethiopia and so on. They put "national liberation wars" into an international category, thereby legitimizing both the subversion of "colonial, alien or racist" regimes and the assistance of such subversion by outside powers such as the Soviet Union.

Worst of all was the impact of the new rules on the traditional purpose of humanitarian law, which is to offer protection to noncombatants by isolating them from the perils of combat operations. The changes granted status as combatants (and, when captured, as prisoners of war) to irregular fighters who do not wear uniforms and who otherwise fail to distinguish themselves from combatants -- in brief, to those whom the world knows as terrorists.

The Ford administration took part in the negotiation of these and other changes and the Carter administration signed them. Such were their limitations even then, however, that they were never forwarded for Senate ratification. Nor was there any lobbying of note for them. But recently the Reagan administration got around to the matter. While asking the Senate to ratify the acceptable Protocol II bearing on noninternational conflicts, it declared that Protocol I on international conflicts was "fundamentally and irreconcilably flawed."

The Reagan administration has often and rightly been criticized for undercutting treaties negotiated by earlier administrations. But it is right to formally abandon Protocol I. It is doing so, moreover, for the right reason: "we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law."

Editorial, *Hijacking the Geneva Conventions*, Wash. Post, Feb. 18, 1987, at A18.

**Authorities, Scholars and International Law Experts
on prisoners of war and the 1949 Geneva Convention**

9/11 COMMISSION

The 9/11 commission has unanimously endorsed the Bush Administration's legal position that the provisions of the Geneva Convention "do not formally apply" to al Qaeda and Taliban fighters.

The final report of the 9/11 commission states:

The United States and some of its allies do not accept the application of full Geneva Convention treatment of prisoners of war to captured terrorists. Those Conventions establish a minimum set of standards for prisoners in internal conflicts. Since the international struggle against Islamist terrorism is not internal, those provisions do not formally apply . . .

The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States, at 379-80 (2004).

THE SCHLESINGER REPORT

The August 2004 final report of the Independent Panel To Review DoD Detention Operations, chaired by James R. Schlesinger, also endorsed the President's Geneva interpretation, stating:

The Panel accepts the proposition that these terrorists are not combatants entitled to the protections of [the] Geneva Convention.

Final Report of the Independent Panel To Review DoD Detention Operations, at 81 (Aug. 2004).

FEDERAL COURTS

Federal courts across the nation have repeatedly upheld the Bush Administration interpretation of the Geneva Convention denying prisoner of war status to al Qaeda and Taliban fighters.

In the John Walker Lindh case, **the federal court in Alexandria, Virginia**, firmly upheld the Bush Administration interpretation of the Geneva Convention. As that court explained:

The GPW sets forth four criteria an organization must meet for its members to qualify for lawful combatant status:

- i. the organization must be commanded by a person responsible for his subordinates;
- ii. the organization's members must have a fixed distinctive emblem or uniform recognizable at a distance;
- iii. the organization's members must carry arms openly; and
- iv. the organization's members must conduct their operations in accordance with the laws and customs of war. . . .

Lindh asserts that the Taliban is a "regular armed force," under the GPW, and because he is a member, he need not meet the four conditions of the Hague Regulations because only Article 4(A)(2), which addresses irregular armed forces, explicitly mentions the four criteria. This argument is unpersuasive; it ignores long-established practice under the GPW and, if accepted, leads to an absurd result. . . .

[T]he President's decision denying Lindh lawful combatant immunity is correct. . . . [T]he Taliban lacked the command structure necessary to fulfill the first criterion, as it is manifest that the Taliban had no internal system of military command or discipline. As one observer noted, "there is no clear military structure with a hierarchy of officers and commanders while unit commanders are constantly being shifted around," and the Taliban's "haphazard style of enlistment ... does not allow for a regular or disciplined army." Thus, Lindh has not carried his burden to show that the Taliban had the requisite hierarchical military structure.

Similarly, it appears the Taliban typically wore no distinctive sign that could be recognized by opposing combatants; they wore no uniforms or insignia and were effectively indistinguishable from the rest of the population. The requirement of such a sign is critical to ensure that combatants may be distinguished from the non-combatant, civilian population. Accordingly, Lindh cannot establish the second criterion.

Next, although it appears that Lindh and his cohorts carried arms openly in satisfaction of the third criterion for lawful combatant status, it is equally apparent that members of the Taliban failed to observe the laws and customs of war. Thus, because record evidence supports the conclusion that the Taliban regularly targeted civilian populations in clear contravention of the laws and customs of war, Lindh cannot meet his burden concerning the fourth criterion.

In sum, the President's determination that Lindh is an unlawful combatant and thus ineligible for immunity is controlling here . . . [T]he Taliban falls far short when measured against the four GPW criteria for determining entitlement to lawful combatant immunity.

United States v. Lindh, 212 F. Supp. 2d 541, 557-58 (E.D. Va. 2002) (citations omitted).

The federal court in New York agreed, stating:

Four criteria generally determine the conditions an armed force and its members must meet in order to be considered lawful combatants . . . Those who do not meet those criteria, including saboteurs and guerrillas, may not claim prisoner of war status.

The Third Geneva Convention, referred to above, reaffirmed the distinction between lawful and unlawful combatants. Article 4 of that treaty uses the same standards as the Hague Regulations for distinguishing who must be treated as a prisoner of war from who enjoys no such protection. . . . [U]nlawful combatants generally have been tried by military commissions. They are not entitled to prisoner of war status, either as a matter of logic or as a matter of law under the Third Geneva Convention. It is not that the Third Geneva Convention authorizes particular treatment for or confinement of unlawful combatants; it is simply that that convention does not protect them. . . .

The point of the protracted discussion immediately above is simply to support what should be an obvious conclusion: when the President designated Padilla an "enemy combatant," he necessarily meant that Padilla was an unlawful combatant, acting as an associate of a terrorist organization whose operations do not meet the four criteria necessary to confer lawful combatant status on its members and adherents. Indeed, even the Taliban militia, who appear at least to have acted in behalf of a government in Afghanistan, were found by Judge Ellis in Lindh not to qualify for lawful combatant status.

Padilla ex rel. Newman v. Bush, 233 F. Supp. 2d 564, 592-93 (S.D.N.Y. 2002) (citations omitted), *rev'd on other grounds sub nom. Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

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Likewise, **the federal court in Chicago** has held:

Arnaout has made no showing whatsoever that al Qaeda, Hezb e Islami, and the Sudanese Popular Defense Force meet the criteria for lawful combatant status: (1) hierarchical military structure; (2) distinctive military uniforms or emblems recognizable at a distance; (3) combatants carry arms openly; and (4) operations are conducted in accordance with the laws and customs of war. All armed forces or militias, regular and irregular, must meet the four criteria if their members are to receive combatant immunity.

United States v. Arnaout, 236 F. Supp. 2d 916, 917-18 (N.D. Ill. 2003) (citations and quotations omitted).

LEGAL SCHOLARS AND INTERNATIONAL LAW EXPERTS

Prior to September 11, leading international and military law scholars well understood that terrorists and other combatants who flagrantly and consistently violate the laws of war are unlawful combatants not entitled to prisoner of war of protections under the Geneva Convention.

Professor W. Thomas Mallison and researcher **Sally V. Mallison** explained long ago that only “combatants who comply with the legal criteria . . . have the legally privileged status of prisoners of war.”

W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict*, 9 Case W. Res. J. Int’l L. 39, 41 (1977).

In his renowned treatise on the law governing prisoners of war, **Professor Allan Rosas** wrote that

“the only effective sanction against perfidious attacks in civilian dress is deprivation of prisoner-of-war status. . . . [P]ersons who are not entitled to prisoner-of-war status are as a rule regarded as unlawful combatants, and can thus be prosecuted for the mere fact of having participated in hostilities.”

Allan Rosas, *The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflicts* 344, 419 (1976).

In her treatise on *The Law of War*, **Professor Ingrid Detter** noted that “[u]nlawful combatants . . . are not, if captured, entitled to any prisoner of war status.”

Ingrid Detter, *The Law of War* 148 (2d ed. 2000).

Professor Gregory M. Travalio has written that “terrorists would not qualify under Article 4 of Geneva Convention III as Prisoners of War.”

Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 Wis. Int’l L.J. 145, 184-85 (2000).

Not surprisingly, then, countless numbers of international legal experts and scholars across the political spectrum have expressed support for the Bush Administration's faithful interpretation of the Geneva Convention not to apply to unlawful combatants.

Professor Kenneth Anderson (formerly of the Open Society Institute, the Soros Foundations, and Human Rights Watch) and numerous other law professors across the political spectrum – including **Carl A. Auerbach, Marshall J. Breger, Robert A. Destro, John C. Eastman, Samuel Estreicher, Charles Fried, Robert P. George, Mary Ann Glendon, Gidon Gottlieb, Malvina Halberstam, Mark Janis, Michael I. Krauss, John O. McGinnis, Geoffrey P. Miller, Michael F. Noone, Jr., Philip D. Oliver, Antonio F. Perez, Stephen B. Presser, Michael Ramsey, Ronald D. Rotunda, Mortimer Sellers, Richard Steinberg, Paul B. Stephan, Robert Turner, Ruth Wedgwood, and Richard G. Wilkins** – argued in one amicus brief to the U.S. Supreme Court:

The President's conclusion that the members of al Qaeda, and the Taliban, are unlawful combatants is clearly correct. Neither group satisfied the four critical criteria. . . .

[A]s unlawful combatants, they do not enjoy the full rights and privileges of Geneva POWs. Unlawful combatants are denied the full rights of lawful belligerents so as to create an incentive system for appropriate behavior in wartime. Unlawful combatants cannot exploit legal asymmetry, demanding the privileges that they fail to accord to their adversary. The matter was put plainly by Professor Richard Baxter of Harvard: "International law deliberately neglects to protect unprivileged belligerents because of the danger their acts present to their opponents."

The brief was also joined by former State Legal Advisers **Abraham D. Sofaer** and **Edwin D. Williamson** and numerous former military lawyers and international legal experts.

See Brief Amicus Curiae of Law Professors, Former Legal Advisers of the Department of State and Ambassadors, Retired Judge Advocates General and Retired Military Commanders, and Other International Law Specialists in Support of Respondents, *Rasul v. Bush*, et al., Nos. 03-334, 03-343, at 10, 13-14.

Professor Eugene Volokh and others argued in another amicus brief to the U.S. Supreme Court that individuals detained as Taliban and al Qaeda fighters "are not entitled" to Geneva Convention protections.

Brief of Citizens for the Common Defence as Amicus Curiae in Support of Respondents, *Al Odah v. United States*, et al., Nos. 03-334, 03-343, at 2.

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Tom Malinowski, Washington advocacy director for Human Rights Watch, told PBS's *NewsHour with Jim Lehrer* that the U.S. treatment of al Qaeda fighters as unlawful combatants is "probably correct":

GWEN IFILL: So to say that they're unlawful combatants is correct technically?

RUTH WEDGEWOOD: I believe it, yes.

GWEN IFILL: How about that, Mr. Malinowski?

TIM MALINOWSKI: It's probably correct – I agree with the other guests that al-Qaida members in particular because they didn't wear uniform insignia, they didn't abide by the laws of war probably would not be deemed to be entitled to prisoner of war status.

The Taliban prisoners – and there are some Taliban prisoners among the detainees in Guantanamo – might be deemed to be entitled to POW status because they were fighting for the armed forces of one of the parties to the conflict – the government of Afghanistan. But it's unclear . . .

Prisoners of War?, January 22, 2002, available at http://www.pbs.org/newshour/bb/terrorism/jan-june02/pow_1-22.html.

Professor Michael Noone – a professor of international and comparative law at Catholic University of America and a former judge advocate in the US Air Force – has published on the Crimes of War Project website (<http://www.crimesofwar.org>):

I agree with the Administration. . . . There is no reason to doubt the White House announcement unless you're just profoundly suspicious of the Executive Branch.

I've never heard anybody advance any evidence that the detainees met all four requirements. . . .

There are going to be people who think that although Taliban prisoners don't meet Geneva Convention qualifications they, as a matter of simple humanitarian policy, should be given those protections. That's a legitimate point of view, but from a legalistic point of view, it doesn't look like the Taliban satisfy the conventions, even though they belong to an army. Al Qaeda has a double problem because they don't belong to an army.

Michael Noone, *POWs or Unlawful Combatants? September 11 and its Aftermath*, January 2002, available at <http://www.crimesofwar.org/expert/pow-noone.html>.

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Professor Ruth Wedgwood – a former Carter Justice Department official, Yale law professor, and director of the International Law and Organization Program at Johns Hopkins University – told PBS’s *NewsHour with Jim Lehrer* that the U.S. treatment of al Qaeda fighters as unlawful combatants is “correct”:

GWEN IFILL: Professor Wedgwood what do you think? Are these POW’s a reality?

RUTH WEDGEWOOD: Well, the al-Qaida members - I think -- will fail the qualifying requisites of being POW’s because in part al-Qaida itself doesn’t obey the laws of war and one of the prime requirements of the Geneva Convention is a kind of reciprocity, where if you want to be a lawful combatant, your side - not you necessarily yourself - but your side has to generally abide by the laws of war and al-Qaida membership and al-Qaida members have not done that.

GWEN IFILL: So to say that they’re unlawful combatants is correct technically?

RUTH WEDGEWOOD: I believe it, yes.

* * *

GWEN IFILL: So do you imagine that if these were treated as POW’s under the laws, Professor Wedgwood, of the Geneva Convention, that there would be immediately triggered a series of legal procedures that would have to happen immediately?

RUTH WEDGEWOOD: Well, let me just mention a couple of things that are in the Geneva Convention that are very awkward and one reason why the status of POW would be very detrimental to good camp governance. Under the POW Convention you can get a mess kit; you can keep your gas mask.

The POW Convention contemplates that the people that are going to be governed by it have really surrendered; they’re not still fighting. Al-Qaida is still up in arms, had the revolt at Mazar-e Sharif, had the revolt in Pakistan - an al-Qaida prisoner also stabbed a guard in the eye and the brain in the Metropolitan Correctional Center in New York City.

So these folks haven’t surrendered. In that sense the almost Victorian, Faustian, important provisions of Geneva three are hard to apply to a group that is still avowed as terrorist. It doesn’t make that much difference frankly on how they’re tried -- I disagree with my colleague.

I think they can be tried in front of military commissions even if they were POW’s. It makes difference on the POW the choice of council. Where it does make a difference is governance of the camp and if you concede they’re lawful

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combatants, you're conceding they had a right to strike military targets like the Pentagon.

* * *

There is a protocol to the old 1949 Geneva Conventions passed in 1977 by some countries but not by the U.S., not by Afghanistan which would really erase the distinction between civilians and soldiers and bless guerrilla warfare and the U.S. frankly will not agree to that and I think should not.

* * *

GWEN IFILL: Professor Wedgewood I want you to also jump in on that but I also want to ask you whether there is any distinction or any concern in the American legal community about how Americans would be treated in similar situations and whether a precedent is being set.

RUTH WEDGEWOOD: I don't think a precedent is being set in any way adverse to the U.S. because really the fundamental disqualifying characteristic of al-Qaida and arguably of the Taliban insofar as they were helping al-Qaida carry out its operations is the failure themselves to abide by the law of war.

And much of it is a tempest in a teapot - about musical instruments or whether chain link fence is better than Plexiglas but the fundamental requirement is that you be part of a side that itself has committed itself to fair fighting . . .

Prisoners of War?, January 22, 2002, available at http://www.pbs.org/newshour/bb/terrorism/jan-june02/pow_1-22.html.

Professor Wedgewood has also written:

The Geneva convention never purported to govern every form of warfare. The rules do not, for example, cover internal civil wars. Most assuredly, they were not negotiated to govern wars against piratical groups that operate internationally.

The convention's premise is that both parties to the conflict will obey the fundamental rules for lawful belligerency: that any fighting force must refrain from terrorising innocent civilians and avoid masking soldiers in civilian dress, lest an adversary target innocent civilians in response. . . .

Geneva contemplates that POWs will be given the free run of a camp. They cannot be confined in cells. The treaty guarantees them utensils including "razors, combs (and) nail scissors", as well as "needles" and "pen-knives". This full equipage does not fit the case of combatants who vow they will kill an American before they leave the camp.

Most ordinary soldiers, once captured, are willing to stand down from combat and wait for the war to finish. The al-Qaeda and Taliban are not. The violence at the Mazar-e-Sharif prison in Afghanistan was begun by al-Qaeda fighters who had supposedly surrendered.

A formal designation as “prisoners of war” could also make a profound difference in the crimes with which al-Qaeda and the Taliban can be charged. An ordinary soldier in a war between nation states is not to be punished for striking at military targets. These are deemed to be his duty and the act of his sovereign. If one were to grant the bin Laden network protected status as lawful combatants, it could be far more difficult to bring criminal charges for their bloody terrorist attacks on the Pentagon, the USS Cole and the Khobar Tower military barracks in Saudi Arabia. These bombings killed and wounded hundreds of American soldiers and civilians. It is not surprising that the Pentagon feels strongly about preserving the option of trial.

Last, some observers have urged that the military should convene panels of three officers, under article 5 of the third Geneva convention, to decide on the status of the particular Guantanamo detainees. Article 5 panels were designed to look at fact-specific individual cases, such as deserters or soldiers who have lost their identification cards, or persons who have committed a belligerent act but are of uncertain affiliation. They were not designed for resolving important interpretive questions of treaty law and customary law in a new kind of war. This is the duty of nation states at the highest level of political responsibility.

Ruth Wedgwood, *Prisoners of a Different War*, Financial Times, January 30, 2002.

Although **Professor Ronald Dworkin** clearly does not support the Bush Administration Geneva policy *per se*, he has nevertheless endorsed precisely the same legal framework under the Geneva Convention adopted by the Bush Administration. Specifically, in an article published by the *New York Review of Books*, he wrote:

The Geneva Conventions draw a fundamental distinction between two classes of people that a nation might capture in war or other military action. One class must be treated as prisoners of war, which means, among other things, that they may not be punished simply for bearing arms against the capturing nation, that they must be held in conditions comparable to those of the soldiers guarding them, and that they may not be exposed to coercive interrogation. The second class includes not only civilians fighting independently of any government but soldiers in a more organized action who do not wear uniforms or other identifying badges or who fight with a force that does not respect the laws of war. They are not entitled to prisoner-of-war status; they may therefore be prosecuted and punished as criminals for acts of war, though the Geneva Conventions require that they be treated humanely.

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The Bush administration claims that these provisions allow it to detain some prisoners, whom it calls “unlawful combatants,” indefinitely without charge or prosecution, even though they are not treated as favorably as prisoners of war and may be subjected to coercive interrogation. It claims that Hamdi, Padilla, and its other prisoners belong to that category, and it may continue to do so if, as seems likely, they are unable successfully to challenge their detention before military commissions or in habeas corpus proceedings. In an earlier article in these pages I argued that, whether or not this option is permitted by a strict understanding of international law, a decent respect for human rights requires that the administration set it aside and choose between prosecuting its prisoners as criminals, with the normal safeguards of the criminal process, and treating them as prisoners of war, which would mean an end to round-the-clock interrogation, sensory deprivation, humiliation and other forms of coercion. I said that the administration’s present policy shows an impermissible contempt for the rights and dignity of its victims.

Ronald Dworkin, *What the Court Really Said*, N.Y. Rev. of Books, Vol. 51, No. 13, Aug. 12, 2004.

Professor Michael Glennon, a fellow at the Woodrow Wilson International Center for Scholars, told the *Washington Post* that “members of al Qaeda will likely fail to meet a key requirement of the Geneva Conventions for POWs: that they ‘conduct their operations in accordance with the laws and customs of war.’ ‘Al Qaeda’s sworn purpose of killing American civilians places them at odds with the customs of war,’ and therefore appears to disqualify most of them from POW designation, he said.”

John Mintz, *On Detainees, U.S. Faces Legal Quandary; Most Experts Say Al Qaeda Members Aren’t POWs but Taliban Fighters Might Be*, Wash. Post, Jan. 27, 2002, at A22.

Professor Sean Murphy, an international law professor at George Washington University, told the *Washington Post* that “[t]he Pentagon ‘seems to have a valid argument’ in making its anticipated contention that al Qaeda members must not be deemed POWs.

John Mintz, *On Detainees, U.S. Faces Legal Quandary; Most Experts Say Al Qaeda Members Aren’t POWs but Taliban Fighters Might Be*, Wash. Post, Jan. 27, 2002, at A22.

Professor Jeremy Rabkin has noted that

The designation of being a prisoner of war carries a certain sense of respectability. A prisoner of war is not a criminal, because soldiering is not inherently criminal. We may not want to say the same about terrorist forces, and there is clear precedent for this attitude. . . .

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[A]part from moral and symbolic issues, serious practical matters are at stake in the current war. Among the most important are the implications for the interrogation of prisoners.

Jeremy Rabkin, *After Guantanamo: The war over the Geneva Convention*, Nat'l Interest, July 1, 2002, at 1526.

Professor Ronald Rotunda – author of the renowned five-volume *Treatise on Constitutional Law: Substance and Procedure* – has written:

The United States says that the prisoners held in Cuba are “unlawful combatants,” not prisoners of war. Some critics treat this as all word play. There is a war, they became prisoners, and that makes them POWs, right? Wrong. Whatever one thinks of the way we treat detainees (the news has reported that some have no complaints while others repeatedly threaten to kill their guards), one cannot argue that they are POWs under international or American law.

Ronald Rotunda, *No POWs*, January 29, 2002, available at <http://www.nationalreview.com/comment/comment-rotunda012902.shtml>.

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THE GENEVA CONVENTION PROTECTS PROFESSIONAL SOLDIERS, NOT TERRORISTS
Four important policy reasons why terrorists are not entitled to, and should not be given, Geneva protection

The Administration's Geneva interpretation is not only legally correct – it is also essential to national security. The protections and rights afforded to "prisoners of war" by the Geneva Convention benefit military units comprised of professional soldiers or trained militia – not terrorists, pirates, or other categories of unlawful combatants. In fact, *POWs are given better treatment than that afforded to ordinary Americans accused of a crime*. That's why, nearly two decades ago, President Reagan rejected a proposed amendment to the Geneva Convention – known as Protocol I of 1977 – to extend POW status to unlawful combatants – and why every President ever since has taken the exact same view. As President Reagan rightly argued, "we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law."

There are at least four valid policy bases for denying POW status to terrorists and unlawful combatants:

- *First*, lawful combatants enjoy POW rights and protections that **could directly endanger their captors** if given to combatants who do not respect the laws of war. All humans are entitled to food, water, and basic shelter. But the Geneva Convention gives POWs additional rights, such as rights to access a variety of devices that could be turned into weapons or otherwise used in a hostile action – including mess kits, gas masks, metal helmets, scientific instruments, athletic equipment, and musical instruments. POWs are even entitled to their regular salary as professional soldiers and preferred tax and customs treatment. Moreover, POWs may not be housed in a cell – thereby enabling individuals not only to roam freely within a detention camp, but also to form groups in order to launch attacks on their captors.
- *Second*, lawful combatants enjoy **broad combat immunity** – and thus generally cannot be punished for lawful acts of war by either a civilian or military tribunal, because their acts are undertaken pursuant to the legitimate authority of another sovereign.
- *Third*, POW status shields combatants from most forms of questioning – including forms that are common place in police stations across America. **Questioning detainees for the purposes of collecting vital military intelligence** is critical to preventing future attacks – a goal that is particularly compelling when enemy combatants willingly engage in targeted attacks against civilians and civilian structures. Yet POWs are largely shielded from robust forms of questioning. POWs may respond to questioning simply by reporting their name, rank, serial number, and date of birth. If they refuse to answer further questions, POWs may not be treated disadvantageously in any way. In other words, interrogators may not try to persuade POWs to answer questions with promises of additional creature comforts or other preferential treatment – even though interrogation methods routinely used at American police stations frequently include offers of leniency and special benefits for cooperating individuals. Finally, because the convention prohibits isolation detention in close quarters, detainees entitled to such protections can strategize and coordinate their stories – thereby thwarting conventional interrogation tactics accepted in American civilian life.
- *Fourth*, denial of POW status is **essential to ensure respect for and enforcement of international law**. The laws of war are designed to entice combatants to comply with the laws of war in return for better treatment in the event of capture. Extending POW status to unlawful combatants dilutes and thus badly undermines the objectives of the laws of war, by providing combatants with no incentives to avoid civilian casualties and otherwise obey the laws of war. As Professor Allan Rosas explained in his renowned treatise on the law governing prisoners of war, "the *only* effective sanction against perfidious attacks in civilian dress is deprivation of prisoner-of-war status."

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GENEVA PRIVILEGES ARE FOR PROFESSIONAL SOLDIERS, NOT TERRORISTS
Terrorists should not be treated better than American citizens accused of a crime

Geneva Convention privileges afforded to “prisoners of war” benefit military units comprised of professional soldiers or trained militia – not terrorists, pirates, or other categories of unlawful combatants. In fact, *POWs enjoy better treatment than that afforded to ordinary Americans accused of a crime*. For example:

- POWs cannot be enticed to answer questions with promises of additional creature comforts or other forms of preferential treatment – as is done in police stations across America.
- POWs cannot be held in secure cells. In fact, they are entitled to the same quality of shelter as our own servicemen.
- POWs are guaranteed access to cooking equipment, sports equipment, and other devices that could be transformed into weapons.
- POWs are entitled to a monthly salary to purchase items at canteens. POWs even help manage and share in the profits of the canteens.
- POWs are entitled to receive shipments that are exempt from ordinary customs and duties.

Why should al Qaeda terrorist fighters enjoy better treatment than ordinary Americans accused of a crime?

Selected Provisions of the 1949 Geneva Convention

Article 17: Prisoners of war who refuse to answer may not be . . . exposed to any . . . disadvantageous treatment of any kind.

Article 21: [P]risoners of war may not be held in close confinement except where necessary to safeguard their health.

Article 25: Prisoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area.

Article 26: Prisoners of war shall, as far as possible, be associated with the preparation of their meals; they may be employed for that purpose in the kitchens. Furthermore, they shall be given the means of preparing, themselves, the additional food in their possession.

Article 28: Canteens shall be installed in all camps, where prisoners of war may procure foodstuffs, soap and tobacco and ordinary articles in daily use. The tariff shall never be in excess of local market prices. The profits made by camp canteens shall be used for the benefit of the prisoners; a special fund shall be created for this purpose. The prisoners' representative shall have the right to collaborate in the management of the canteen and of this fund.

Article 38: While respecting the individual preferences of every prisoner, the Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games amongst prisoners, and shall take the measures necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment.

Prisoners shall have opportunities for taking physical exercise, including sports and games, and for being out of doors. Sufficient open spaces shall be provided for this purpose in all camps.

Article 60: The Detaining Power shall grant all prisoners of war a monthly advance of pay, the amount of which shall be fixed by conversion, into the currency of the said Power, of the following amounts:

- Category I: Prisoners ranking below sergeant: eight Swiss francs.
- Category II: Sergeants and other non-commissioned officers, or prisoners of equivalent rank: twelve Swiss francs.
- Category III: Warrant officers and commissioned officers below the rank of major or prisoners of equivalent rank: fifty Swiss francs.
- Category IV: Majors, lieutenant-colonels, colonels or prisoners of equivalent rank: sixty Swiss francs.
- Category V: General officers or prisoners of equivalent rank: seventy-five Swiss francs.

Article 74: All relief shipments for prisoners of war shall be exempt from import, customs and other dues.

Recommendation: A comprehensive U.S. strategy to counter terrorism should include economic policies that encourage development, more open societies, and opportunities for people to improve the lives of their families and to enhance prospects for their children's future.

Turning a National Strategy into a Coalition Strategy

Practically every aspect of U.S. counterterrorism strategy relies on international cooperation. Since 9/11, these contacts concerning military, law enforcement, intelligence, travel and customs, and financial matters have expanded so dramatically, and often in an ad hoc way, that it is difficult to track these efforts, much less integrate them.

Recommendation: The United States should engage other nations in developing a comprehensive coalition strategy against Islamist terrorism. There are several multilateral institutions in which such issues should be addressed. But the most important policies should be discussed and coordinated in a flexible contact group of leading coalition governments. This is a good place, for example, to develop joint strategies for targeting terrorist travel, or for hammering out a common strategy for the places where terrorists may be finding sanctuary.

Presently the Muslim and Arab states meet with each other, in organizations such as the Islamic Conference and the Arab League. The Western states meet with each other in organizations such as NATO and the Group of Eight summit of leading industrial nations. A recent G-8 summit initiative to begin a dialogue about reform may be a start toward finding a place where leading Muslim states can discuss—and be seen to discuss—critical policy issues with the leading Western powers committed to the future of the Arab and Muslim world.

These new international efforts can create durable habits of visible cooperation, as states willing to step up to their responsibilities join together in constructive efforts to direct assistance and coordinate action.

Coalition warfare also requires coalition policies on what to do with enemy captives. Allegations that the United States abused prisoners in its custody make it harder to build the diplomatic, political, and military alliances the government will need. The United States should work with friends to develop mutually agreed-on principles for the detention and humane treatment of captured international terrorists who are not being held under a particular country's criminal laws. Countries such as Britain, Australia, and Muslim friends, are committed to fighting terrorists. America should be able to reconcile its views on how to balance humanity and security with our nation's commitment to these same goals.

The United States and some of its allies do not accept the application of full Geneva Convention treatment of prisoners of war to captured terrorists. Those

Conventions establish a minimum set of standards for prisoners in internal conflicts. Since the international struggle against Islamist terrorism is not internal, those provisions do not formally apply, but they are commonly accepted as basic standards for humane treatment.

Recommendation: The United States should engage its friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists. New principles might draw upon Article 3 of the Geneva Conventions on the law of armed conflict. That article was specifically designed for those cases in which the usual laws of war did not apply. Its minimum standards are generally accepted throughout the world as customary international law.

Proliferation of Weapons of Mass Destruction

The greatest danger of another catastrophic attack in the United States will materialize if the world's most dangerous terrorists acquire the world's most dangerous weapons. As we note in chapter 2, al Qaeda has tried to acquire or make nuclear weapons for at least ten years. In chapter 4, we mentioned officials worriedly discussing, in 1998, reports that Bin Ladin's associates thought their leader was intent on carrying out a "Hiroshima."

These ambitions continue. In the public portion of his February 2004 worldwide threat assessment to Congress, DCI Tenet noted that Bin Ladin considered the acquisition of weapons of mass destruction to be a "religious obligation." He warned that al Qaeda "continues to pursue its strategic goal of obtaining a nuclear capability." Tenet added that "more than two dozen other terrorist groups are pursuing CBRN [chemical, biological, radiological, and nuclear] materials."²⁸

A nuclear bomb can be built with a relatively small amount of nuclear material. A trained nuclear engineer with an amount of highly enriched uranium or plutonium about the size of a grapefruit or an orange, together with commercially available material, could fashion a nuclear device that would fit in a van like the one Ramzi Yousef parked in the garage of the World Trade Center in 1993. Such a bomb would level Lower Manhattan.²⁹

The coalition strategies we have discussed to combat Islamist terrorism should therefore be combined with a parallel, vital effort to prevent and counter the proliferation of weapons of mass destruction (WMD). We recommend several initiatives in this area.

Strengthen Counterproliferation Efforts. While efforts to shut down Libya's illegal nuclear program have been generally successful, Pakistan's illicit trade and the nuclear smuggling networks of Pakistani scientist A. Q. Khan have revealed that the spread of nuclear weapons is a problem of global dimensions. Attempts to deal with Iran's nuclear program are still underway. Therefore, the

**Final Report
of the
Independent Panel To Review
DoD Detention Operations**



August 2004

**Independent Panel to Review
DoD Detention Operations**

Chairman

The Honorable James R. Schlesinger

Panel Members

The Honorable Harold Brown

The Honorable Tillie K. Fowler

General Charles A. Homer (USAF-RET)

Executive Director

Dr. James A. Blackwell, Jr.



INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS

CHAIRMAN
THE HONORABLE JAMES R. SCHLESINGER

PANEL MEMBERS
THE HONORABLE HAROLD BROWN
THE HONORABLE TILLIE K. FOWLER
GENERAL CHARLES A. HORNER (USAF-RET.)

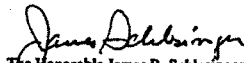
EXECUTIVE DIRECTOR
DR. JAMES A. BLACKWELL, JR.


August 24, 2004

To U.S. Secretary of Defense Donald Rumsfeld

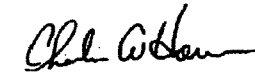
We, the appointed members of the Independent Panel to Review DoD Detention Operations, pursuant to our charter do hereby submit the results of our findings and offer our best recommendations.

Sincerely,


The Honorable James R. Schlesinger
Chairman


The Honorable Harold Brown
Panel Member


The Honorable Tillie K. Fowler
Panel Member


General Charles A. Horner
(USAF-RET.)
Panel Member

The Independent Panel to Review
Department of Defense
Detention Operations

August 2004

Upon this premise, the President determined the Geneva Conventions did not apply to the U.S. conflict with al Qaeda, and that Taliban detainees did not qualify for prisoner of war status. Removed from the protections of the Geneva Conventions, al Qaeda and Taliban detainees have been classified variously as "unlawful combatants," "enemy combatants," and "unprivileged belligerents."

The enemy in the Global War on Terror is one neither the United States nor the community of nations has ever before engaged on such an extensive scale. These far-reaching, well-resourced, organized, and trained terrorists are attempting to achieve their own ends. Such terrorists are not of a nation state such as those who are party to the agreements which comprise the law of war. Neither do they conform their actions to the letter or spirit of the law of war.

✱ [The Panel accepts the proposition that these terrorists are not combatants entitled to the protections of Geneva Convention III. Furthermore, the Panel accepts the conclusion the Geneva Convention IV and the provisions of domestic criminal law are not sufficiently robust and adequate to provide for the appropriate detention of captured terrorists.] ✱

The Panel notes the President qualified his determination, directing that United States policy would be "consistent with the principles of Geneva." Among other things, the Geneva Conventions adhere to a standard calling for a delineation of rights for all persons, and humane treatment for all persons. They suggest that no person is "outlaw," that is, outside the laws of some legal entity.

The Panel finds the details of the current policy vague and lacking. Justice Sandra Day O'Connor, writing for the majority in *Hamdi v Rumsfeld*, June 28, 2004 points out "the Government has never provided any court with the full criteria that it uses in classifying individuals as [enemy combatants]." Justice O'Connor cites several authorities to support the proposition that detention "is a clearly established principle of the law of

PRESIDENTIAL AUTHORITY TO DECLINE TO EXECUTE
UNCONSTITUTIONAL STATUTES

This memorandum discusses the President's constitutional authority to decline to execute unconstitutional statutes.

November 2, 1994

MEMORANDUM FOR THE HONORABLE ABNER J. MIKVA
COUNSEL TO THE PRESIDENT

I have reflected further on the difficult questions surrounding a President's decision to decline to execute statutory provisions that the President believes are unconstitutional, and I have a few thoughts to share with you. Let me start with a general proposition that I believe to be uncontroversial: there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional.

First, there is significant judicial approval of this proposition. Most notable is the Court's decision in *Myers v. United States*, 272 U.S. 52 (1926). There the Court sustained the President's view that the statute at issue was unconstitutional without any member of the Court suggesting that the President had acted improperly in refusing to abide by the statute. More recently, in *Freytag v. Commissioner*, 501 U.S. 868 (1991), all four of the Justices who addressed the issue agreed that the President has "the power to veto encroaching laws . . . or even to disregard them when they are unconstitutional." *Id.* at 906 (Scalia, J., concurring); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) (recognizing existence of President's authority to act contrary to a statutory command).

Second, consistent and substantial executive practice also confirms this general proposition. Opinions dating to at least 1860 assert the President's authority to decline to effectuate enactments that the President views as unconstitutional. See, e.g., Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 469-70 (1860) (asserting that the President need not enforce a statute purporting to appoint an officer); see also annotations of attached Attorney General and Office of Legal Counsel opinions. Moreover, as we discuss more fully below, numerous Presidents have provided advance notice of their intention not to enforce specific statutory requirements that they have viewed as unconstitutional, and the Supreme Court has implicitly endorsed this practice. See *INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983) (noting that Presidents often sign legislation containing constitutionally objectionable provisions and indicate that they will not comply with those provisions).

While the general proposition that in some situations the President may decline to enforce unconstitutional statutes is unassailable, it does not offer sufficient guidance as to the appropriate course in specific circumstances. To continue our conversation about these complex issues, I offer the following propositions for your consideration.

1. The President's office and authority are created and bounded by the Constitution; he is required to act within its terms. Put somewhat differently, in serving as the executive created by the Constitution, the President is required to act in accordance with the laws -- including the Constitution, which takes precedence over other forms of law. This obligation is reflected in the Take Care Clause and in the President's oath of office.

2. When bills are under consideration by Congress, the executive branch should promptly identify unconstitutional provisions and communicate its concerns to Congress so that the provisions can be corrected. Although this may seem elementary, in practice there have been occasions in which the President has been presented with enrolled bills containing constitutional flaws that should have been corrected in the legislative process.

3. The President should presume that enactments are constitutional. There will be some occasions, however, when a statute appears to conflict with the Constitution. In such cases, the President can and should exercise his independent judgment to determine whether the statute is constitutional. In reaching a conclusion, the President should give great deference to the fact that Congress passed the statute and that Congress believed it was upholding its obligation to enact constitutional legislation. Where possible, the President should construe provisions to avoid constitutional problems.

4. The Supreme Court plays a special role in resolving disputes about the constitutionality of enactments. As a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue. If, however, the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.

5. Where the President's independent constitutional judgment and his determination of the Court's probable decision converge on a conclusion of unconstitutionality, the President must make a decision about whether or not to comply with the provision. That decision is necessarily specific to context, and it should be reached after careful weighing of the effect of compliance with the provision on the constitutional rights of affected individuals and on the executive branch's constitutional authority. Also relevant is the likelihood that compliance or non-compliance will permit judicial resolution of the issue. That is, the President may base his decision to comply (or decline to comply) in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch.

6. The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency. Where the President believes that an enactment unconstitutionally limits his powers, he has the authority to defend his office and decline to abide by it, unless he is convinced that the Court would disagree with his assessment. If the President does not challenge such provisions (i.e., by refusing to execute them), there often will be no occasion for judicial consideration of their constitutionality; a policy of consistent Presidential enforcement of statutes limiting his power thus would deny the Supreme Court the opportunity to review the limitations and thereby would allow for unconstitutional restrictions on the President's authority.

Some legislative encroachments on executive authority, however, will not be justiciable or are for other reasons unlikely to be resolved in court. If resolution in the courts is unlikely and the President cannot look to a judicial determination, he must shoulder the responsibility of protecting the constitutional role of the presidency. This is usually true, for example, of provisions limiting the President's authority as Commander in Chief. Where it is not possible to construe such provisions constitutionally, the President has the authority to act on his understanding of the Constitution.

One example of a Presidential challenge to a statute encroaching upon his powers that did result in litigation was Myers v. United States, 272 U.S. 52 (1926). In that case, President Wilson had defied a statute that prevented him from removing postmasters without Senate approval; the Supreme Court ultimately struck down the statute as an unconstitutional limitation on the President's removal power. Myers is particularly instructive because, at the time President Wilson acted, there was no Supreme Court precedent on point and the statute was not manifestly unconstitutional. In fact, the constitutionality of restrictions on the President's authority to remove executive branch officials had been debated since the passage of the Tenure of Office Act in 1867 over President Johnson's veto. The closeness of the question was underscored by the fact that three Justices, including Justices Holmes and Brandeis, dissented in Myers. Yet, despite the unsettled constitutionality of President Wilson's action, no member of the Court in Myers suggested that Wilson overstepped his constitutional authority -- or even acted improperly -- by refusing to comply with a statute he believed was unconstitutional. The Court in Myers can be seen to have implicitly vindicated the view that the President may refuse to comply with a statute that limits his constitutional powers if he believes it is unconstitutional. As Attorney General Civiletti stated in a 1980 opinion,

Myers is very nearly decisive of the issue [of Presidential denial of the validity of statutes]. Myers holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts. He cannot be required by statute to retain postmasters against his will unless and until a court says that he may lawfully let them go. If the statute is unconstitutional, it is unconstitutional from the start.

The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 59 (1980).

7. The fact that a sitting President signed the statute in question does not change this analysis. The text of the Constitution offers no basis for distinguishing bills based on who signed them; there is no constitutional analogue to the principles of waiver and estoppel. Moreover, every President since Eisenhower has issued signing statements in which he stated that he would refuse to execute unconstitutional provisions. See annotations of attached signing statements. As we noted in our memorandum on Presidential signing statements, the President "may properly announce to Congress and to the public that he will not enforce a provision of an enactment he is signing. If so, then a signing statement that challenges what the President determines to be an unconstitutional encroachment on his power, or that announces the President's unwillingness to enforce (or willingness to litigate) such a provision, can be a valid and reasonable exercise of Presidential authority." Memorandum for Bernard N. Nussbaum, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel at 4 (Nov. 3, 1993). (Of course, the President is not obligated to announce his reservations in a signing statement; he can convey his views in the time, manner, and form of his choosing.) Finally, the Supreme Court recognized this practice in INS v. Chadha, 462 U.S. 919 (1983): the Court stated that "it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds" and then cited the example of President Franklin Roosevelt's memorandum to Attorney General Jackson, in which he indicated his intention not to implement an unconstitutional provision in a statute that he had just signed. Id. at 942 n.13. These sources suggest that the President's signing of a bill does not affect his authority

to decline to enforce constitutionally objectionable provisions thereof.

In accordance with these propositions, we do not believe that a President is limited to choosing between vetoing, for example, the Defense Appropriations Act and executing an unconstitutional provision in it. In our view, the President has the authority to sign legislation containing desirable elements while refusing to execute a constitutionally defective provision.

We recognize that these issues are difficult ones. When the President's obligation to act in accord with the Constitution appears to be in tension with his duty to execute laws enacted by Congress, questions are raised that go to the heart of our constitutional structure. In these circumstances, a President should proceed with caution and with respect for the obligation that each of the branches shares for the maintenance of constitutional government.

Walter Dellinger
Assistant Attorney General

Brief Description of Attached Materials

Attorney General Opinions

- 1) Memorial of Captain Meigs, 9 Op. Att'y Gen. 462 (1860): In this opinion the Attorney General concluded that the President is permitted to disregard an unconstitutional statute. Specifically, Attorney General Black concluded that a statute purporting to appoint an officer should not be enforced: "Every law is to be carried out so far forth as is consistent with the Constitution, and no further. The sound part of it must be executed, and the vicious portion of it suffered to drop." Id. at 469.
- 2) Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President, 4A Op. O.L.C. 21 (1980): In this opinion Attorney General Civiletti instructed Secretary of Education Hufstedler that she was authorized to implement regulations that had been disapproved by concurrent congressional resolutions, pursuant to a statutory legislative veto. The Attorney General noted that "the Attorney General must scrutinize with caution any claim that he or any other executive officer may decline to defend or enforce a statute whose constitutionality is merely in doubt." Id. at 29. He concluded, however, that "[t]o regard these concurrent resolutions as legally binding would impair the Executive's constitutional role and might well foreclose effective judicial challenge to their constitutionality. More important, I believe that your recognition of these concurrent resolutions as legally binding would constitute an abdication of the responsibility of the executive branch, as an equal and coordinate branch of government with the legislative branch, to preserve the integrity of its functions against constitutional encroachment." Id.
- 3) The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55 (1980): Attorney General Civiletti, in answer to a congressional inquiry, observed that "Myers holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts." Id.

at 59. He added as a cautionary note that "[t]he President has no 'dispensing power,'" meaning that the President and his subordinates "may not lawfully defy an Act of Congress if the Act is constitutional. . . . In those rare instances in which the Executive may lawfully act in contravention of a statute, it is the Constitution that dispenses with the operation of the statute. The Executive cannot." *Id.* at 59-60.

4) Letter from William French Smith, Attorney General, to Peter W. Rodino, Jr., Chairman, House Judiciary Committee (Feb. 22, 1985): This letter discussed the legal precedent and authority for the President's refusal to execute a provision of the Competition in Contracting Act. The Attorney General noted that the decision "not to implement the disputed provisions has the beneficial byproduct of increasing the likelihood of a prompt judicial resolution. Thus, far from unilaterally nullifying an Act of Congress, the Department's actions are fully consistent with the allocation of judicial power by the Constitution to the courts." *Id.* at 8. The letter also stated that "the President's failure to veto a measure does not prevent him subsequently from challenging the Act in court, nor does presidential approval of an enactment cure constitutional defects." *Id.* at 3.

Office of Legal Counsel Opinions

1) Memorandum to the Honorable Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel (Sept. 27, 1977): This opinion concluded that the President may lawfully disregard a statute that he interprets to be unconstitutional. We asserted that "cases may arise in which the unconstitutionality of the relevant statute will be certain, and in such a case the Executive could decline to enforce the statute for that reason alone." *Id.* at 13. We continued, stating that "[u]nless the unconstitutionality of a statute is clear, the President should attempt to resolve his doubts in a way that favors the statute, and he should not decline to enforce it unless he concludes that he is compelled to do so under the circumstances." *Id.* We declined to catalogue all the considerations that would weigh in favor of non-enforcement, but we identified two: first the extent of the harm to individuals or the government resulting from enforcement; and, second, the creation of an opportunity for a court challenge through non-enforcement (e.g., *Myers*).

2) Appropriations Limitation for Rules Vetoed by Congress, 4B Op. O.L.C. 731 (1980): In this opinion we rejected the constitutionality of a proposed legislative veto, prior to the Court's decision in *Chadha*. We opined that "[t]o regard this provision as legally binding would impair the Executive's constitutional role and would constitute an abdication of the responsibility of the Executive Branch." *Id.* at 734. It should be noted that the legislation in question was pending in Congress, and the possibility that President Carter would sign the legislation did not affect our analysis of the constitutional issue. We simply stated that, "if enacted, the [legislative veto provision] will not have any legal effect." *Id.*

3) Issues Raised by Section 102(c)(2) of H.R. 3792, 14 Op. O.L.C. 38 (1990) (preliminary print): This opinion also addressed then-pending legislation, in this case the foreign relations authorization bill for fiscal years 1990 and 1991. The opinion found that a provision of the bill was unconstitutional and severable. Regarding non-execution, the opinion stated that "at least in the context of legislation that infringes the separation of powers, the President has the constitutional authority to refuse to enforce unconstitutional laws." *Id.* at 53. The opinion concluded that "if the President chooses to sign H.R. 3792, he would be constitutionally authorized to decline to enforce" the constitutionally objectionable section. *Id.* at 38.

4) Issues Raised by Section 129 of Pub. L. No. 102-138 and Section 503 of Pub. L. No. 102-140, 16 Op. O.L.C. 18 (1992) (preliminary print): This opinion concluded that two statutory provisions that limited the issuance of official and diplomatic passports were unconstitutional and were severable from the remainder of the two statutes. On the question of non-execution, the opinion rejected "the argument that the President may not treat a statute as invalid prior to a judicial determination." *Id.* at 40. The opinion concluded that the Constitution authorizes the President to refuse to enforce a law that he believes is unconstitutional.

5) Memorandum for Bernard N. Nussbaum, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel (Nov. 3, 1993): This opinion discusses different categories of signing statements, including those construing bills to avoid constitutional problems and those in which the President declares "that a provision of the bill before him is flatly unconstitutional, and that he will refuse to enforce it." *Id.* at 3. The opinion concludes that such "uses of Presidential signing statements generally serve legitimate and defensible purposes." *Id.* at 7.

Presidential Signing Statements

1) Statement by the State Department (Announcing President Wilson's Refusal to Carry Out the Section of the Jones Merchant Marine Act of June 5, 1920, directing him to terminate treaty provisions restricting the Government's right to impose discriminatory tonnage dues and tariff duties), 17 A Compilation of the Messages and Papers of the Presidents 8871 (Sept. 24, 1920) (Pres. Wilson): The State Department announced that it "has been informed by the President that he does not deem the direction contained in Section 34 of the so-called Merchant Marine Act an exercise of any constitutional power possessed by the Congress." *Id.* The statement also defended President Wilson's decision to sign the bill and noted that "the fact that one section of the law involves elements of illegality rendering the section inoperative need not affect the validity and operation of the Act as a whole." 5 Green Haywood Hackworth, Digest of International Law 324 (1943).

2) Special Message to the Congress Upon Signing the Department of Defense Appropriation Act, Pub. Papers of Dwight D. Eisenhower 688 (July 13, 1955): President Eisenhower, in signing a bill (H.R. 6042) that contained a legislative veto, stated that the legislative veto "will be regarded as invalid by the executive branch of the Government in the administration of H.R. 6042, unless otherwise determined by a court of competent jurisdiction." *Id.* at 689.

3) Memorandum on Informing Congressional Committees of Changes Involving Foreign Economic Assistance Funds, Pub. Papers of John F. Kennedy 6 (Jan. 9, 1963): President Kennedy stated that a provision in the bill he was signing contained an unconstitutional legislative veto. He announced that "[i]t is therefore my intention . . . to treat this provision as a request for information." *Id.*

4) Statement by the President Upon Approving the Public Works Appropriations Act, Pub. Papers of Lyndon B. Johnson 104 (Dec. 31, 1963): President Johnson also found that a legislative veto provision was unconstitutional and stated that he would treat it as a request for information.

5) Statement About Signing the Public Buildings Amendments of 1972, Pub. Papers of

Richard Nixon 686 (June 17, 1972): President Nixon stated that a clause conditioning the use of authority by the executive branch on the approval of a congressional committee was unconstitutional. He ordered the agency involved to comply with "the acceptable procedures" in the bill "without regard to the unconstitutional provisions I have previously referred to." Id. at 687.

6) Statement on Signing the Department of Defense Appropriation Act of 1976, Pub. Papers of Gerald R. Ford 241 (Feb. 10, 1976): President Ford stated that a committee approval mechanism was unconstitutional and announced that he would "treat the unconstitutional provision . . . to the extent it requires further Congressional committee approval, as a complete nullity." Id. at 242.

7) Statement on Signing Coastal Zone Management Improvement Act of 1980, Pub. Papers of Jimmy Carter 2335 (Oct. 18, 1980): President Carter stated that a legislative veto provision was unconstitutional and that any attempt at a legislative veto would "not [be] regarded as legally binding." Id.

8) Statement on Signing the Union Station Redevelopment Act of 1981, Pub. Papers of Ronald Reagan 1207 (Dec. 29, 1981): President Reagan stated that a legislative veto was unconstitutional and announced that "[t]he Secretary of Transportation will not . . . regard himself as legally bound by any such resolution." Id.

9) Statement On Signing the National and Community Service Act of 1990, Pub. Papers of George Bush 1613 (Nov. 16, 1990): President Bush rejected the constitutionality of provisions that required a Presidentially appointed board exercising executive authority to include, among its 21 members, "seven members nominated by the Speaker of the House of Representatives . . . [and] seven members nominated by the Majority Leader of the Senate." Id. at 1614. He announced that the restrictions on his choice of nominees to the board "are without legal force or effect." Id.

10) 7 A Compilation of the Messages and Papers of the Presidents 377 (Aug. 14, 1876) (Pres. Grant): This is one of the earliest of many instances of a President "construing" a provision (to avoid constitutional problems) in a way that seems to amount to a refusal to enforce a provision of it. An 1876 statute directed that notices be sent to certain diplomatic and consular officers "to close their offices." President Grant, in signing the bill, stated that, "[i]n the literal sense of this direction it would be an invasion of the constitutional prerogatives and duty of the Executive." Id. In order to avoid this problem, President Grant "constru[ed]" this provision "only to exercise the constitutional prerogative of Congress over the expenditures of the Government," not to "imply[] a right in the legislative branch to direct the closing or discontinuing of any of the diplomatic or consular offices of the Government." Id. at 378.

Other Presidential Documents

1) A Presidential Legal Opinion, 66 Harv. L. Rev. 1353 (1953): This was a legal opinion from President Franklin Roosevelt to Attorney General Jackson. President Roosevelt stated that he was signing the Lend-Lease Act despite a provision providing for a legislative veto, "a provision which, in my opinion, is clearly unconstitutional." Id. at 1357. The President stated that, "[i]n order that I may be on record as indicating my opinion that the foregoing provision of the so-called Lend-Lease Act is unconstitutional, and in order that my approval

of the bill, due to the existing exigencies of the world situation, may not be construed as a tacit acquiescence in any contrary view, I am requesting you to place this memorandum in the official files of the Department of Justice. I am desirous of having this done for the further reason that I should not wish my action in approving the bill which includes this invalid clause, to be used as a precedent for any future legislation comprising provisions of a similar nature." *Id.* at 1358.

2) Message to the Congress on Legislative Vetoes, Pub. Papers of Jimmy Carter 1146 (Jun. 21, 1978): In this memorandum President Carter expressed his strong opposition to legislative vetoes and stated that "[t]he inclusion of [a legislative veto] in a bill will be an important factor in my decision to sign or to veto it." *Id.* at 1148. He further stated that, "[a]s for legislative vetoes over the execution of programs already prescribed in legislation and in bills I must sign for other reasons, the Executive Branch will generally treat them as 'report-and-wait' provisions. In such a case, if Congress subsequently adopts a resolution to veto an Executive action, we will give it serious consideration, but we will not, under our reading of the Constitution, consider it legally binding." *Id.* at 1149.

Historical Materials

1) Statement of James Wilson on December 1, 1787 on the Adoption of the Federal Constitution, reprinted in 2 Jonathan Elliot, Debates on the Federal Constitution 418 (1836): Wilson argued that the Constitution imposed significant -- and sufficient -- restraints on the power of the legislature, and that the President would not be dependent upon the legislature. In this context, he stated that "the power of the Constitution was paramount to the power of the legislature acting under that Constitution; for it is possible that the legislature . . . may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges,-- when they consider its principles, and find it to be incompatible with the superior power of the Constitution,-- it is their duty to pronounce it void . . . In the same manner, the President of the United States could shield himself, and refuse to carry into effect an act that violates the Constitution." *Id.* at 445-46.

2) Letter from Chief Justice Chase to Gerrit Smith (Apr. 19, 1868), quoted in J. Schuckers, The Life and Public Services of Salmon Portland Chase 577 (1874): Chase stated that President Johnson took the proper action in removing Secretary of War Stanton without Senate approval, in light of Johnson's belief that the statutory restriction on his removal authority was unconstitutional. In this regard, Chase commented that "the President had a perfect right, and indeed was under the highest obligation, to remove Mr. Stanton, if he made the removal not in wanton disregard of a constitutional law, but with a sincere belief that the Tenure-of-Office Act was unconstitutional and for the purpose of bringing the question before the Supreme Court." *Id.* at 578.

Congressional Materials

1) The President's Suspension of the Competition in Contracting Act is Unconstitutional, H.R. Rep. No. 138, 99th Cong., 1st Sess. (1985): The House Committee on Government Operations concluded that the President lacked the authority to refuse to implement any provision of the Competition in Contracting Act. The Committee stated that, "[t]o adopt the view that one's oath to support and defend the Constitution is a license to exercise any available power in furtherance of one's own constitutional interpretation would quickly destroy the entire constitutional scheme. Such a view, whereby the President pledges

allegiance to the Constitution but then determines what the Constitution means, inexorably leads to the usurpation by the Executive of the others' roles." *Id.* at 11. The Committee also stated that "[t]he Executive's suspension of the law circumvents the constitutionally specified means for expressing Executive objections to law and is a constitutionally impermissible absolute veto power." *Id.* at 13.

2) Memorandum from the Congressional Research Service to the Committee on Government Operations concerning "The Executive's Duty to Enforce the Laws" (Feb. 6, 1985), reprinted in Constitutionality of GAO's Bid Protest Function: Hearings Before a Subcomm. of the House Comm. on Government Operations, 99th Cong., 1st Sess. 544 (1985): This memorandum stated that the President lacks the authority to decline to enforce statutes. The CRS argued that "[t]he refusal of the President to execute the law is indistinguishable from the power to suspend the laws. That power, as is true of the power to amend or to revive an expired law, is a legislative power." *Id.* at 554.

Cases (not included in the submitted materials)

1) Myers v. United States, 272 U.S. 52 (1926): The President refused to comply with -- that is, enforce -- a limitation on his power of removal that he regarded as unconstitutional, even though the question had not been addressed by the Supreme Court. A member of Congress, Senator Pepper, urged the Supreme Court to uphold the validity of the provision. The Supreme Court vindicated the President's interpretation without any member of the Court indicating that the President had acted unlawfully or inappropriately in refusing to enforce the removal restriction based on his belief that it was unconstitutional.

2) United States v. Lovett, 328 U.S. 303 (1946): The President enforced a statute that directed him to withhold compensation from three named employees, even though the President believed the law to be unconstitutional. The Justice Department argued against the constitutionality of the statute in the ensuing litigation. (The Court permitted an attorney to appear on behalf of Congress, *amicus curiae*, to defend the statute.)

3) INS v. Chadha, 462 U.S. 919 (1983): This case involved the withholding of citizenship from an applicant pursuant to a legislative veto of an Attorney General decision to grant citizenship. Despite a Carter Administration policy against complying with legislative vetoes (see Carter Presidential memorandum, *supra*), the executive branch enforced the legislative veto, and, in so doing, allowed for judicial review of the statute. As with Lovett, the Justice Department argued against the constitutionality of the statute.

4) Morrison v. Olson, 487 U.S. 654 (1988): The President viewed the independent counsel statute as unconstitutional. The Attorney General enforced it, making findings and forwarding them to the Special Division. In litigation, however, the Justice Department attacked the constitutionality of the statute and left its defense to the Senate Counsel, as *amicus curiae*, and the independent counsel herself.

5) Freytag v. Commissioner, 501 U.S. 868 (1991): A unanimous Court ruled that the appointment of special trial judges by the Chief Judge of the United States Tax Court did not violate the Appointments Clause. Five Justices concluded that the Tax Court was a "Court of Law" for Appointments Clause purposes, despite the fact that it was an Article I court, so that the Tax Court could constitutionally appoint inferior officers. Four Justices, in a concurrence by Justice Scalia, contended that the Tax Court was a "Department" under the

Appointments Clause. The concurrence stated that "Court of Law" did not include Article I courts and that the Framers intended to prevent Congress from having the power both to create offices and to appoint officers. In this regard, the concurrence stated that "it was not enough simply to repose the power to execute the laws (or to appoint) in the President; it was also necessary to provide him with the means to resist legislative encroachment upon that power. The means selected were various, including a separate political constituency, to which he alone was responsible, and the power to veto encroaching laws, see Art. I, § 7, or even to disregard them when they are unconstitutional." *Id.* at 906 (Scalia, J., concurring).

6) *Lear Siegler, Inc., Energy Products Division v. Lehman*, 842 F.2d 1102 (9th Cir. 1988), withdrawn in part 893 F.2d 205 (9th Cir. 1990) (en banc): The President refused to comply with provisions of the Competition in Contracting Act that he viewed as unconstitutional and thereby allowed for judicial resolution of the issue. The Ninth Circuit rejected the President's arguments about the constitutionality of the provisions. The court further determined that Lear Siegler was a prevailing party and was entitled to attorneys' fees, because the executive branch acted in bad faith in refusing to execute the contested provisions. In this regard, the court stated that the President's action was "utterly at odds with the texture and plain language of the Constitution," because a statute is part of the law of the land that the President is obligated to execute. *Id.* at 1121, 1124. On rehearing en banc, the court ruled that Lear Siegler was not a prevailing party and withdrew the sections of the opinion quoted above.

THE GENEVA CONVENTIONS OF 12 AUGUST 1949

COMMENTARY

published under the general editorship of

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Doctor of Laws

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III

GENEVA CONVENTION

RELATIVE TO THE TREATMENT
OF PRISONERS OF WAR

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Translated into English from the original French by A. P. de HENEY

GENEVA
INTERNATIONAL COMMITTEE OF THE RED CROSS
1960

had militias and volunteer corps which, although part of the armed forces, were quite distinct from the army as such. The mention of militias and volunteer corps was therefore maintained as it appears in the Hague Regulations, although strictly speaking it was probably not essential.

The drafters of the 1949 Convention, like those of the Hague Convention, considered that it was unnecessary to specify the sign which members of armed forces should have for purposes of recognition. It is the duty of each State to take steps so that members of its armed forces can be immediately recognized as such and to see to it that they are easily distinguishable from members of the enemy armed forces or from civilians. The Convention does not provide for any reciprocal notification of uniforms or insignia, but merely assumes that such items will be well known and that there can be no room for doubt. If need be, any person to whom the provisions of Article 4 are applicable can prove his status by presenting the identity card provided for in Article 17.

This sub-paragraph relates to the armed forces of a Government whose legal status is not contested by the other Party. The case of members of regular armed forces who profess allegiance to a Government or an authority not recognized by the Detaining Power is referred to under (3) below.

2. — *Sub-paragraph (2)—Partisans*

The opening years of the Second World War witnessed immense changes in the political system of Europe. Many countries were occupied, armistices were concluded and alliances reversed. Some Governments ceased to be, others went into exile and yet others were brought to birth. Hence arose an abnormal and chaotic situation in which relations under international law became inextricably confused. In consequence, national groups continued to take an effective part in hostilities although not recognized as belligerents by their enemies, and members of such groups, fighting in more or less disciplined formations in occupied territory or outside their own country, were denied the status of combatant, regarded as "francs-tireurs" and subjected to repressive measures. The International Committee of the Red Cross always made every effort to secure for "partisans" captured by their adversaries the benefit of treatment as prisoners of war, provided of course that they themselves had conformed to the conditions laid down in Article 1 of the Regulations annexed to the Fourth Hague Convention of 1907.

Apart from various applications to individual authorities, on August 17, 1944, the International Committee addressed a Memorandum¹ to all belligerent States. Some of the Governments concerned gave affirmative replies; others made certain reservations and this reaction strengthened all the more the desire of the International Committee of the Red Cross to see a Diplomatic Conference go thoroughly into the matter and reach a solution inspired by the broadest sentiments of humanity².

A. Origin of the provision.—Both during the preparatory work and in the course of the 1949 Diplomatic Conference, the discussions regarding this provision were among the most lively of all and it might well have been that no agreement could have been reached. The Occupying Powers, on the one hand, and the occupied countries, on the other, held conflicting views. The former considered that resistance movements should have to fulfil more numerous conditions than those

¹ This Memorandum read as follows:

“ Certain aspects of the present struggle have induced the International Committee to envisage the consequences of acts of war committed by or against combatant formations whom their adversaries have not recognized as belligerents, but regard as partisans. The Committee are of opinion that when, in the course of war, situations arise analogous to those of war, but not explicitly covered by international Conventions, the fundamental principles of international law and of humanity should nevertheless be regarded as applicable.

The International Committee have always devoted especial attention to the treatment of prisoners of war, and are of opinion that all combatants, without regard to the authority to whom they belong, should enjoy the benefit of the provisions applicable to prisoners of war, if they fall into enemy hands. But this benefit must be conditional on conformity on their part to the laws and usages of war, especially the following:

- (1) They must be commanded by a person responsible for his subordinates,
- (2) They must carry a distinctive badge, and
- (3) They must bear arms openly.

The International Committee also attach especial importance to securing universal respect for the principles of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, and to enabling auxiliary Red Cross organizations to discharge their functions for the benefit of all sick and wounded alike, without discrimination.

The International Committee are of opinion that the principles stated must be applied, irrespective of all juridical arguments as to the recognition of the belligerent status of the authority to whom the combatants concerned belong.

In view of the situation hereinafter described, the International Committee, as always when armed forces are in conflict, are ready to serve as impartial intermediaries. In particular, they are ready to forward distinctive badges and notify the wearing of such emblems by combatants not in uniform, as soon as it receives such information from either party for communication to the other.”

² See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, pp. 517-519; see also, for particular steps and representations by the International Committee of the Red Cross, *ibid.*, pp. 519-535.

as that of Italian troops who fought against the German forces in Southern Italy from September 1943 onwards.

The Franco-German armistice of 1940 stipulated that French nationals who continued to bear arms against Germany would not enjoy the protection of the laws of war¹. In fact, following representations by the International Committee of the Red Cross, General de Gaulle's troops were treated as prisoners of war, and the German authorities informed the International Committee that they would not apply to those French combatants the provisions of the armistice. But representations on behalf of Italian troops who were in a similar situation at the end of 1943 remained unanswered².

At the Conference of Government Experts, delegations immediately approved the International Committee's proposal for a special clause to cover "members of armed forces claiming to be under an authority not recognized by the enemy"³. It was feared, however, that the proposal might be open to abusive interpretation, and the Conference therefore decided to add that such forces must, in order to benefit by the Convention, be fighting "in conjunction" with a State recognized as a belligerent State by the enemy. This clause was deleted at Stockholm, and was subsequently amended by the Special Committee of Committee II at the 1949 Diplomatic Conference, which considered it preferable to insert the stipulations mentioned in paragraph 2 (a), (b), (c) and (d) above⁴. Other proposals included one for the deletion of the provision, and another for the reinstatement of the Stockholm draft. The latter suggestion was eventually approved⁵.

This provision must be interpreted, in the first place, in the light of the actual case which motivated its drafting—that of the forces of General de Gaulle which were under the authority of the French National Liberation Committee.

The expression "members of regular armed forces" denotes armed forces which differ from those referred to in sub-paragraph (1) of this paragraph in one respect only: the authority to which they profess allegiance is not recognized by the adversary as a Party to the

¹ Article 10, paragraph 3, of the Armistice Agreement between France and Germany, dated June 22, 1940.

² See *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, pp. 519-520 and 532-533. In this connection, it should be noted that the Free French authorities denied the validity of the armistice, especially after November 11, 1942, when the whole of France was occupied by the German forces. See SCHMID, *op. cit.*, p. 115, Note 85.

³ See *Report on the Work of the Conference of Government Experts*, pp. 104 and 106-107.

⁴ See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-A, p. 465.

⁵ *Ibid.*, pp. 479-480 and p. 577.

conflict. These "regular armed forces" have all the material characteristics and all the attributes of armed forces in the sense of sub-paragraph (1): they wear uniform, they have an organized hierarchy and they know and respect the laws and customs of war. The delegates to the 1949 Diplomatic Conference were therefore fully justified in considering that there was no need to specify for such armed forces the requirements stated in sub-paragraph (2) (a), (b), (c) and (d).

The distinguishing feature of such armed forces is simply the fact that in the view of their adversary, they are not operating or are no longer operating under the direct authority of a Party to the conflict in accordance with Article 2 of the Convention.

One solution in order to bring these armed forces *legally* within the scope of the Convention was to associate them with a belligerent fighting against the Power concerned. During the Second World War, the German authorities accepted this solution and stated that they would consider the Free French Forces to be "fighting for England". The Conference of Government Experts also supported this solution¹.

Another procedure which was proposed by the International Committee of the Red Cross, was that such forces should be recognized provided that they were *constituted* in a regular manner "irrespective of the Government or authority under whose orders they might claim to be"². In order to preclude any abusive interpretation which might have led to the formation of armed bands such as the "Great Companies" of baneful memory³, the drafters of the 1949 Convention specified that such armed forces must "profess allegiance to a Government or authority not recognized by the Detaining Power". It is not expressly stated that this Government or authority must, as a minimum requirement, be recognized by third States, but this condition is consistent with the spirit of the provision, which was founded on the specific case of the forces of General de Gaulle.

It is also necessary that this authority, which is not recognized by the adversary, should either consider itself as representing one of the High Contracting Parties, or declare that it accepts the obligations stipulated in the Convention and wishes to apply them.

The present provision naturally covers armed forces which continue operations under the orders of a Government in exile which is not recognized by the adversary, but has been given hospitality by another State. In our view, it also covers armed forces which continue to fight

¹ See *Report on the Work of the Conference of Government Experts*, pp. 106-107.

² *Ibid.*, p. 106.

³ Mercenaries who devastated France in the XIVth century, during the peaceful periods of the Hundred Years War.

January 12, 2005

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
U.S. Senate
711 Hart Building
Washington, DC 20510
202.228.1229 (fax)

Dear Senator Specter:

We, the undersigned, are Latino/Hispanic law professors from throughout the United States. We are teachers of international law, human rights, international criminal law, criminal law, and constitutional law among other fields. We believe President Bush deserves some recognition for nominating an experienced Latino lawyer with an inspiring personal story to serve as Attorney General. Nonetheless, we write because we are deeply concerned that the President's nominee for Attorney General, Alberto Gonzales, has been a principal architect of the Administration's no-law-applies scheme to fight terrorism, an approach placing our security at risk and making people across the world dangerously question America's commitment to freedom and human dignity.

Rarely does a week pass without Americans learning about still more abuses by U.S. authorities in Iraq and at the U.S. Naval Base at Guantanamo Bay. The International Committee of the Red Cross reports that Guantanamo detainees have sustained sexual humiliation, beatings, and prolonged isolation. A recently-released FBI report says interrogators in Iraq engaged in "strangulation, beatings," and "placement of lit cigarettes into detainees' ear openings." The man poised to become the nation's chief lawyer advised the President to reject prohibitions on many of these activities. Secretary of State Colin Powell and military lawyers strenuously objected, fearing such advice would undermine existing military culture. All this should raise a red flag.

The hearings no doubt reminded Americans that Mr. Gonzales is living the American dream. The son of a poor immigrant, he beat the odds to become a successful and respected lawyer. What Mr. Gonzales has yet to prove is that he meets the most crucial requirement for an Attorney General: a commitment to upholding the law. As White House Counsel, Mr. Gonzales urged the President to find that the United States was no longer bound by its obligations under the Geneva Conventions during its armed conflict in Afghanistan. Americans led countless other nations in writing those Conventions to guarantee basic rights for soldiers and civilians alike following the carnage of World War II. Yet in his January 25, 2002 memo on the subject, Mr. Gonzales argued that the threat of terrorism had rendered key protections of the Geneva Conventions "obsolete."

Treating those commitments as obsolete, Mr. Gonzales counseled, would help insulate U.S. personnel from prosecution for war crimes, even under U.S. law. Soon thereafter Mr. Gonzales sought and supervised a number of ethically and legally questionable memos purporting to provide legal justifications for the use of torture during interrogations of Al-Qaeda suspects. Those memos epitomize the legal environment that prevailed in the Administration at a time when American interrogators in Guantanamo were using tactics "tantamount to torture."

And while Mr. Gonzales was defending Americans' alleged prerogative to ignore the Geneva Conventions and engage in cruel and inhuman treatment during interrogations, he was among the chief defenders of the Administration's policy of detaining Americans as "enemy combatants" in the United States without access to counsel or a chance to dispute allegations against them.

Not surprisingly, the courts and the American people have themselves disputed some of these radical views. In an eight-to-one ruling last June, the Supreme Court held that American citizens held in military custody are entitled to a lawyer and some chance to argue their case before a neutral authority. And a recent ruling by a district court in Washington, D.C. rejected the view advanced by Mr. Gonzales and the Administration that the Geneva Conventions did not apply to many Guantanamo detainees. When told that the Supreme Court has rejected the Administration's contention that detainees should not receive access to a lawyer or a full hearing, nearly 70% of people polled by the University of Maryland's Program on International Policy agreed with the Court. And two out of three Americans in the same survey agreed that "governments should never use physical torture." While our allies balk at cooperating in American counterterrorism efforts in light of our Guantanamo and Iraq abuses, our enemies recruit the next generation of terrorists using every new picture and revelation of American abuse.

No one should believe someone in Mr. Gonzales' position can stop all such abuse from ever happening. What he can do is to forcefully reject those tactics, especially when they violate laws and treaties we promised to honor. Unless the interpretations he articulated and defended as White House Counsel are rejected, Mr. Gonzales' nomination risks sending a telegram to the world saying that America lacks a firm commitment to freedom and human dignity. These are the principles, we are told, that groups like Al-Qaeda most want to annihilate.

In response, we urge you and your colleagues on the Senate Judiciary Committee to weigh Mr. Gonzales' own principles. Mr. Gonzales should make a clearer commitment to enforcement of the law than he did at his confirmation hearings last week. He should explain whether he still thinks the Geneva Conventions are as quaint and worthless as he advised the President they were. He should explain if he would consistently uphold legal prohibitions on torture and other cruel, inhuman, and degrading treatment. Most important, Senators should not simply accept Mr. Gonzales' vague answers about his involvement in the crafting U.S. policy toward detainees and should insist on seeing the full record of Mr. Gonzales' involvement in the development of a policy on the use of torture that has coincided with massive abuses in Iraq and Guantanamo and that even the White House now seeks to disavow. The Attorney General decides whose rights are protected and how our laws and treaties should be applied. Given the stakes, the Senate must study the facts and remember to advise instead of simply consenting. Nothing less will than this will safeguard the interests of all Americans at such a delicate time in our history.

Sincerely,

Mariano-Florentino Cuéllar
Associate Professor and
Deane F. Johnson Faculty Scholar
Stanford Law School

Jenny S. Martinez
Assistant Professor
Stanford Law School

Why Latinos Should Oppose the Gonzales Nomination

By Mariano-Florentino Cuéllar and Jenny S. Martinez

Despite Alberto Gonzales' stonewalling about torture during his confirmation process, some Latino groups continue to back him as the President's nominee for Attorney General. It appears likely the committee and then the full Senate will vote to confirm him as early as next week. Incredibly, it doesn't seem to matter that he has been a principal architect of the Administration's no-law-applies scheme to fighting terrorism and that rarely does a week pass without Americans learning about still more abuses by U.S. authorities in Iraq and at the U.S. Naval Base at Guantanamo Bay. The International Committee of the Red Cross reports that Guantanamo detainees have sustained sexual humiliation, beatings, and prolonged isolation. A recently released FBI report says interrogators in Iraq engaged in "strangulation, beatings," and "placement of lit cigarettes into detainees' ear openings." The man poised to become the nation's chief lawyer seems to have been instrumental in advising the President that he could reject prohibitions on many of these activities.

We respect Gonzales' inspiring personal story. We welcome the prospect of more Latinos serving in leadership positions in the government. But we reject the notion that Latinos should loyally support Gonzales' nomination when he appears to have sat quietly while administration officials discussed using torture against people in American custody.

As Latino law professors who oppose double standards whether they benefit or hurt Latinos, we reluctantly have to ask: if these abuses primarily victimized Latinos instead of non-Latinos, would Latino groups be so united in their support of the Gonzales nomination? We should not forget that Latinos' history in the U.S. shows the importance of fighting to ensure the rule of law is respected and honored. Whenever one group of people is denied the protection of the laws, it is a threat to us all. Already, harsh immigration laws enacted as anti-terrorism measures are being used against vulnerable immigrant communities with no connection to terrorism at all. And while this Administration has dismissed the importance of our allies' concerns about international law, we must remember that America's own concern about how it was perceived abroad was an important factor during the civil rights movement in breaking down barriers of opportunity for African-Americans and Latinos.

When President Bush nominated Gonzales, he praised him as a man who "always gives me his frank opinion" and whose "sharp intellect and sound judgment have helped shape our policies in the war on terror." At his hearing, these attributes were noticeably absent. Judge Gonzales exhibited a distressing lack of candor, giving incomplete, inaccurate and evasive answers. Senators should not simply accept Judge Gonzales' vague answers about his involvement in the crafting U.S. policy toward detainees and should insist on seeing the full record of Judge Gonzales' involvement in the development of a policy on the use of torture that has coincided with massive abuses in Iraq and Guantanamo and that even the White House now seeks to disavow.

Prior to the confirmation hearing, both retired military leaders and human rights groups expressed serious concerns regarding three particular positions he had taken during his tenure as White House Counsel: (1) his role in commissioning and disseminating a memo substantially watering down the federal prohibition against torture; (2) his opinion on the view that the President could constitutionally circumvent the laws Congress passed against torture by personal fiat; and (3) his advice to the President that the "war on terror" rendered provisions of the Geneva Conventions obsolete.

At his confirmation hearing, Gonzales made almost no effort to clarify or disavow his positions. Judge Gonzales answered "I don't recall" on nine separate occasions when asked about his role and views regarding detainee and interrogation policy, including once when he was asked whether he had requested the memo analyzing the torture statute and interrogation standards. His follow-up written answers released this week provided even less reassurance. Gonzales continued to maintain he can't remember how the infamous torture memo was generated. Gonzales refused to explain the language in his own memo which implied that rejecting the applicability of the Geneva Conventions would insulate US personnel from prosecution for war crimes they might "need" to commit. Gonzales asserted that the Convention Against Torture's prohibition on cruel and inhuman treatment doesn't apply to aliens overseas. This is precisely the attitude of tolerance toward bending the law that led to abuses at Abu Ghraib, Guantanamo and elsewhere.

No one thinks someone in Judge Gonzales' position can stop all such abuse from ever happening. What he can do is to forcefully reject those tactics, especially when they violate laws and treaties we promised to honor. Unless the interpretations he articulated and defended as White House Counsel are rejected, Judge Gonzales' nomination risks sending a telegram to the world that America lacks a firm commitment to freedom and human dignity. These are the principles, we are told, that America is fighting for and that groups like Al-Qaeda most want to annihilate.

In response, we urge the Senate to weigh Judge Gonzales' own principles. The Attorney General, as the nation's chief law enforcement officer, should demonstrate a clear commitment to enforcement of the law. By now, Gonzales should have given the American people a straight answer on whether he still thinks the legal requirements of the Geneva Conventions are as quaint and worthless as he advised the President they were. He should have committed to consistently uphold legal prohibitions on torture and other cruel, inhuman, and degrading treatment. Although given ample opportunity to make these commitments during his confirmation process, Gonzales still has not done so. That sends a message about what kind of Attorney General he will be, and the message is clear: Judge Gonzales is not committed to enforcing the law and should not be confirmed.

Confirming a Latino candidate for Attorney General who does not respect the rule of law does not represent advancement for the Latino community. The Attorney General decides whose rights are protected and how our laws and treaties should be applied. Given the stakes, the Senate must study the facts and remember to advise instead of simply

consenting. Nothing less than this will safeguard the interests of all Americans at such a delicate time in our history.

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**STATEMENT OF
SENATOR RICHARD J. DURBIN**

ON THE NOMINATION OF

**ALBERTO R. GONZALES
TO BE ATTORNEY GENERAL OF THE UNITED STATES**

JANUARY 6, 2005

Earlier this week, I had the opportunity to meet with Mr. Alberto Gonzales. He is an impressive individual with a record of achievement and an inspiring personal story. With hard work and determination, he overcame difficult circumstances to become the first in his family to attend college. He went on to Harvard Law School, the Texas Supreme Court, and now the White House. It is the quintessential American success story.

I do not question his background or dedication. However, I do have concerns, particularly regarding his role as the architect of the Bush Administration's policies on detention and treatment of prisoners since 9/11. His record on this issue raises serious questions of judgment and commitment to the rule of law.

In our meeting, Mr. Gonzales told me repeatedly there was no connection between the "torture memos" drafted by senior officials of this Administration and the prison abuses that took place in either Guantanamo or Iraq.

I respectfully disagree. Blaming Abu Ghraib completely on renegade night-shift soldiers ignores critical decisions on torture policies made at the highest levels of our government – decisions that Mr. Gonzales played a major role in making. If we are going to hold those at the lowest levels accountable, it is only fair to hold those at the highest levels accountable.

Let us review what we now know:

- First, over the strenuous objections of Secretary of State Colin Powell and the Joint Chiefs of Staff, Mr. Gonzales recommended to the President that the Geneva Conventions should not apply to the war on terrorism.

- The President accepted this recommendation. He issued a memo concluding that “new thinking in the law of war” was needed and that Geneva does not apply to the war on terrorism.
- Next, Mr. Gonzales requested the Justice Department torture memo, which adopted a new, very restrictive definition of torture and concluded that the torture statute, which makes torture a crime, does not apply to interrogations conducted under the President’s Commander-in-Chief authority.
- Then, relying on the President’s “new thinking” on the Geneva Convention and the Justice Department’s new definition of torture, the Defense Secretary Rumsfeld approved numerous abusive interrogation tactics for use against prisoners in Guantanamo Bay – even as he acknowledged that “some nations” may view them as “inhuman.”
- The Red Cross has since concluded that the use of these methods at Guantanamo was more than inhumane – it was and is “a form of torture.”
- The Commander of Guantanamo Bay’s detention operations gave the Guantanamo policies to senior officers in Iraq and they became the “bedrock” for interrogation tactics in Iraq, according to a Defense Department investigation.

The horrible images that emerged from Abu Ghraib have seared into our minds the nature of some of these techniques, including the forced removal of clothing, using dogs to intimidate detainees, and placing detainees in painful stress positions.

There is no room for legal hair-splitting when it comes to the humane treatment of detainees – not in a nation founded on the rule of law and respect for human rights. The tortured debate about torture, conducted at the highest levels of our government, sent a signal to our commanders and troops that the law of war is an obstacle to be overcome, not a bright line that cannot be crossed.

Before Mr. Gonzales can assume the position of the top law enforcement official of the land, this Committee must determine what his involvement was in the development of this new torture policy and whether his views are consistent with the settled laws that we have relied upon for decades.

I am also very concerned about this Administration’s refusal to cooperate with Congress on this issue.

In a June 2004 press conference, Mr. Gonzales stated that the torture memos show that the Bush Administration engaged in a “thorough and deliberative process” on the law of war and torture.

However, the record does not support that statement. Congress was not involved in this process and Congress under our Constitution has the power to make law.

Article I of the United States Constitution states that Congress makes laws, not the President. If the President wants to change the law of war, which has served our country well since the time of President Abraham Lincoln, it is not enough to simply ask his lawyer to do so. He must come to Congress and ask the people of this nation through their elected representatives to change the law like every other President.

I am troubled that this Administration has not been forthcoming in providing information about the prisoner abuse scandal. Congress learned about the Abu Ghraib prison abuses from the media, even though Administration officials knew about it months before it became public.

From the day the story broke until today, the Administration has insisted that the prison scandal is limited to isolated abuses by a small group of rogue soldiers. We now know that is not true; senior-level officials had explicitly approved the use of abusive interrogation techniques.

Last June, Attorney General Ashcroft came before this Committee. He assured us, "It is not the job of the Justice Department or this administration to define torture." Despite Attorney General Ashcroft's denial, we now know that is exactly what the Justice Department did in its torture memos.

We asked the Attorney General to provide us with the memos. He refused to do so, but he cited no legal authority to justify this refusal.

Over six months later, Congress still has not received many of the documents that we have requested, and there remain many troubling, unanswered questions. This Republican-controlled Congress has remained passive despite the historic importance of this debate and the ghastly reports of torture used by American operatives.

For example, there have been numerous reports about the CIA using torture tactics such as "waterboarding," submerging detainees in water to simulate drowning. Despite our repeated requests, we have no information about what the CIA's interrogation standards are, and the role Mr. Gonzales played in developing and approving these standards. I hope that this Committee receives answers to these questions today.

Last June, in response to the torture scandal, I offered a bipartisan, anti-torture amendment to the Defense Department authorization bill. My amendment, which was cosponsored by Chairman Specter, as well as Senators McCain, Feinstein, Leahy, Kennedy, and Levin, was adopted unanimously by the Senate.

The Durbin amendment affirms the United States' long-standing obligation not to engage in torture or cruel, inhuman or degrading treatment. This standard is embodied in our Constitution and in numerous international agreements which the United States has ratified.

For reasons that I still do not understand, the Bush Administration opposed my amendment. Ultimately, the amendment was enacted into law – over the Administration's objections.

Last fall, the bipartisan 9/11 Commission recommended unanimously that the United States develop policies to ensure that all detainees are treated humanely.

In response, I worked with Senator McCain and Senator Lieberman on an amendment to the intelligence reform legislation. The amendment simply would have extended the requirements of my Defense Department Authorization amendment to the intelligence community.

Again, the amendment was adopted unanimously by the Senate. Again, it was opposed by this Administration. At the insistence of the White House, the amendment was removed in conference and still has not been enacted into law.

Let me explain why I am so concerned about this issue. This is not about partisan politics. It is about our ability to win the war on terrorism and to maintain our character as a freedom-loving society. And it is about protecting American soldiers.

Former Congressman Pete Peterson, who was a prisoner of war in Vietnam for six and a half years, wrote a letter to me in support of my anti-torture amendment. This is what he wrote:

From my 6 ½ years of captivity in Vietnam, I know what life in a foreign prison is like. To a large degree, I credit the Geneva Conventions for my survival. . . This is one reason the United States has led the world in upholding treaties governing the status and care of enemy prisoners: because these standards also protect us. . . We need absolute clarity that America will continue to set the gold standard in the treatment of prisoners in wartime.

The United States Army agrees. The Army Field Manual on Intelligence Interrogation states:

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. 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 may also place U.S. and allied personnel in enemy hands at a greater risk of abuse by their captors.

In other words, weakening the rules against torture makes us less secure, not more. Torture produces unreliable information, makes it more difficult to win wars, and places our troops at risk.

The 9/11 Commission correctly concluded that the prisoner abuse scandal has damaged our ability to combat the terrorist threat. In the Commission's words, "Allegations that the

United States abused prisoners in its custody make it harder to build the diplomatic, political, and military alliances the government will need.”

Sadly, pictures from Abu Ghraib have become recruiting posters for Al-Qaeda. To remedy this problem, we must heed the words of Revolutionary Thomas Paine, who said: “He that would make his own liberty secure must guard even his enemy from oppression.”

This hearing today is about more than Mr. Gonzales’ personal story, as compelling as it is. This is about how we are perceived in the world, and how those perceptions affect the safety of our troops in the field and our citizens here at home. This is about our ability to win the war on terrorism. There are many serious and troubling questions that must be answered about Mr. Gonzales’ role in developing this Administration’s policies.

In addition to his troubling record on the Geneva Convention and the torture scandal, I am concerned about some other aspects of Mr. Gonzales’ record.

His decade of public service in state and federal government, while commendable, includes instances where the decisions and judgments he made must be questioned. Without a full discussion of these issues, we do not know whether he will be able to maintain the objectivity and balance necessary to carry out the duties of the office of Attorney General.

I am particularly concerned by Mr. Gonzales’ role as General Counsel in advising then-Texas Governor George W. Bush on the clemency petitions of 59 death row inmates between 1995 and 1997.

In my meeting with Mr. Gonzales, we discussed his role in advising Governor Bush on whether these executions should go forward. I asked him whether he had ever recommended clemency for any of these 59 individuals in light of the possibility that some of their cases raised serious questions of innocence or due process, including the lack of adequate counsel.

Mr. Gonzales explained that he never once felt that clemency should be accorded because he and the Governor were obligated to follow the recommendations of the state’s Board of Pardons and Paroles. But when I asked him who appoints members of that Board, Mr. Gonzales admitted that it was the Governor who appointed those members. Furthermore, his response ignored the Governor’s authority to order the Board to hold a hearing or to conduct an investigation into any case in which the Governor has doubts about guilt or due process. The Governor of Texas even may instruct the Board to reconsider a negative recommendation on clemency.

Therefore, Mr. Gonzales’ answer suggests to me that, even in matters of life and death, Mr. Gonzales may have been unable or unwilling to seek out and consider information from sources beyond those who serve their own political interests.

In particular, the circumstances surrounding some of the 59 death penalty cases trouble me because of what appears to be a lack of effort on the part of Mr. Gonzales to thoroughly investigate and report to the Governor all of the pertinent facts.

For example, in the case of David Wayne Stoker, Mr. Gonzales' briefing memo to the Governor – which appears to be the only written record of his legal analysis of the case and his recommendation to the Governor – omitted important details, including a key witness' recantation of his original testimony and the fact that the psychiatrist who testified that Stoker was a sociopath who would be violent again had never even examined Stoker and had been expelled from the American Psychiatric Association.

In the case of Irineo Tristan Montoya, Mr. Gonzales' briefing memo – again, the only written communication between the Governor and his top lawyer concerning this man's fate – did not even mention the most important issue raised in the clemency petition: whether the Vienna Convention on Consular Relations had been violated.

Finally, Mr. Gonzales' briefing memo on Carl Johnson's clemency petition did not inform Governor Bush that Johnson's trial lawyer had literally slept through major portions of the jury selection.

I hope that Mr. Gonzales will be able to fully explain his role in these clemency decisions so that we can have more confidence in his ability to pursue justice objectively and fairly as Attorney General.

I also have concerns about Mr. Gonzales' record as White House Counsel where he was responsible for overseeing the Bush Administration's judicial nomination selection process.

During President Bush's first term, the judicial nomination process unfortunately reached new lows of controversy and contention. This Administration's unilateral approach to the Constitution's Advice and Consent process has exacerbated tensions between the White House and the Senate as much as any issue over the past four years.

As the primary White House official responsible for vetting the President's nominees, Mr. Gonzales recommended nominees who were known to be controversial and unacceptable to many Senators. Yet, rather than seeking advice from the Senate as required by the Constitution, Mr. Gonzales instead accused Senate Democrats of using "obstructionist" and "unconstitutional" tactics because 10 of President Bush's 230 judicial nominees were blocked during the last Congress.

The record is clear. President Bush had 204 judicial nominees confirmed in his first term alone – exceeding the number approved under the previous three Presidents during similar timeframes.

The Senate's record of confirming so many nominees over the past four years has resulted in the lowest vacancy rate in the federal bench since the Reagan era. There are more federal judges serving today than at any time in history.

Yet Mr. Gonzales and this White House continue to seek confrontation rather than compromise when it comes to the federal bench. They chose to give recess appointments to nominees who were blocked in Congress.

The President has announced that he will re-nominate every rejected judicial nominee from the last Congress (except those who withdrew) to provide his party in the Senate an unprecedented opportunity to exercise the “nuclear option” and throw out 200 years of Senate rules and tradition.

While we will have ample opportunity over the coming months to debate the complex issues of appointing federal judges, I hope that at this hearing, we can explore some of the decisions made by Mr. Gonzales as White House Counsel that may have helped create the contentious situation we have today over this issue.

I thank the Chairman for scheduling this hearing and I look forward to hearing from the nominee and the witnesses.

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789 Captain's Drive
St. Augustine FL 32080-6157
January 1, 2005

Dear Senator Leahy:

Re: Nomination of Alberto Gonzales:

I am writing to express my alarm and deep concerns about the nomination of Alberto Gonzales for the position of attorney general of the United States. I implore you to oppose this nomination, which menaces the values I hold most dear.

I believe that the White House memos authored by Mr. Gonzales demonstrate beyond reasonable doubt that he has a dangerous disregard for both the spirit and letter of the law. I cannot believe that an individual capable of drafting such documents is actually being considered for the post of attorney general in this country.

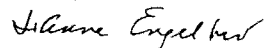
Torture has ever been abhorrent to our system of national values. Our country supposedly prides itself on its commitment to moral values. How then is a person capable of condoning torture a candidate for the position which perhaps more than any other signals to the world our regard for the rule of law? Torture is unquestionably an abomination, rejected by the civilized world in treaty after treaty to which the United States is a signatory. Torture has been rejected again and again by our own judiciary.

Because Mr. Gonzales' memos certainly encouraged the use of torture with regards to detainees in the war against terror, I believe that he is poorly qualified indeed to serve as our attorney general. As a citizen, I am ashamed that his nomination is being seriously considered by the Judiciary Committee.

The use of torture and other abuses is not only unethical and illegal, it puts our own servicemen and women at risk. Moreover, our own intelligence agencies have repeatedly stated that the use of torture almost never produces reliable or useful information. Such harsh measures do not protect us, but rather endanger us.

As a longtime member of Amnesty International and other human rights organizations, I am appalled to find my country engaging in egregious violations of human rights. Please oppose the nomination of Alberto Gonzales and use your considerable powers to urge our return to responsible world citizenship and the rule of law.

Sincerely,



Dr. Jo Anne Engelbert, Professor Emerita, Montclair State University

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Statement
Nomination of Alberto Gonzales
to be Attorney General

January 6, 2005
Senator Dianne Feinstein

I would like to begin by expressing my thanks to Chairman Specter and Ranking Member Leahy for moving forward promptly with this critical nomination. Today marks the first formal meeting of this Committee under the leadership of Chairman Specter, and I look forward to working with him during this Congress.

Welcome, Judge Gonzales, and congratulations on the honor given you by the President in nominating you to serve as Attorney General of the United States. I look forward to hearing your answers to our questions.

Because time is short, I would like to get straight to the point. I have several areas of concern about the Department of Justice, and I want to outline three of them quickly, and hope you will address them all in your answers to my questions.

The first area involves the relationship of this Administration in general, and the Department of Justice in particular, to the Congress and to this Committee. I believe that is critical that there be a healthy open relationship

between Executive Branch agencies and the Congress. Particularly in times such as these, where the nation is mobilized to respond to the new threat of international terrorism, it is important that this Committee can perform its oversight, legislative and authorization functions in concert with the Executive Branch.

To be frank, I have seen a significant deterioration in that relationship over the past four years. The current Attorney General rarely appeared before this Committee, and when he did, the tone and substance was adversarial and partisan. Getting information or documents from the Department of Justice has been difficult, resembling more a bitter discovery fight in a civil lawsuit than the kind of collegial cooperation that I would hope would mark such a relationship. Reports required to be provided to the Committee by law have been late or never provided at all. Department officials have advanced specious claims of privilege, or security classification, to delay or obstruct requests for information. This needs to stop, and I hope you can commit to me that you will make every effort to ensure that it does.

The second area involves the issue of the detention and interrogation of prisoners held by the United States in the course of our response to terrorism. It is unfortunate, but one result of the confusion surrounding this issue is that our nation's once-clear adherence to the rule of law, to international treaties, and to basic human decency, has been obscured. It is a terrible thing, but I believe that

many people around the world, including our closest allies, doubt our commitment to these principles.

I think today you can begin to address this question by clearly and unambiguously stating whether or not our nation intends to follow the spirit and letter of the key international agreements on this subject: the Geneva Conventions and the Convention Against Torture?

I am well aware that the precise meaning and application of both these treaties is somewhat complex, but I think you can simplify it today by making clear that America intends to treat every prisoner (whether or not technically covered by the various Geneva Conventions) in accord with the principles of human decency that form the basis of that agreement – can you do so?

The third area which I would like to speak to before turning to specific questions involves the role of the Attorney General, and how it differs than that of Counsel to the President. To quote the Department's own publication, which describes the job you are being considered for: "The Attorney General, as head of the Department of Justice and chief law enforcement officer of the Federal Government, represents the United States in legal matters generally and gives advice and opinions to the President and to the heads of the executive departments of the Government when so requested." As is clear from this

description, unlike your current job, where you are the President's counsel, you may soon be serving as the representative of the United States.

Some have expressed concern that you will not embrace that aspect of the job of Attorney General, and restrict your focus to representing the President. I deeply hope that this criticism is wrong – and that you will truly be the Attorney General of the whole United States. I hope you will speak about this issue in the answer to my questions.

I have outlined three areas of concern, and I hope you will address all three, as well as answer some specific questions.

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Memorandum

To: Attorney General John Ashcroft, Judge Alberto R. Gonzales, and Acting Assistant
Attorney General Daniel B. Levin
From: Signatories to Attached Document
Re: Attached Principles to Guide the Office of Legal Counsel
Date: December 21, 2004

As President Bush begins his second term in office, we respectfully offer for your consideration the enclosed set of "Principles to Guide the Office of Legal Counsel." Prompted in part by concerns about the August 1, 2002 OLC memorandum "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A," disclosed last Summer, the undersigned former OLC attorneys have engaged in a series of conversations about that memorandum and also more generally about the practices OLC should follow in advising the President and the Executive Branch on the legality of contemplated action. In preparing these written guidelines, we in large part drew upon what we believe are longstanding, desirable OLC practices in administrations of both political parties. The Office of Legal Counsel plays a central role in upholding the rule of law in this great nation, and we take pride in our service there. We stand ready to be of any assistance in maintaining that important tradition.

**Principles to Guide the Office of Legal Counsel
December 21, 2004**

The Office of Legal Counsel (OLC) is the Department of Justice component to which the Attorney General has delegated the function of providing legal advice to guide the actions of the President and the agencies of the executive branch. OLC's legal determinations are considered binding on the executive branch, subject to the supervision of the Attorney General and the ultimate authority of the President. From the outset of our constitutional system, Presidents have recognized that compliance with their constitutional obligation to act lawfully requires a reliable source of legal advice. In 1793, Secretary of State Thomas Jefferson, writing on behalf of President Washington, requested the Supreme Court's advice regarding the United States' treaty obligations with regard to the war between Great Britain and France. The Supreme Court declined the request, in important measure on the grounds that the Constitution vests responsibility for such legal determinations within the executive branch itself: "[T]he three departments of government ... being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions seems to have been purposely as well as expressly united to the executive departments." Letter from John Jay to George Washington, August 8, 1793, *quoted in* 4 *The Founders' Constitution* 258 (Philip B. Kurland & Ralph Lerner, eds. 1987).

From the Washington Administration through the present, Attorneys General, and in recent decades the Office of Legal Counsel, have served as the source of legal determinations regarding the executive's legal obligations and authorities. The resulting body of law, much of which is published in volumes entitled *Opinions of the Attorney General* and *Opinions of the Office of Legal Counsel*, offers powerful testimony to the importance of the rule-of-law values that President Washington sought to secure and to the Department of Justice's profound tradition of respect for the rule of law. Administrations of both political parties have maintained this tradition, which reflects a dedication to the rule of law that is as significant and as important to the country as that shown by our courts. As a practical matter, the responsibility for preserving this tradition cannot rest with OLC alone. It is incumbent upon the Attorney General and the President to ensure that OLC's advice is sought on important and close legal questions and that the advice given reflects the best executive branch traditions. The principles set forth in this document are based in large part on the longstanding practices of the Attorney General and the Office of Legal Counsel, across time and administrations.

When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.

OLC's core function is to help the President fulfill his constitutional duty to uphold the Constitution and "take care that the laws be faithfully executed" in all of the varied work of the

executive branch. OLC provides the legal expertise necessary to ensure the lawfulness of presidential and executive branch action, including contemplated action that raises close and difficult questions of law. To fulfill this function appropriately, OLC must provide advice based on its best understanding of what the law requires. OLC should not simply provide an advocate's best defense of contemplated action that OLC actually believes is best viewed as unlawful. To do so would deprive the President and other executive branch decisionmakers of critical information and, worse, mislead them regarding the legality of contemplated action. OLC's tradition of principled legal analysis and adherence to the rule of law thus is constitutionally grounded and also best serves the interests of both the public and the presidency, even though OLC at times will determine that the law precludes an action that a President strongly desires to take.

2. OLC's advice should be thorough and forthright, and it should reflect all legal constraints, including the constitutional authorities of the coordinate branches of the federal government—the courts and Congress—and constitutional limits on the exercise of governmental power.

The President is constitutionally obligated to “preserve, protect and defend” the Constitution in its entirety—not only executive power, but also judicial and congressional power and constitutional limits on governmental power—and to enforce federal statutes enacted in accordance with the Constitution. OLC's advice should reflect all relevant legal constraints. In addition, regardless of OLC's ultimate legal conclusions concerning whether proposed executive branch action lawfully may proceed, OLC's analysis should disclose, and candidly and fairly address, the relevant range of legal sources and substantial arguments on all sides of the question.

3. OLC's obligation to counsel compliance with the law, and the insufficiency of the advocacy model, pertain with special force in circumstances where OLC's advice is unlikely to be subject to review by the courts.

In formulating its best view of what the law requires, OLC always should be mindful that the President's legal obligations are not limited to those that are judicially enforceable. In some circumstances, OLC's advice will guide executive branch action that the courts are unlikely to review (for example, action unlikely to result in a justiciable case or controversy) or that the courts likely will review only under a standard of extreme deference (for example, some questions regarding war powers and national security). OLC's advice should reflect its best view of all applicable legal constraints, and not only legal constraints likely to lead to judicial invalidation of executive branch action. An OLC approach that instead would equate “lawful” with “likely to escape judicial condemnation” would ill serve the President's constitutional duty by failing to describe all legal constraints and by appearing to condone unlawful action as long as the President could, in a sense, get away with it. Indeed, the absence of a litigation threat signals special need for vigilance: In circumstances in which judicial oversight of executive branch action is unlikely, the President—and by extension OLC—has a special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers.

4. OLC's legal analyses, and its processes for reaching legal determinations, should not simply mirror those of the federal courts, but also should reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office.

As discussed under principle 3, jurisdictional and prudential limitations do not constrain OLC as they do courts, and thus in some instances OLC appropriately identifies legal limits on executive branch action that a court would not require. Beyond this, OLC's work should reflect the fact that OLC is located in the executive branch and serves both the institution of the presidency and a particular incumbent, democratically elected President in whom the Constitution vests the executive power. What follows from this is addressed as well under principle 5. The most substantial effects include the following: OLC typically adheres to judicial precedent, but that precedent sometimes leaves room for executive interpretive influences, because doctrine at times genuinely is open to more than one interpretation and at times contemplates an executive branch interpretive role. Similarly, OLC routinely, and appropriately, considers sources and understandings of law and fact that the courts often ignore, such as previous Attorney General and OLC opinions that themselves reflect the traditions, knowledge and expertise of the executive branch. Finally, OLC differs from a court in that its responsibilities include facilitating the work of the executive branch and the objectives of the President, consistent with the requirements of the law. OLC therefore, where possible and appropriate, should recommend lawful alternatives to legally impermissible executive branch proposals. Notwithstanding these and other significant differences between the work of OLC and the courts, OLC's legal analyses always should be principled, thorough, forthright, and not merely instrumental to the President's policy preferences.

5. OLC advice should reflect due respect for the constitutional views of the courts and Congress (as well as the President). On the very rare occasion when the executive branch—usually on the advice of OLC—declines fully to follow a federal statutory requirement, it typically should publicly disclose its justification.

OLC's tradition of general adherence to judicial (especially Supreme Court) precedent and federal statutes reflects appropriate executive branch respect for the coordinate branches of the federal government. On very rare occasion, however, Presidents, often with the advice of OLC, appropriately act on their own understanding of constitutional meaning (just as Congress at times enacts laws based on its own constitutional views). To begin with relatively uncontroversial examples, Presidents at times veto bills they believe are unconstitutional and pardon individuals for violating what Presidents believe are unconstitutional statutes, even when the Court would uphold the statute or the conviction against constitutional challenge. Far more controversial are rare cases in which Presidents decide to refuse to enforce or otherwise comply with laws they deem unconstitutional, either on their face or in some applications. The precise contours of presidential power in such contexts are the subject of some debate and beyond the scope of this document. The need for transparency regarding interbranch disagreements, however, should be beyond dispute. At a bare minimum, OLC advice should fully address

applicable Supreme Court precedent, and, absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, it should publicly release a clear statement explaining its deviation. Absent transparency and clarity, client agencies might experience difficulty understanding and applying such legal advice, and the public and Congress would be unable adequately to assess the lawfulness of executive branch action. Indeed, federal law currently requires the Attorney General to notify Congress if the Department of Justice determines either that it will not enforce a provision of law on the grounds that it is unconstitutional or that it will not defend a provision of law against constitutional challenge.

6. OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.

OLC should follow a presumption in favor of timely publication of its written legal opinions. Such disclosure helps to ensure executive branch adherence to the rule of law and guard against excessive claims of executive authority. Transparency also promotes confidence in the lawfulness of governmental action. Making executive branch law available to the public also adds an important voice to the development of constitutional meaning—in the courts as well as among academics, other commentators, and the public more generally—and a particularly valuable perspective on legal issues regarding which the executive branch possesses relevant expertise. There nonetheless will exist some legal advice that properly should remain confidential, most notably, some advice regarding classified and some other national security matters. OLC should consider the views regarding disclosure of the client agency that requested the advice. Ordinarily, OLC should honor a requestor's desire to keep confidential any OLC advice that the proposed executive action would be unlawful, where the requestor then does not take the action. For OLC routinely to release the details of all contemplated action of dubious legality might deter executive branch actors from seeking OLC advice at sufficiently early stages in policy formation. In all events, OLC should in each administration consider the circumstances in which advice should be kept confidential, with a presumption in favor of publication, and publication policy and practice should not vary substantially from administration to administration. The values of transparency and accountability remain constant, as do any existing legitimate rationales for secret executive branch law. Finally, as discussed in principle 5, Presidents, and by extension OLC, bear a special responsibility to disclose publicly and explain any actions that conflict with federal statutory requirements.

7. OLC should maintain internal systems and practices to help ensure that OLC's legal advice is of the highest possible quality and represents the best possible view of the law.

OLC systems and processes can help maintain high legal standards, avoid errors, and safeguard against tendencies toward potentially excessive claims of executive authority. At the outset, OLC should be careful about the form of requests for advice. Whenever possible, agency requests should be in writing, should include the requesting agency's own best legal views as well as any relevant materials and information, and should be as specific as circumstances allow. Where OLC determines that advice of a more generally applicable nature would be helpful and

appropriate, it should take special care to consider the implications for its advice in all foreseeable potential applications. Also, OLC typically should provide legal advice in advance of executive branch action, and not regarding executive branch action that already has occurred; legal “advice” after the fact is subject to strong pressures to follow an advocacy model, which is an appropriate activity for some components of the Department of Justice but not usually for OLC (though this tension may be unavoidable in some cases involving continuing or potentially recurring executive branch action). OLC should recruit and retain attorneys of the highest integrity and abilities. OLC should afford due respect for the precedential value of OLC opinions from administrations of both parties; although OLC’s current best view of the law sometimes will require repudiation of OLC precedent, OLC should never disregard precedent without careful consideration and detailed explanation. Ordinarily OLC legal advice should be subject to multiple layers of scrutiny and approval; one such mechanism used effectively at times is a “two deputy rule” that requires at least two supervising deputies to review and clear all OLC advice. Finally, OLC can help promote public confidence and understanding by publicly announcing its general operating policies and procedures.

8. Whenever time and circumstances permit, OLC should seek the views of all affected agencies and components of the Department of Justice before rendering final advice.

The involvement of affected entities serves as an additional check against erroneous reasoning by ensuring that all views and relevant information are considered. Administrative coordination allows OLC to avail itself of the substantive expertise of the various components of the executive branch and to avoid overlooking potentially important consequences before rendering advice. It helps to ensure that legal pronouncements will have no broader effect than necessary to resolve the question at hand. Finally, it allows OLC to respond to all serious arguments and thus avoid the need for reconsideration.

9. OLC should strive to maintain good working relationships with its client agencies, and especially the White House Counsel’s Office, to help ensure that OLC is consulted, before the fact, regarding any and all substantial executive branch action of questionable legality.

Although OLC’s legal determinations should not seek simply to legitimate the policy preferences of the administration of which it is a part, OLC must take account of the administration’s goals and assist their accomplishment within the law. To operate effectively, OLC must be attentive to the need for prompt, responsive legal advice that is not unnecessarily obstructionist. Thus, when OLC concludes that an administration proposal is impermissible, it is appropriate for OLC to go on to suggest modifications that would cure the defect, and OLC should stand ready to work with the administration to craft lawful alternatives. Executive branch officials nonetheless may be tempted to avoid bringing to OLC’s attention strongly desired policies of questionable legality. Structures, routines and expectations should ensure that OLC is consulted on all major executive branch initiatives and activities that raise significant legal questions. Public attention to when and how OLC generally functions within a particular administration also can help ensure appropriate OLC involvement.

10. OLC should be clear whenever it intends its advice to fall outside of OLC's typical role as the source of legal determinations that are binding within the executive branch.

OLC sometimes provides legal advice that is not intended to inform the formulation of executive branch policy or action, and in some such circumstances an advocacy model may be appropriate. One common example: OLC sometimes assists the Solicitor General and the litigating components of the Department of Justice in developing arguments for presentation to a court, including in the defense of congressional statutes. The Department of Justice typically follows a practice of defending an act of Congress against constitutional challenge as long as a reasonable argument can be made in its defense (even if that argument is not the best view of the law). In this context, OLC appropriately may employ advocacy-based modes of analysis. OLC should ensure, however, that all involved understand whenever OLC is acting outside of its typical stance, and that its views in such cases should not be taken as authoritative, binding advice as to the executive branch's legal obligations. Client agencies expect OLC to provide its best view of applicable legal constraints and if OLC acts otherwise without adequate warning, it risks prompting unlawful executive branch action.

The following former Office of Legal Counsel attorneys prepared and endorse this document:

Walter E. Dellinger, Assistant Attorney General 1993-96
Dawn Johnsen, Acting Assistant Attorney General 1997-98; Deputy AAG 1993-97
Randolph Moss, Assistant Attorney General 2000-01, Acting 1998-2000; Deputy AAG 1996-98
Christopher Schroeder, Acting Assistant Attorney General 1997; Deputy AAG 1994-96
Joseph R. Guerra, Deputy Assistant Attorney General 1999-2001
Beth Nolan, Deputy Assistant Attorney General 1996-99; Attorney Advisor 1981-85
Todd Peterson, Deputy Assistant Attorney General 1997-99; Attorney Advisor 1982-85
Cornelia T.L. Pillard, Deputy Assistant Attorney General 1998-2000
H. Jefferson Powell, Deputy Assistant Attorney General and Consultant 1993-2000
Teresa Wynn Roseborough, Deputy Assistant Attorney General 1994-1996
Richard Shiffrin, Deputy Assistant Attorney General, 1993-97
William Michael Treanor, Deputy Assistant Attorney General 1998-2001
David Barron, Attorney Advisor 1996-99
Stuart Benjamin, Attorney Advisor 1992-1995
Lisa Brown, Attorney Advisor 1996-97
Pamela Harris, Attorney Advisor 1993-96
Neil Kinkopf, Attorney Advisor 1993-97
Martin Lederman, Attorney Advisor 1994-2002
Michael Small, Attorney Advisor 1993-96

January 03, 2005 - 1

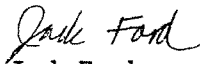
Senator Arlen Specter
Chairman Senate Judiciary Committee
Patrick J. Leahy,
Ranking Member Senate Judiciary Committee

Dear Senators,

We, the undersigned, believe, without reservation, that the Senate should not confirm Alberto Gonzales for the post of Attorney General of the United States. Primarily, we are deeply concerned about his position opposing the standards required by the Geneva Conventions as well as the potential for his alignment with indefinite detentions of people held in prisons in the US and abroad. Furthermore, Mr. Gonzales lacks the integrity and the requisite independence to carry out the job of Attorney General. We are steadfast in our opposition to his confirmation.

We eagerly await your written response addressing our concerns.

Respectfully,



Jack Ford
1021 Everglades Drive
Pacifica, Ca. 94044



Delia McGrath
239 Modoc Place
Pacifica, Ca. 94044-3142



THE
INTERFAITH
ALLIANCE

REV. DR. C. WELTON GADDY
PRESIDENT

December 06, 2004

Dear Senator,

I write to you today as president of The Interfaith Alliance, a nonpartisan, national grassroots organization dedicated to promoting the positive and healing role of religion in public life, to urge you to fully examine the religious liberty record of Judge Alberto Gonzales, President Bush's nominee to be the next Attorney General of the United States. Since in many aspects Judge Gonzales' record is not clear on matters of church-state separation and the proper role of religion in public life, we urge the Senate Judiciary Committee to have a meaningful conversation with the nominee in full view of the nation.

This conversation becomes even more important given that our nation just experienced a national election in which religion and the personal faith of the candidates for public office became a focus point for debate and for some a qualification for holding public office.

While the office of Attorney General is an appointed one and not one in which the nation will vote, the diversity of our nation's religious traditions requires a Department of Justice that will show no preference for one religious tradition over another, and requires an Attorney General who upholds the current laws and Supreme Court precedents that guarantee religious liberty to all Americans.

As you well know, the importance of the Establishment Clause of the First Amendment of our Constitution cannot be overstated or underestimated. For over 200 years this simple language — Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof — has been a guiding principle of our national government and has been interpreted in numerous Supreme Court decisions to ensure the institutional separation of government and religion and the protection of religious minorities. The nation needs to hear that Judge Gonzales will defend these precedents in all aspects of his job.

During the 2004 campaign, The Interfaith Alliance assembled five questions on religious liberty that were sent to nearly every candidate for public office. The purpose of creating these questions was to help people of faith cut through campaign propaganda and political slogans and to be able to ask candidates directly their stance on religious liberty. The questions were used in local, state and national races culminating in one of the questions being asked of the presidential candidates in the last televised presidential debate. We believe



that these questions can be of use to the Committee, and the nation, as they weigh this nomination. The questions to be asked to Judge Gonzales are as follows:

1. How will your religious faith and values impact your role in carrying out the laws of the United States?
2. In public and private settings, will your use of religious language reflect the language of your religious tradition, or will it be more broadly inclusive?
3. What active steps will you take to show respect for the variety of religious beliefs of the people living in this country?
4. What are your views on the Constitutional guarantee of the separation of church and state?
5. How will you balance the principles of your faith and your pledge to defend the Constitution, particularly when the two come into conflict?

Additionally, given recent media attention to the plight of prisoners in Abu Ghraib, and the role that the nominee has been identified as playing in that human catastrophe, we would like to know the exact role that Judge Gonzales played in sanctioning torture. With images of sadness and desperation burnt into our collective souls by visions of torture and outright humiliation overseas, we can think of nothing more antithetical to our basic moral values, or detrimental to our national role as a voice for human rights throughout the world, if this pain is ignored.

If our highest law enforcement official is known to have sanctioned torture and shown a willingness to disregard or evade some of the most fundamental international human rights laws, the United States Senate must seriously weigh whether or not this nominee should be confirmed and bestowed upon with the responsibility of enforcing our Constitutional rights and privileges. As people of faith and goodwill who seek to build bridges to other lands, we seek an Attorney General who will respect that most basic cause and set in place firm policies and procedures to compliment and affirm our work to create a better world for all our children.

The Interfaith Alliance looks forward to a thorough vetting of Judge Gonzales on these crucial matters. If we can be of any help to you, please do not hesitate to contact Roger Limoges, Deputy Director of Public Policy at 202-639-6370.

Sincerely,



C. Welton Gaddy

President

**STATEMENT OF
ALBERTO R. GONZALES
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
JANUARY 6, 2005**

Mr. Chairman, Senator Leahy, Distinguished Members of the Committee.

It is the highest honor of my professional career to appear before you today as the President's nominee to be Attorney General of the United States. I owe a debt of deep gratitude to the President for the trust he has placed in me.

I also want to thank Senator Cornyn, for his kind introduction, and for his many years of friendship. Ken Salazar was sworn in as a United States Senator just two days ago. Thank you Senator for your willingness to extend your hand of friendship across the political aisle to introduce me today. Although Senator Hutchison could not be with us today, I appreciate her many years of support as well.

My family is critical to any measure of success I have had, and if I may, I'd like to introduce them to you now. My wife Rebecca – thank you, Becky, for your unfailing support. I am immensely proud of our sons, they are here today: Jared, Graham, and Gabriel.

I would be remiss if I failed to acknowledge the support and sacrifices of my parents – my late father Pablo, and my mother, Maria. My mother is here this morning, as is my brother Tony – a 20-year veteran of the Houston Police Department. A person could not even begin the journey from Humble, Texas to the White House to this hearing without the foundation of a fine family, and I want to acknowledge their love and support.

Mr. Chairman, the highest objective of the Department of Justice is the pursuit of justice. This noble objective – justice – is reflected in human terms in the hopeful eyes of a new citizen, voting for the first time; in the quiet gratitude of a victim of crime whose rights have been vindicated in the courts; and in the pride of a person given the opportunity to succeed, no matter the skin color, or gender, or disability. For Justice, properly understood, cannot in my view be divorced from the individual. It always has a human dimension and if confirmed as Attorney General, I pledge that I will always remember that.

If confirmed as Attorney General, I will no longer represent only the White House; I will represent the United States of America and its people. I understand the differences between the two roles. In the former, I have been privileged to advise the President and his staff. In the latter, I would have a far broader responsibility: to pursue justice for all the people of our great nation; to see that the laws are enforced in a fair and impartial manner for all Americans.

Wherever we pursue justice – from the war on terror to corporate fraud to civil rights – we must always be faithful to the rule of law. I want to make very clear that I am deeply

committed to the rule of law. I have a deep and abiding commitment to the fundamental American principle that we are a nation of laws, and not of men. That commitment is the core principle that has guided all of my professional endeavors.

Our Government's most basic obligation is to protect its citizens from enemies who would destroy their lives and our nation's way of life. The Department of Justice's top priority is to prevent terror attacks against our nation.

As we fight the War on Terror, we must always honor and observe the principles that make our society so unique and worthy of protection. We must be committed to preserving civil rights and civil liberties. I look forward if I am confirmed to working with this Committee, the Congress, and the public to ensure that we are doing all we can to do so. Although we may have differences from time to time, we all love our country and want to protect it while remaining true to our nation's highest ideals. Working together, we can accomplish that goal.

After the attacks of 9/11, our government had fundamental decisions to make concerning how to apply treaties and U.S. law to an enemy that does not wear a uniform, owes no allegiance to any country, is not a party to any treaties, and – most importantly – does not fight according to the laws of war.

As we have debated these questions, the President has made clear that he is prepared to protect and defend the United States and its citizens, and will do so vigorously, but always in a manner consistent with our nation's values and applicable law, including our treaty obligations. I pledge that, if I am confirmed as Attorney General, I will abide by those commitments.

Chairman Specter, if I may add a personal note, I want to congratulate you for your Chairmanship of this important committee, and I look forward if confirmed to the many occasions we will discuss the important issues facing our country in the months and years ahead. Senator Hatch, I want to thank you for your dedicated service as Chairman of this Committee, for the good working relationship we have enjoyed, and for all the many kindnesses you have shown me personally. I appreciate the good working relationship I've enjoyed with Senator Leahy during my tenure as Counsel to the President. I know him to be a person of good will and dedication and I have great confidence that, if I'm fortunate enough to be confirmed, we will build on that as we reach across the aisle to work together to serve the American people.

Mr. Chairman, it is a distinct honor to appear before the Committee today. I appreciate the time and attention that members of the Committee and their staffs have dedicated to this hearing and to consideration of my nomination. And I look forward to answering your questions not just at this hearing, but if I am fortunate enough to be confirmed, in the months and years ahead as we work together in the noble and high calling of the pursuit of justice.

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ELLYN S. STEINHORN

MICHAEL D. WEISENFELD

January 4, 2005

The Honorable Patrick Leahy
 Fax: (202) 224-3479

Dear Senator Leahy:

As rabbi of the largest Jewish congregation in the Triad, I would like to share with you some of my concerns concerning the question of whether the Senate should confirm Alberto Gonzales to become Attorney General of the United States.

I am deeply concerned that Mr. Gonzales as White House counsel advised the President that the President was authorized under the Constitution to annul the Geneva Conventions and to authorize the use of torture by United States forces and agents in the process of interrogating prisoners.

That memo was not merely theoretical: It had a major effect on the chain of command and the behavior of American forces and agents in Guantanamo and at Abu Ghraib, and at other prisons in various places where the United States has either itself used methods named as torture by the Geneva Conventions or has "rendered" its prisoners to foreign governments known to use extremely brutal methods of torture.

In my view, Mr. Gonzales' advice that the President was legally entitled to authorize such behavior casts great doubt on his worthiness to become Attorney General.

I do believe that the only way for him to assuage that doubt is for him to unequivocally affirm before the Judiciary Committee that he:

1. Denounces and will oppose the use of torture;
2. Will uphold, obey, and enforce the Supreme Court ruling that it is unconstitutional to imprison anyone designated as an "enemy combatant" for months without access to lawyers or the right to challenge their detentions in court;
3. Affirms the binding legality of the Geneva Conventions and the laws of war;
4. Rejects the practice of "extraordinary rendition," at home and abroad, by which some prisoners are sent to countries that practice extreme torture for interrogation;
5. Believes that these provisions of the Constitution and laws of the United States apply to the President as well as to all other Federal officials;
6. Will use if confirmed the full power and authority of the Department of Justice to enforce these laws.

I take this position not only out of love for the Constitution and laws of the United States, not only out of deep concern for the safety of American soldiers and civilians who may well be endangered if the protections of the Geneva Conventions are denigrated and diminished by the United States, but out of moral and ethical values deeply affirmed by Torah and by the religious traditions of many communities and peoples.

From the standpoint of Jewish tradition, all human beings are created in the Image of God.

Torture shatters and defiles that image. In every shriek of those in unbearable pain, in every crazed nightmare of those who are denied sleep for days and weeks at a time, in every muffled moan of those plunged under water for minutes at a time, trying not to breathe lest they drown, God is broken. God is defiled.

And the very Geneva Conventions that Mr. Gonzales said were obsolete were adopted by the nations of the world very shortly after, and because of, World War II. They are one of the most sacred legacies of the dead of the Nazi Holocaust, bequeathed from their suffering to the human race as a whole.

I know that some have argued that the President is entitled to have almost anyone he wishes in his Cabinet. But the power to reject such appointments was placed by the Constitution in the hands of the Senate precisely to check and balance the likelihood that Presidents might appoint officials who might then assist the President to puff up his power beyond Constitutional limits, and to break the law.

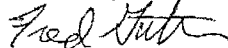
Our Founders knew perfectly well of British kings who had used torture or otherwise broken the bounds of legitimate law. They intended to make that impossible in our republic.

I urge you therefore to use wisely the authority that the Founders so wisely put in your hands.

If Mr. Gonzales fails or refuses to make these commitments that I have outlined, I urge you to vote against confirming his nomination.

I know that you share our deep concern for moral values and for those aspects of our tradition that are universally relevant. And we believe that you stand also for an overarching vision of the Constitution; that you will not be, in the words of one writer, "victimized by the age in which [you] live." So I will look forward to your decision on this question.

With the blessings of shalom,



Rabbi Fred Guttman
M.H.L., M.Ed., D.Div.

**Statement of Senator Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Hearing on the nomination of**

**JUDGE ALBERTO GONZALES
FOR ATTORNEY GENERAL OF THE UNITED STATES**

I believe that President Bush has submitted a strong nominee for the position of Attorney General of the United States.

I want to join Senators Specter and Leahy in welcoming Judge Gonzales to the Committee today.

I know that this is a very proud day for Judge Gonzales' family and I welcome his family to our hearing this morning. While his father, Pablo, did not live long enough to see his son receive the honor of this important nomination, I can not help but think that he is here in spirit today.

The position of Attorney General – our nation's highest law enforcement official – requires a person with a deep commitment to the principle of equal justice under the law.

I have worked closely with Judge Gonzales for four years.

I know from my first-hand experiences with Judge Gonzales that he believes in the principle of equal justice for all. I know that he has the ability to make an outstanding Attorney General for all of the citizens of the United States.

His career has been an American success story. Judge Gonzales has already had a distinguished career as an attorney, judge, and civil servant. He has made much of the opportunities that were in part created by his education at Harvard Law School, Rice University and the Air Force Academy.

I think that his background experiences will enable him to bring an important perspective to the administration of justice in the United States.

I stand ready to work with Judge Gonzales to help him succeed in carrying out his new responsibilities. The American public will be counting on him to help see that justice is fair for all in America.

I see eye to eye with Judge Gonzales on many of the issues. But from time to time we have had our disagreements. Whether we have agreed, or disagreed, on a particular matter, I have always respected the forthright manner in which he has been willing to discuss the issues with me.

Judge Gonzales will be asked some tough questions today. This is how it should be.

For example, today's hearing will continue the on-going public policy debate on how a democratic society with a long tradition of protecting civil liberties should conduct itself when it finds itself threatened and attacked by terrorist groups and individuals who will stop at literally nothing to destroy our way of life.

It is my hope that in addition to providing an adequate record about Judge Gonzales' qualifications to serve as Attorney General, one of the outcomes of today's hearing will be to help educate the Committee and the public about the facts of what actions were taken, and were not taken, with respect to the treatment and interrogation of the various classes of individuals who have been detained and taken into custody by the United States as part of our response to the horrific 9/11 attacks on America.

I am confident that Judge Gonzales will attempt to fully and fairly answer our inquiries today. I also believe that he will continue to consult with us on a constructive basis throughout his tenure as Attorney General.

Let me just say to Judge Gonzales that he has a big job ahead but I believe he is up to the task.

Before I ask Judge Gonzales some questions, I want to take this opportunity to once again recognize the hard work, dedication, and many accomplishments of our current Attorney General, John Ashcroft.

Frankly, it has not been lost on me that many of those who are opposing Judge Gonzales today are the very same groups that attempted to unfairly vilify Attorney General Ashcroft for the last four years.



human rights *first*

Statement of Human Rights First on its Opposition to Alberto Gonzales' Confirmation as Attorney General of the United States

January 24, 2005

"America's vital interests and our deepest beliefs are now one. From the day of our founding we have proclaimed every man and woman on this earth has rights, and dignity, and matchless value." These were the words of President Bush as he took the oath of office for his second term. They fairly reflect the principle on which the United States was founded: all people, by virtue of their humanity, have inalienable rights under law.

Torture and calculated cruelty inflicted by the government cannot be reconciled with this principle. Such conduct strips those subject to it of their dignity, and deprives them of their humanity. It is for this reason such treatment has long been prohibited by the laws of the United States, and by treaties the United States urged the world to embrace.

Alberto Gonzales, the President's nominee to be the United States' chief law enforcer, is without question familiar with this first principle of human rights. An experienced lawyer, he has served successfully in private practice, as a judge and as counsel to the President. He has an inspiring personal history of struggle and opportunity that is, in many ways, uniquely American. But during the past four years, Mr. Gonzales has helped to steer America away from its commitment to human rights under law. For this reason, we must oppose his nomination.

During his tenure as White House Counsel, Mr. Gonzales advised the President that the laws of war do not bind us in the difficult fight against terrorism. He approved a definition of torture so narrow that much of the barbarism depicted in the photos from Abu Ghraib would have been beyond the law to punish. He has contended that U.S. personnel are exempt from the ban on cruel and degrading practices that has been binding U.S. treaty law for more than a decade. And he has embraced the radical view that the President has the power to ignore laws passed by the nation's representatives in Congress. Such views are anathema to the rule of law, and contrary to the rights the United States has pledged to protect.

Indeed, the policies Mr. Gonzales embraced as White House Counsel – and reaffirmed in his hearings before the Senate this month – opened the door to abuses that have undermined military discipline, put our troops abroad at greater risk, and as even Mr. Gonzales acknowledges, denied the United States the moral authority essential to prevailing against terrorism in the long term. After the horrific images from Abu Ghraib became public last year, Secretary of Defense Donald Rumsfeld insisted that the world should "[j]udge us by our actions," and "watch how a democracy deals with the wrongdoing and with scandal and the pain of acknowledging and correcting our own mistakes." The world is indeed watching. And the picture it will see should the Senate approve the nomination of Mr. Gonzales is the promotion of one closely associated with the torture and cruelty the President says he rejects.

Some have argued that it is unfair to blame Mr. Gonzales for the torture, cruelty, and death inflicted on individuals in U.S. custody overseas. As Mr. Gonzales repeatedly said

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at his confirmation hearing, setting interrogation policy was "not my job." Clearly there are other officials who also bear responsibility for these actions. But no one disputes that Mr. Gonzales rejected the applicability of essential provisions of the Geneva Conventions in Afghanistan, and that he endorsed interrogation methods that law enforcement and military experts advised were unlawful, and that many senior military officers reject today. Mr. Gonzales reaffirmed these views in his statements before the Senate – telling Senators that he agreed with the conclusions of the memo reducing the definition of torture to meaninglessness, and suggesting that the President could ignore laws if he thought they unconstitutionally infringed on his powers as Commander-in-Chief. We evaluate Mr. Gonzales based on his own actions, and his own words. And it is on this basis we oppose his nomination.

As a human rights organization committed to protecting the rule of law, we are compelled to take what is, for us, this unusual step. This is the second time in 27 years that Human Rights First has opposed a presidential nominee, and the first such action since 1981. We take this difficult decision with great reluctance, recognizing that the President has broad discretion to make executive appointments, and to provide, consistent with his office, such national leadership as he sees fit. But in a nation committed to observing the rule of law as it is, not as power finds it convenient to be, we cannot accept the President's decision here. We urge the Senate to reject Mr. Gonzales' nomination.

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**Human Rights Watch Opposes Gonzales Nomination**

January 24, 2005

Human Rights Watch opposes the nomination of Alberto Gonzales to serve as Attorney General of the United States. Mr. Gonzales played a key role in providing legal justification for policies that led to torture and abuse of detainees in U.S. custody. While we did not realistically expect Mr. Gonzales to repudiate the Bush Administration's past positions during his confirmation hearing, we hoped he would seize the chance to reassure the world that he would in the future uphold and enforce the laws that prohibit torture and ill-treatment. Instead, in his answers to Senators' questions, he raised new doubts about whether he is committed to the rule of law, and whether he even understands the laws that govern the conduct of war and the treatment of prisoners. We therefore believe Mr. Gonzales should not be confirmed to serve as Attorney General.

As Counsel to the President, Mr. Gonzales helped lay the faulty legal foundation of the Bush Administration's detention and interrogation policies in Afghanistan, Guantanamo Bay, Iraq and secret locations abroad. Ignoring the advice of Secretary of State Colin Powell and the United States' top military leaders, he urged President Bush not to apply the Geneva Conventions to the armed conflict in Afghanistan. He also wrote or requested legal memoranda that untethered U.S. treatment of detainees from its traditional moorings, leaving U.S. soldiers and interrogators without clear limits on their conduct. The theories these memos advanced provided the basis for the approval of interrogation methods the United States has long condemned as torture, including binding prisoners in painful positions, threatening them with dogs, extended sleep deprivation, prolonged exposure to extreme heat and cold, and reportedly simulated drowning. Whether giving advice to the President or reviewing the opinions of government lawyers, Mr. Gonzales never said "no" to extreme legal theories when "no" was legally and morally required.

Human Rights Watch has never before opposed the nomination of a cabinet official in the United States. We do so today mindful of a President's prerogatives in putting forth candidates for executive posts. But more important is the U.S. Senate's role in ensuring that nominees are minimally fit to serve. The Attorney General must scrupulously enforce the law and lead a Justice Department that is committed to ensuring that no one - not even the President - is above the law. Sadly, Mr. Gonzales's statements to the Senate indicate a continuing willingness to bend the law in service of a desired policy outcome, rather than an unbending commitment to respecting the law.

In his hearing, Mr. Gonzales was asked about a memo that he requested from the Justice Department's Office of Legal Counsel, which redefined torture to exclude conduct that unquestionably constituted torture. That memo also made the radical claim that President, as commander in chief, was exempt from laws prohibiting torture.

The Bush administration has retreated from its absurdly narrow definition of torture. But when Senators asked Mr. Gonzales if he believes that the President could lawfully order a prisoner to be tortured, Mr. Gonzales repeatedly refused to say, simply, "no." Instead, he argued that the Congress could, theoretically, pass a law that is unconstitutional, which the President could, hypothetically, ignore. But the laws against torture, like the laws against murder or rape, are not hypothetical; they are real and unconditional. The United States should not have an Attorney General who refuses to say whether the President is bound to obey specific, existing laws that reflect its most fundamental values as a nation.

Mr. Gonzales's written responses revealed another aspect of the Bush Administration's deliberate strategy to circumvent legal prohibitions against mistreatment of detainees. Administration lawyers have invented a geographic limitation to the United States' obligation not to engage in cruel, inhuman or degrading treatment under the Convention against Torture. Mr. Gonzales told the Senate that this obligation does not apply to non-Americans held outside of U.S. territory. While he notes that members of the military and military contractors may be bound by other laws that prohibit serious assaults, he failed to acknowledge the principal effect of refusing to honor this treaty obligation abroad: it leaves the CIA with a free hand to engage in the very cruel and inhumane treatment that the United States pledged to prevent when it ratified this human rights treaty. In effect, Mr. Gonzales said that no law would prohibit the CIA from engaging in the same degrading conduct revealed by the photographs from Abu Ghraib.

At his oversight hearing, Mr. Gonzales also demonstrated a lack of understanding of the most basic concepts of the Geneva Conventions. He repeatedly argued that had the Geneva Conventions been applied to al Qaeda members captured in Afghanistan, the United States would have had to give them all the privileges of prisoner of war status. In fact, the Geneva Conventions do not require that all captured belligerents be granted POW status -- but they do require humane treatment of all captives, whether soldiers, insurgents, or civilians. He also said more than once that had the Geneva Conventions been applied to al Qaeda members, they could not have been prosecuted for war crimes. This is an elementary misstatement of the law. The Third Geneva Convention confers immunity only for lawful acts of combat - the act of taking up arms - and only on POWs. The Geneva Conventions do not grant immunity for war crimes to anyone. Given that President Bush relied on Mr. Gonzales's legal advice in deciding not to apply

the Geneva Conventions to al Qaeda, it is deeply troubling that Mr. Gonzales appears to have misunderstood such a fundamental principle of the laws of war.

In his written responses, Mr. Gonzales also demonstrated a lack of knowledge of the U.S. military's fundamental rules on the treatment of detainees, stating that the U.S. Army's interrogation manual (FM 34-52) only protects prisoners of war from mistreatment. In fact, the manual, like the Geneva Conventions, explicitly protects all detainees, whether POWs, insurgents or civilians.

Mr. Gonzales began his testimony by asserting that he shared the commitment of America's founding fathers to a government of laws, not of men. His position on torture cannot be squared with that principle. By stressing that the President's rejection of torture is simply a choice, not a legal obligation, he has endorsed the position that governments are bound not by law, but by presidential policies that can be made and unmade as presidents wish.

If widely adopted, such a view would grant license to the leaders of all nations to order the torture of anyone they deem to threaten their national security. It would provide U.S. adversaries with a justification for the torture of American soldiers and civilians. The assertion of such a radical view by the Attorney General of the United States would undermine President Bush's stated intention to promote liberty and law around the world. An administration that preaches moral clarity to others should not tolerate moral ambiguity in its top law enforcement official.

For over 25 years, Human Rights Watch has worked to stamp out torture around the world. That struggle has been made harder by the legal positions adopted by the Bush Administration, including Mr. Gonzales's refusal to state that a President could not lawfully order torture. Statements against torture in the abstract are welcome, but they are no substitute for the strong hand of the law in protecting human dignity and ensuring the human rights of all people.



**Senator Hutchison's Statement on the Nomination of Alberto Gonzales
to be Attorney General**

Mr. Chairman. I strongly support the President's nomination of Judge Alberto Gonzales to be the 80th Attorney General of the United States.

A fellow Texan, Judge Gonzalez is one of eight children of Mexican immigrants, growing up in Humble, Texas. He was the first person in his family to attend college, obtaining his undergraduate degree from Rice University and his Juris Doctorate from Harvard Law School. Judge Gonzales also served in the United States Air Force and attended the United States Air Force Academy.

Judge Gonzales has provided thoughtful and comprehensive advice and counsel to the President in his tenure as White House Counsel. He has honorably served the American people and this Administration through a difficult time in our history—through challenges that have demanded new thinking and bold policies.

Judge Gonzales demonstrated this same courage throughout his impressive career in serving as a Justice on the Supreme Court of Texas, Texas Secretary of State and as senior advisor to then Governor Bush, working as the chief elections officer and the Governor's lead liaison on Mexico and border issues. As a judge, he interpreted the law strictly and decided cases on their merits, with a non-partisan, fair assessment—not his own personal views.

In Texas, Judge Gonzales was a partner in a leading law firm, taught law as an adjunct professor at the University of Houston Law Center, and has been active in the State Bar of Texas and numerous associations and charities. He has been a leader in Texas and this country's legal community and has risen to the upper echelons in both the private and public legal sector.

Judge Gonzales' experience, vast legal knowledge and good character will serve us well as he guides this nation's Justice Department. I know he will serve with great distinction as our 80th Attorney General and I am proud to support his nomination. I urge my colleagues to confirm him quickly and commend the President on his selection of Judge Gonzales.

**TESTIMONY OF JOHN D. HUTSON
BEFORE THE UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
CONCERNING THE NOMINATION OF ALBERTO GONZALES
FOR CONFIRMATION
AS ATTORNEY GENERAL OF THE UNITED STATES
JANUARY 6, 2005**

I am John Hutson. I'm the Dean and President of the Franklin Pierce Law Center in Concord, New Hampshire. I served as a judge advocate in the United States Navy from 1972-2000. I was the Judge Advocate General of the Navy from 1997-2000.

Having dedicated most of my professional life to military service, it is not an insignificant event for me to come here to testify in opposition to the confirmation of an Administration nominee for high office. I don't do this lightly, but these are issues about which I feel very strongly. In a very real way, this nomination presages the next four years for this country because more than any other discipline, it is the Rule of Law that directs our future. The Attorney General of the United States should be the chief enforcer of that Rule of Law. One of the few things Judge Gonzales got right in his infamous January, 2002 memo is when he stated, "The Attorney General is charged by statute with interpreting the law for the Executive Branch. This interpretive authority extends to both domestic and international law." Given the analysis that follows in that same memo, the fact that he has now been nominated to that very position should be of great concern to us all. Perhaps more than any other cabinet officer, the Attorney General has cherished public responsibilities to the people, distinct from the role of legal or political advisor to any particular president.

My opposition to this nomination focuses primarily on Judge Gonzales' January 25, 2002 memorandum, the subject of which is DECISION RE APPLICATION OF THE GENEVA CONVENTION ON PRISONERS OF WAR TO THE CONFLICT WITH AL QAEDA AND THE TALIBAN. In this memo, Judge Gonzales states that, "this new paradigm [the war against terrorism] renders obsolete Geneva's strict limitation on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, script..., athletic uniforms, and scientific instruments." He further urges the President to disregard it because he argues that adherence would restrict the war effort and potentially create criminal liability for war crimes.

In addition, other legal analyses were drafted by administration officials which Judge Gonzales did not repudiate, at least not on the record. These memoranda defined torture very narrowly, the defenses to torture broadly, and gave the President carte blanche in prosecuting the war on terror.

I believe Judge Gonzales' January 25 memorandum was shallow in its legal analysis, short-sighted in its implications, and altogether ill-advised. Frankly, it was just wrong.

Moreover and importantly, it and the other memoranda it drew from and formed the basis for, [the Bybee memorandum (January 22, 2002 from Assistant Attorney General Jay Bybee), the Yoo memorandum (August 1, 2002 from Deputy Assistant Attorney General John Yoo) and the legal analysis from the DoD Working Group (April 4, 2003)] when taken together “set the conditions” for the horrific events that followed. They took the United States from the role we have held for generations on the world stage as the avatar for the Rule of Law and proponent of human rights to being just another nation trying to evade our legal obligations. I believe they place our troops and our citizens in even greater harm’s way by lowering the bar on acceptable conduct and fueling bitterness and resentment that encourages recruits to the enemy’s cause. It weakens our coalition and removes long held limitations on the most destructive of all human endeavors--warfare.

Let me begin with some discussion about why adherence to the Rule of Law in general and the Geneva Conventions in particular are so important for our country. I’ll then turn to my specific concerns about Judge Gonzales’ January 25 memorandum , and finally the very negative impact of that document on our national security and the safety of our present and future military forces.

As with individuals, the most important attribute of a nation is integrity. Integrity is the characteristic that ensures goodness in a society. Webster defines “integrity” as “firm adherence to a code especially moral ...values,” or “incorruptibility.”

Integrity in a nation ensures several outcomes. One is that other nations can be confident in dealing with a nation of integrity that it will always take whatever action its leadership believes to be the moral, not simply the expedient, action; it will take the right course and stay on the high road. Interaction among nations will be predictable. A particular nation’s course of action will be consistent and dependable through time. Predictability and dependability foster peace and security. Unpredictability and undependability foreshadow unrest and insecurity.

The most important reason for our leaders to strive for integrity at all times is because Americans want to be a nation of integrity. It is simply the right thing to do, regardless of any utilitarian or expedient benefit. It’s never too late to do the right thing, and this hearing provides an opportunity to do that.

In physics the law of entropy holds that through time any system will degrade to disorder and ultimately to chaos unless there is an outside force that ensures order in the system. That applies equally to the solar system, the community of nations and to the United States. That outside force ensuring world order is the regime of international treaties, obligations and customary international law. Without adherence to these, we will surely devolve to disorder through time.

This is particularly true in wartime. War is simply the state of the ultimate, but hopefully temporary, disorder. Its only value is to provide the time and space necessary for real solutions to take place--diplomatic, economic, political, and social. War is not a solution in itself and cannot be used to justify national misbehavior or loss of national integrity.

In disagreements or arguments between individuals, it is important that they not act in a manner that so poisons their relationship that it cannot recover. The same is true with nations. It's easy to act with integrity in peacetime when things are going smoothly. The true test of national integrity is in wartime. We must wage war in such a way that we are able ultimately to resume peace.

The Geneva Conventions envision an end to the hostilities and to the destruction of war. They envision a return to peace. They provide a framework for the conduct of the war that will enable the peace to be sustained and flourish. We must not be deterred just because our enemy in a war on terror doesn't comply with the Conventions. Our unilateral compliance will aid in the peace process. Moreover, it should have been understood that violations of the Conventions, or ignoring them, doesn't help bring an end to the war. To the contrary, as we have seen, this only adds ferocity to the fighting and lengthens the war by hardening the resolve of the enemy. Our flagrant disregard for the Conventions only serves as a recruiting poster for this enemy and for our enemies for generations to come.

For over half a century and many conflicts, the Geneva Conventions have served us well as the accepted rules of conduct in wartime, the Rule of Law with which civilized nations comply. They comply because they are nations of integrity. They also comply out of pure self interest. Nations always act in what they believe to be their self interest. They may miscalculate what their self interest is, but they always act in what they believe it to be. It is in our self interest is to comply with the Geneva Conventions under any circumstances. To do otherwise risks waging such an unlimited war that we are no longer perceived to be a nation that values the Rule of Law or supports human rights. Other nations learn from our actions more than our words. Moreover, if we move away from the Geneva Conventions and toward unlimited warfare, our own troops are imperiled in this war and future wars by our enemies who will follow suit.

If the United States complies with the rules of conduct as laid out by the Geneva Conventions, we can endeavor to force others, including our enemies, to comply as well.

The converse is also true. If we fail to live up to the aspirations of the Geneva Conventions, we will have served as the wrong kind of role model. We will have stepped down from the pulpit from which we can preach adherence to the Rule of Law in war.

In the wake of World War II, the U.S. leadership advocated the adoption and reaffirmation of the Conventions because they served the ultimate interest of the United States. Eisenhower, Truman, Marshall, Senator Vinson and others envisioned another step in the historical journey toward the quintessential oxymoron, civilized warfare. They supported the warfighting concepts contained in the Geneva Conventions because those rules would protect U.S. troops in the field. Their concern was to safeguard our troops from mistreatment by the enemy, not to protect the enemy from mistreatment by U.S. forces. Judge Gonzales' memorandum completely eviscerated the original vision of the Geneva Conventions.

Where GPW (Geneva Convention Relative to the Protection of Prisoners of War) talks about scrip, athletic uniforms, commissaries and the like, American proponents were thinking of the treatment we could demand for U.S. prisoners of war, not how we should avoid providing those amenities to enemy prisoners we held. Far from being quaint, these stand as bulwarks protecting U.S. troops who are captured.

Our disregard for the Conventions will likely deter potential future allies from joining us. If we comply with the Geneva Conventions only when it's convenient, who will fight alongside us? The answer is only other nations which also don't want to be hamstrung by so-called quaint and obsolete rules. We will become an outlaw nation that wages unlimited warfare and only like-minded renegade nations will fight with us. In the past we have always insisted on compliance. We are a special nation in the history of the world and should be shouting from the rooftops that we will always insist that all our allies enforce those rules that serve to protect us all and demonstrate and preserve our humanity. Rather, we are leading the way in the other direction. That displays either a gross disregard or an abject lack of understanding for the implications of our actions.

Since World War II and looking into the foreseeable future, United States armed forces are more forward-deployed both in terms of numbers of deployments and numbers of troops than all other nations combined. What this means in practical terms is that adherence to the Geneva Conventions is more important to us than to any other nation. We should be the nation demanding adherence under any and all circumstances because we will benefit the most.

Instead, what we see in the January, 2002 memo from Judge Gonzales and the other legal memoranda which were prepared during that time period from the Department of Justice and Department of Defense, is a short-sighted, narrow minded, and overly legalistic analysis. It's too clever by half, and frankly, just plain wrong. Wrong legally, morally, practically, and diplomatically.

The memo is incorrect in its conclusion that that Geneva Convention regarding POWs does not apply to the conflict in Afghanistan against the Taliban and their partners, al Qaeda. Afghanistan is a party to the Convention. The United States fought the Taliban as the *de facto* government of Afghanistan, in control of 90% of the country, and its armed forces as the "regular armed forces" of a party to the Convention. Those facts entitled Taliban and al Qaeda combatants from Afghanistan to a determination on a case-by-case basis of their status as prisoners of war. Moreover, any detainee not entitled to POW status is nevertheless entitled to basic humanitarian protections guaranteed by the Geneva Conventions and customary international law. This is the position taken by the State Department, but rejected by Judge Gonzales.

Judge Gonzales begins his rationale for this erroneous position by stating that the "war against terror is a new kind of war." That may be. But the war in Afghanistan was not new in any fundamental way. The Geneva Conventions could be applied to that war without any great difficulty, just as we applied them in Iraq and every war we have

fought since World War II. They are all new kinds of wars at the time you fight them, with new enemies, new weapon systems, and new tactics and strategies.

The Conventions are designed to apply in all armed conflict and the immediate aftermath of armed conflict. They are designed to apply to combatants—persons taking direct part in hostilities and regular members of the armed forces. There simply is no case for concluding that the Geneva Conventions were obsolete regarding the war in Afghanistan. They formed the proper applicable law and concluding they did not was simply incorrect.

Although it may still be our self-interest, it is difficult to apply the Geneva Conventions to a terrorist when he is not taking part in an armed conflict because the Conventions were not intended to apply to those settings. Criminal law is designed to apply to violent, unlawful acts outside the situation of intense inter-group armed hostilities, i.e. war. Fundamentally, Judge Gonzales' problems with the Geneva Conventions stem from his attempt to apply the wrong law to the problem of terrorism.

As he should have anticipated, but apparently didn't, his error was compounded as the war on terror expanded to Iraq and included American citizens as enemy combatants. Once he reduced his legal analysis to simply that the Geneva Conventions don't apply to terrorists without explaining what law, if any does apply, he created a downward spiral of unruliness from which we have not yet pulled out.

His memo is slightly over three pages long. Almost one full page is devoted to listing and rationalizing his two positive reasons for concluding the Conventions do not apply: preserving flexibility and "substantially reduce(ing) the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441)."

On less than one half page, 21 lines, Judge Gonzales lists seven reasons why they should apply or the impact of non-application (an action which he describes to the President as "...reconsideration and reversal of your decision....") These are:

- *since 1949 the United States has never denied their applicability
- *unless they apply U.S. could not invoke the GPW if enemy forces threatened or in fact mistreated our forces
- *War Crimes Act could not be used against the enemy if they don't apply
- *it would invoke "widespread condemnation among our allies and in some domestic quarters" for us to turn away from the Conventions
- *encourage other countries to look for technical "loopholes" in future conflicts
- *other countries would be less inclined to turn over terrorists or provide legal assistance to us;

And finally, and notable for its understatement,

*"A determination that GPW does not apply to al Qaeda and the Taliban could undermine U.S. military culture which emphasizes maintaining the highest standards of

conduct in combat, and could introduce an element of uncertainty in the status of adversaries.”

The paragraph of the memo which discusses the interplay between the Section 2441 of the War Crimes Act and the Geneva Conventions is particularly striking. To his credit, Judge Gonzalez is remarkably frank and candid. Without apparent embarrassment, he asserts as one of the chief reasons to not invoke the Conventions the argument that such action “reduces the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441).” He essentially opines that the Conventions create problems because “grave breaches” of the Conventions would constitute war crimes under the domestic legislation which, unlike the Conventions themselves, is enforceable in U.S. courts. He says, “. . .it would be difficult to predict with confidence what action might be deemed to constitute violations of the relevant provisions of the GPW.” He references as examples of this problem the difficulty he sees in defining such phrases from the Conventions as “outrages upon personal dignity” and “inhuman treatment.” Later in that paragraph he offers, “. . .it is difficult to predict the needs and circumstances that could arise in the course of the war on terrorism.”

His meaning is clear. We don’t want to implicate the War Crimes Act via “grave breaches” of the Geneva Conventions because we can’t predict whether we may need to engage in what may be defined as outrages on personal dignity and inhuman treatment during the war on terror. This is a stunning observation. It certainly undermines good order and discipline within the military. More importantly, if we can’t define those terms, how can we expect the enemy to do so? How can we ever demand that they not engage in such conduct having now said the prohibitions are incapable of definition?

Although he doesn’t advocate the reasons with any strength or conviction, Judge Gonzales at least was able to identify the damage that following his advice would cause. Unfortunately, he fails utterly to comprehend the degree or consequences of that damage. Nor does he seem to appreciate the consequences of even advancing his ultimate conclusion: “I believe that the arguments for reconsideration and reversal are unpersuasive.”

Law is not practiced in a vacuum. It’s practiced in real life. The issues are real, affecting real people. They aren’t purely academic or just curious intellectual exercises.

A careful, honest reading reveals that the legal analysis of the January, 2002 memo is very result oriented. It appears to start with the conclusion that we don’t want the Geneva Conventions to apply in the present situation, and then it reverse engineers the analysis to reach that conclusion. That approach may be appropriate for a criminal defense counsel who starts with the proposition that the client is not guilty and figures out how to best present that case, but it is not the kind of legal thoughtfulness one would expect from the legal counsel to the commander-in-chief.

It is also very oriented to the immediate situation. It considers only the events at that moment in time and space. It fails to adequately consider the practical implications of characterizing the relevant provisions of the Geneva Conventions as “obsolete” and “quaint.” Once those words are written down they rang a bell that cannot be unring. If the Geneva Conventions were obsolete and quaint in 2002, they are obsolete and quaint for all time. Those two words will come back to haunt us forever, or until the Conventions are “modernized.” The problem is that it’s a bit like going to war with the Army you have, not the Army you would like to have. These are the rules that we went to war with. We must make them work. We must live, or die, with them.

The Bush Administration should officially and unequivocally repudiate Judge Gonzales’ erroneous position on the applicability of the Geneva Conventions. It is not the case that the Conventions are obsolete in regulating armed conflict. Perhaps they can be improved and updated to deal with the new face of asymmetrical warfare and the Administration should work for that, but in the meantime they are the binding law and they serve us well. If new international law is needed for the struggle against terrorism, then that law should be developed, too, but do not throw out the Geneva Conventions because his poor legal analysis couldn’t make them fit.

When I have spoken out publicly on these matters over the course of the last two years, often someone in the back of the room, or a caller on a radio talk show, pipes up with the argument that “they are all terrorists and look at what they have done to us.” I find that argument to be singularly unpersuasive and unbecoming of the United States. Judge Gonzales, however, echoes the argument when he says in the memo, “Finally, I note that our adversaries in several recent conflicts have not been deterred by GPW in their mistreatment of captured U.S. personnel, and terrorists will not follow GPW rules in any event.” That statement is both true and reprehensible coming from the President’s legal counsel. For that to be urged as a justification for not applying the Rule of Law in the war on terror is beneath the dignity and civility of the United States. Although more articulately stated than I generally hear it, it is the same argument I have come to expect from someone in the back of the room or an anonymous caller on talk radio.

The United States has supported the Geneva Conventions and urged other nations to do so for over half a century. Now, suddenly, they are characterized by the President’s counsel as quaint and obsolete. He argues they may impede our freedom to commit what might otherwise be violations of our own War Crimes Act; we don’t want this outdated international law to inhibit our ability to outrage human dignity and engage in inhuman treatment.

Judge Gonzales also bears responsibility, along with others, for the other memoranda written to inform those in government and the military about the definitions of torture, defenses, and authority of the President acting as Commander-in-Chief. The Bybee and Yoo memoranda are chilling. They read as though they were written in another country, one that does not honor the Rule of Law or advocate on behalf of human rights. They contain an air of desperation: this is the worst war ever and justifies almost anything in

order to win. The concept is that as long as you are a smart enough lawyer, you can find an argument to justify anything. Torture is limited to “inflict(ing)pain that is difficult to endure...equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death.” (Bybee Memo)

Even if you surpass that lofty standard, your defenses include “necessity” and “self-defense” (meaning defense of the nation, not personal self-defense). Basically, anything that inhibits the President’s discretion is unconstitutional and anything that carries it out is permitted.

No mention is made of U.S. military regulations. All services have their own regulations relating to these issues. The U.S. Army Field Manual 34-52 is representative. It states:

“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 U.C. M. J. 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.”

Although Judge Gonzales would surely consider it quaint and obsolete, this is long-standing U.S. military doctrine.

Significantly, these opinions and legal arguments weren’t written in some law review article or in an op-ed piece to stimulate national debate. They were written to inform the President as Commander-in-Chief. Unfortunately, we saw the result of that kind of situational, shortsighted legal analysis.

This advice given to the President by Judge Gonzales was not offered with an eye to protecting American troops, as it may seem to be upon a superficial consideration. In both the short term and the long term, it doesn’t protect our armed forces, it imperils them. It enables them to engage in the sort of reprehensible conduct we have seen, and it will enable our enemy to also engage in such conduct with impunity.

There are two great spines that run down the back of military discipline. They are accountability and the chain of command. These profound concepts are separate, but related. The concept of accountability means that you may delegate authority, but you can never delegate responsibility. Responsibility always remains with the person in charge.

Who was responsible for the series of memoranda that were drafted during that time which defined torture so narrowly and defenses so broadly, which argued that the President as Commander-in-Chief enjoys virtually unlimited power? Who failed to stand up and say this is not only bad law; it also fosters bad morals and therefore bad

diplomacy, and it leaves our troops at risk? Taking this course will make the United States a less good, less secure, nation.

Who thought this was the single most important, awful war, past or future, and that that justified throwing out all the rules that good people had defended over the years, all for the sake of ill-advised expediency?

The chain of command enables the military to operate effectively and efficiently. For good or evil, what starts at the top of the chain of command drops like a rock down the chain of command. Soldiers, sailors, Marines, and airmen execute the orders of those at the top of the chain and adopt their attitude. Consequently, those at the top have a legal and moral responsibility to protect their subordinates. We don't want the subordinates to feel compelled to second guess the legality, morality, or wisdom of what is decided above them in the chain of command.

If the message that is transmitted is that the Geneva Conventions don't apply to the war on terror, then that is the message that will be executed. The law and over 200 years of U.S. military tradition say that those at the top are responsible for the consequences. Again, law isn't practiced in a vacuum. It's practiced in real life. This isn't just a quaint academic exercise. It affects human beings and the world order.

The United States is now without a peer competitor. This places an awesome responsibility on us because there is no nation or coalition of nations that can forestall our national will. By in large, we can do what we want in the world if we rely solely on military might. Therefore, it is incumbent upon us to also rely on our integrity as a nation in making decisions about the role we will play. It doesn't make us small or weak to voluntarily inhibit our free will; indeed, it is an indication of great strength and discipline. For generations we have justifiably served as a role model for other nations. We have been a paragon of human rights and the world's leading advocate for the Rule of Law. We must not step back from that role now. We must also preserve our self-respect. If we don't respect ourselves, we can't expect others to respect us. Fear alone isn't enough to be a world leader.

The strongest nation on earth can ill afford an Attorney General who engages in sloppy, shortsighted legal analysis or who doesn't object when others do.

The war on terror is crucial to our survival. And survive we will. But there will be other wars to fight in the future just as there have always been in the past. We cannot lose our soul in this fight. If we do, even if we win the military battles, the victories will be Pyrrhic, and we will have lost the war. The Attorney General (designate) has led us down that path. Instead, we need an Attorney General who recognizes that when there is a conflict between law and policy, law prevails.



THE CENTER
FOR VICTIMS OF
TORTURE

Hearing on the nomination of
The Honorable Alberto R. Gonzales, Counsel to President George W. Bush
to be the Attorney General of the United States

Testimony of
Douglas A. Johnson, Executive Director
The Center for Victims of Torture
Minneapolis, Minnesota

Thursday, January 6, 2005

Our Mission: To heal the wounds of torture on individuals, their families and their communities and to stop torture worldwide.

January 6, 2005

Draft Testimony of
Douglas A. Johnson
Executive Director
The Center for Victims of Torture

Re: Judiciary Hearing on the Nomination of The Honorable Alberto R. Gonzales,
Counsel to President George W. Bush, to be the Attorney General
of the United States

Dear Mr. Chairman:

Thank you for the invitation to testify today before the Committee on the nomination of the Honorable Alberto R. Gonzales as Attorney General of the United States of America. I have submitted my written testimony and I would request that my written testimony be accepted for the written record of this hearing.

Historically, campaigns to end torture have focused initially on two national authorities: the president or chief executive and the head of the Ministry of Justice. It is presumed that the president or prime minister has both the responsibility and the capacity to set values and policies that direct how security forces and all government officials operate. The minister of justice or attorney general has three important roles: (1) to establish policies and procedures that diminish the incentive to use torture, such as regulating the role that confessions play in the overall administration of justice; (2) the prosecuting of or other sanctioning of torturers or persons who ill-treat detainees, and (3) the overall responsibility for avoiding impunity. These roles require a clear understanding of what torture is and why it is wrong, as well as very practical ideas on how to prevent its use.

Because of heightened national and international concern about torture and issues that have been raised about this nomination, I have been invited to talk about the experience the Center for Victims of Torture has had addressing these roles and what needs to be done to repair the standing of the United States in the world.

Background on Experience and CVT

The Center for Victims of Torture¹ is a nonpartisan, nonprofit organization established in 1985 as the first specialized institution in the United States to provide rehabilitation to victims of government-sponsored torture and to work for the abolition of torture. CVT has provided care for about 1000 survivors of torture from over 60 countries, including American citizens who were tortured by foreign governments. In 1998, at the invitation of the U.S. State Department Bureau of Population, Migration, and Refugees, we initiated treatment projects in Sierra Leone

¹ www.cvt.org for further information and background

and Guinea to assist survivors from Sierra Leone and Liberia, adding about 6,500 additional clients to our caseload.² I have been CVT's executive director for more than 16 years. What I have learned from our clients and their interactions with our staff of health professionals is the primary basis of my testimony.

In addition, CVT is one of the earliest members of the International Rehabilitation Council for Torture Victims (the IRCT) and a founder of the National Consortium of Torture Treatment Programs (NCTTP). CVT provides technical assistance to 33 U.S. programs for torture survivors and another 17 international torture rehabilitation programs in places where torture has been widely practiced. In September 2004 the Center for Victims of Torture also sponsored an international symposium on New Tactics in Human Rights in Ankara, Turkey, a culmination of nine years of interaction with the global human rights community about new ideas to create more effective strategies to improve human rights, including the abolition of torture. In all, 565 people from 89 nations participated in that symposium.

In making my remarks today, I also draw from my experience as an original member of the Experts Panel on the Prevention of Torture of the Organization for Security and Cooperation in Europe.

Before addressing the heart of my testimony, I would like to make these preliminary comments.

I have notified the Committee's staff that I am not here to take a position on the nomination itself, as it is CVT's policy not to comment on the qualifications of specific individuals for government posts. I have been asked to draw on the expertise of CVT in speaking about the January 25, 2002, memorandum emerging from the White House Counsel and other memoranda and discussions related to torture, as well as their implications for American policy.

I also reiterate that the Center for Victims of Torture is not only a nonpartisan organization, but one that consistently and most consciously has sought to bridge partisan differences to focus on a basic American moral principle, reiterated by President Bush in his June 26, 2004, declaration marking United Nations International Day in Support of Victims of Torture: "Freedom from torture is an inalienable right." We are very proud of our work with Senator David Durenberger of Minnesota in initiating the Torture Victims Relief Act; we worked closely with Senators Paul Wellstone and Rod Grams to achieve the bill's passage in 1998, with the support of many members of this Committee; and we have welcomed ongoing support from Senators Norm Coleman and Mark Dayton, continuing Minnesota's bipartisan tradition of supporting victims of torture.

In 2001, in recognition of our work treating survivors of torture, Attorney General John Ashcroft awarded CVT the National Crime Victim's Service Award.

² Hubbard, J., & Pearson, N. (2004) Sierra Leonean refugees in Guinea: Addressing the mental health effects of massive community violence. In K. Miller & L. Rasco (Eds.), The mental health of refugees: Ecological approaches to healing and adaptation (pp. 95-132). Mahwah, NJ: Lawrence Erlbaum Publishers, Inc.

Despite that bipartisan history, even we have found an increasingly partisan tone during the previous election period regarding the interpretation of the memoranda about torture and the nature and extent of interrogation methods used in Guantánamo, Abu Ghraib, and elsewhere. We believe that Americans do not want to be, and cannot afford to be, partisan about the issue of torture.

In no small part, I decided to appear before this Committee because its Chairman, Senator Arlen Specter, was the primary champion of the 1992 Torture Victims Protection Act, a legislative breakthrough with enormous potential for the prevention of torture as well as the protection of its victims. The TVPA has been broadly welcomed by human rights advocates around the world as a model of a new tactic in the arsenal of torture prevention. I come today to seek continued leadership from this Committee, from the Congress, and from the Administration at a time when basic treaties and other human rights norms have been undermined and, for so many of us in the movement against torture, there has been a disheartening retreat from the clarity of the prohibition against all forms of torture, as well as cruel, inhuman or degrading treatment.

Torture is not a partisan issue. The United States was deeply involved in the process of drafting the Convention Against Torture, during the administrations of both Jimmy Carter and Ronald Reagan. For seven years, U.S. delegates worked to help make the language of the Convention concrete and enforceable. The Reagan Administration submitted the Convention to the Senate in 1988 for its advice and consent. The Administration of George H. Bush resubmitted it to the Senate the next year, and strongly supported ratification. A bipartisan coalition in the Senate worked to ensure ratification. The Senate Foreign Relations Committee voted 10-0 to report the Convention favorably to the full Senate, which considered and supported a package of amendments presented jointly by Senators Helms and Pell. It is an indication of the strength of the consensus about the prohibition of torture that the U.S. has ratified no other human rights treaty so promptly.

Concerns about Official Memoranda Justifying Torture.

Having worked with thousands of survivors from more than 60 countries around the world, we know what torture is and we know firsthand its impact.

Based on this experience, I was asked to address concerns about the memorandum prepared by White House Counsel Alberto R. Gonzales regarding the applicability of the Geneva Conventions, and a series of other memoranda prepared at his direction and distributed as legal positions within various parts of the government, including those by Jay Bybee and the Working Group on Interrogations.³

³ January 25, 2002, *Memorandum for the President*, From Alberto R. Gonzales, Subject: Decision re: Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban; *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*, 6 March 2003; August 1, 2002, Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A., From Office of the Assistant Attorney General (Jay Bybee), Office of Legal Counsel

The memoranda not only make errors with regard to the legal prohibition of torture, but grave moral and political errors as well that have high costs for human beings and for the reputation of our nation in the world. They disregard the human suffering caused by torture and inhumane treatment. They are based on faulty premises, even fantasies, about the benefits and payoffs of torture. They created vast political costs for our nation's leadership role for human rights and democracy in the world. What is striking about all of these memoranda is the lack of recognition of the physical and psychological damage of torture and inhumane treatment.

Human Costs

There are approximately 500,000 survivors of torture who have fled to this nation's shores to seek safety and freedom from torture. Although there are different physical symptoms associated with the form of torture they endured, there is a remarkably common pattern of profound emotional reactions and psychological symptoms that transcends cultural and national differences. The affects can include but are not limited to: re-experiencing the trauma, avoidance and emotional numbing, hyperarousal, depression, damaged self-concept and foreshortened future, dissociation/ depersonalization, atypical behaviors such as impulse-control problems and high-risk behavior, somatic complaints, sexual dysfunction, psychosis, substance abuse, and neuropsychological impairment such as the loss of short-term or long-term memory, perceptual difficulties, loss of ability to sustain attention or concentration, and the loss of ability to learn.⁴

The main psychiatric disorders associated with torture are posttraumatic stress disorder (PTSD) and major depression (DSM IV).⁵ While it is important to recognize that not everyone who has been tortured develops a diagnosable mental disorder, it is equally important to recognize that for many survivors, the symptoms and aftereffects of torture endure for a lifetime. We know, for example, that survivors of the Holocaust and the concentration camps during World War II have much higher rates of clinical depression and suicide even 50 years after the conclusion of those events. This suffering is not something that time simply heals. We also know that torture can profoundly damage intimate relationships between spouses, parents, children, and other family members, and between the victims and their communities. This level of trauma affects future generations, as again we see higher rates of suicide and depression among the children and grandchildren of Holocaust survivors. These results have been repeated among survivors of other cruel and inhumane treatment.⁶

⁴ See, for example, Physicians for Human Rights. (2001). "Psychological evidence of torture," in Examining asylum seekers: A health professional's guide to medical and psychological evaluations of torture. Boston: Author. Pp. 64-69. and Basoglu, M., Jaranson, J. M., Mollica, R., & Kastrup, M. (2001). Torture and mental health : A research overview. In. E. Gerrity, T.M. Keane, & F. Tuma (Eds.), The mental health consequences of torture (pp. 35- 62). New York: Plenum.

⁵ American Psychiatric Association. (2000). Diagnostic and Statistical Manual of Mental Disorders, 4th edition. Author.

⁶ Torture and It's Consequences: Current Treatment Approaches; edited by Metin Basoglu, Cambridge University Press, 1992

Through our examination and detailed work with survivors, we have reached conclusions about torture's nature and purpose that we believe to be relevant for the discussion that must take place in our nation about the tolerance or intolerance of torture and any practices that border on it. Torture in the modern world is not, primarily, a tool for gaining information, but rather a political weapon, that uses fear to shape societies.

The Bybee memorandum of August 2002 is particularly egregious and dangerous. The overall tone of the Bybee memorandum restricts the definition of torture so narrowly that it could be used to justify various forms of torture. One of the most problematic conclusions of that memo was the notion that "These statutes suggest that 'severe pain'... would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions—in order to constitute torture."⁷

When I first read this statement, I was reminded of our interactions with Vietnamese reeducation camp survivors who arrived as refugees in the United States in the early 1990s. They had been through horrific experiences that any reasonable person would understand to be torture with regard to direct physical coercion, conditions of malnutrition, and intentionally malevolent prison conditions. Their symptoms were consistent with those of other survivors of torture we had seen from Cuba, Central and South America, Africa and Eastern Europe, and from Cambodia. Yet we discovered that the Vietnamese word for torture literally meant "dying under torment." As they survived and still lived, it stood to reason that in their minds they were not "tortured." They didn't have the concepts within their language to interpret and understand what had happened to them. Bybee's definition for torture appears to be "dying under torment." If we used this definition, the Center for Victims of Torture wouldn't have clients at all.

The second extraordinary claim was that torture occurs only when the intent was to cause pain, rather than that pain was intentionally used to gain information or confessions: "the infliction of such (severe) pain must be the defendant's precise objective."⁸ In other words, only when a sadist carried out techniques that lead to organ failure and death can we call it torture.

This is not only a wrong definition from a legal point of view, it is morally wrong, and it is against American values. With a definition like this, we can not retrieve the historic leadership role that the United States has played in the global campaign against torture. We are thankful that the new Justice Administration memorandum of December 2004 recognizes the errors of the earlier memorandum and corrects some of them.⁹ We wish that it had not taken so long to do so. After the Bybee definition was solicited, accepted, and circulated by Gonzales, hundreds of detainees under U.S. control have suffered from torture and inhumane and degrading treatment.

⁷ Bybee Memorandum to Alberto Gonzales, page 6.

⁸ Bybee Memorandum to Alberto Gonzales, page 3.

⁹ December 30, 2004, *Memorandum for James B. Comey Deputy Attorney General*, re: Legal Standards Applicable Under 18 U.S. C. § 2340-2340A, Office of the Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel, signed by Daniel Levin, Acting Assistant Attorney General.

The American public and the world were shocked by the photos from Abu Ghraib. They remind us that torture is not abstract: It is dirty, intentionally humiliating, often sexual in its content, and degrading for the victim and the victimizer.

These photos were not the first credible reports on the use of torture in the war on terrorism. At least two years previously, the *Washington Post* reported on incidents of torture and death during interrogations in Afghanistan. Human rights organizations carefully monitored the situation based on highly restricted access, and concerns were raised by, among others, the U.N. Special Rapporteur on Torture. We now know that the International Committee of the Red Cross—the institution assigned the responsibility to interpret and to monitor the Geneva Conventions—had expressed concerns about U.S. practices in interrogation and the hiding of prisoners from their view. Such efforts to avoid ICRC access to detainees are a practice which, in every other circumstance has been accompanied by torture and is usually denounced by the State Department's annual human rights review. Since then, many other internal memoranda have been released to the public indicating that abuses including torture as well as inhumane treatment have been systematically practiced. Perhaps the only truly good news from this sorry situation is the extent to which military personnel and lawyers, members of the FBI, and other government officials have denounced torture and ill-treatment of detainees and have used their influence to try and curb the abuses.

But it is not clear what their superiors did with the information, or whether their valiant efforts were ignored or heeded. It is not encouraging, however, to learn that the abuses continued over time and, in fact, no outside monitor can assure us that they have ended altogether.

Part of the problem is that the Bybee memorandum misuses a criminal statute for procedural and administrative guidelines. The discussion on an appropriate definition of torture must distinguish between at least three operative differences:

1. The U.S. statute (18 U.S.C. §§ 240-2340A) implementing the Convention Against Torture must define torture with sufficient clarity to guide prosecutors and judges on issues of proscribed actions and evidence to meet the high standards of proof necessary to convict in U.S. criminal courts.
2. Another sort of definition prescribes what conduct must be avoided, as a matter of policy and procedures, by government agents with regard to acceptable practices to use in interrogations. Such a definition should be much broader and more inclusive, and not try to create a line that is too fine.
3. Health care professionals and those working with victims use the definition within the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁰ Documentation of the experience and symptoms of torture within

¹⁰ Article 1.1 For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public

treatment tends to focus on scenarios and contexts, where various practices accumulate and mutually reinforce one another for effect, rather than individual forms of torture. This provides a richer view to understand what happened and how it affects the survivor. This more empirical approach allows the gathering of evidence that ultimately can help provide greater clarity for legal and policy purposes.^{11 12}

By confusing the criminal code definition with a guide to policy, Mr. Bybee twisted its content to become an advisory on how to avoid criminal prosecution. The U.S. understanding of torture must be more inclusive than that needed to keep our interrogators out of jail. It should be based on a clear view of the standards of human dignity that we stand for in the world.

The December 30 memorandum of the Office of the Legal Counsel of the Justice Department recognizes some of the errors of the Bybee memorandum, in particular the definition of torture as pain equivalent in intensity to pain accompanying serious physical injury such as organ failure or death. It also clearly states that torture is abhorrent to both the American law and values and to international norms. But the new memo is problematic in other ways. It assiduously refuses to provide a broad view of the appropriate standards for conduct of interrogations or detention. In this sense, it does not escape the narrow focus on criminal prosecution that I discussed above. It gives the impression that the Office of the Legal Counsel is not concerned with conduct which qualifies as "cruel, inhuman or degrading treatment or punishment." The Torture Convention and U.S. law prohibit both torture and inhuman and degrading treatment. The memo just says that torture is prohibited and then works with a narrow definition of torture. We need top legal experts also to say what we stand for, not just what we are against. What we stand for is clearly stated in Article 10 of the Covenant on Civil and Political Rights, which we have ratified without reservation: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." The memo is also unclear about whether it applies to Guantánamo, Afghanistan, or Iraq, at a time when we are in great need of clarity on exactly those issues.¹³ Finally, the new memo evades the question of whether the President has the authority to order that torture be inflicted. It says it doesn't have to deal with that issue because the President has stated an unequivocal directive that U.S. personnel not engage in torture. But this leaves the impression that the President (or secretary of defense) could change his mind and ignore the limits on torture. But in light of continuing evidence that the President's directive has not been followed in the field, there is still a need for a stronger statement that U.S.

official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

¹¹ As an example of this empirical approach, see *HURIDOCs Standard Formats for the Recording and Exchange of Bibliographic Information Concerning Human Rights*, by Aida Maria Noval et al, HURIDOCs, 1993.

¹² *The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the "Istanbul Protocol"), United Nations, 1999.

¹³ In footnote 6, the memo states that it does not address the Geneva Conventions, the Uniform Code of Military Justice, the Military Extraterritorial Jurisdiction Act, and the War Crimes Act, giving the impression that the conclusions of the memo may not apply to conduct of members of the military.

and international law prohibit torture and inhuman and degrading treatment and must be followed in all circumstances.

Moral and Political Errors

Among the moral and political errors, the memoranda ignore the fact that torture violates at least three important principles embedded in our Constitution that are such basic American values as to define our very identity. These values include:

- 1) “One is innocent until proven guilty.” Perhaps this is the bedrock of Americans’ sense of justice. Its corollary is that one should not be punished until that guilt is established. But there is nothing more punishing than the strategic but sadistic use of pain to force a confession or to gain information. Victims of torture—who tell us that they longed for death—would testify that this punishment is even worse than death. Punishment before guilt is proven must be viewed as anathema to American’s values.

- 2) Punishment must fit the crime, but should never descend to barbarity. Hence, our Eighth Amendment to the Constitution prohibits all forms of “cruel and unusual punishments.” This prohibition together with the privilege against self-incrimination in the Fifth Amendment and the prohibition of unlawful searches and seizures in the Fourth Amendment, led to the abolition of the “third-degree” forms of interrogation by the U.S. Supreme Court in the 1930s, a euphemism for torture routinely applied by police before that time. The Bybee memorandum relies on a narrow legalistic interpretation of the Eighth Amendment as applying only to punishment after conviction and therefore leaves open the possibility of using forms of pain prior to conviction. While there may be court decisions to support this extremely narrow perception of the Eighth Amendment, the Bybee memorandum’s approach ignores the fundamental and far broader American values which are reflected in the cruel and unusual punishments clause. Further, the Bybee memorandum’s approach ignores the first principle and pretends that torture is not an extreme form of punishment, both to the body and the soul of the victim.

- 3) The most practical tool against torture is the Fifth Amendment to the U.S. Constitution, which protects the accused from self-incrimination (“nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law”). Our Founding Fathers did not write this protection to allow mobsters and the corrupt an easy pass to frustrate justice. They recognized that the restriction puts the burden on the state to prove that a crime has been committed. They did so in a time when torture was still a basic tactic of autocratic states to intimidate populations in the name of order. Freedom from torture was one of the key struggles of the 18th-century Enlightenment. Even today, when human rights experts plan campaigns to end torture, they identify the need to limit the importance of confessions in legal proceedings as the single most important action to be taken. Abolishing confessions—self-incrimination—takes away the incentive to use torture.

The Fifth Amendment has been much degraded by Hollywood movies and politicians. That this protection has fallen from popular favor only indicates the degree to which most Americans have felt free from the fear of torture, a freedom that has expanded as our courts have given greater prominence to the Amendment’s protections.

Faulty Premises

The assumption behind the memoranda, particularly the Bybee memorandum and the later report by the Working Group on Interrogation, is that some form of physical and mental coercion is necessary to get information to protect the American people from terrorism. These are unproven assumptions based on anecdotes from agencies with little transparency. But they have been popularized in the American media by endless repetition of what is called the “ticking time bomb” scenario. A version of this scenario is outlined in the findings of the Israeli Supreme Court, which outlawed the stress and duress type techniques reportedly now in use by American forces. “A given suspect is arrested by the GSS (General Security Service). He holds information respecting the location of a bomb that was set and will imminently explode. There is no way to diffuse the bomb without this information. If the information is obtained, however, the bomb may be diffused. If the bomb is not diffused, scores will be killed and maimed. Is a GSS investigator authorized to employ physical means in order to elicit information regarding the location of the bomb in such instances?”¹⁴ There are variations on this scenario, often emphasizing an increasing number of victims or an ever more imminent blast.

The assumption of the Bybee memorandum is “yes, this is justified.” The conclusion of the Israeli Supreme Court was that it was not. I believe that the Court was right. Based on our experience with torture survivors and understanding the systems in which they have been abused, we believe it is important that these discussions not be shaped by speculation but rather through an understanding of how torture is actually used in the world. There are eight broad lessons we have learned from working with torture survivors:

1. **Torture does not yield reliable information.** Well-trained interrogators, within the military, the FBI, and the police have testified that torture does not work, is unreliable and distracting from the hard work of interrogation. Nearly every client at the Center for Victims of Torture, when subjected to torture, confessed to a crime they did not commit, gave up extraneous information, or supplied names of innocent friends or colleagues to their torturers. It is a great source of shame for our clients, who tell us they would have said anything their tormentors wanted them to say in order to get the pain to stop. Such extraneous information distracts, rather than supports, valid investigations.
2. **Torture does not yield information quickly.** Although eventually everyone will confess to something, it takes a lot of time. We know that many militaries and radical groups train their members to resist torture and to pass along false pieces of information during the process. And we note that those with strong religious beliefs and those with strong political beliefs that help them understand the purposes of torture used against them are most able to resist and to recover from its impact.
3. **Torture will not be used only against the guilty.** Inherent in all of the scenario building is the assumption that we know, with great reliability, that we have the appropriate party who possesses knowledge that could save lives. But our clients are living testimony that once used, torture becomes a fishing expedition to find information. It perverts the system which, seeking shortcuts to the hard work of investigation, relies

¹⁴ (P. 33 from “Judgment on the Interrogation Methods applied by the GSS, Israeli Supreme Court, the 6th of September, 1999” taken from website: <http://www.derechos.org/human-rights/mena/doc/torture.html>)

increasingly on torture. The estimate from the Red Cross was that at least 80 percent of those imprisoned at Abu Ghraib, for example, should never have been arrested, but were there because it was easier to arrest persons than to let them go (people feared letting go a terrorist more than protecting the innocent). The Israeli security system claimed to use its stress and duress techniques only where they had the most reliable information about the detainee's guilt. Yet human rights monitors estimate that they were used on over 8000 detainees. It is not credible to believe they had this precise information about so many.¹⁵

4. **Torture has a corrupting effect on the perpetrator.** The relationship between the victim and the torturer is highly intimate, even if one-sided. It is filled with stress for the interrogator, balancing the job with the moral and ethical values of a person with family and friends. One way this cognitive dissonance is managed is through a group process that dehumanizes the victim. But still another way is to insure that some sort of confession is obtained to justify to the interrogator and to his superiors that pain and suffering was validly used.¹⁶
5. **Torture has never been confined to narrow conditions.** Torture has often been justified by reference to a small number of people who know about the "ticking time bomb," but in practice, it has always been extended to a much wider population.
6. **Psychological torture is damaging.** When torture is defined as strictly a physical act, many believe that psychological coercion is okay. I was surprised when I began working at CVT to find that our clients said it was the psychological forms of torture that were the most debilitating over a long period. The source of their nightmares, 15 and 20 years later, was the mock executions or hearing others being tortured. The lack of self-esteem and depression were more related to scenarios of humiliation, consciously structured to demean the victim. Many within the world treatment movement believe we have seen increasingly sophisticated forms of psychological torture over the past 20 years.
7. **Stress and duress techniques are forms of torture.** Many of these techniques were developed during Israel's struggle against terrorism, and so this example is often cited for effective interrogation techniques falling short of torture. But the Israeli Supreme Court concluded that they were illegitimate. Every democratic nation's court system and international court which has reviewed them has concluded that they are forms of torture.¹⁷
8. **We cannot use torture and still retain the moral high ground.** The arguments we hear are not so different in form and content from those used by the repressive governments of CVT's clients, and which the U.S. has refused to accept from other nations that have used torture to combat their real or perceived enemies. Torture is not an effective or efficient producer of reliable information. But it is effective and efficient at producing fear and rage, both in the individuals tortured and in their broader communities.

Costs to America's Leadership

¹⁵ Barton Gelman, "Israeli First: Word 'Torture' is Spoken: Attorney General Condemns Shaking of Arab Prisoners in Interrogation," *Washington Post*, October 21, 1995

¹⁶ *The Politics of Pain: Torturers and their Masters*, edited by Ronald D. Crelinsten and Alex P. Schmid (Leiden: Center for the Study of Social Conflicts, 1993).

¹⁷ See citation #14.

America has much to be proud of in its leadership on torture over the past two decades. Legislation such as the TVPA has provided new ways for survivors of torture to seek justice and also ways of warning torturers that their impunity has real limits. The U.S. is the single largest contributor to efforts to support the care and rehabilitation of torture victims through the TVRA and other efforts supported by Congress. Congress has actively investigated cases of torture and many members have devoted personal efforts to protect individuals and protest government policies of torture. This Congressional action has set into motion a series of national institutions and policies that have worked against torture, such as the creation of the human rights bureau at State Department, whose annual report regularly reports on issues of torture. I have been asked by State Department officials on several occasions to meet with them and representatives of states that use torture so that the experience of the torture rehabilitation network could come to bear on the discussion. Through our New Tactics in Human Rights program, we have consulted with State on ideas and projects that might help diminish the acceptability of torture in a number of nations. I have been proud to serve on the U.S. delegation to the Human Dimension Meeting of the OSCE and deliver our nation's statement on the prevention of torture.

The costs to America are far reaching, from the disillusionment and fear of individuals, on the one hand, to complications in our ability to conduct foreign policy, on the other.

For CVT clients and other torture victims living in the U.S., there is increased anxiety and a sense of danger to them. They fled seeking safety in a nation known to protect individuals from the abuse of the state. Now they see this guardian engaging in behavior so reminiscent of what happened in their own nation.

Human rights organizations in repressive countries now express fear that they no longer have the assistance and assurance of the U.S. to protect them as human rights defenders from torture. At the recent New Tactics in Human Rights Symposium in Ankara, Turkey, a number of human rights defenders told me that their governments now say that they are only doing what the Americans do. Perceptions of greater vulnerability and fear can reduce the activity of those needed to identify and work to correct human rights abuses in their home countries, including much of the Middle East.

It is not an abstraction for us to say that the August 2002 memorandum received and disseminated by Mr. Gonzales also increases the danger of torture to American citizens. CVT has provided care to American torture survivors—religious leaders, businessmen, tourists—tortured in as diverse locales as Mexico and Saudi Arabia. The struggle to end torture everywhere is to our nation's benefit in an increasingly globalized world.

Yet for those who oppose America, the use of torture proves to them what they thought they already knew about American policy and justifies to themselves the use of extreme violence against American interests and people. It changes their political calculations of what they can get away with and still attract public support for their cause. Torture produces rage and fear, not only with the victims, but in their society.

The memoranda create a global impression that the U.S. rejects world consensus on basic issues, such as human rights. They embarrass the United States and undermine our political credibility on many other foreign policy issues.

What Must Be Done?

In March 2003, President Bush met with the recently appointed U.N. High Commissioner for Human Rights, Mr. Sergio de Mello, in the Oval Office a few months before Mr. de Mello was killed in a terrorist bombing in Iraq. At that time, there were already concerns being raised about the conduct of American interrogations in Afghanistan. I am told that President Bush himself raised the issue of torture, saying that he would never authorize or condone torture as President of the United States. But, he added, that if there were another terrorist attack like the Twin Towers, he would have to explain to the American people why he did not.

This is a terrible burden to bear, balancing effectiveness in performing his duty to protect the American people and holding firm to an important American value. There are voices telling him that this is no burden and offering torture as an effective instrument of policy with minimal moral and political consequences. There are other voices, as in the Gonzalez and Bybee memoranda, that try to relieve the burden by separating the concepts from the reality that is torture. These answers do not relieve the burden, they only increase the temptation.

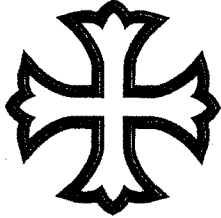
It is up to all of us, to members of this Senate, and to the U.S. attorney general to be clear that torture is a line we will not cross under any circumstances or for any purpose. It is imperative to U.S. security, the success of our foreign policy and the safety of Americans working and living abroad that the attorney general is in agreement with American values and will use the full scope of American and international law to take a responsible stance in actively denouncing torture and that he will work vigorously to prevent the use of torture and prosecute perpetrators.

To that end I respectfully call on the Senate Judiciary Committee to require a routine report from the Department of Justice on their work to stop and prevent the use of torture including their collaborative efforts with the Department of Defense and the Department of State. I ask that the Committee keep the issue of torture on the forefront of their agenda. America needs you to be vigilant in your questioning and oversight until it is clear in both our tacit and explicit policies and our actions that the U.S. is back on course and is in full compliance with national and international law and American values.

When speaking on the Senate floor in support of ratification of the Convention Against Torture, Senator Nancy Kassebaum said "I believe we have nothing to fear about our compliance with the terms of the treaty. Torture is simply not accepted in this country, and never will be."¹⁸ This is as true today as it was then. Now, let us make it so.

Thank you.

¹⁸ Congressional Record, U.S. Senate, October 27, 1990, p. S17491



Royal Lane Baptist Church

Diverse People United in Christ

6707 Royal Lane, Dallas Texas 75230-4145
214-361-2809 www.royallane.org

Dear Sen. Leahy,

I am very concerned by the appointment of Alberto Gonzales to the office of Attorney General. Mr. Gonzales is best known as the administration figure who wrote the memo saying that our country did not have to follow the Geneva Conventions in dealing with prisoners taken in the War on Terror. My concern is twofold.

First, if the Bush administration and the Republican Party wants to reach out to those with whom they disagree, if they want to unite the country, then they should not name such a divisive figure.

Second, as a Christian minister, I cannot sit silently by and allow Mr. Gonzales to be appointed to the office that assures due process of law and oversees civil rights. He has taken a position on torture, imprisonment, and application of international law that is contrary to the teaching of Christian scripture and in opposition to what all good people of faith of all religions hold as the right treatment of human beings.

Please do all you can to assure that Mr. Gonzales does not become Attorney General of the United States.

Peace,

A handwritten signature in black ink that reads "Scott Jones". The signature is written in a cursive, flowing style.

from the office of
Senator Edward M. Kennedy
of Massachusetts

FOR IMMEDIATE RELEASE
January 6, 2005

CONTACT: Melissa Wagoner
(202) 224-2633

**STATEMENT OF SENATOR EDWARD M. KENNEDY AT THE
CONFIRMATION HEARING FOR ALBERTO
GONZALES TO BE THE ATTORNEY GENERAL**

Mr. Gonzales, I join in welcoming you to today's hearing and I commend you on your nomination as Attorney General.

The story of your life is impressive. Your grandparents came to this country from Mexico. Your parents were migrant farm workers. You grew up in a small house with no hot water or telephone. Yet, you obtained degrees from two of the nation's finest universities, became a justice on the Texas Supreme Court, and now, as White House counsel, you've been one of the President's closest advisers over the past four years. I agree with President Bush when he said that in many ways you embody the American Dream. I have the highest respect for your accomplishments.

Today, however, the issue of your commitment to the rule of law is what most concerns us. Unfortunately, there is increasing and disturbing evidence that, with the approval of our highest officials, the Administration has undermined respect for law and for international standards of civilized behavior.

It appears that legal positions that you have supported have been used by the Administration, the military and the CIA to justify torture and Geneva Convention violations by military and civilian personnel. Memos you solicited, endorsed, approved or acquiesced in undermined longstanding traditions in our military and weakened important protections for our own troops serving abroad by violating the military's golden rule: that we treat captured enemy forces as we would want our own prisoners of war to be treated.

Many of us are disturbed by the Administration's role -- and particularly your participation -- in fostering a climate which has led to unthinkable behavior by those dealing with our prisoners.

I hope you understand that my responsibility, in keeping with the Senate's constitutional role of advice and consent to Executive nominations, is to inquire into these areas. They are too important to be set aside out of respect for your personal history, however impressive that may be.

By my count, it appears that you have been directly involved in failed policy decisions in at least four areas relating to the detention and interrogation of people we have captured in Afghanistan, Iraq, and elsewhere. You were reportedly instrumental in preparing the plan to use military tribunals to try detainees, a plan that was widely criticized as unjust, unworkable, and unconstitutional. Your view that the system was beyond any judicial review was categorically rejected by the Supreme Court.

You were also the author of a memorandum which relegated the Geneva Convention to the scrapheap of history, despite their universal acceptance by our own military forces and despite the advice of Secretary of State Powell, and also, reportedly, of Joint Chiefs Chairman Gen. Myers and other high military officials. We now know that the position you espoused helped lead to the breakdown of humane practices by many in our military precisely as Secretary Powell predicted.

You were also instrumental in initiating the "Bybee" memorandum, which narrowed the definition of torture so drastically that two years later, you had to retract and denounce it. That extreme and poorly reasoned legal opinion set the stage for the shameful human rights abuses against detainees that have tarnished America in the eyes of the world. Your failure to withdraw Mr. Bybee as a nominee for a lifetime judgeship on the Ninth Circuit, after seeing his memo, stands as dramatic proof that you did not take issue with his positions.

Each of these policy decisions suggests your fourth problem, that you believe in almost unlimited Presidential Power, unfettered by the constitution or basic treaties. The Administration ignored and excluded top military lawyers and experts in the State Department and Defense Department who raised objections to your policies. It engaged in a long process of denial and deception by top Administration officials after the Abu Ghraib prison scandal broke last spring. That arrogance of Executive power has led to national embarrassment.

Your nomination as Attorney General is one of the most significant this committee has ever considered. We need to know from you the specific steps you intend to take to restore the rule of law and America's standing in the world if you are confirmed. Among these, I hope you will support an independent, 9/11-style commission to investigate all allegations of prisoner abuse and conduct a comprehensive review of our detention and interrogation policies.

I look forward to your responses on these and other important matters.

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**APPLICATION OF THE BYBEE
MEMORANDUM BY THE MILITARY**

**BYBEE MEMORANDUM FOR
ALBERTO R. GONZALES
(AUGUST 1, 2002)**

"Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite intent even though the defendant did not act in good faith." (p.4)

"Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.... These constitutional principles preclude an application of Section 2340A to punish officials for aiding the President in exercising his exclusive constitutional authorities." (p.35)

"We believe that a defense of necessity could be raised, under the current circumstances, to an allegation of a Section 2340A violation." (p.39)

"Even if a court were to find that a violation of Section 2340A was not justified by necessity, a defendant could still appropriately raise a claim of self-defense." (p.42)

**DEFENSE DEPARTMENT WORKING
GROUP REPORT
(APRIL 4, 2003)**

"Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite intent even though the defendant did not act in good faith." (p.9)

"Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.... These constitutional principles preclude an application of Section 2340A to punish officials for aiding the President in exercising his exclusive constitutional authorities." (p.21)

"The defense of necessity could be raised, under the current circumstances, to an allegation of a violation of a criminal statute." (p.25)

"Even if a court were to find that necessity did not justify the violation of a criminal statute, a defendant could still appropriately raise a claim of self-defense." (p.27)

**REVISED OLC MEMORANDUM ON
TORTURE
(DECEMBER 30, 2004)**

"[I]t would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture." (pp.16-17)

"[T]he discussion in that [Bybee] memorandum concerning the President's Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary." (p.2)



U.S. Department of Justice
Office of Legal Counsel

Washington, D.C. 20530

August 1, 2002

Memorandum for Alberto R. Gonzales
Counsel to the President

Re: *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*

You have asked for our Office's views regarding the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by Sections 2340-2340A of title 18 of the United States Code. As we understand it, this question has arisen in the context of the conduct of interrogations outside of the United States. We conclude below that Section 2340A prohibits acts inflicting, and that are specifically intended to inflict, severe pain or suffering, and that are specifically intended to inflict, severe pain or suffering, on a detainee within the meaning of Section 2340A and the Convention. We further conclude that certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A's proscription against torture. We conclude by examining possible defenses that would negate any claim that certain interrogation methods violate the statute.

In Part I, we examine the criminal statute's text and history. We conclude that for an act to constitute torture as defined in Section 2340, it must be of a certain different and more severe nature than that which would constitute a violation of the statute as applied to military personnel. Physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years. We conclude that the mental harm also must result from one of the predicate acts listed in the statute, namely: threats of imminent death; threats of infliction of the kind of pain that would amount to physical torture; infliction of such physical pain as a means of psychological torture; use of drugs or other procedures designed to deeply disturb the senses, or to humiliate, or to otherwise inflict severe mental anguish, or to humiliate, or to otherwise inflict severe mental anguish. The legislative history's summary confirms the intent of these provisions. The legislative history's summary reveals that Congress intended for the statute's definition to track the Convention's definition of torture and the reservations, understandings, and declarations that the United States submitted with its ratification. We conclude that the statute, taken as a whole, makes plain that it prohibits only extreme acts.

In Part II, we examine the text, ratification history, and negotiating history of the Torture Convention. We conclude that the treaty's text prohibits only the most extreme

As we have made clear in other opinions involving the war against al Qaeda, the nation's right to self-defense has been triggered by the events of September 11. If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate Section 2340A, he would be doing so in order to prevent further attacks on the United States by the al Qaeda terrorist network. In that case, we believe that he could argue that his actions were justified by the executive branch's constitutional authority to protect the nation from attack. This national and international version of the right to self-defense could supplement and bolster the government defendant's individual right.

Conclusion

For the foregoing reasons, we conclude that torture as defined in and proscribed by Sections 2340-2340A, covers only extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental health care literature. The acts proscribed in Section 2340A are intended to inflict such severe pain or suffering on a detainee within the meaning of Section 2340. Because the acts inflicting torture are extreme, there is significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fall to rise to the level of torture.

Further, we conclude that under the circumstances of the current war against al Qaeda and its allies, application of Section 2340A to interrogations undertaken pursuant to the President's Commander-in-Chief powers may be unconstitutional. Finally, even if an interrogation method might violate Section 2340A, necessity or self-defense could provide justifications that would eliminate any criminal liability.

Please let us know if we can be of further assistance.

Jay S. Bybee
Assistant Attorney General

As recognized by the charter of the United Nations, "This right of self-defense is a right to offensive self-defense. In other words, the victim state has the right to use force against the aggressor who has initiated an 'armed attack' until the threat has abated. The United States, through its military and intelligence personnel, has a right recognized by Article 51 of the Charter of the United Nations to use force in self-defense against al Qaeda and its affiliates. This attack is complete and ongoing. Other treaties re-affirm the right of the United States to use force in its self-defense. See, e.g., Inter-American Treaty of Reciprocity Assistance, art. 3, Sept. 2, 1947, T.I.A.S. No. 1938, 21 U.N.T.S. 77 (Rio Treaty); North Atlantic Treaty, art. 5, Apr. 4, 1949, 60 Stat. 2241, 34 U.N.T.S. 243.

Statement of Harold Hongju Koh
Dean and Gerard C. and Bernice Latrobe Smith Professor of International Law
Yale Law School
before the Senate Judiciary Committee
regarding
The Nomination of the Honorable Alberto R. Gonzales
as Attorney General of the United States
January 7, 2005

Thank you, Mr. Chairman and Members of the Committee, for inviting me today.

I am the Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law at Yale Law School, where I have taught since 1985 in the areas of international law, the law of U.S. foreign relations, and international human rights.¹ I have twice served in the United States government: during the Reagan Administration between 1983-85, as an Attorney-Adviser at the Office of Legal Counsel of the U.S. Department of Justice, and during the Clinton Administration between 1998-2001, as Assistant Secretary of State for Democracy, Human Rights and Labor.

I do *not* appear today to advise you on how to vote regarding this nomination. Your decision as to whether this candidate deserves confirmation as Attorney General ultimately turns on many factors about which you Senators are more expert than I. Your decision may also involve qualifications and positions of Mr. Gonzales that I have neither reviewed nor researched.

I appear today solely to comment upon Mr. Gonzales' positions regarding three issues on which I have both legal expertise and government experience: the illegality of torture and cruel, inhuman and degrading treatment, the scope of the President's constitutional powers to authorize torture and cruel treatment by U.S. officials, and the applicability of the Geneva Conventions on the Laws of War to alleged combatants held in U.S. custody.

With respect to these three issues, my professional opinion is that United States law and policy have been clear and unambiguous. Torture and cruel, inhuman and degrading treatment are both illegal and totally abhorrent to our values and constitutional traditions. No constitutional authority licenses the President to authorize the torture and cruel treatment of prisoners, even when he acts as Commander-in-Chief. Finally, the U.S. has long recognized the broad applicability of the Geneva Conventions, which is a critical safeguard for our own troops now serving in more than 130 countries around the world. These legal standards apply to all alleged combatants held in U.S. custody.

¹ A brief resume is attached as an appendix to this testimony. Although I am a law school dean and sit on the boards of directors of a number of human rights organizations, the views expressed here are mine alone, and do not necessarily represent those of any institutions with which I am affiliated.

These are legal principles of the highest significance in American life.² To be true to the oath of his office, the Attorney General must swear to uphold the Constitution and laws of the United States of America. He must be committed to enforcing strictly the laws banning torture and cruel treatment. He must observe ratified treaties banning torture and requiring humane treatment of prisoners, and he must ensure that the President abides by the constitutional principle of separation of powers. Most fundamentally, the Attorney General must assure that no one is above the law—even the President of the United States—and that no person is outside the law, whether that person is deemed an “enemy combatant,” or held outside the United States or on Guantanamo.

As Americans, we are unalterably committed to the rule of law and the notion that every person has certain inalienable rights. Mr. Gonzales’ record and public statements could be read to suggest: first, that the extraordinary threats that we face in the war on terrorism somehow require that the President act above the law, and second, that those who are deemed “enemy combatants” or are held on Guantanamo live outside the protections of the Convention Against Torture and the Geneva Conventions as “rights-free persons” in “rights-free zones.”

As Attorney General, Mr. Gonzales must ensure that no person is above the law and that no person is outside the law. His positions on these important issues are thus highly relevant to his fitness to serve as Attorney General.

I. The Illegality of Torture and Cruel Treatment

Article 5 of the Universal Declaration of Human Rights states unequivocally that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” In 1994, the United States ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which states in Article 2 that “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.” While serving as Assistant Secretary for Democracy, Human Rights, and Labor in 2000, I stated, upon presenting the United States’ first report on its

² The right to be free from torture is an indelible part of the American experience. It is recognized by the unequivocal words of the Eighth Amendment of the Bill of Rights— “nor [shall] cruel and unusual punishments [be] inflicted”—and in the Fifth Amendment’s Due Process Clause, which flatly forbids interrogation techniques that “shock the conscience.” See *Chavez v. Martinez*, 538 U.S. 760, 796 (2003) (Kennedy, J., concurring) (“it seems to me a simple enough matter to say that use of torture or its equivalent in an attempt to induce a statement violates an individual’s fundamental right to liberty of the person.”). Nothing in our Constitution or laws preserves any inherent authority in the President to order such acts. Moreover, as President Bush has recently reaffirmed: “The United States . . . remains steadfastly committed to upholding the Geneva Conventions, which have been the bedrock of protection in armed conflict for more than 50 years. These Conventions provide important protections designed to reduce human suffering in armed conflict. We expect other nations to treat our service members and civilians in accordance with the Geneva Conventions. Our Armed Forces are committed to complying with them and to holding accountable those in our military who do not.” President’s Statement on the U.N. International Day in Support of Victims of Torture, June 26, 2004, <http://www.whitehouse.gov/news/releases/2004/06/20040626-19.html>.

compliance with the Convention Against Torture to the United Nations in Geneva, that “as a country we are unalterably committed to a world without torture.”³

This remains the announced policy of this Administration. In June of last year, President Bush reiterated:

“Today . . . the United States reaffirms its commitment to the worldwide elimination of torture. . . . Freedom from torture is an inalienable human right, and we are committed to building a world where human rights are respected and protected by the rule of law. To help fulfill this commitment, the United States has joined 135 other nations in ratifying the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction. American personnel are required to comply with all U.S. laws, including the United States Constitution, Federal statutes, including statutes prohibiting torture, and our treaty obligations with respect to the treatment of all detainees.”⁴

Despite this unambiguous policy, as the President’s chief counsel, Mr. Gonzales apparently requested a number of legal memoranda setting forth the administration’s legal framework for conducting the war on terrorism. Of these, the most important is an August 1, 2002 memorandum from Jay S. Bybee of the Office of Legal Counsel (OLC) to Mr. Gonzales regarding coercive interrogation tactics. This opinion was not rescinded until last week, more than two years after it first issued.⁵ It is more than fifty pages long and has been summarized repeatedly in the press.

³ “Our country was founded by people who sought refuge from severe governmental repression and persecution and who, as a consequence, insisted that a prohibition against the use of cruel or unusual punishment be placed into the Bill of Rights. As our report today notes, ‘Torture is [now] prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. In every instance, torture is a criminal offense. No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification for torture.’”

Statement of Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights and Labor, On-the-Record Briefing on the *Initial Report of the United States of America to the UN Committee Against Torture*, Washington, DC, October 15, 1999, available at http://www.state.gov/www/policy_remarks/1999/991015_koh_rpt_torture.html.

⁴ President’s Statement on the U.N. International Day in Support of Victims of Torture, *supra* note 2.

⁵ Memorandum of August 1, 2002 from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, for Alberto R. Gonzales, Counsel to the President, re Standards of Conduct for Interrogation Under 18 U.S.C. § 2340-2340A, available at <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>, rescinded by Memorandum of December 30, 2004 from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, for James B. Comey, Deputy Attorney General, Regarding Legal Standards Applicable Under 18 U.S.C. § 2340-2340A, available at <http://www.justice.gov/olc/dagmemo.pdf>

Having worked in both Democratic and Republican administrations, and for more than two years as an attorney in the Office of Legal Counsel itself, I am familiar with how legal opinions like this are sought and drafted. I further sympathize with the tremendous pressures of time and crisis that government lawyers face while drafting such opinions.

Nevertheless, in my professional opinion, the August 1, 2002 OLC Memorandum is perhaps the most clearly erroneous legal opinion I have ever read. The opinion has five obvious failures. First, it asks which coercive interrogation tactics are permissible, never mentioning what President Bush correctly called every person's "inalienable human right" to be free from torture.⁶ The opinion's apparent purpose is to explore how U.S. officials can use tactics tantamount to torture against suspected terrorists, without being held criminally liable.⁷ Second, the opinion defines "torture" so narrowly that it flies in the face of the plain meaning of the term. For example, the memorandum would require that the interrogator have the precise objective of inflicting "physical pain ... equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death." August 1, 2002 OLC Memorandum at 1. Under this absurdly narrow legal definition, many of the heinous acts committed by the Iraqi security services under Saddam Hussein would not be torture.⁸ Third, the OLC memorandum grossly overreads the inherent power of the President under the Commander-in-Chief power in Article II of the Constitution, an error I discuss in Part II below.

Fourth, the August 1 memorandum suggests that executive officials can escape prosecution for torture on the ground that "they were carrying out the President's Commander-in-Chief powers." The opinion asserts that this would preclude the application of a valid federal criminal statute "to punish officials for aiding the President in exercising his exclusive constitutional authorities." *Id.* at 35. By adopting the doctrine of "just following orders" as a valid defense, the opinion undermines the very underpinnings of individual criminal responsibility. These principles were set forth in the landmark judgments at Nuremberg, and now embodied in the basic instruments of international criminal law.⁹

⁶ See text accompanying note 4, *supra*.

⁷ As the first footnote of the August 1, 2002 OLC Memorandum highlights, under 18 U.S.C. § § 2340-40A, a person who commits torture is eligible for a fine or imprisonment for up to 20 years, or both, and if the victim should die from the torture, the torturer may be sentenced to life imprisonment or death. The U.S.A. Patriot Act, Pub.L.No. 107-56, 115 Stat. 272 (2001), further makes conspiracy to commit torture a crime.

⁸ See Saddam Hussein's Repression of the Iraqi People ("Iraqi security services routinely and systematically torture detainees. According to former prisoners, torture techniques included branding, electric shocks administered to the genitals and other areas, beating, pulling out of fingernails, burning with hot irons and blowtorches, suspension from rotating ceiling fans, dripping acid on the skin, rape, breaking of limbs, denial of food and water, extended solitary confinement in dark and extremely small compartments, and threats to rape or otherwise harm family members and relatives. Evidence of such torture often was apparent when security forces returned the mutilated bodies of torture victims to their families.") available at <http://www.whitehouse.gov/infocus/iraq/decade/sect4.html> (emphasis added).

⁹ Cf. Article 7(4) of the Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted (ADOPTED 25 MAY 1993 by UNSC Resolution 827) ("The fact that an accused person acted pursuant to

Fifth and finally, the August 1 OLC memorandum concludes that, for American officials, the International Convention *against* Torture and *Other Cruel, Inhuman or Degrading Treatment or Punishment* allows cruel, inhuman, or degrading treatment as permissible U.S. government interrogation tactics. In effect, the opinion gives the Executive Branch a license to dehumanize, degrade, and act cruelly, notwithstanding the Fifth Amendment's rejection of government acts that shock the conscience and the Eighth Amendment's rejection of any "cruel and unusual punishments."

Left unchallenged, such dangerous reasoning could even be used to justify the atrocities at Abu Ghraib. For if U.S. and international law do not forbid cruel, inhuman, and degrading treatment, then lower executive officials would have a license to degrade and dehumanize detainees in their custody, without regard to whether those detainees hold any information of value in the war against terror.¹⁰

The August 1 OLC memorandum cannot be justified as a case of lawyers doing their job and setting out options for their client. If a client asks a lawyer how to break the law and escape liability, the lawyer's ethical duty is to say no. A lawyer has no obligation to aid, support, or justify the commission of an illegal act.

In sum, the August 1, 2002 OLC memorandum is a stain upon our law and our national reputation. A legal opinion that is so lacking in historical context, that offers a definition of torture so narrow that it would have exculpated Saddam Hussein, that reads the Commander-in-Chief power so as to remove Congress as a check against torture, that turns Nuremberg on its head, and that gives government officials a license for cruelty can only be described—as my predecessor Eugene Rostow described the Japanese internment cases—as a "disaster."¹¹

One would have expected the Counsel to the President to have immediately repudiated such an opinion. Mr. Gonzales did not. Nor did he send the opinion back to the Office of Legal Counsel to take account of the unambiguous views of the State Department—expressed in the official 1999 U.S. Report on the Convention Against Torture discussed above—or to incorporate the President's unambiguous policy against torture. Instead, the 2002 OLC Opinion was apparently transmitted to the Defense Department, where its key conclusions appear to run through the Defense Department's

an order of a Government or of a superior shall not relieve him of criminal responsibility . . ."), available at <http://www.un.org/icty/legaldoc/index.htm>.

¹⁰ Those of us who have had the sad experience of visiting torture dens around the world have learned that only in the rarest case is torture and degrading treatment used for the dramatic purpose of extracting information about a ticking time-bomb from a committed terrorist. Far more typical is the "banality of torture" found at Abu Ghraib, where captors apparently came to feel that they had a license to degrade and dehumanize their prisoners.

¹¹ Cf. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 *Yale L.J.* 489 (1945).

April 4, 2003 Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations.¹²

In a June 22, 2004 press conference, Mr. Gonzales did not repudiate the opinion, but instead stated that "[u]nnecessary, over-broad discussions in some of these memos that address abstract legal theories, or discussions subject to misinterpretation, but not relied upon by policymakers *are under review, and may be replaced, if appropriate*, with more concrete guidance addressing only those issues necessary for legal analysis of actual practice."¹³ Another six months then passed before the Office of Legal Counsel, last week, finally repudiated its earlier opinion's overly narrow definition of torture.¹⁴ Thus, the OLC opinion apparently remained the controlling executive branch legal interpretation for nearly two and one-half years. Even now, the Office of Legal Counsel has not yet clearly and specifically renounced the parts of the August 1, 2002 OLC opinion concerning the Commander-in-Chief power, stating that "[c]onsideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture." Levin Memorandum, *supra* note 5, at 2.

This reading simply begs the question of whether the President and his subordinates have legal authority to commit torture and cruel treatment—but have chosen not to exercise it—or whether, as I believe, the Constitution, treaties and laws of the United States deny the President and his subordinates that power. Although the new OLC Opinion marks a welcome, if long-delayed, repudiation of the August 1, 2002 OLC Opinion, it still leaves unclear what legal rules constrain U.S. interrogators. Nor is it clear from the written record what Mr. Gonzales' own current views are.¹⁵

Our nation's chief law enforcement official should not tolerate such ambiguity on a matter so central to our national values. Mr. Gonzales should commit himself, if confirmed as Attorney General, to repudiate all elements of the August 1, 2002 OLC Memorandum and to rigorously enforce all treaties and laws barring torture and cruel, inhuman, and degrading treatment.

II. The President's Inherent Constitutional Powers

¹² http://wikisource.org/wiki/Rumsfeld_Torture_Report.

¹³ Press Briefing by White House Counsel Judge Alberto Gonzales et al., June 22, 2004, available at <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html> (emphasis added).

¹⁴ See Levin Memorandum, *supra* note 5 (finally rescinding August 1, 2002 OLC memorandum).

¹⁵ According to several press accounts, which you are better placed to verify than I, Mr. Gonzales reportedly asked his subordinates with respect to the use of coercive interrogation tactics in the war on terror: "Are we forward-leaning enough?" See Michael Isikoff, Daniel Klaidman and Michael Hirsh, *Torture's Path*, December 27, 2004, Newsweek, U.S. Edition; R. Jeffrey Smith and Dan Eggen, Gonzales Helped Set the Course for Detainees, Washington Post, January 5, 2005, at A1.

As noted above, the August 1, 2002 OLC memorandum grossly overreads the inherent power of the President under the Commander-in-Chief power in Article II of the Constitution. The memorandum claims that criminal prohibitions against torture do “not appl[y] to interrogations undertaken pursuant to [the President’s] Commander-in-Chief authority,” *id.* at 35. Yet the Eighth Amendment does not say “nor [shall] cruel and unusual punishments [be] inflicted” *except when the Commander-in-Chief orders*, and the Fifth Amendment’s Due Process Clause nowhere sanctions executive torture.

As remarkably, the August 1 memorandum declares that “[a]ny effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.” August 1, 2002 OLC Memorandum at 39.¹⁶ But if the President has the sole constitutional authority to sanction torture, and Congress has no power to interfere, it is unclear why the President should not also have unfettered authority to license genocide or other violations of fundamental human rights.¹⁷ In a stunning failure of lawyerly craft, the August 1, 2002 OLC Memorandum nowhere mentions the landmark Supreme Court decision in *Youngstown Steel & Tube Co. v. Sawyer*, where Justice Jackson’s concurrence spelled out clear limits on the President’s constitutional powers.¹⁸

Under these parts of the August 1, 2002 OLC memorandum (which unlike the narrow torture definition have not been formally replaced), the President would have constitutional power to ignore the criminal prohibition against torture in 18 U.S.C. § § 2340-40A, or to flout the recent Defense Authorization Act, which states that “[i]t is the policy of the United States to— (1) ensure that no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States.”¹⁹ Moreover, this reading of the President’s Commander-in-Chief power would even allow him to order subordinates to trump Congress’ power under Article I, section 8, clause 10 to “define and punish ... offences against the law of nations” such as torture.

¹⁶ See also *id.* at 39 (“Congress can no more interfere with the President’s conduct of interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield.”).

¹⁷ If the U.S. President has authority, as Commander-in-Chief, to authorize torture in the name of war, it is hard to explain why Saddam Hussein could not similarly authorize torture under his parallel Commander in Chief power.

¹⁸ “Presidential powers are not fixed, but fluctuate, depending on their ... disjunction with those of Congress. When the President takes measures incompatible with the express or implied will of Congress, his *power is at its lowest ebb*, for then he can rely only on his own constitutional powers minus any constitutional powers of Congress over the matter.” 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring)(emphasis added). In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the entire Supreme Court embraced Justice Jackson’s view as “bringing together as much combination of analysis and common sense as there is in this area.” *Id.* at 661 (Rehnquist, C.J.).

¹⁹ See section 1091(b)(1) of the RONALD W. REAGAN NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2005, House Rep. No. 108-767, available at http://thomas.loc.gov/cgi-bin/cpquery/?&db_id=cp108&r_n=hr767.108&se1=TOC_993985&

This sweeping view of the President's powers to conduct the war on terror has not been confined to the area of torture. In a recently unearthed OLC memorandum to Mr. Gonzales' office, dated two weeks after September 11, then-Deputy Assistant Attorney General John C. Yoo asserted that "[t]he historical record demonstrates that the power to initiate military hostilities, particularly in response to the threat of an armed attack, rests exclusively with the President."²⁰ This remarkably overbroad assertion not only ignores Congress' power "to declare war," Art. I, sec. 8, cl. 11, but also suggests that several centuries of congressional participation in initiating war—including the declarations of war in the War of 1812 and the two world wars, the authorizing statutes in the two Gulf Wars, the Korean War, the Indochina conflict, and after September 11—were all constitutionally unnecessary.²¹

Mr. Gonzales' own brief statements have also urged a broad view of the president's constitutional powers to conduct the "war on terror." In claims that have now been largely rejected by the United States Supreme Court, he has asserted the President's broad power as Commander-in-Chief to label detainees as enemy combatants and to detain them indefinitely and incommunicado without judicial oversight or express congressional authorization.²² In a speech before the American Bar Association's Standing Committee on Law and National Security, Mr. Gonzales suggested that when detaining so-called "enemy combatants," "there is no rigid process for making such determinations—and certainly no particular mechanism required by law. Rather, these are the steps that we have taken in our discretion." Later in the same address, he suggested that in such actions, the President was constrained less by the rule of law than "as a matter of prudence and policy."²³

The Attorney General has a duty not just to serve his client, but more fundamentally to support, protect, and defend the Constitution's commitment to a system of checks and balances. Mr. Gonzales should clarify his views regarding the appropriate balance among executive, judicial and congressional authority to conduct a "war against terrorism" and what limits the Constitution places upon the scope of the President's power to authorize torture and cruel, inhuman, and degrading treatment.

III. The Applicability of the Geneva Conventions

²⁰ See Memorandum Opinion for the Deputy Counsel to the President re The President's Constitutional Authority To Conduct Military Operations Against Terrorists And Nations Supporting Them (*September 25, 2001*), available at <http://www.justice.gov/olc/whatsnew.htm> (*added to OLC website 12/17/04*).

²¹ See generally John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath* (1993) (citing historical examples).

²² See *Rasul v. Bush*, 124 S.Ct. 2686 (2004) (ruling that alien "enemy combatants" on Guantanamo are entitled to raise their claims on writs of habeas corpus); *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004) (ruling 8-1 that U.S. citizens held as "enemy combatants" in military custody are constitutionally entitled to an opportunity to be heard before an independent tribunal).

²³ Remarks by Alberto R. Gonzales, Counsel to the President, American Bar Association Standing Committee on Law and National Security, Washington, D.C., Feb. 24, 2004 at 7.

Far from being outmoded, the Geneva Conventions of 1949, which the United States has ratified, set forth the international humanitarian law war applicable to all international armed conflicts. In particular, the Third and Fourth Conventions specify terms of detention for prisoners of war and civilians in such conflicts. Mr. Gonzales' January 25, 2002 Memorandum to the President correctly notes, at 2: "Since the Geneva Conventions were concluded in 1949, the United States has never denied their applicability to either U.S. or opposing forces engaged in armed conflict, despite several opportunities to do so." Yet as Counsel to the President, Mr. Gonzales found that the war on terror presents a "new paradigm [that] renders obsolete Geneva's strict limitations on questioning of enemy prisoners." In the same opinion, he rejected the views of the Secretary of State and concluded instead that the United States is not bound by its obligations under the Geneva Conventions in the conflict in Afghanistan.

Unsuccessfully urging that this policy be reconsidered, Secretary of State Colin Powell argued that:

It will reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the rule of law for our troops, both in this specific conduct and in general. It has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy. It will undermine public support among critical allies, making military cooperation more difficult to sustain.²⁴

State Department Legal Adviser William H. Taft IV echoed Secretary Powell's protest, noting that Mr. Gonzales' decision "deprives our troops [in Afghanistan] 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."²⁵ By contrast, a decision that the Geneva Conventions did apply to the conflict in Afghanistan would have been consistent with the plain language of the treaties, the unbroken practice of the United States over the prior half-century, the practice of every other known party to the Conventions, and the express terms of the U.N. Security Council Resolution authorizing the intervention in Afghanistan.²⁶

The Administration could have conducted case-by-case status review hearings as required by Article 5 of the Geneva Conventions, to determine whether POW status might be appropriate in some cases. Instead Mr. Gonzales urged a blanket exclusion of the Afghanistan conflict from the operation of the Convention. Under this reasoning, Taliban fighters, who were acting as the armed forces of Afghanistan at the time, had no

²⁴ Memorandum from Secretary of State Colin L. Powell to Counsel to the President re Draft Decision Memorandum for the President on the Application of the Geneva Convention to the Conflict in Afghanistan, January 26, 2002, available at http://www.humanrightsfirst.org/us_law/etn/gonzales/index.asp#memos.

²⁵ Feb. 2, 2002 Memorandum from William Howard Taft, IV to Counsel to the President, Comments on Your Paper on the Geneva Conventions, available at http://www.humanrightsfirst.org/us_law/etn/gonzales/index.asp#memos.

²⁶ Id. See U.N.S.C. Res. 1193 ("all parties to the conflict [in Afghanistan] are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions.").

legal entitlement even to the humane treatment mandated by the Conventions. Yet if this were true, the same treatment would arguably apply to American soldiers sent to the Afghan war.

Ironically, Mr. Gonzales' own memorandum correctly identified, *but then rejected*, the major problems created by his own legal determination:

- “The United States could not invoke the GPW [the Geneva Conventions] if enemy forces threatened to mistreat or mistreated U.S. or coalition forces captured during operations in Afghanistan, or if they denied Red Cross access or other POW privileges ...
- Our position would likely provoke widespread condemnation among our allies and in some domestic quarters, even if we make clear that we will comply with the core humanitarian principles of the treaty as a matter of policy.
- Concluding that the Geneva Convention does not apply may encourage other countries to look for technical ‘loopholes’ in future conflicts to conclude that they are not bound by GPW either.
- Other countries may be less inclined to turn over terrorists or provide legal assistance to us if we do not recognize a legal obligation to comply with the GPW.
- A determination that GPW does not apply to al Qaeda and the Taliban could undermine U.S. military culture which emphasize maintaining the highest standards of conduct in combat, and could introduce an element of uncertainty in the status of adversaries.” January 25, 2002 Memorandum at 2.²⁷

In February 2002, the President directed United States Armed Forces to continue to treat all detainees humanely, and to the extent appropriate and consistent with military necessity, in “a manner consistent with the principles of [the] Geneva Conventions.”²⁸ But prisoner abuse at Abu Ghraib and reports of mistreatment on Guantanamo and elsewhere raise serious doubts as to whether this exhortation has been effective. Nor did the February 2002 directive specifically order *civilian personnel* in the intelligence services or civilian contractors to desist from coercive interrogation or cruel, inhuman and degrading treatment. Even apart from the Geneva Convention, the United States has a separate treaty obligation, under Article 16 of the Convention Against Torture, “to prevent in any territory under its jurisdiction *other acts of cruel, inhuman or degrading treatment which do not amount to torture as defined in Article I of the Convention*, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” (emphasis added).

²⁷ The damaging impact of this decision on our military officials has been made clear by the recent open letter to your committee from 12 retired military leaders. See http://www.humanrightsfirst.org/us_law/etn/gonzales/statements/gonz_military_010405.pdf.

²⁸ Memorandum from President George W. Bush re Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002).

Since the onset of the war in Iraq in March 2003, the Administration has conceded that the Geneva Conventions apply to that conflict, but more than a year after the invasion, Mr. Gonzales requested from the Justice Department's Office of Legal Counsel an opinion regarding Article 49 of the Fourth Geneva Convention. That provision unequivocally states that "[i]ndividual or mass forcible transfers of protected persons [e.g. noncombatant civilians] from occupied territory ... are *prohibited, regardless of their motive.*" (emphasis added) Yet in response, OLC provided a draft opinion asserting that Article 49 does not prohibit temporary relocation of "protected persons" "for a brief but not indefinite period, to facilitate interrogation."²⁹

Taken together, Mr. Gonzales' legal positions have sent a confusing message to the world about our Nation's commitment to human rights and the rule of law. They have fostered a sense that we apply double standards and tolerate a gap between our rhetoric and our practice. Obviously, our country has faced a dangerous threat since September 11, and we expect our leading officials to respond. But we should not discount the enormous costs to our reputation as a leader on human rights and the rule of law from the perception that we have waged a war on terror by skirting the Torture Convention, upsetting constitutional checks and balances, opening loopholes in the Geneva Conventions, and creating extra-legal persons and extra-legal zones.

The Attorney General of the United States must ensure that no person is above the law, and that no person is outside the law. I urge you to closely examine Mr. Gonzales' views on these matters and to give very careful consideration to his record and his current legal opinions. His willingness to commit to renouncing torture and cruel treatment as instruments of U.S. policy, to preserving the constitutional system of checks and balances and to ensuring strict U.S. observance of the Geneva Conventions should be key factors in evaluating his fitness to serve as our nation's highest law enforcement officer.

Thank you. I now stand ready to answer any questions the Committee may have.

²⁹ Draft Memorandum for Alberto R. Gonzales, Counsel to the President re Permissibility of Relocating Certain "Protected Persons" from Occupied Iraq, at 14 (March 19, 2004), available at http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20040319_Golds_Gonz.pdf.

U.S. SENATE COMMITTEE ON THE JUDICIARY

HEARING ON THE NOMINATION OF ALBERTO GONZALES
TO BE THE ATTORNEY GENERAL OF THE UNITED STATES

JANUARY 6, 2004

STATEMENT OF SENATOR KYL:

Mr. Gonzales has served the President well as White House counsel, and he clearly is competent to serve as Attorney General of the United States. No more need be said to explain why I will support the President's choice for this office.

I will, however, briefly address one aspect of the debate over the Geneva Conventions that otherwise might go unaddressed. The principal allegation leveled against Mr. Gonzales is that he undercut the Conventions by issuing a legal opinion concluding that Geneva's protections for uniformed soldiers captured and held as prisoners of war do not extend to terrorists and other unlawful combatants captured by U.S. forces in Iraq and Afghanistan.

First, I think that Mr. Gonzales's opinion is clearly correct as a matter of *law*. Any critic investigating a conspiracy to "undercut" the Conventions by not extending P.O.W. protections to terrorists would be obligated to indict the drafters of the Conventions themselves. Geneva, *by its own terms*, does not apply to unlawful combatants – *i.e.*, to those who violate the laws of war, do not wear uniforms, and do not operate under a responsible command structure. For Mr. Gonzales to have concluded otherwise would have been nothing less than to rewrite the Conventions that a past President had agreed to and that a past Senate had ratified. This he cannot do. Mr. Gonzales served as the President's lawyer; it was his job to describe the state of the law to the President, not to present his own policy prescriptions. Mr. Gonzales's memorandum to this President represents the only plausibly correct interpretation of the Geneva Conventions.

Second, I would note that some of Mr. Gonzales's harshest critics in the liberal press have, in recent years, even agreed with Mr. Gonzales's legal conclusions as a matter of *policy*. In the past, advocates of extending Geneva privileged status to terrorists and other irregular combatants have been more honest about the current state of the law, and have sought to formally amend the Geneva Conventions to give P.O.W. protections to unlawful combatants. This proposal – agreed to by the Carter Administration in the 1970s but never submitted to the Senate – was known as Protocol I. Protocol I was repudiated by the Reagan Administration in 1987. Here is what the *Washington Post* had to say about President Regan's rejection of Protocol I in a February 18, 1987 editorial:

The changes [made by Protocol I] granted status as combatants (and, when captured, as prisoners of war) to irregular fighter who do not wear uniforms and

who otherwise fail to distinguish themselves from combatants – in brief, to those whom the world knows as terrorists.

* * * *

[The Reagan Administration] is right to formally abandon Protocol I. It is doing so, moreover, for the right reason: “we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.”

Nor was this view confined to the *Washington Post*. Here is what the *New York Times* had to say about the Reagan Administration’s repudiation of Protocol I in a February 17, 1987 editorial: it noted that Protocol I would extend “new legal protections to guerillas and possible terrorists” by creating grounds for “giving terrorists the legal status of P.O.W.’s.” The editors warned that “[n]ations might * * * have read that as legitimizing terrorists.” The *New York Times*’s final judgment? “[President Reagan] decided to say no, a judgment that deserves support.”

President Reagan was right to oppose formally amending the Geneva Conventions to give privileged status to terrorists. Mr. Gonzales was doubly right to conclude, 15 years later, that the Geneva Conventions, never amended by Protocol I, do not extend P.O.W. privileged status to terrorists. To quote the *New York Times*, President Reagan’s repudiation of Protocol I – and Mr. Gonzales’s nomination as Attorney General – “deserves support.”

I ask unanimous consent that the attached editorials from the *Washington Post* and the *New York Times* be included in the record of this hearing.

LA RAZA

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**La Raza Centro Legal opposes the nomination of Alberto
Gonzales to the post of Attorney General of the United States.**

As a Latino civil and human rights organization, La Raza Centro Legal strongly opposes the recent nomination of White House General Counsel Alberto Gonzales to the post of Attorney General of the United States. While we strongly encourage the nomination process to reflect the great diversity of this nation, we believe that any appointments of members of the Latino community or any other community must reflect a commitment to civil and human rights and respect for the law. Alberto Gonzales has failed to live up to these treasured standards.

Torture: Gonzales attempted to circumvent national and international law. In two White House Counsel memos, he loosened the definition of torture and declared the President above the law of the Geneva Convention. The abuses at Abu Ghraib Prison in Iraq and several incidents of torture at Guantánamo Bay, Cuba occurred as a direct result of this policy. Some of the torture methods included refusing to administer painkillers after a prisoner had been shot in the groin, forcing prisoners to squat for prolonged periods, and threatening to harm prisoners' family members. Many of these prisoners are immigrants.

Ethical Integrity: In several incidents while serving as Chief Justice of the Texas Supreme Court, Gonzales accepted contributions from Halliburton and other litigants appearing before him for a total of \$7,500. A lobby affiliated with the insurers also contributed about \$55,000 to his judicial campaign funds. Before these incidents, he served as partner for the law firm which represented the former energy giant Enron, the company that destroyed tens of thousands of jobs in a global financial scandal.

Failure to speak up: Gonzales has not spoken up for our values. Attorney General John Ashcroft attempted to trample the most basic values guaranteed by the Constitution, including the right to procedural due process and honoring search and seizure protections. While Ashcroft waged his ideological war, Gonzales was all but silent.

Encouraging the Death Penalty: Gonzales served as chief counsel to President Bush when he was governor of Texas and briefed then Governor Bush on the facts of the cases of death row inmates. He frequently failed to report evidence to the governor that would have supported clemency, including clear instances of mental disability.

Eliminating Procedural Due Process: Gonzales attempted to eliminate vital procedural due process protections. In the name of the war on terror, Gonzales designed the military tribunals in Guantánamo Bay, Cuba that removed the ability of prisoners to seek legal counsel or communicate with the outside world. Of 560 prisoners, only four have been

formally charged. These actions are important because many of these prisoners are immigrants and our communities now face increased ICE raids. In this environment it is essential that the head lawyer of the United States respect the fundamental importance of procedures, rather than consciously attempt to destroy them.

We at La Raza Centro Legal welcome the recognition by the nation that it is time for a Latino Attorney General of the United States. But it is time we expect our leaders to be just that: our leaders. They must strive to promote the values that strengthen us and give us hope. Mr. Gonzales does not reflect those values.

Lawyers' Committee for
CIVIL RIGHTS
of the San Francisco Bay Area

FOR IMMEDIATE RELEASE
Friday, January 07, 2005

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**CALIFORNIA LATINO LEADERSHIP OPPOSES
CONFIRMATION OF ALBERTO GONZALES TO U.S.
ATTORNEY GENERAL**

SAN FRANCISCO - An alliance of prominent Latino civil rights leaders and academics have formally opposed the confirmation of White House General Counsel Alberto Gonzales to the post of U.S. Attorney General. The group was joined by Latin American torture victims, who condemn Gonzales' role in the use of torture against terrorism suspects, to insist that the U.S. Senate Judiciary Committee vote to reject the nomination.

Gonzales gave testimony before the Judiciary Committee on Thursday, January 6 and rejected the idea that either himself or the White House were responsible for the broad legal policies that the civil rights groups believe opened the door to the abuse of prisoners held in American custody in Iraq, Afghanistan, and at Guantánamo Bay. The groups condemned Gonzales' testimony surrounding the power of the executive branch to interpret laws passed by Congress.

"When asked about the legal obligation for the United States to comply with international law that prohibits torture, Gonzales replied that the United States is compelled to follow the Geneva Conventions 'whenever they apply,'" explained Maria Blanco, Executive Director of the Lawyers' Committee for Civil Rights. "The Geneva Conventions were ratified by the U.S. Congress specifically to eradicate war crimes like those at Abu Ghraib. Gonzales does not get to pick and choose what applies."

National Latino organizations including the Mexican American Political Association decided to oppose the confirmation based on the role played by Alberto Gonzales in formulating the legal interpretations of the Geneva Convention and U.S. law.

"MAPA opposes the confirmation because it is now unequivocally clear that the Gonzales interpretation of both the Geneva Convention and U.S. law became the basis for the operational use of torture and human rights abuses," stated Nativo Vigil Lopez, National President of MAPA.

Many activists believe that Gonzales sanctioned the use of torture by creating a legal justification for its use and believe the abuses at Abu Ghraib Prison in Iraq and alleged incidents of torture in Guantánamo Bay are the result of policy crafted by Gonzales.

"We cannot support Gonzales just because he is Latino. That idea is ridiculous, many Latinos in the U.S. have left their home countries precisely because of government officials like Gonzales, who condone the use of torture," stated Zita Cabello, a professor whose brother was tortured and executed by the Chilean military death squad "Caravan of Death" following the the coup in September 1973 led by General Pinochet.

The groups will hold a press conference at 10:00 a.m. on Monday, January 10, 2005 to express their opposition to the confirmation. The press conference will be held at the Lawyers' Committee for Civil Rights, 131 Steuart Street, Suite 400, San Francisco, CA 94105.

The press conference will be attended by members of La Raza Centro Legal, Mexican American Political Association ("MAPA"), Coalition for Humane Immigrant Rights of Los Angeles ("CHIRLA"), San Francisco La Raza Lawyers Association, and National Latino Law Students Associations.

For a complete list of speakers and/or a copy of this press release, please visit
<http://www.lccr.com/news.html>

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January 4, 2005

The Honorable Arlen Specter
Chairman
United States Senate Judiciary Committee
711 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member
United States Senate Judiciary Committee
433 Russell Senate Office Building
Washington, D.C. 20510

Re: Lawyers' Statement on the Nomination of Alberto Gonzales

Dear Senators Specter and Leahy,

The revelations of torture and other mistreatment of persons held in United States custody at Abu Ghraib and elsewhere in Iraq, Guantánamo Bay, and Afghanistan have shamed our nation, disappointed our friends, and shaken our moral standing in the world. Serious questions have been raised about the role played by Alberto R. Gonzales in formulating the policies that led to these abuses, and, consequently, about his fitness to serve as attorney general of the United States. His nomination to this office imposes on the United States Senate and its Committee on the Judiciary the obligation to determine fully his role in these abuses.

Despite many unanswered questions, it is already clear that as White House counsel, Mr. Gonzales was deeply involved in formulating the policies that led to these actions. Yet, as the nation's chief law enforcement officer, Mr. Gonzales would be responsible for ensuring compliance with both U.S. and international legal obligations for detainee treatment and for prosecuting those who violate these obligations. It is therefore incumbent on the Senate to question him closely about his role in the abuses that have already taken place, and about his commitment to end such abuses and to ensure that the wrongdoers are brought to justice. Mr. Gonzales and the Department of Justice should provide the Committee and the Senate with all relevant documents and memoranda, including those earlier requested. Senators must also urge

Mr. Gonzales to support establishment of an independent commission similar to the 9/11 Commission to thoroughly investigate the detention and interrogation policies and practices of the United States.

Specifically, the Senate must determine the precise nature of Mr. Gonzales' role in the following matters, among others:

1. On January 25, 2002, Mr. Gonzales advised the president that the Geneva Conventions did not apply to the Guantánamo Bay detainees, describing some of its provisions as "quaint." This advice laid the basis for President Bush's decision of February 7, 2002 to treat all Guantánamo detainees as unlawful enemy combatants. Mr. Gonzales reportedly made this decision in order to shield military personnel and others from liability for detainee treatment that violated the Conventions.¹ The Gonzales opinion has been widely condemned in the United States and abroad, including by members of the State and Defense Departments, for contending that the Geneva Conventions protect only "lawful combatants." In fact, the Conventions provide comprehensive coverage for all actors in armed conflict, and its provisions may not be suspended.

Mr. Gonzales' opinion appears to have led to grave abuses not only at Guantánamo, but also in Afghanistan and Iraq, even though the United States has agreed that the Geneva Conventions protect persons apprehended in Iraq and apply to Taliban soldiers in Afghanistan. As the Final Report of the Independent Panel to Review DOD Detention Operations (the "Schlesinger Report") found, the "augmented techniques for Guantánamo migrated" to Iraq and Afghanistan

¹ Editorial, *Mr. Gonzales's Record*, WASHINGTON POST, Nov. 22, 2004.

“where they were neither limited nor safeguarded.”²

2. The August 1, 2002, Justice Department memo, which discusses the definition of “torture” under United States law and the Convention Against Torture, was requested by Mr. Gonzales after a meeting called by him in which specific practices like “water boarding” and “open-handed slapping of suspects” were discussed and approved. The memo defines “torture” as physical pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”³ This memo, like the January 25, 2002 memo, was also designed to shield U.S. military and other personnel from liability for actions commonly considered illegal torture and inhumane mistreatment. The memo was widely condemned as contrary to the plain language of the U.S. anti-torture statute (18 U.S.C. § 2340), to the interpretation of “torture” in federal case law under other statutes, and to the language, purpose and consistent interpretation of the Convention Against Torture. Mr. Gonzales called the memo “irrelevant” but until last week the administration had not indicated that any changes in policy had been made, and the memo apparently remained operative. On December 30, 2004, however, less than one week before Judiciary Committee hearings on Mr. Gonzales were scheduled to open, the Office of Legal Counsel submitted a memo to Deputy Attorney General James B. Comey that “disagreed” with key provisions of the August 2, 2002 memo with respect to torture and related matters. These developments make it even more essential that the Judiciary Committee question

² p. 14.

³ Michael Issikoff, Daniel Klaidman and Michael Hirsh, *Torture's Path*, NEWSWEEK, Dec. 27, 2004/Jan. 3, 2005.

Mr. Gonzales thoroughly about each of the relevant OLC memos (including the January 9, 2002 memo by Deputy Attorney General John Yoo) with respect to their initiation, formulation, implementation and modification, and about Mr. Gonzales' role in each of these matters.

3. A March 19, 2004, Department of Justice memo authorizes the CIA to transfer detainees—both citizens and foreigners—from Iraq to other countries for interrogation. Such transfers clearly violate international law. Nevertheless, the memo apparently sought to legitimize a CIA policy of rendering detainees to countries like Syria with extensive records of grave human rights violations, including torture and other coercive interrogation. This memo was also written at the request of Mr. Gonzales.⁴

4. The CIA has hidden an unknown number of detainees from any outside scrutiny or review, particularly by the International Committee of the Red Cross. The Committee must ascertain Mr. Gonzales' role in this matter.

5. Mr. Gonzales reportedly played a central role in the issuance of the presidential order establishing military commissions to try non-citizens for war crimes. These commissions operate under procedures that are not only inconsistent with the Uniform Code of Military Justice, but violate the most fundamental principles of due process, such as the right to independent counsel, to an impartial tribunal, and to reliable evidence.⁵

6. Mr. Gonzales has contended that the president is constitutionally authorized to detain anyone—citizen or non-citizen—whether found in the United

⁴ Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq; Practice Is Called Serious Breach of Geneva Conventions*, WASHINGTON POST, Oct. 24, 2004.

⁵ Tim Golden, *After Terror, a Secret Rewriting of Military Law*, NEW YORK TIMES, October 24, 2004.

States or abroad, for an indefinite period of time and without any outside check or scrutiny of what is done to such persons, a position rejected by the Supreme Court.⁶

Each of these matters raises fundamental questions about Mr. Gonzales' fidelity to the rule of law, about his views concerning the responsibility of a government lawyer, and about the role of the Department of Justice. We also urge the Committee to require Mr. Gonzales to pledge his support for the establishment of an independent commission to investigate all aspects of the prisoner abuse issue in order to determine the responsibility for the underlying policies and the current status of the policies. All the investigations to date into prisoner abuse have been limited and have failed to apprise Congress and the public of who is responsible for these illegal and inhumane practices, especially with respect to the role of the CIA, about which there have been very disturbing reports. It is essential that an independent, bipartisan commission with full subpoena power, such as that urged by the American Bar Association, be established to prepare a full account of detention and interrogation practices carried out by the United States, to make public findings to determine responsibility, and to make recommendations that will ensure that such practices adhere faithfully to the Constitution, the laws of the United States, and to its treaties.

Mr. Gonzales must be closely questioned about his record in these matters so that the Senate and the nation may determine whether he is fit to serve as attorney general of the United States.

Respectfully submitted,

⁶ Stuart Taylor, *America's Best Choice?*, LEGAL TIMES, Nov. 15, 2004.

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November 29, 2004

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The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick L. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Hatch and Ranking Member Leahy:

On behalf of the undersigned organizations, we write to you regarding the nomination of White House Counsel Alberto R. Gonzales to the position of Attorney General of the United States. The Attorney General is the nation's chief law enforcement official, with responsibility for enforcing federal law on behalf of all persons under the Constitution. We strongly believe that this appointment is one of the most important that any president can make, and that your constitutionally mandated review of Mr. Gonzales' nomination is especially important.

We believe that every candidate for such an important office must be carefully evaluated on the basis of his or her entire record, including whether he or she has demonstrated a strong commitment to the protection of civil rights and civil liberties. In these areas, we believe that there are aspects of Mr. Gonzales' record that raise concerns and that must be closely scrutinized by the Judiciary Committee before you and the American people can determine his suitability for the position of Attorney General:

- **Mr. Gonzales' role in setting the administration's policy on detention, interrogation, and torture.** As White House Counsel, Mr. Gonzales oversaw the development of policies that were applied for handling prisoners in Afghanistan, Iraq, and elsewhere. He wrote a memo disparaging the Geneva Conventions and arguing that they do not bind the United States in the war in Afghanistan. He was warned by U.S. military leaders that this decision would undermine respect for the law in the military, but he advised the President to reject that advice, with catastrophic results. He requested and reviewed legal opinions that radically altered the definition of torture and claimed U.S. officials were not bound by laws prohibiting torture. Changes made as a result to long-established U.S. policy and practice paved the way for the horrific torture at Abu Ghraib.
- **The administration's failure to disclose a number of critical documents that could show the extent of Mr. Gonzales's involvement in setting policy requiring or encouraging the Defense Department and the CIA to cast aside laws and practices that would have prevented torture.** All of these documents should be disclosed and reviewed by the Committee before the confirmation

Realize the Dream. Restore Civil Rights 2004.



hearing, and the President should waive any purported claims of privilege for these documents. The Committee should seek clear and specific assurances from Mr. Gonzales that as Attorney General he will uphold and enforce across the U.S. government the Geneva Conventions and the absolute legal prohibition on torture and other cruel, inhuman, or degrading treatment or punishment.

- **Mr. Gonzales' role in the formulation of administration policies that undermine checks and balances safeguarding basic rights.** Mr. Gonzales also played a critical role in shaping the administration's core legal theory in the struggle against terrorism, which has been to place individuals beyond the reach of the law by declaring them "enemy combatants" and holding them indefinitely without charge in *incommunicado* military detention. Rather than respect the vital importance of judicial review in ensuring that the government operates within the bounds of the law, the administration has sought unfettered executive authority to deprive persons of their liberty without due process of law. Mr. Gonzales publicly argued that the authority of the President to detain enemy combatants was constrained not so much by the rule of law but "as a matter of prudence and policy" – a radical view that was eventually rejected by an 8-1 majority of the U.S. Supreme Court. The administration's quest for expanded powers of detention and surveillance in measures ranging from the Patriot Act to its misuse of immigration laws to eviscerate the basic rights of non-citizens reflects this same effort to eliminate checks and balances. The Judiciary Committee should seek a firm and precise commitment from Mr. Gonzales that, if confirmed, he would respect the time-honored and vital role of courts in our democracy by reversing policies that attempt to undermine judicial review of executive action.

Similarly, Mr. Gonzales should be asked about his role as legal counsel to then-Governor Bush. Published reports indicate that Gonzales drafted legal summaries in clemency cases and briefed the Governor in a manner wholly inadequate to determine fairly whether the death penalty was the appropriate punishment, whether the condemned prisoner had received a fair trial, or even whether the prisoner was actually innocent.

- **Mr. Gonzales' involvement in shaping the overall civil rights record of the administration.** As many of us have previously stated, this administration's record on civil rights has been weak and ineffective. In limiting both the number and nature of civil rights cases, the Justice Department has failed to use its full enforcement powers to break down existing barriers to equality. Particular areas of concern include, but are not limited to, voting rights, racial profiling, weakened enforcement of sex discrimination laws, and police misconduct issues. The U.S. Commission on Civil Rights recently posted on its website a draft report on the administration's record on civil rights. The 166-page report shows that the administration has done little to advance the civil rights of a number of disadvantaged groups across a host of issue areas. It is vital that the Committee determine Mr. Gonzales' level of involvement in formulating administration policy on the civil rights issues raised in this extremely troubling report and elsewhere. The Committee should ascertain whether, as Attorney General, Mr. Gonzales would ensure that the Department of Justice upholds its vital role as the nation's chief law enforcement entity by fully and vigorously enforcing our nation's civil rights laws.



In addition to closely examining Mr. Gonzales' own record, we believe that the Committee must also, given the troubling record of outgoing Attorney General John Ashcroft, determine whether and to what extent Mr. Gonzales plans to continue the policies adopted by Mr. Ashcroft on important matters of civil rights and civil liberties. For example, we urge the Committee to carefully consider whether Mr. Gonzales would support the continuation of harsh and ineffective anti-immigrant policies imposed in recent years that deny due process and infringe on the basic rights against detention without charge. The Committee should also determine whether Mr. Gonzales shares Mr. Ashcroft's extremist view – most recently expressed in comments made before the Federalist Society – that federal judges “can put at risk the very security of our nation” simply by exercising their responsibility to review the constitutional limits of administrative powers in the campaign against terrorism.

Nowhere is the Senate's “advise and consent” role in the review of a presidential cabinet appointment more important than in the case of Attorney General. As each Senator examines his or her conscience for the appropriate course of action, we strongly urge that you engage in a searching and thorough review of Mr. Gonzales' record, his positions, and his future plans for the Justice Department. We call upon the Judiciary Committee to begin full and fair hearings that must include the voices of individuals who will look to the next Attorney General for equal protection under law for all people.

Thank you for your consideration. If you have any questions, please feel free to contact LCCR Deputy Director Nancy Zirkin at (202) 263-2880, or LCCR Policy Analyst Rob Randhava at (202) 466-6058. We look forward to working with you.

Sincerely,

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**STATEMENT OF SENATOR PATRICK LEAHY,
RANKING MEMBER, SENATE JUDICIARY COMMITTEE
CONFIRMATION HEARINGS ON THE NOMINATION
OF ALBERTO GONZALES
TO BE ATTORNEY GENERAL OF THE UNITED STATES
JANUARY 6, 2005**

Judge Gonzales, welcome to the Senate Judiciary Committee. In the 109th Congress we also welcome a very experienced member of the committee -- Senator Specter -- as our new chairman.

We are entrusted by the American people, the Senate and our Constitution to do a thorough and fair job in considering nominations for the Executive Branch of government.

At the outset, I want to make clear how inspiring your life story is. The recent *Washington Post* profile of your life's journey in particular touched me as few accounts of your life have. The road you have traveled from being a twelve-year-old boy selling soft drinks at football games, all the way to the State House in Texas and our White House, is a tribute to you and to your family.

I am sure today we will hear more about your life story. We are also here to learn more about Alberto Gonzales as counsel to the President. And we are here to try to glean a portrait of the kind of Attorney General you would become if confirmed by the Senate.

The Role Of Attorney General

The Attorney General should represent the interests of all Americans and is the nation's chief law enforcement officer. As Justice James Iredell wrote in 1792, the person who serves as Attorney General, to quote him, "is not called Attorney General of the President, but Attorney General of the United States."

This post is quite distinct from the position Judge Gonzales has performed for the President in which he acted as a spokesman for the Administration and appeared

as chief defense lawyer for the White House on a range of important and politically sensitive matters.

A key question before this hearing is whether the nominee shares this view of the crucial role of the U.S. Attorney General.

When he was designated for this position by the President, Judge Gonzales said that he was looking forward to, in his words, “continuing to work with friends and colleagues in the White House in a different capacity on behalf of our President.”

But there may be times when the Attorney General of the United States has to enforce the law and cannot be worried about friends, colleagues and benefactors at the White House.

At a time when the Republican Party has taken control of all three branches of the Federal Government, my worry is that our system of checks and balances may become short-circuited by too few checks on assertions of Executive Branch authority.

My concern is that during several high-profile matters in your professional career you have appeared to serve as a facilitator, rather than an independent force in the policy-making process. The job of Attorney General is not about crafting rationalizations for ill-conceived ideas. It is a much more vital role than that. It is about being a forceful, independent voice in our continuing quest for justice and in defense of the constitutional rights of each and every American.

Need For A Fresh Start

We have now seen what happens when the rule of law plays second fiddle to a President’s policy agenda. With John Ashcroft as Attorney General and with a White House Counsel’s office that has impulsively facilitated rather than cautiously vetted serious constitutional issues, the Administration has taken one untenable legal position after another regarding the rule of law in the war against terror.

The few times that Attorney General Ashcroft consented to appear before this Senate oversight committee, he brandished intimidation as a weapon, sometimes going so far as to say that questioning the Administration’s policies was giving aid and comfort to our enemies.

By contrast, Judge Gonzales’ nomination seems to offer the possibility of a new era.

But as I told the nominee when we met within days of the announcement of his nomination, these hearings matter. We need to know more about his judgment and actions in connection with the tragic legal and policy changes formulated in secret by this Administration that are still hidden from proper congressional oversight and public scrutiny.

Policy Changes Leading to Torture

Those policies include this nominee's role in developing interpretations of the law to justify harsh treatment of prisoners tantamount to torture. America's troops and citizens are at greater risk because of those actions and the terrible repercussions throughout so much of the world. The searing photographs from Abu Ghraib have made it harder to create and maintain the alliances we need to prevail against the vicious terrorists who threaten us. Those abuses serve as recruiting posters for the terrorists.

The scandal of Abu Ghraib, allegations of mistreatment at Guantanamo, and charges from cases in Iraq and Afghanistan are serious matters with lingering questions and unresolved accountability. These hearings are about a nomination, but these hearings are also about accountability.

From the outset of public disclosure of the Abu Ghraib photographs, the Bush Administration maintained that any wrongdoing was the action of "a few bad apples."

As bits of information have been made public by the press over the last year, it has become clear to all that these incidents at U.S. facilities around the world are not just the actions of a few low-ranking members of the military. Rather, in the upper reaches of the Executive Branch a process was set in motion that rolled forward to produce scandalous results.

The Army Field Manual reflects our nation's long-held policies toward prisoners. It says: "The goal of any interrogation is to obtain reliable information in a lawful manner.... U.S. policy expressly prohibit[s] acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or to aid interrogation."

The policies are in place for good reason. The Field Manual continues: "The use of torture 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. . . . It also may place U.S. and allied personnel in enemy hands at greater risk."

Yet senior officials in the Bush White House, Ashcroft Justice Department and Rumsfeld Pentagon set in motion a systematic effort to minimize, distort and even ignore our laws, policies and agreements on torture and the treatment of prisoners. Defense Secretary Rumsfeld and, later, Lt. Gen. Ricardo Sanchez, authorized the use of techniques that were contrary to both U.S. military manuals and international law. Former CIA Director Tenet requested and Secretary Rumsfeld approved the secret detention of "ghost detainees" in Iraq so that they could be hidden from the International Committee of the Red Cross. Still unexplained are instances where the U.S. Government delivered prisoners to other countries known to utilize torture. Where is the responsibility and accountability for these abuses?

We are the most powerful nation on earth, the most powerful nation the earth has ever known, a country that cherishes liberty and human rights, a nation that has been a beacon of hope and freedom to the world. We face vicious enemies in the war on terrorism, but we can and will defeat them without sacrificing our values or stooping to their levels. I believe there are several people in the audience who are themselves survivors of torture committed by the armed forces and secret police of other countries who do not share our values. They continue to struggle to overcome those horrifying experiences, and they are very concerned that we not retreat from the high standards against torture that we have held up to the world in the past. I appreciate being made aware of their presence here today.

Opportunity For Accountability

These hearings are an opportunity at long last for some accountability for this meltdown of longstanding U.S. policy on torture. As White House Counsel, Judge Gonzales was at the center of discussions on the applicability of the Geneva Conventions to the wars in Afghanistan and Iraq, and the legality of detention and interrogation methods that have been seen as tantamount to torture. He oversaw the formulation of this Administration's extreme views of unfettered executive power and unprecedented government secrecy.

I hope things will be different if you are confirmed, Judge Gonzales. I hope that you will be accessible to Members of this Committee, and more responsive. Judge Gonzales, I welcome you and your family.

I know the President asked our incoming Chairman to proceed expeditiously with these hearings, and I have worked with him and other Members of the Committee to do just that.

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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

May 17, 2004

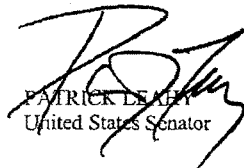
The Honorable Alberto R. Gonzales
Counsel to the President
The White House
Washington, D.C. 20500

Dear Judge Gonzales:

I am writing to request a copy of the January 2002 memorandum you reportedly sent to the President regarding the application of the Geneva Conventions to "enemy prisoners" in the war against terrorism. Your memo reportedly stated, among other policy assertions, that, "this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners."

In light of recent revelations regarding the treatment of prisoners in U.S. custody—including at Guantanamo Bay, in Iraq, and in other undisclosed locations throughout the world—I believe that members of Congress are entitled to view documents that pertain to the policies regarding the treatment and interrogation of detainees. This memo has been in the hands of the press for over two years. I ask that you immediately provide this document to me and other members of Congress.

Sincerely,



PATRICK LEAHY
United States Senator

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

June 15, 2004

The Honorable Alberto R. Gonzales
Counsel to the President
The White House
Washington, DC 20500

Dear Judge Gonzales:

As you know, for over a year I have sought answers from the Department of Justice, the FBI, the CIA, and the Department of Defense regarding reported and, in some instances, documented cases of the abuse of prisoners in U.S. custody.

Contrary to the statements of some Administration officials, the photographs and reports that have recently emerged of prisoner abuse in Iraq depict an interrogation and detention system operating contrary to U.S. law and the Geneva Conventions. Such acts are not limited to Iraq. This system includes policies that allowed the transfer of a suspect to Syria, a country that the President himself has condemned for its systematic use of torture. In addition, reports of abuse continue to emerge from Afghanistan and Guantanamo Bay, Cuba.

In order that all Members of Congress have timely, detailed, and accurate information about the role of the Administration in developing these policies and practices, I ask that you respond to the following questions by June 25, 2004.

1. When the Attorney General appeared before the Senate Judiciary Committee on June 8, 2004, I asked him if the President has signed any directive with respect to interrogation of detainees, prisoners or combatants. The Attorney General did not answer this question directly, but rather stated that the President "has made no order that would require or direct the violation of any law of the United States enacted by the Congress, or any treaty to which the United States is a party as ratified by the Congress, or the Constitution of the United States." He later cited the President's order to the Department of Defense to treat al Qaeda and Taliban detainees humanely and, to the extent consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions.

Please describe any and all orders or directives, including the one noted above, signed by the President, with respect to interrogation of detainees, prisoners or combatants. Please provide copies of all such documents. If such documents are classified, please arrange for myself and appropriately cleared staff to review them.

The Honorable Alberto R. Gonzales
 June 15, 2004
 Page 2

2. On Friday June 11, 2004, the President was asked the following question at a press conference: "Mr. President, the Justice Department issued an advisory opinion last year declaring that as Commander-in-Chief you have the authority to order any kind of interrogation techniques that are necessary to pursue the war on terror ... [D]id you issue any such authorization at any time?" The President answered: "No, the authorization I issued ... was that anything we did would conform to U.S. law and would be consistent with international treaty obligations. That's the message I gave our people."

Later in the press conference, a reporter pressed the President on this topic: "What we've learned from these memos this week is that the Department of Justice lawyers and the Pentagon lawyers have essentially worked out a way that U.S. officials can torture detainees without running afoul of the law. So when you say that you want the U.S. to adhere to international and U.S. laws, that's not very comforting." The President responded, "The instructions went out to our people to adhere to law. That ought to comfort you. We're a nation of law. We adhere to laws. We have laws on the books. You might look at those laws, and that might provide comfort for you. And those were the instructions out of -- from me to the government."

Please provide a copy of the authorization and instructions the President referred to in the exchange noted above from the June 11 press conference.

3. Does the White House agree with the arguments reportedly advanced in the August 1, 2002, memorandum signed by Jay Bybee, then the AAG for the Office of Legal Counsel (OLC), that (A) torturing enemy combatants in U.S. custody outside the United States may be justified, and (B) the torture statute may be unconstitutional if applied to interrogations conducted pursuant to the President's Commander-in-Chief powers? In your opinion, would this immunity from prosecution extend to the torture of U.S. citizens who are believed to be enemy combatants or members of al Qaeda, if captured and held overseas?
4. In addition to the specific documents referenced in this letter, please describe any communications your office has had with the DOD or CIA Office of General Counsel, or DOJ-OLC, regarding interrogation methods. When did these conversations begin and how frequently did they occur? [Please provide me with an index of all such communications.]
5. When did President Bush first become aware of reports of prisoner abuse in Iraq, Afghanistan, and elsewhere by the International Committee of the Red Cross? By organizations such as Human Rights Watch and Amnesty International? Was your office asked for advice on how to restructure the interrogation programs in response

The Honorable Alberto R. Gonzales
June 15, 2004
Page 3

to such reports? Did your office modify and/or approve of revised rules at any point in response to such reports or in response to accounts in the media of abuse?

6. Please provide copies of the following documents, including any and all attachments to such documents. If you refuse to provide any of the documents requested, please explain the basis for your refusal.
 - (A) Memorandum for Timothy E. Flannigan, Deputy Counsel to the President, from John Yoo, Deputy Assistant AG, Office of Legal Counsel, Re: The President's Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001);
 - (B) Memorandum for Alberto Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Assistant Attorney General, OLC, Re: Legality of the Use of Military Commissions to Try Terrorists (Nov. 6, 2001);
 - (C) Memorandum for Alberto Gonzales, Counsel to the President; William J. Haynes, General Counsel, DoD, from Jay S. Bybee, Assistant Attorney General, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002);
 - (D) Draft Memorandum for the President from Alberto Gonzales, Counsel to the President, Re: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban (Jan. 25, 2002), and the final version of this Draft Memorandum;
 - (E) Memorandum for Alberto Gonzales, Counsel to the President from Colin Powell, Re: Response to the Gonzales draft memo of January 25, 2002 (Jan. 26, 2002);
 - (F) Memorandum for Alberto Gonzales, Counsel to the President, from William Howard Taft IV, Department of State Office of Legal Advisor, Re: Comments on Your Paper on the Geneva Convention (Feb. 2, 2002);
 - (G) Memorandum for Alberto Gonzales, Counsel to the President (written for the CIA), from Jay S. Bybee, Assistant AG, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340 – 2340A (Aug. 1, 2002);
 - (H) Draft Memorandum for Defense Secretary Rumsfeld from Working group appointed by DoD General Counsel, William Haynes II, Re: Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical,

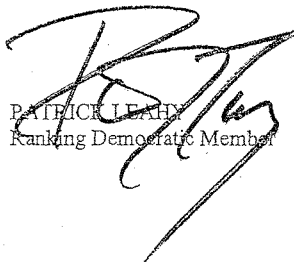
The Honorable Alberto R. Gonzales
June 15, 2004
Page 4

Policy, and Operational Considerations (Mar. 6, 2003), and the final version of this Draft Memorandum;

- (I) Memorandum for General James T. Hill from Defense Secretary Rumsfeld, Re: Coercive interrogation techniques that can be used with approval of the Defense Secretary (based on conclusions of the March 6 memo) (Apr. 2003); and
- (J) Any other memoranda prepared by or for the Office of the White House Counsel or for the President since September 11, 2001, regarding the treatment or interrogation of prisoners of war and/or enemy combatants.

Thank you in advance for what I expect to be detailed and comprehensive answers to the above questions.

Sincerely,



PATRICK LEAHY
Ranking Democratic Member

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United States Senate
 COMMITTEE ON THE JUDICIARY
 WASHINGTON, DC 20510-6275

December 3, 2004

The Honorable Alberto R. Gonzales
 Counsel to the President
 The White House
 Washington, DC 20500

Dear Judge Gonzales:

I enjoyed our preliminary meeting and look forward to your confirmation hearings. In following up on our meeting, and to give you and your staff ample opportunity to prepare for the hearings, I write to reiterate several concerns that I have raised in prior discussions and correspondence. When we met on November 17, 2004, I said that these issues will be raised, by myself and other members of the Senate Judiciary Committee, during the upcoming hearings. Based on our conversation, I am encouraged by your willingness to answer questions about your role and your views in these matters.

Photographs and reports of prisoner abuse in Iraq and other locations show an interrogation and detention system operating contrary to U.S. law and the Geneva Conventions. In addition to the abhorrent images from the Abu Ghraib prison that were published last spring, actions that have occurred with Administration approval include the forcible rendition of individuals to nations where they may face torture, and the hiding of "ghost detainees" from the International Committee of the Red Cross. Reports of abuse continue to emerge. Just this week, *The New York Times* reported that the Red Cross has charged U.S. military authorities with using physical and psychological coercion "tantamount to torture" on prisoners at Guantanamo Bay. *The Washington Post* is reporting that in December 2003 Army generals in Iraq were warned in a confidential report that members of an elite military and CIA task force were abusing detainees. According to *The Post*, the report concluded that certain arrest and detention practices could be deemed to be "technically" illegal.

In letters dated May 17 and June 15 of this year, I asked you to describe your role in both the interpretation of the law and the development of policies that led to what I and many others consider to have been a disregard for the rule of law. These letters remain unanswered.

My concerns regarding the abuse of prisoners in U.S. custody did not begin with these letters. I have been seeking answers from the Administration for well over a year, before the abuses at Abu Ghraib came to light. In a very few cases my questions were answered, but with information that later proved to be less than accurate. For example, in a news conference on June 22, 2004, you stated, "In Iraq, it has always been U.S. position

The Honorable Alberto R. Gonzales
December 3, 2004
Page 2

that Geneva applies. From the early days of the conflict, both the White House and the Department of Defense have been very public and clear about that.”

However, an October 24, 2004, article in *The Washington Post* revealed yet another Justice Department memo authorizing actions that potentially violate the Geneva Conventions. The draft memo, dated March 19, 2004, apparently was written to authorize the CIA to transfer detainees out of Iraq for interrogation – a practice expressly prohibited by the Geneva Conventions. According to the memo’s cover letter, it was drafted at your request.

In another example, a June 25, 2003, letter from Department of Defense General Counsel William Haynes stated that the United States was adhering to its international obligations including those under the Convention Against Torture. We later learned of an August 1, 2002, Department of Justice memorandum that twisted the definition of torture in unrecognizable ways. That memo was addressed to you. We also learned months later of the rendition of a Canadian-Syrian citizen to Syria, despite his fear of being tortured there, and despite the Syrian government’s well-documented history of torture. Unnamed CIA officials told the press that this man was in fact tortured in Syria.

The Committee and the Senate will want to know your role in these situations and your views with regard to the development of the legal justifications that appear to underlie so many of these actions. You will be called upon to explain in detail your role in developing policies related to the interrogation and treatment of foreign prisoners. The American public and the Senate that will be called upon to confirm your appointment deserve to know how a potential Attorney General, the chief law enforcement officer in the nation, will interpret and enforce the laws and how you will develop policy.

We want to know what the current policy on torture is, but since the Administration disavowed the August 1, 2002, memo, no public statement of policy has replaced it. Questions remain unanswered on a host of issues. Requests to the White House and the Department of Justice for relevant documents – including my requests to you in May and June of this year – have been ignored or rejected. I urge you and the Administration to provide the documents that have been requested by myself and others without further delay so that the hearings will be well informed.

Another key concern you will be called upon to discuss is how you view the duties and responsibilities of the Attorney General. As we discussed, I view the White House Counsel position and that of the Attorney General as quite distinct. You may well have viewed this President as your “client” while serving him at the White House, although the courts do not recognize an attorney-client privilege in that setting. We will want to know

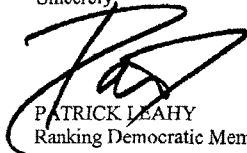
The Honorable Alberto R. Gonzales
December 3, 2004
Page 3

how differently you will act and view your responsibilities as the Attorney General of the United States.

Finally, I encourage you to commit to cooperating with all members of the Judiciary Committee on issues of oversight and accountability. In the 108th Congress, the Judiciary Committee failed to fulfill its oversight responsibilities. Accountability and improving government performance are sound and long established purposes of congressional oversight, and accountability has been lacking on these and other crucial issues. With a new Congress, and a new Attorney General, I expect a return to the diligent oversight envisioned by our Founders to ensure that the Executive Branch remains accountable to the American people.

Our meeting was a constructive beginning at the start of the confirmation process, and I look forward to your hearing early next month. In the meantime, Marcelle and I send our best wishes to you and your family and hope that you have a restful and rewarding holiday season.

Sincerely,



PATRICK LEAHY
Ranking Democratic Member

cc: The Honorable Arlen Specter

Good seeing you!

THE WHITE HOUSE
WASHINGTON

December 17, 2004

Dear Senator Leahy:

I write in further response to your letters of May 17, 2004, and June 15, 2004, to Counsel to the President Alberto R. Gonzales concerning treatment of detainees in U.S. custody.

My understanding is that you discussed these letters with Judge Gonzales shortly after they were received by him. In addition, I note that some of the documents requested in your letters were released on June 22, 2004, and that some of the issues raised in those letters were addressed in a July 1, 2004, letter to you from the Department of Justice. In a letter to Judge Gonzales dated December 3, 2004, however, you have indicated that you consider your letters to him unanswered and your requests for documents "ignored or rejected." I am therefore happy to provide you with this written response to those letters.

1. In the letter of May 17, 2004, you requested a copy of "the January 2002 memorandum [Judge Gonzales] reportedly sent to the President" that "reportedly stated, among other policy assertions, that, 'this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners.'" This request is repeated in paragraph 6(D) of your June 15, 2004 letter. As you know, longstanding practice followed by Presidents of both parties ordinarily precludes disclosing internal advice given to the President by his senior advisors. A draft of the memorandum to which your letter apparently refers has, however, been obtained by the press and is available at <http://www.msnbc.msn.com/id/4999148/site/newsweek/>. I trust that you have accordingly had access to that document (copy at Tab 1 of the accompanying binder for your convenience) and that the request contained in your letter of May 17, 2004, has been overtaken by events.

2. Your June 15, 2004 letter also seeks (at paragraph 6(D)) a final version of the memorandum from Judge Gonzales to the President concerning the application of Geneva Conventions to al Qaeda and the Taliban. I must respectfully advise you that we decline to make such a document available in order to protect the interests of this and future Presidents in receiving confidential and candid advice from senior advisors. The Supreme Court has long recognized "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." United States v. Nixon, 418 U.S. 683, 708 (1974).

In our view, these interests are at their zenith with respect to any memorandum prepared for the President by the Counsel to the President concerning issues such as application of the Geneva Convention to terrorists who have attacked our country and seek to do our citizens harm. While we recognize and respect the Senate's interest in exploring Judge Gonzales' views on important legal issues, we respectfully suggest that such exploration can and should take place

without undermining “the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking” that would attend public release of a confidential memorandum to the President.

3. Your letter of June 15, 2004, also propounded questions and requested numerous documents concerning the development of policies and practices related to treatment of those in U.S. custody. As your December 3 letter notes, one week after your June 15 letter, the Administration held a briefing and released multiple documents – including some of those specifically requested in your letter (Items C, G, H, and I of paragraph 6 of that letter) – relating to treatment of detainees. For your convenience, I have enclosed the transcript of a June 22, 2004, briefing by Judge Gonzales and others (Tab 2) as well as a set of the documents released concurrent with those briefings (Tab 3).

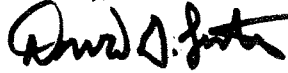
4. Among the other documents requested in your June 15 letter is a January 26, 2002, memorandum from Secretary of State Colin Powell to Judge Gonzales (Item E of paragraph 6 of your June letter). That memorandum has been obtained by the press and is available at <http://msnbc.msn.com/id/4999363/site/newsweek/>. Similarly, a February 2, 2002 memorandum from State Department Legal Adviser William H. Taft IV (requested at paragraph 6(F) of your June letter) is found at http://www.nytimes.com/packages/html/politics/20040608_DOC.pdf. For your convenience, I have enclosed copies of both items. (Tabs 4 and 5)

5. Two other documents requested in your June 15 letter (DOJ Office of Legal Counsel (“OLC”) opinions dated September 25, 2001, and November 6, 2001, requested as items A and B of paragraph 6 of that letter) did not involve consideration of issues concerning interrogation or treatment of detainees and were not among the documents released in June. As you may be aware, however, OLC routinely reviews legal opinions it has generated to determine when, if ever, such opinions might be appropriate for public dissemination without harm to the deliberative processes of the Executive Branch or to the attorney-client relationship between OLC and Administration officials. As part of this ongoing review, OLC, in consultation with others in the Administration, has determined that one opinion identified in your June 15 letter – the September 25, 2001 opinion regarding “The President’s Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them” – may be released under the traditional practice. OLC has posted this opinion on its web site; I have enclosed a courtesy copy of that opinion for your convenience. (Tab 6).

The other OLC opinion requested in your June 15 letter concerned “Legality of the Use of Military Commissions to Try Terrorists.” Because the issues addressed in that memorandum are currently the subject of litigation in cases such as *Hamden v. Rumsfeld*, (D.C. Cir. No. 04-5393) (scheduled for argument March 8, 2005), it would in our view be inappropriate at this time to disclose an internal legal analysis of those issues. The Administration’s position, however, is fully discussed in publicly-available court filings, including the brief recently filed by the Department of Justice in the *Hamden* case. I have enclosed that brief for your convenience. (Tab 7)

Thank you for your interest in the Administration's legal determinations and policies related to the war on terror. I know Judge Gonzales looks forward to the opportunity to appear before the Committee as it considers his nomination to be Attorney General.

Sincerely,

A handwritten signature in black ink, appearing to read "David G. Leitch".

David G. Leitch
Deputy Counsel to the President

The Honorable Patrick J. Leahy
Ranking Member
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

cc: The Honorable Orrin G. Hatch

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

December 21, 2004

The Honorable Alberto R. Gonzales
Counsel to the President
The White House
Washington, DC 20500

Dear Judge Gonzales:

I received a letter from your office dated December 17, 2004, signed by your deputy, David G. Leitch. While this letter purports to respond to my letters to you dated May 17 and June 15, 2004, it neither answers the questions I raised, nor provides the documents I requested, and it raises several new questions that I hope you will answer promptly.

First, in declining to release documents, the Leitch letter refers to three documents that have been obtained by the press and posted on the Internet, and includes copies "for your convenience" in an accompanying binder. By so doing, is the White House authenticating these documents?

Second, one of the documents included in the binder accompanying Mr. Leitch's letter was a draft memorandum dated January 25, 2002, that you prepared for the President, regarding the application of the Geneva Conventions to "enemy prisoners" in the war against terrorism. I specifically asked for the final version of this memorandum in my letter to you dated June 15, 2004, but Mr. Leitch declined to make it available, citing a leading Supreme Court case on executive privilege. Is the President claiming executive privilege with regard to this and other requested documents? If not, on what basis are you declining to provide these documents?

Sincerely,



PATRICK LEAHY
Ranking Democratic Member

cc: The Honorable Arlen Specter

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THE WHITE HOUSE
WASHINGTON

December 30, 2004

Dear Senator Leahy:

Thank you for your letter of December 21, 2004 to Judge Gonzales. I should have made clear in my earlier correspondence to you that, in light of Judge Gonzales' nomination to be Attorney General, I am responding to your requests for documents and information, and any other correspondence on this issue will be handled by me.

With respect to the specific points raised in your December 21, 2004 letter, I can confirm that the three documents obtained by the press and posted on the Internet are the documents you had requested.

The President has not claimed executive privilege with respect to the two documents you requested that we did not include among the 19 documents that were sent with my December 17, 2004 letter. As you know, however, it is generally not the practice of this or prior Administrations to provide all documents requested by a Member of Congress where those documents contain highly deliberative or Presidential communications. By longstanding practice, no claim of executive privilege is necessary to decline to produce such documents in response to such a request. It is on the basis of this practice, and in light of the nature of the documents at issue, that we respectfully declined to provide two of the documents you requested.

In answer to other questions raised in your earlier letters, I would offer the following.

- There are no "orders or directives . . . signed by the President, with respect to the interrogation of detainees, prisoners or combatants." The President has made numerous public statements concerning the Administration's policy against the use of torture. *See, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167 (July 5, 2004) ("Freedom from torture is an inalienable human right . . ."); Statement on United Nations International Day in Support of Victims of Torture, 39 Weekly Comp. Pres. Doc. 824 (June 30, 2003) ("Torture anywhere is an affront to human dignity everywhere."). In addition, the President's February 7, 2002 memorandum ("Humane Treatment of al Qaeda and Taliban Detainees"), while not specifically addressing interrogations, ordered the armed forces to treat detainees humanely.
- With respect to your inquiry concerning the August 1, 2002 memorandum signed by Jay Bybee, as the statements cited above make clear, the President has repeatedly stated that torture is unacceptable and that it is not the policy of the United States to engage in torture. Judge Gonzales has indicated that certain parts of the analysis in the August 1, 2002 memorandum were unnecessary to support any action taken by the President, and the Department of Justice has indicated that the memorandum has

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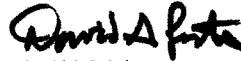
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been withdrawn. My understanding is that the Department will soon be issuing a memorandum to replace the analysis in the August 1, 2002 memorandum.

With respect, I must also note for the record our strong disagreement with the assertion in the press release that accompanied your letter that "the Administration [is] stonewalling on torture policy documents." In fact, since at least June, all documents you have specifically requested that address interrogation policies have been made public. The only arguable exception is a final memorandum from the Counsel to the President to President Bush regarding application of the Geneva Convention to al Qaeda and the Taliban. Our decision not to disclose that document is grounded in well settled and long recognized principles that have been observed by Presidents of both parties. Even in that case, moreover, the Administration's position on the subject at issue was publicly announced on February 7, 2002. It is therefore inaccurate to suggest that the Administration is stonewalling. On the contrary, given the public and Congressional interest in the Administration's policies and practices, the Administration has voluntarily disclosed information to a degree that is, in our view, most accommodating.

We do respect and appreciate your interest in the Administration's legal determinations and policies related to the war on terror. I know Judge Gonzales looks forward to the opportunity to appear before the Senate Judiciary Committee as it considers his nomination to be Attorney General, and to address questions you may have on this and other issues.

Sincerely,



David G. Leitch
Deputy Counsel to the President

The Honorable Patrick J. Leahy
Ranking Member
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

cc: The Honorable Orrin G. Hatch
The Honorable Arlen Specter

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

January 4, 2005

The Honorable Alberto R. Gonzales
Counsel to the President
The White House
Washington, DC 20500

Dear Judge Gonzales:

I am disappointed that, contrary to your promises to me to engage in an open exchange and to answer my questions in connection with your confirmation process, you have not answered my letters. I expected answers to my letters dated May, 17, June 15, December 3, and December 21, 2004, to come from you. The responses from David Leitch, Deputy Counsel to the President, fail to fully address the questions contained in my correspondence.

In his most recent letter, Mr. Leitch claimed that, except for the final version of the January 25, 2002, memo, all requested documents regarding interrogation policy have been made public. In fact, I and other Senators have requested a number of documents from you and other Administration officials that have not been released. While some of these documents may not specifically address interrogation policies, they are nonetheless relevant to your nomination. They are listed below, for your convenience.

Please provide copies of the referenced documents no later than January 5, 2005. For any document that you refuse to release, state the basis for your refusal and whether the President is asserting executive privilege.

1. Memorandum for Alberto Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Assistant Attorney General, OLC, Re: Legality of the Use of Military Commissions to Try Terrorists (Nov. 6, 2001). I requested this document from you in a letter of June 15, 2004. In a letter dated December 17, 2004, Mr. Leitch refused to release the document because it addresses legal issues that are "currently the subject of litigation in cases such as *Hamden v. Rumsfeld*."
2. Memorandum for William J. Haynes, General Counsel, DOD, from John Yoo, Deputy Assistant Atty. Gen. and Patrick F. Philbin, Deputy Assistant Atty. Gen., Re: Possible Habeas Jurisdiction Over Aliens Held in Guantanamo Bay (December 28, 2001). I requested this document in a letter to Attorney General Ashcroft dated May 28, 2004. There has been no response to this request.

The Honorable Alberto R. Gonzales
January 4, 2005
Page 2

3. Memorandum to William J. Haynes, General Counsel, DOD, from John Yoo, Deputy Assistant Atty. Gen. and Patrick F. Philbin, Deputy Assistant Atty. Gen., Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (January 9, 2002). I requested this document in a letter to Attorney General Ashcroft dated May 28, 2004. There has been no response to this request.
4. Memorandum to John Yoo, Deputy Assistant Atty. Gen., from William Howard Taft IV, Department of State Office of Legal Advisor, Re: Response to the January 9 Yoo/Delahunty memo (January 11, 2002). I requested this document in a letter to Attorney General Ashcroft dated May 28, 2004. I also requested all relevant documents from Secretary of State Powell in a letter dated July 6, 2004. There has been no response to these requests.
5. Final version of draft Memorandum for the President from Alberto Gonzales, Counsel to the President, Re: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban (Jan. 25, 2002). I requested this document in letters to you dated May 17, 2004, and June 15, 2004. Mr. Leitch's December 17 letter refused to provide it based on "longstanding practice."
6. Interim Ruling from Assistant Attorney General Jack L. Goldsmith, Office of Legal Counsel, Re: Directing the CIA to return Hiwa Abdul Rahman Rashul to Iraq and defining a new category of persons in Iraq whom he said did not qualify for protection under the Geneva Conventions (October 2003). I requested this document in letter to Attorney General Ashcroft dated October 29, 2004. There has been no response to this request.
7. Memorandum for Alberto Gonzales, Counsel to the President, from Jack Goldsmith, Assistant Attorney General, Office of Legal Counsel, Re: "Protected Persons" in Occupied Iraq (March 18, 2004). I requested this document in a letter to Attorney General Ashcroft dated October 29, 2004. There has been no response to this request.
8. Final version of draft Memorandum for Alberto Gonzales, Counsel to the President, from Jack Goldsmith, Assistant Attorney General, Office of Legal Counsel, Re: Permissibility of Relocating Certain "Protected Persons" from Occupied Iraq (March 19, 2004). I also requested this document in my October 29 letter to Attorney General Ashcroft.

My letters to you and to the Department of Justice, State, and other agencies have included requests for other relevant documents not specifically listed in the letters. Some documents were cited in other memoranda and some were described in the press without specific identifying information, such as an author or date. These documents are also relevant to the consideration of your nomination. My request includes, but is not limited to, the following:

The Honorable Alberto R. Gonzales
January 4, 2005
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9. Memorandum for Alberto Gonzales, Counsel to the President, and William J. Haynes, General Counsel, Department of Defense, from John Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States (October 17, 2001). This memo was cited on page 32 of the August 1, 2002, Bybee memo and page 29 of the January 22, 2002, Bybee memo. It appears that the same memo is cited on pages 16 & 21 of the February 26, 2002, Bybee memo, but the date is listed as October 23, rather than October 17.
10. Memorandum to William J. Haynes, General Counsel, DOD, from Jay S. Bybee, Assistant Atty. Gen., Re: The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations (March 13, 2002). This memo was cited on page 38 of the August 1, 2002, Bybee memo.
11. Memorandum to the CIA from "top officials in the deputy attorney general's office," regarding specific interrogation methods that the CIA could use against top al-Qaeda members, dated August 2002, or thereabouts. This memo is cited in a June 28, 2004, *USA Today* article.
12. Study by the CIA raising questions about the significance of detainees held at Guantanamo Bay, dated September 2002, or thereabouts. This memo is cited in a June 21, 2004, *New York Times* article.

Again, in order that these documents are available to all Committee members prior to your confirmation hearings, I ask that you respond by January 5, 2005.

Sincerely,



PATRICK LEAHY
Ranking Democratic Member

cc: The Honorable Arlen Specter

THE WHITE HOUSE

WASHINGTON

January 5, 2005

Dear Senator Leahy:

This responds to your letter of January 4, 2005 to Judge Gonzales, which requested copies by today of twelve listed documents. For ease of reference, this response discusses the items listed in your letter in three groups – those addressed in my earlier correspondence, others you have previously requested from the Department of Justice, and those specifically requested for the first time in your letter of January 4.

Documents previously requested from the White House. Prior to receipt of your most recent letter, this Office had provided you with all but two of the documents (listed as Nos. 1 & 5 in your January 4 letter) specifically requested by your prior letters to Judge Gonzales. We have made clear the basis for declining to provide those documents and have provided alternative information about the issues discussed in those documents. For that information, I would refer you to my letters to you dated December 17, 2004 (with attachments) and December 30, 2004.

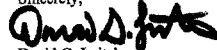
Documents previously requested from DOJ. As you note, six other documents listed in your letter (Nos. 2, 3, 4, 6, 7 & 8) have also been the subject of earlier requests from you. I would note that, with respect to four of these documents (Nos. 2, 3, 4 & 6), Judge Gonzales was neither the author nor the addressee of the document. Another (No. 8) existed in draft form, which has been obtained by the press, but was never finalized. There is therefore no document responsive to that request.

Your earlier requests were directed not to Judge Gonzales, but rather to the Department of Justice, and, in one case, also to the Department of State. With respect to these requests, you state in each case that “[t]here has been no response to this request.” For the record, I have attached the responses of the Department of Justice to your May 28, June 15, and October 29, 2004 letters to the Attorney General.

Newly requested documents. The remaining four items requested for delivery on the eve of Judge Gonzales’ hearing (Nos. 9-12 in your January 4 letter) have not previously been among those you specifically requested. As your letter indicates, however, information regarding the existence of these documents has been publicly available since June 2004.

With respect to items 9 and 10, we have asked the Department of Justice to consider whether those documents may appropriately be released. Items 11 and 12 are described only generally; to the extent we are able to identify documents meeting the descriptions in your letter, we will, in consultation with appropriate agencies, evaluate whether such documents can be made public.

Sincerely,



David G. Leitch
Deputy Counsel to the President

The Honorable Patrick J. Leahy
Ranking Member
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

cc: The Honorable Arlen Specter



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 8, 2004

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

This responds to your letter of May 28, 2004. We are pleased, as a matter of comity, to respond to your inquiries about the Department's views on legal issues related to wartime detentions.

Before turning to the governing legal principles bearing on your questions, we first want to reject categorically any suggestion that the Department of Justice has participated in developing policies that permit unlawful conduct. In particular, we take issue with the suggestion in your letter that "the Department of Justice may have assisted the Pentagon and the intelligence community in circumventing the law." Letter at 1. The Department has done no such thing. The Constitution and statutes enacted by Congress dictate the requirements of the law. Providing advice about the scope of particular legal prohibitions, particularly limits that Congress itself has set in the text of a statute, should not be portrayed as "circumventing" the law. Part of the Department's role is precisely to provide advice to the Executive Branch on the requirements of the law. That is why Congress enacted a law expressly stating that "[t]he head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department." 28 U.S.C. § 512.

We think the Department can best respond to your questions by outlining the major aspects of the legal framework relevant to the detention and treatment of enemy combatants. First, we describe certain legal rules whose application does not depend on the nature of the particular international armed conflict at issue. Second, we describe the legal principles whose scope does depend on the nature of the underlying armed conflict.

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First, the following provisions apply regardless of the nature of the underlying conflict.

UCMJ. The Uniform Code of Military Justice ("UCMJ") governs the actions of U.S. military personnel, whether in Iraq during time of war or elsewhere in the world. It expressly proscribes assault (art. 128), cruelty and maltreatment (art. 93), disobedience to orders and dereliction of duty (art. 92), maiming (art. 124), involuntary manslaughter (art. 119), and murder (art. 118).

Special Maritime and Territorial Jurisdiction. Many federal violent crimes, including assault (18 U.S.C. § 113), maiming (*id.* § 114), murder (*id.* § 1111), manslaughter (*id.* § 1112), and sexual abuse (*id.* § 2242), apply in the "special maritime and territorial jurisdiction" of the United States (*id.* § 7). The special maritime and territorial jurisdiction is defined to include "[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, . . . for the erection of a fort, magazine, arsenal, dockyard, or other needful building," *id.* § 7(3), and "the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States," 18 U.S.C. § 7(9). Courts have disagreed over the extent to which 18 U.S.C. § 7(3) extends the special maritime and territorial jurisdiction to military bases and related facilities overseas. Compare *United States v. Gallin*, 216 F.3d 207 (2d Cir. 2000) (special maritime and territorial jurisdiction does not extend to United States military installation overseas), with *United States v. Corey*, 232 F.3d 1166 (9th Cir. 2000) (special maritime and territorial jurisdiction extends to air force base overseas). However, Congress added 18 U.S.C. § 7(9) in the USA PATRIOT Act in order to resolve the split in the courts and to make clear that the special maritime and territorial jurisdiction extends, *inter alia*, to permanent military bases, at least for certain persons. See H.R. Rep. No. 107-236, pt. 1, at 74 (2001).

MEJA. Under the Military Extraterritorial Jurisdiction Act ("MEJA"), 18 U.S.C. §§ 3261-3267, those employed by or accompanying United States Armed Forces, former members of the military no longer subject to the UCMJ, and members of the military who act with others may be prosecuted for certain acts committed "outside the United States" that would be a felony if committed within the "special maritime and territorial jurisdiction of the United States." *Id.* § 3261(a). These crimes could include those listed above, such as assault (*id.* § 113), maiming (*id.* § 114), murder (*id.* § 1111), and manslaughter (*id.* § 1112).

Torture Statute. The federal torture statute makes it a crime for any person "outside the United States [to] commit[] or attempt[] to commit torture." 18 U.S.C. § 2340A. The statute defines torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." *Id.* § 2340(1). Congress placed limiting

The Honorable Patrick J. Leahy
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definitions on the terms of the statute. It defined "severe mental pain and suffering" as "the prolonged mental harm caused . . . or resulting from" specified acts, including the "intentional infliction or threatened infliction of severe physical pain or suffering" and the threat of imminent death, and the actual or threatened administration of mind-altering substances. *Id.* § 2340(2).

Congress limited the torture statute to conduct occurring "outside the United States." Congress also defined the "United States" to include the "special maritime and territorial jurisdiction of the United States," which, in turn, may include certain military bases and other areas overseas, at least for certain persons. *Id.* § 7(3) & 7(9). Because of the way Congress drafted the torture statute, therefore, its application to certain geographical areas, and to the conduct of particular persons in those areas, may vary depending on the circumstances at issue. This does not mean, of course, that there is no applicable law in those areas that would prohibit conduct amounting to torture. As explained above, other criminal laws apply in the special maritime and territorial jurisdiction.

You have asked whether the Department of Justice takes the view that U.S. Government officials can avoid liability under the torture statute by colluding with officials from other governments to place an individual "formally" in the custody of another nation in order to have that individual tortured during interrogation so that the U.S. officials can obtain the fruits of the interrogation (Question 9). Letter at 4. The Department emphatically does not take that view. Rather, it is the established view of the Department that the torture statute criminalizes conspiracy to commit torture. 18 U.S.C. § 371. Furthermore, in some circumstances, a United States Government official who provides assistance for a foreign government's torture of a detainee and who shares the purpose of inflicting that torture could be guilty of aiding and abetting the crime. 18 U.S.C. § 2(a).

Second, the applicability of the following legal principles depends on the nature of the underlying conflict.

Geneva Conventions. The Geneva Conventions apply differently to the conflict with Iraq, on the one hand, and to the conflict with al Qaeda and the Taliban, on the other.

1. *Iraq*

Article 2 of the Geneva Conventions -- an article that is worded identically in each of the four Geneva Conventions -- specifies, in relevant part, that the Conventions "apply" in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties," art. 2(1), and in "cases of partial or total occupation of the territory of a High Contracting Party," art. 2(2). As the United States has always recognized and made clear, because the armed

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conflict with Iraq is between two High Contracting Parties, and because the United States has occupied Iraq (the territory of a High Contracting Party), the Geneva Conventions govern the conflict with and occupation of Iraq.

As a result, captured members of the Iraqi armed forces are generally entitled to the prisoner-of-war protections of Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 ("GPW"). That Convention protects prisoners of war against "grave breaches," which include "wilful killing," "torture or inhuman treatment," or "wilfully causing great suffering or serious injury to body or health." In addition, because the United States is an occupying power in Iraq, the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 ("GC"), applies and protects Iraqi civilians against essentially the same "grave breaches" proscribed by GPW.

2. *Al Qaeda and the Taliban*

Limitations in the Geneva Conventions foreclose, by their terms, application of the protections of those Conventions to al Qaeda and Taliban fighters. GPW does not protect members of al Qaeda because, as the President has determined, al Qaeda "is not a state party to [the treaties]; it is a foreign terrorist group." White House Fact Sheet (Feb. 7, 2002). As the President also determined, although Afghanistan is a party to GPW, Taliban detainees are not entitled to the protections of GPW because they do not satisfy the four conditions for status as POWs under the treaty. Those conditions are: to be commanded by a person responsible for his subordinates, to have a distinctive sign recognizable at a distance, to carry arms openly, and to act in accordance with the laws of war. Because the Taliban failed to meet each of these standards, except the open carrying of arms, Taliban detainees do not qualify for POW status under GPW. The only court to address this issue has upheld the President's determination that members of the Taliban militia fail to qualify for POW status under GPW. See *United States v. Lindh*, 212 F. Supp. 2d 541, 556-558 (E.D. Va. 2002).

Despite the fact that the protections of the GPW do not apply to al Qaeda and Taliban fighters, the President early on announced the policy that the Department of Defense will treat al Qaeda and Taliban detainees "humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949 [GPW]." White House Fact Sheet.

War Crimes Act. The War Crimes Act in pertinent part imposes criminal liability on any U.S. citizen or any member of the U.S. Armed Forces who commits a "grave breach" of the Geneva Conventions. 18 U.S.C. § 2441. As that description suggests, Congress made this crime dependent

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on the application of the Geneva Conventions. "Grave breaches" under the relevant treaties include "wilful killing," "torture or inhuman treatment," and "wilfully causing great suffering or serious injury to body or health." Congress deliberately crafted the War Crimes Act to fulfill our treaty obligations and thus limited it to situations where the treaties apply, and then only to grave breaches of the Conventions.

As a result of these limitations, the War Crimes Act is available only where the protections of the Geneva Conventions apply. Because the Conventions apply in Iraq, if there is conduct that constitutes a "grave breach" in Iraq, a prosecution under the War Crimes Act is a possibility. With respect to the Taliban and al Qaeda, however, the protections of the Conventions do not apply and as a result a prosecution under the War Crimes Act is not a possible option.

Many of your questions ask for copies of memoranda in which the Department, specifically the Office of Legal Counsel, has provided confidential legal advice to other departments in the Executive Branch. As you know, it has been the longstanding practice of the Department not to disclose the requests for advice the Department receives from within the Executive Branch or the confidential legal advice that it has provided. Institutional interests in ensuring that other departments within the Executive Branch can receive confidential legal advice from the Department of Justice require that such advice, including in particular memoranda from the Office of Legal Counsel, be kept confidential.

Please do not hesitate to contact this office if we may be of further assistance.

Sincerely,



William E. Moschella
Assistant Attorney General

cc: The Honorable Orrin G. Hatch
Chairman



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 1, 2004

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Leahy:

This responds to your letter, dated June 15, 2004, which enclosed written questions for the record of the Committee's oversight hearing on June 8, 2004, regarding terrorism, with particular reference to the interrogation of detainees.

Questions 1 through 4: Administration Documents

In response to the requests for documents contained in your first four questions, enclosed are six Department of Justice documents that have been released publicly. They are: 1) a memorandum from the Office of Legal Counsel (OLC) to the Counsel to the President and the General Counsel of the Department of Defense on the "Application of Treaties and Laws to al Qaeda and Taliban Detainees," dated January 22, 2002; 2) a letter from the Attorney General to the President on the status of Taliban detainees, dated February 1, 2002; 3) a memorandum from OLC to the Counsel to the President on the "Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949," dated February 7, 2002; 4) a memorandum from OLC to the General Counsel of the Department of Defense on the "Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan," dated February 26, 2002; 5) a letter from OLC to the Counsel to the President on the legality, under international law, of interrogation methods to be used during the war on terrorism, dated August 1, 2002; and 6) a memorandum from OLC to the Counsel to the President on "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A," dated August 1, 2002.

While these are documents that would not usually be disclosed to anyone outside the Executive Branch, the Administration decided to release a number of documents, including these and including many from the Department of Defense, to provide a fuller picture of the issues the Administration had considered and the narrower policies the Administration actually adopted in this important area. While we appreciate your interest in the additional documents set forth in the attachment to your letter, the Executive Branch has substantial confidentiality interests in those documents. OLC opinions consist of confidential legal advice, analysis, conclusions, and recommendations for the consideration of senior Administration decision-makers. The

disclosure of OLC opinions that have not been determined to be appropriate for public dissemination would harm the deliberative processes of the Executive Branch and disrupt the attorney-client relationship between OLC and Administration officials. We are not prepared to identify these documents specifically or reveal which documents may be classified, but we can assure you that no portions of any of these documents have been classified since the Attorney General's testimony on June 8, 2004.

We also can state that included in the memoranda that have been released are all unclassified, final written opinions from the Department of Justice addressing the legality of interrogation techniques used in interrogations conducted by the United States of al Qaeda and Taliban enemy combatants. While the Department has not issued written opinions addressing interrogation practices in Iraq, it has been the consistent understanding within the Executive Branch that the conflict with Iraq is covered by the Geneva Conventions, and the Department has concurred in that understanding.

Lastly, we note that some of the documents requested originated with other agencies such as the Departments of State and Defense. Consistent with established third-agency practice, we suggest that you contact those agencies directly if you wish to obtain copies of their documents.

5. Do you agree with the conclusions articulated in an August 1, 2002, memorandum from Jay Bybee, then AAG for the Office of Legal Counsel, to Alberto Gonzales, Counsel to the President, that: (A) for conduct to rise to the level of "torture" it must include conduct that a prudent lay person could reasonably expect would rise to the level of "death, organ failure, or the permanent impairment of a significant bodily function," and (B) section 2340A of the Federal criminal code "must be construed as not applying to interrogations undertaken pursuant to [the President's] Commander-in-Chief authority"?

(A). In sections 2340 & 2340A of title 18, Congress defined torture as an act "specifically intended to inflict severe physical or mental pain or suffering." Because Congress chose to define torture as encompassing only those acts that inflict "severe . . . pain or suffering," Department of Justice lawyers who are asked to explain the scope of that prohibition must provide some guidance concerning what Congress meant by the words "severe pain" (emphasis added). In an effort to answer that question, the August 1, 2002 memorandum examines other places in the federal code where Congress used the same term - "severe pain." In at least six other provisions in the U.S. Code addressing emergency medical conditions, Congress identified "severe pain" as a typical symptom that would indicate to a prudent lay person a medical condition that, if not treated immediately, would result in - "(i) placing the health of the individual . . . in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part." 42 U.S.C. § 1395w-22(d)(3)(B); see also § U.S.C. § 1369(d) (same); 42 U.S.C. § 1395x(v)(1)(K)(ii); id. § 1395dd(e)(1)(A); id. § 1396b(v)(3); id. § 1396u-2(b)(2)(C). In light of Congress's repeated usage of the term, the memorandum concluded that, in Congress's view, "severe pain" was the type of pain that would be associated

with such conditions. (The opinion refers to these medical consequences as a guide for what Congress meant by "severe pain"; it does not state, as your question suggests, that, to constitute torture, conduct must be likely to cause those consequences.)

Although, in other statutory provisions, Congress repeatedly associated "severe pain" as a symptom with certain physical or medical consequences, it is open to doubt whether that statutory language actually provides useful guidance concerning the prohibition in sections 2340 & 2340A. A description of medical consequences – consequences which could be accompanied by a variety of symptoms including varying degrees of pain – does not necessarily impart useful guidance to a lay person concerning the meaning of "severe pain." The Office of Legal Counsel is currently reviewing that memorandum with a view to issuing a new opinion to replace it and may well conclude that the meaning Congress intended when it defined torture to require "severe pain" is best determined from the other sources addressed in the original memorandum, including standard dictionary definitions. See, e.g., *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) ("In the absence of [a statutory] definition, we construe a statutory term in accordance with its ordinary or natural meaning.")

(B). The analysis in the August 1, 2002, memorandum concerning the President's authority under the Commander-in-Chief Clause, U.S. Const. art. II, sect. 2, cl. 1, was unnecessary for any specific advice provided by the Department. The Department has concluded that specific practices it has reviewed are lawful under the terms of sections 2340 & 2340A of title 18 and other applicable law without regard to any such analysis of the Commander-in-Chief Clause. The discussion is thus irrelevant to any policy adopted by the Administration. As a result, that analysis is under review by the Office of Legal Counsel and likely will not be included in a revised memorandum that will replace the August 1, 2002, memorandum. The Department believes that, as a general matter, the better course is not to speculate about difficult constitutional issues that need not be decided. For the same reason, it would be imprudent to speculate here concerning whether some extreme circumstances might exist in which a particular application of sections 2340 & 2340A would constitute an unconstitutional infringement on the President's Commander-in-Chief power. Cf. *Request of the Senate for an Opinion as to the Powers of the President 'In Emergency or State of War,'* 39 Op. A.G. 343, 347-48 (1939).

6. Has President Bush or anyone acting under his authority issued any order, directive, instruction, finding, or other writing regarding the interrogation of individuals held in the custody of the U.S. Government or an agent of the U.S. Government? If so, please provide copies. If any portion of any document is provided with redactions, please explain the basis for such redactions. The basis for withholding any document should also be explained in detail.

On June 22, 2004, the White House released the instruction issued by the President to the Department of Defense on February 7, 2002, concerning the treatment of al Qaeda and Taliban detainees (it does not, however, expressly address interrogation practices). The Department of Justice is not aware of any writing issued by the President that expressly addresses the issue of

interrogations practices. The President has, however, made it clear that the United States does not condone or commit torture. We should also emphasize that the President has not in any way made a determination that doctrines of necessity or self-defense would permit conduct that otherwise constitutes torture. The President has never given any order or directive that would immunize from prosecution anyone engaged in conduct that constitutes torture.

We assume that to the extent your question asks about directives issued by others under the President's authority it is limited to interrogations of enemy combatants in the conflict with al Qaeda and the Taliban or interrogations of persons detained in connection with the conflict in Iraq. As you know, numerous law enforcement agencies of the Executive Branch have likely acted under the President's authority as Chief Executive to issue numerous directives concerning interrogations or interviews of subjects in custody in the ordinary course of enforcing the criminal and immigration laws. We assume that such directives are outside the scope of your question.

Numerous individuals acting under the President's authority have undoubtedly issued orders or instructions regarding interrogations of individuals in U.S. custody, both in the conflict with al Qaeda and the Taliban and in the conflict in Iraq. Such documents, however, are not Department of Justice documents. Those documents should be sought from the appropriate departments or agencies that issued them, through the appropriate oversight committees in Congress.

As for the Department of Justice, the General Counsel of the FBI issued a memorandum on May 19, 2004, reiterating existing FBI policy with regard to the interrogation of prisoners, detainees or other persons under United States control. That memorandum reiterated established FBI requirements that FBI personnel "may not obtain statements during interrogations by the use of force, threats, physical abuse, threats of such abuse, or severe physical conditions." It also set forth reporting requirements for known or suspected abuse or mistreatment of detainees. A copy of that memorandum is enclosed. The Department is still following up to determine whether there are any other similar written directives relevant to your question. Please also see the response to Question 8 concerning the Department's legal advice to other agencies.

7. On Friday June 11, 2004, the President was asked the following question at a press conference: "Mr. President, the Justice Department issued an advisory opinion last year declaring that as Commander-in-Chief you have the authority to order any kind of interrogation techniques that are necessary to pursue the war on terror ... [D]id you issue any such authorization at any time?" The President answered: "No, the authorization I issued ... was that anything we did would conform to U.S. law and would be consistent with international treaty obligations." Please provide a copy of the authorization to which the President was referring. Please also provide a copy of the Presidential directive you had before you and referred to at the hearing.

At the press conference to which you refer, it seems likely that the President was referring to the February 7, 2002, instruction discussed above. At the hearing before the Committee, the Attorney General was also referring to the President's instruction of February 7, 2002. The Attorney General did not have any Presidential directive before him at the hearing. He was merely reading language from the February 7, document that had been incorporated into his notes.

8. Were you ever asked to approve or otherwise agree to a set of rules, procedures, or guidelines authorizing the interrogation of individuals held in the custody of the U.S. Government or an agent of the U.S. Government? If so, please indicate when you were asked to do so, and whether you did, in fact, approve or agree in any way in whole or in part. In addition, please provide a copy of any such rules, procedures or guidelines, or explain your basis for refusing to do so.

The Department of Justice has given specific advice concerning specific interrogation practices, concluding that they are lawful. The institutional interests the Executive Branch has in ensuring that agencies of the Executive Branch can receive confidential legal advice from the Department of Justice require that that specific advice not be publicly disclosed. In addition, that advice is classified. We understand that, to the extent the client department(s) have not already done so, they will arrange to provide the advice to the relevant oversight committees in a classified setting.

As noted above, included among the memoranda that the Department has already released are all unclassified, final written opinions from the Department of Justice addressing the legality of interrogation techniques used in interrogations conducted by the United States of al Qaeda and Taliban enemy combatants. While the Department has not issued written opinions addressing interrogation practices in Iraq, it has been the consistent understanding within the Executive Branch that the conflict in Iraq is covered by the Geneva Conventions, and the Department has concurred in that understanding.

9. What were the criteria the Department used in selecting civilian contractors to assist in the reconstituting of Iraq's prison system? Please describe the vetting process to which they were subjected. To what extent were concerns about their backgrounds known to the officials who recommended them to you and to what extent were you aware of such concerns when you selected them? Why were such concerns dismissed when such individuals were recommended to you and selected by you? Please explain in detail.

It was and is essential that we do whatever we can to help create a fair and humane criminal justice system in Iraq. To that end, the Department of Justice responded to urgent requests from the Coalition Provisional Authority ("CPA") and its predecessor for the provision of experts in the areas of prosecution, policing, and corrections. The individuals whom the Department of Justice has sent to Iraq - federal prosecutors, former state and local police

officers, and corrections experts -- have volunteered to take on one of the most dangerous missions in that country. They are literally on the front lines: in the courts, in the police stations, and in the prisons.

The experts the Department provided to the CPA -- including the corrections experts -- have had neither responsibility for, nor control over, individuals detained by the Coalition military forces. The Department's role is strictly limited to the Iraqi criminal justice system. In particular, the corrections experts have operated heretofore under the direction of the CPA's Senior Advisor to the Iraqi Justice Ministry. Thus they have had no involvement in any of the alleged abuses at the military portions of the Abu Ghraib prison that are currently under investigation by Congress and by the United States Military.

Ensuring that these contractors are appropriately screened is a responsibility that we take very seriously. But it is important to note that we are aware of no allegation that any of the corrections contractors committed or countenanced any abuse of prisoners in Iraq. To the contrary, their central role in rebuilding the Iraqi prison system -- including creating systems for reporting and correcting abuses by Iraqi prison officials -- has been highly praised by the CPA's Senior Advisors to the Iraqi Justice Ministry. Nevertheless, at the Attorney General's request, the Inspector General is undertaking a review of the process used to screen and hire corrections advisors sent to Iraq.

With regard to the process for selecting the initial team of corrections experts, which deployed in May 2003, the Department of Justice consulted experts in the Bureau of Prisons (BOP) and the American Correctional Association. The Department contacted one of the individuals recommended by BOP, a former BOP Regional Director, and requested his assistance in further vetting proposed assessment team members. That individual agreed to join the first assessment team, and to help recommend other members. Candidates were required to submit SF 85Ps (Questionnaires for Public Trust Positions) and fingerprint cards. NCIC checks were conducted. No disqualifying information was found.

A second assessment team was deployed starting in September 2003. This team was selected based in part on BOP recommendations and in part on recommendations of members of the first assessment team. To be sure, some of the corrections experts sent to Iraq previously had been named in lawsuits in the United States, in their capacities as the directors of major state corrections systems. Although we do not minimize the significance of such lawsuits, they are commonplace for prison officials. And as far as we are aware, none of the corrections experts sent to Iraq was ever found by a court to have committed or countenanced abuses against prisoners in their custody.

As the need for corrections advisors grew, the Department worked with a government contractor firm to identify qualified candidates willing to serve in Iraq. Since January 2004, more than 80 additional correctional experts have served, or are now serving, in Iraq. These candidates were also required to submit SF85Ps and fingerprint cards. The preliminary results of

our internal review indicate that a few candidates were deployed before the necessary checks had been completed. (We would note, however, that we are aware of no allegations or findings of abuse of prisoners by these candidates in Iraq or elsewhere.) Appropriate remedial action is being taken to address this situation.

It goes without saying that these experts have taken on one of the most dangerous of tasks in Iraq. We are glad to be able to report to you that, so far as we have been able to determine, they have done so in a manner that has brought honor to the United States. We nevertheless recognize that we must engage in constant vigilance to ensure that this remains the case, and intend to do so throughout the duration of our mission in Iraq.

10. Is the Department of Justice currently drafting, or considering drafting, legislation to authorize the President to detain individuals as "enemy combatants"? If the Department is drafting or considering drafting such legislation, will you consult with us before submitting it to Congress?

The Department is not currently drafting or considering drafting such legislation. The Department does not believe that such legislation is necessary at the present time. Although the Department is still evaluating the full import of the Supreme Court's recent decisions, the decision in *Hamdi v. Rumsfeld*, No. 03-6696, slip op. at 9-17 (June 28, 2004), confirms that additional legislation is unnecessary. In *Hamdi*, the Court held that in the Authorization for Use of Military Force, 115 Stat. 224 (Sept. 18, 2001), Congress has "clearly and unmistakably authorized detention" of enemy combatants, *id.* at 12, including American citizens, where an enemy combatant is defined as a person who is "part of or supporting forces hostile to the United States or coalition partners" and who "engaged in an armed conflict against the United States," *id.* at 9 (internal quotation marks omitted).

Should circumstances change, the Department would always be willing to work with the Committee to ensure that necessary and appropriate legislation is enacted.

11. During the Judiciary Committee hearing last week, you mentioned the limitation placed on the torture statute (18 U.S.C. § 2340-2340A) by 18 U.S.C. § 7(9). This section was added to the definition of "special maritime and territorial jurisdiction" by section 804 of the USA-PATRIOT Act—originally an Administration proposal. The Administration explained at the time, in its sectional analysis, that the provision would "extend" Federal jurisdiction to ensure that crimes committed by or against U.S. nationals abroad on U.S. Government property did not go unpunished. Unmentioned in the Administration's explanation was that this provision creates a jurisdictional gap in our ability to prosecute acts of torture.

(A) Did the Department of Justice know and intend that the proposed amendment would restrict the applicability of the anti-torture statute?

(B) Would the Department support legislation to restore the pre-PATRIOT Act reach of the torture statute, making it applicable to U.S.-owned, U.S.-run, and U.S.-controlled facilities, including aircraft, ships, and other mobile sites, located outside of the United States? If not, why not?

(C) Would the Justice Department support further extension of the torture statute, to make it applicable anywhere outside the geographical borders of United States (i.e., the 50 States, the District of Columbia, and the commonwealths, territories, and possessions of the United States)? If not, why not?

(A) An inquiry with Department personnel who were involved in drafting the amendment to the provision defining the special maritime and territorial jurisdiction of the United States ("SMTJ"), 18 U.S.C. § 7, has determined that they were unaware of the potential that the amendment had for affecting the applicability of sections 2340 & 2340A. To the contrary, the provision was intended, as the Department's section-by-section analysis indicated, to ensure jurisdiction over crimes committed by or against U.S. nationals at embassies and consular offices and on military bases and other U.S. facilities overseas. In particular, the amendment was intended to address a conflict among the courts of appeals concerning the extraterritorial application of an existing paragraph in section 7 and to codify the longstanding position of the United States that the SMTJ did extend to overseas bases. Compare *United States v. Gallin*, 216 F.3d 207 (2d Cir. 2000) (holding, contrary to position taken by the United States, that section 7(3) does not apply extraterritorially), with *United States v. Corey*, 232 F.3d 1166 (9th Cir. 2000) (holding that section 7(3) does apply extraterritorially), and *United States v. Erdos*, 474 F.2d 157 (4th Cir. 1973) (same).

(B) The Department would support legislation making sections 2340 & 2340A applicable to U.S.-owned, U.S.-run, and U.S.-controlled facilities outside the United States. The question, however, assumes that such applicability was clear before the passage of the USA PATRIOT Act. As our answer to part A indicates, that is not entirely accurate. Rather, before the PATRIOT Act, there was a circuit split concerning the scope of the SMTJ and whether or not it applied to overseas military bases. Thus, under the view of the Ninth Circuit, the SMTJ extended to military bases overseas and accordingly sections 2340 & 2340A would not have applied to such bases. See *Corey*, 232 F.3d at 1172. Under the view of the Second Circuit, on the other hand, the SMTJ did not extend to bases overseas, and sections 2340 & 2340A would have applied to such bases. See *Gallin*, 216 F.3d at 223.

The Department will gladly work with Congress to draft appropriate legislation to achieve the objective of applying sections 2340 & 2340A to such bases overseas. Simply returning statutory language to its pre-PATRIOT Act form, however, is likely not the best means for achieving that goal.

(C) The Department would have no objection to such legislation, and would work with the Committee to ensure that it is carefully drafted to achieve its intended effect.

We hope that this information is helpful. We will supplement this response with additional information relating to other questions for the hearing record as soon as possible. Please do not hesitate to contact this office if you would like additional assistance regarding this or any other matter.

Sincerely,

William E. Moschella
William E. Moschella
Assistant Attorney General

cc: The Honorable Orrin G. Hatch
Chairman

Enclosure

01/05/05 WED 18:37 FAX

4017



U.S. Department of Justice
Office of Legislative Affairs.

Office of the Assistant Attorney General

Washington, D.C. 20530

December 16, 2004

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Leahy:

This letter responds to your letter dated October 29, 2004, requesting copies of Office of Legal Counsel (OLC) opinions regarding "the treatment and interrogation of prisoners in U.S. custody overseas."

As we have indicated in connection with earlier requests for OLC opinions, our longstanding practice followed by Attorneys General of both parties is that non-public OLC opinions are not disclosed outside the Executive Branch. The Executive Branch has substantial confidentiality interests in OLC opinions. They consist of confidential legal advice, analysis, conclusions and recommendations for the consideration of senior Administration decision-makers. The disclosure of OLC opinions that have not been determined to be appropriate for public dissemination would harm the deliberative processes of the Executive Branch and disrupt the attorney-client relationship between OLC and Administration officials. These confidentiality interests are especially great with respect to OLC opinions addressing issues arising in connection with the discharge of the President's constitutional authority as Commander in Chief. It is critical to the discharge of the President's constitutional responsibilities that he and the officials under his supervision be able to receive confidential legal advice from OLC. We appreciate your interest in these matters and your understanding of the corresponding Executive Branch interest in the confidentiality of non-public OLC opinions.

We hope that this information is helpful. If you would like assistance regarding any other matter, please do not hesitate to contact this office.

Sincerely,

William E. Moschella
Assistant Attorney General

cc: The Honorable Orrin G. Hatch
Chairman

Los Angeles Times
January 6, 2005 Thursday

Editorial: A Window on a Man's Morality; Alberto R. Gonzales' record raises questions about his fitness to serve as attorney general.

The Republicans' comfortable majority in the Senate means that Alberto R. Gonzales will almost certainly be confirmed as the next attorney general. With hearings on his nomination set to start today, many Democrats think the best they can do is wound Gonzales enough with questions about his notorious torture memos to disqualify him for any future Supreme Court seat. In the end, however, they will feel pressure to support him or face retaliation from Republicans.

They should resist.

The eight Democrats and a smattering of moderate Republicans who voted for John Ashcroft four years ago probably felt the same pressure.

No one now can doubt the enormous power the attorney general wields or the lasting harm the person who holds that office can do. Gonzales may not share his predecessor's zeal in hounding X-rated moviemakers or cancer patients who smoke marijuana, but as the president's chief lawyer, he has been every bit as reckless.

As a leading architect of Bush's ends-justifies-means war on terror, Gonzales pushed to justify torturing terror suspects in violation of international law, promoted military tribunals that echo Stalin's show trials, helped write the Patriot Act (which, among other powers, gives government agents vast new snooping authority) and excused the limitless imprisonment of American citizens whom the president merely suspects of terror activity.

Three years into that war, much of Gonzales' handiwork has been rejected by courts, damned by the world community and disavowed by the administration -- as in the Justice Department memo quietly released last week declaring that "torture is abhorrent to both American law and values and to international norms."

Gonzales' defenders argue that, as White House counsel, he was simply a passionate advocate for his client. But the most devoted counselor knows that, even in wartime, there are legal and moral lines this nation crosses at peril to its own citizens and those of other countries. Gonzales' justifications opened the door to the abuse at Abu Ghraib prison and the Guantanamo Bay detention facility. The mistreatment and prisoner deaths that occurred have raised fears of retaliation against captured Americans. Those concerns prompted a dozen retired generals and admirals, along with civil rights groups, to oppose Gonzales' nomination.

Our justice system relies on an attorney general willing to defend civil liberties as ardently as he pursues criminals and terrorists. That person must be someone who respects both the power and the limits of law.

Gonzales' record as White House counsel is not just a series of unfortunate missteps; rather, it is a troubling window into the man's morality and his fitness to be the nation's chief lawyer. Democratic senators will surely ask Gonzales sharp and embarrassing questions about the principles that guided his tenure in the Office of Legal Counsel. **These lawmakers then ought to demonstrate that they understand the principles at stake by actually voting no.**

January 4, 2004

To the editor:

Senator John Cornyn quotes me out of context in his defense of Attorney-General nominee Alberto Gonzales (In defense of Judge Gonzales, January 4, 2005). I do believe the Bush administration was "probably correct" that irregular al Qaeda fighters captured in Afghanistan were not entitled to prisoner of war status -- though a proper tribunal should have been convened to determine that. But this decision is not what Mr. Gonzales is being criticized for today.

What concerns serious critics of Mr. Gonzales is his view that Taliban soldiers, at the time the regular armed forces of the government of Afghanistan, should also be denied POW status. That decision ran counter to the plain terms of the Geneva Conventions. More troubling still was Gonzales's position, which Senator Cornyn curiously doesn't mention or defend, that the Geneva Conventions didn't apply at all to the war in Afghanistan, and that therefore, Afghan prisoners were not legally entitled even to humane treatment. Thanks to Gonzales's advice, for the first time in modern American history, U.S. troops were sent to war neither bound nor protected by the laws of war.

If Senator Cornyn wants to know what's wrong with that, he could ask the military leaders, including Joint Chiefs Chairman General Myers, who opposed Gonzales' advice. Or he could ask Secretary of State Powell, who wrote that adopting Gonzales's view would "reverse over a century of U.S. policy and practice supporting the Geneva Conventions and undermine the protections of the law of war for our troops." These men, vastly more experienced than Gonzales, understood that throwing out the rules would hurt, not advance, America's security and goals in the world.

Tom Malinowski
Washington Advocacy Director
Human Rights Watch

612

University of Washington
Department of Political Science
Box 353530
Seattle, WA 98195
January 3, 2005

The Honorable Patrick J. Leahy
Ranking Democratic Member, Committee on the Judiciary
US Senate
Washington, DC 20510
Fax No: 202-224-9102

Dear Senator Leahy:

I urge you to oppose the appointment of Alberto Gonzales as attorney general.

Memos written and solicited by Mr. Gonzales reveal a systematic and determined effort to remove every possible legal obstacle to the use of torture by US officials. (See, e.g., the documents collected in Mark Danner, Torture and Truth.) We know that these legal findings led, via Pentagon and CIA directives, to the cruel abuses inflicted in Guantánamo Bay, Afghanistan, and Abu Ghraib. These abuses are still being inflicted in Guantánamo Bay, and perhaps elsewhere as well.

In other words, Mr. Gonzales was a central architect of an official plan to license the use of torture in US detention facilities around the world. Given his record, Mr. Gonzales should not even be considered for the position of attorney general.

I enclose a Seattle Times editorial on this subject that I co-authored with Professor Darius Rejali of Reed College.

Sincerely,



Jamie Mayerfeld
Associate Professor

Press Releases

MALDEF Statement on the Likely Confirmation of White House Counsel Alberto Gonzales to the Position of United States Attorney General

January 19, 2005

Authored By: Gina Montoya

(Los Angeles, CA) MALDEF, the nation's premier Latino civil rights organization, released a statement today regarding the likely confirmation of White House Counsel Alberto Gonzales to the Cabinet post of Attorney General. Below is the statement released today by Ann Marie Tallman, MALDEF President and General Counsel.

"The United States Attorney General upholds the laws that define the very democracy of our nation. The Attorney General enforces all federal criminal and civil laws. The office holder has the responsibility to determine how to use federal resources to prosecute violations of individual civil liberties and civil rights— such protective laws have profound impact on the daily lives of American citizens and those living in the United States. Finally, the Attorney General has the authority to appoint a special counsel to investigate and, if appropriate, prosecute matters when the Attorney General concludes that extraordinary circumstances exist such that the public interest would be best served by removing the matter from the Justice Department.

MALDEF acknowledges that Judge Alberto Gonzales can fulfill his duties as Attorney General as defined by the United States Constitution, the U.S. Code and various federal Statutes. Judge Gonzales' personal history is compelling. He has overcome significant obstacles to achieve his success. His past professional experience speaks to his capabilities. MALDEF remains encouraged that President Bush would make an historic appointment of such a diligent Individual.

MALDEF acknowledges Judge Gonzales' adherence to precedent in the area of individual privacy rights as defined by the constitutional right to privacy. We also recognize his perspectives on diversity and equal opportunity in higher education and employment.

MALDEF is America's premier Latino civil rights Organization, and from this unique position, we have serious questions and concerns about Judge Gonzales' record in three important areas of the law. First, Judge Gonzales' public statements and past record demonstrate Support and deference to our Federal Government's Executive branch. It will be imperative for the Attorney General to question and challenge unilateral exercise of executive authority when matters of constitutional concern and violations of our federal laws demand that the Attorney General protect individual civil liberties or civil rights. In addition, there remains a concern about Judge Gonzales' unique position and transition— from Counsel to the President of the United States to the United States Attorney General— and his ability to determine when to appoint a special counsel. There is a question whether Judge Gonzales can fairly and independently determine in a matter he previously gave advice to the President as the President's attorney, if a special counsel should be appointed. A possible inherent conflict of interest based upon his on-going attorney-client duties to the President may impede his ability to be independent.

Second, due process under the law is an important Constitutional protection. Judge Gonzales' past record in the Texas Death Penalty cases and his association with

memoranda setting aside the application of international war conventions as applied to enemy combatants raises concerns about whether he may set aside constitutionally guaranteed due process protections in various domestic circumstances.

Third, the federal government has sole authority and responsibility to uphold our nation's immigration policies while working to keep our homeland safe and secure. MALDEF is concerned that Judge Gonzales, as Attorney General, may delegate such important federal civil and criminal immigration authority to state and local law enforcement already overburdened with responsibilities to protect and serve at the local level without the appropriate due process protections that must remain guaranteed at the federal level.

We acknowledge that Judge Gonzales is likely to be Confirmed as the next Attorney General of the United States and the first Latino to hold this important post. MALDEF stands ready to work with Judge Gonzales as he carries out his duties and continues his public service. However, because of our specific concerns regarding apparent primacy of executive authority; a potential conflict of interest in the transition from Counsel to the President to Attorney General in enforcing the special counsel law; setting aside due process protections; and, uncertainty about whether inherent authority exists at the state and local level to enforce federal immigration policy, MALDEF cannot support his confirmation.

For more information contact:
Gina Montoya: 213 629-2512, ext.112
Rachel Estrada: (202) 293-2828, ext. 19

Contact: **Nativo V. Lopez**

January 6, 2005

(Cell) 323/236/7990

F o r I m m e d i a t e R e l e a s e

MapaCommunications@sbcglobal.net

**MAPA OPPOSES CONFIRMATION OF ALBERTO GONZALES FOR THE
POSITION OF U.S. ATTORNEY GENERAL**

MAPA CALLS FOR THE RESPECT OF THE RULE OF LAW

Los Angeles - The Mexican American Political Association (MAPA) categorically opposes the confirmation of current White House Legal Counsel, Alberto Gonzales, as the U.S. Attorney General of the Department of Justice.

“While this is an extremely important appointment by President George Bush to his cabinet, and laudable and unprecedented that a Mexican American would be so appointed, the Mexican American Political Association has expressed grave reservations about this candidate. Ethnicity, race, and gender are all important considerations when such appointments are made by the top executive officer of the U.S., but both merit and substantive policy positions by such candidates must be of paramount consideration,” stated Nativo Vigil Lopez, National President of MAPA.

“Based on the information made available to the public, actually leaked to the media, regarding the role played by White House Counsel, Alberto Gonzales, in formulating the legal interpretations of the Geneva Convention and U.S. law, as these relate to the use of torture, MAPA cannot support the confirmation of his candidacy for the position of U.S. Attorney General of the Department of Justice,” added Lopez..

It is now unequivocally clear that the Gonzales interpretation of both the Geneva Convention and U.S. law, related to the use of tactics of torture on enemy detainees, became the basis for the operational use of torture and human rights abuses at Guantanamo Bay, Cuba, and Iraq by U.S. military and contractor personnel. This was in contravention to the rule of law – international and domestic.

The position of U.S. Attorney General is the highest legal position of the government charged with protecting the citizenry, most particularly the civil rights of the historically disenfranchised sectors of the population – minorities, females, disabled, seniors, and minors. The Justice Department is a bastion of recourse by these sectors whose rights have been violated in the areas of voting, employment, immigration, and education. The highest respect and observance of the rule of law are of utmost concern to MAPA, which has a half century history of fighting to protect the civil rights of its constituency.

“We can only support a candidate who has a demonstrated commitment to the rule of law, most especially during trying times and circumstances of social unrest, war, civil disturbances, protest, and real or supposed threats to our security. The treatment of arrestees and detainees under such circumstances, and the observance of constitutional protections, are real life indicators of the respect for the rule of law. Alberto Gonzales does not merit favorable consideration for this charge,” concluded Lopez.

MAPA, a multi-partisan advocacy organization, was founded in Fresno, California in 1963 and has chapters throughout California. It is dedicated to the constitutional and democratic principles of political freedom and representation for the Mexican, Mexican American and Latino people in the U.S. For more information, call (323) 269-1575 or visit the MAPA website at www.mapa.org.

Midwest Coalition for Human Rights

Bringing together regional and international human rights leaders on issues of common concern.

January 3, 2004

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Mike DeWine
United States Senate
Washington, D.C. 20510

The Honorable Charles E. Grassley
United States Senate
Washington, D.C. 20510

The Honorable Herbert Kohl
United States Senate
Washington, D.C. 20510

The Honorable Russell D. Feingold
United States Senate
Washington, D.C. 20510

The Honorable Richard J. Durbin
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Senators:

We are writing to you concerning the upcoming hearings the Senate Judiciary Committee will conduct on the nomination of The Honorable Alberto R. Gonzales to the post of Attorney General of the United States.

As you may know, the Midwest is the Heartland, a region with a strong history of grassroots efforts to promote social justice and human rights. From the pioneering efforts of Jane Addams, who chaired the international women's peace organization, and Ida Barnett Wells, who launched an international campaign to abolish lynching, the Midwest region has made tremendous contributions to the defense of individual rights. In keeping with this tradition, the Midwest Coalition for Human Rights is a network of twenty academic centers, and advocacy and service organizations committed to promoting and protecting human rights. Leaders of these twenty organizations represent some of the foremost experts in the field of human rights.

At this time, we feel it is necessary to speak with a unified voice to express our deep concern about the nomination of Mr. Gonzales. As representatives of organizations

Administrative support: Human Rights Program at the University of Minnesota
214 Social Sciences Building • 267 19th Avenue South • Minneapolis, MN 55455
Tel: (612) 626-2957 • Fax: (612) 626-2242

Midwest Coalition for Human Rights
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committed to the promotion and protection of human rights and to the rule of law – in particular, international human rights and humanitarian law – we are exceptionally troubled by Mr. Gonzales' actions and statements over the past several years. These include an effort to undermine U.S. obligations under the Geneva Conventions and a disregard for the international laws on the prohibition of torture.

We ask that you address with Mr. Gonzales his claim that the United States need not be bound by its obligations under the Geneva Conventions in the conflict in Afghanistan; his role in the preparation of legal memos justifying the use of torture during interrogations of al-Qaeda suspects; and his support of the Bush Administration's policy of detaining "enemy combatants" without access to counsel or an opportunity to contest the allegations against them. We believe that these legal positions are incorrect and indicate an extreme misinterpretation of the U.S.'s obligation under international law that will place this country in an isolated and vulnerable position in our foreign relations.

In grave times as we face in our world today, it is even more pressing for the U.S. to reaffirm that our democratic tradition is based, not on fiat, but on the rule of law. As representatives of the Midwest Coalition for Human Rights we are urging you to show your commitment to human dignity by exploring Mr. Gonzales' questionable legal interpretations. We respectfully request that you avoid the rush to confirm this nominee and that you weigh carefully his commitment to human rights and the rule of law before casting a vote on his confirmation.

Sincerely,

M. Cherif Bassiouni
*Professor of Law and President
International Human Rights Law Institute
DePaul University College of Law*

Douglass W. Cassel
*Director
Center for International Human Rights
Northwestern University, School of Law (for identification only)*

Kenneth Cmiel
*Director
University of Iowa Center for Human Rights*

Gary L. Cozette
*Director
Chicago Religious Leadership Network on Latin America*

Marcella David
*Professor of Law & International Studies
University of Iowa*

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George E. Edwards, Professor of Law
Director, Program in International Human Rights Law
Faculty Director/Advisor, LLM Track in International Human Rights Law
Indiana University School of Law at Indianapolis

Mark Ensalaco, PhD
Director
International Studies and Human Rights program
University of Dayton

Barbara A. Frey
Director
Human Rights Program
University of Minnesota

David E. Guinn, JD, PhD
Executive Director
International Human Rights Law Institute
DePaul University College of Law

Kareem M. Irfan
Chairman
Council of Islamic Organizations of Greater Chicago

Bert Lockwood
Urban Morgan Institute for Human Rights
University of Cincinnati College of Law

Michael McConnell
Great Lakes Regional Director
American Friends Service Committee

Garth Meintjes
Acting Director
Center for Civil and Human Rights
Notre Dame Law School

Robin Phillips
Executive Director
Minnesota Advocates for Human Rights

Milo Mumgaard
Executive Director/Lawyer
Nebraska Appleseed Center for Law in the Public Interest

Midwest Coalition for Human Rights
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Jean Maclean Snyder
MacArthur Justice Center (for identification only)

Professor David Weissbrodt
University of Minnesota Human Rights Center (for identification only)

Cc: The Honorable Evan Bayh
 The Honorable Norm Coleman
 The Honorable Kent Conrad
 The Honorable Mark Dayton
 The Honorable Byron L. Dorgan
 The Honorable Chuck Hagel
 The Honorable Tom Harkin
 The Honorable Tim Johnson

 The Honorable Carl Levin
 The Honorable Richard G. Lugar
 The Honorable Ben Nelson
 The Honorable Barack Obama
 The Honorable Debbie Stabenow
 The Honorable John R. Thune
 The Honorable George
 Voinovich


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Editorial: Don't confirm Gonzales

From the Journal Sentinel

Last Updated: Jan. 8, 2005

Thursday's Senate confirmation hearing provided Alberto R. Gonzales with an opportunity to confront some of the nagging questions that have been raised about his nomination to be attorney general. So important is the office to which Gonzales aspires that the Senate and the American people needed to hear convincing answers to these questions. They deserved assurances that Gonzales had the judgment, the temperament and the integrity necessary for this cabinet position.

Far from supplying this reassurance, Gonzales proved to be consistently weak and evasive. So intellectually sterile was his testimony that it showed Gonzales to be unfit for the important office he seeks, and for this reason the Senate should reject his nomination.

Realistically, of course, this will almost certainly not happen; Democrats on the Judiciary Committee signaled Thursday that, despite reservations about Gonzales, they will support the nomination. Indeed, they make a respectable case, which is that presidents are entitled to broad leeway in the selection of their cabinet members. But there are limits to the discretion to which presidents are entitled; otherwise, the entire confirmation process becomes meaningless.

Unfortunately, Gonzales' views put him beyond even these broad limits. As White House counsel, he was largely responsible for, or at least acquiesced in, a repudiation of some of this country's most precious ideals, such as the notion that human beings should not be tortured.

In January 2002, Gonzales told President Bush that the war on terror "renders obsolete" some of the strict limitations imposed by the Geneva Conventions as applied to al-Qaida and, in some cases, Taliban fighters. Arguably, one can make that legal case but elsewhere in that letter, and more disturbing, was the tone Gonzalez adopted when he dismissed as merely "quaint" some of the convention's human rights provisions. In August 2002, Gonzales received a Justice Department memorandum that a president could suspend Geneva Convention protections at will and that some forms of torture "may be justified."

On Thursday, Gonzales disavowed the use of torture. A week earlier, the Justice Department had repudiated its August 2002 memo. But why did this reversal take this long? In light of Gonzales's four-year record, his disavowal of terrorism seemed merely rhetorical and tactical. Efforts to elicit Gonzales' views were met with vagueness and equivocation. Gonzales said he couldn't remember key details of his involvement with the August 2002 memo. He wasn't even sure whether Americans could legally engage in torture under any circumstances.

Ordinarily, even these gross deficiencies might be tolerable. But these are not ordinary times. The threat to civil liberties posed by the fight on terror requires an attorney general with a demonstrated record of sound judgment, independent temperament and unquestioned integrity.

Gonzales's rags-to-riches personal story is an inspiration to all Americans. But his story is not the issue. He has not demonstrated the judgment and integrity to be the nation's chief law enforcement officer at this pivotal time in our history.

Appeared in the Milwaukee Journal Sentinel on Jan. 9, 2005.
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Major General Melvyn Montano
Ret. USAF National Guard
Albuquerque, NM 87122
(505) 350-3268 cell

The Honorable Members of the Committee on the Judiciary
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

January 25, 2005

AN OPEN LETTER TO THE SENATE JUDICIARY COMMITTEE:

Dear Senators:

I am writing to urge that you reject the nomination of Alberto Gonzales for Attorney General. I understand that some Hispanic groups support Judge Gonzales' nomination and have urged you to confirm him. I write, as a Hispanic and as a military officer and veteran, to offer a different perspective.

I know what it feels like to be the first Hispanic named to an important leadership position in this country. I was the first Hispanic Air National Guard officer appointed as an adjutant general in the United States. I am a Vietnam veteran and served 45 years in the military, including 18 years in a command position. I welcome the prospect of more Hispanics serving in leadership positions in the government, and I respect Judge Gonzales' inspiring personal story. But I reject the notion that Hispanics should loyally support the nomination of a man who sat quietly by while administration officials discussed using torture against people in American custody, simply because he is one of our own.

I was among 12 retired Admirals and Generals, including former Chairman of the Joint Chiefs of Staff, General John Shalikashvili (Ret. USA), who wrote to you urging that you closely examine Judge Gonzales' role in setting U.S. policy on torture during his confirmation hearing.

At that hearing, Judge Gonzales did not allay concerns about his record. To the contrary, his evasiveness and memory lapses raised even more concerns. Judge Gonzales continues to maintain he can't remember how the infamous torture memo was generated. He has refused to explain the language in his own memo which implied that rejecting the applicability of the Geneva Conventions would insulate US personnel from prosecution for war crimes they might "need" to commit. And he asserts that the Convention Against Torture's prohibition on cruel and inhuman treatment doesn't apply to aliens overseas.

In my view, these positions put our service men and women – already facing enormous danger – at even greater risk. In my capacity as Major General of the National Guard, I oversaw 4,800 National Guard personnel. When I think about how many of our troops fighting in Iraq today are drawn from the National Guard, it angers me that the danger they face has been increased as a result of the policies Judge Gonzales has endorsed. I wonder, if Judge Gonzales' children grow up to serve in the military, would he be so cavalier in dismissing the Geneva Conventions as obsolete?

Some have cynically suggested that Americans who question Judge Gonzales' record on these issues do so because they are anti-Hispanic. I reject this view. My own concerns about Judge Gonzales' fitness to serve as Attorney General grow from a deep respect for American values and the rule of law. Judge Gonzales should be evaluated on his record, not his ethnicity. On the basis of that record, I urge you to reject his nomination.

Sincerely,


Major General Melvyn Montano



National Lawyers Guild

FOR IMMEDIATE RELEASE, November 15, 2004

Contact: Michael Avery, NLG President, mavery@suffolk.edu, 617-335-5023

NATIONAL LAWYERS GUILD URGES SENATE TO REJECT ALBERTO GONZALES AS ATTORNEY GENERAL

Gonzales will continue Ashcroft policies that threaten constitutional democracy

The National Lawyers Guild (NLG) announced that it opposes the nomination of Alberto Gonzales for the position of Attorney General.

The NLG condemned Gonzales for his approval of the torture of prisoners in memos he adopted as White House Counsel. The memos explained how American officials could escape legal liability for torture. Gonzales rejected the applicability of the Geneva Conventions to prisoners taken during the "war against terrorism," terming some of the Geneva provisions "quaint." The Guild said that Gonzales's contempt for accepted international law principles rendered him unfit to serve as the head of the Justice Department.

NLG President Michael Avery declared that, "The Constitution requires that the United States treat international treaties that it has signed as the supreme law of the land in the United States. It is the solemn obligation of the Attorney General to make sure that the United States complies with international law. It would be outrageous for the nation's top law enforcement officer to be contriving theories for American officials to avoid accountability for actions such as the torture of prisoners."

The Guild also said that it was deeply concerned by Gonzales's record in reviewing death penalty cases in Texas for then Governor Bush. An analysis of Gonzales's memos to the governor demonstrated that he repeatedly suppressed crucial facts that Bush should have considered in determining whether to grant clemency, such as "ineffective counsel, conflict of interest, mitigating evidence, even actual evidence of innocence."

The Guild said that Gonzales's radical ideological positions were responsible for the right-wing litmus test that he employed to recommend judicial nominees to President Bush. Gonzales's participation in the drafting of the USA PATRIOT Act demonstrates that he will continue the Ashcroft policy of sacrificing civil liberties in the name of the "war on terror."

The Guild called upon the Democrats in the Senate to filibuster if necessary to block the Gonzales nomination. NLG President Michael Avery said, "The suggestion that has appeared in the media that Democrats may be afraid to oppose Gonzales because he is a Latino is offensive. It would be wonderful to have a Latino Attorney General, but he or she should be someone who respects the rule of law."

The National Lawyers Guild is an association of attorneys, law students and legal workers dedicated to the proposition that human rights are more important than property rights.

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HEADLINE: The Roots of Torture

BYLINE: By John Barry, Michael Hirsh and Michael Isikoff; With Mark Hosenball and Roy Gutman in Washington, T. Trent Gegax and Julie Scelfo in New York and Melinda Liu, Rod Nordland and Babak Dehghanpisheh in Baghdad

HIGHLIGHT:

The road to Abu Ghraib began after 9/11, when Washington wrote new rules to fight a new kind of war. A NEWSWEEK investigation

BODY:

It's not easy to get a member of Congress to stop talking. Much less a room full of them. But as a small group of legislators watched the images flash by in a small, darkened hearing room in the Rayburn Building last week, a sickened silence descended. There were 1,800 slides and several videos, and the show went on for three hours. The nightmarish images showed American soldiers at Abu Ghraib Prison forcing Iraqis to masturbate. American soldiers sexually assaulting Iraqis with chemical light sticks. American soldiers laughing over dead Iraqis whose bodies had been abused and mutilated. There was simply nothing to say. "It was a very subdued walk back to the House floor," said Rep. Jane Harman, the ranking Democrat on the House Intelligence Committee. "People were ashen."

The White House put up three soldiers for court-martial, saying the pictures were all the work of a few bad-apple MPs who were poorly supervised. But evidence was mounting that the furor was only going to grow and probably sink some prominent careers in the process. Senate Armed Services Committee chairman John Warner declared the pictures were the worst "military misconduct" he'd seen in 60 years, and he planned more hearings. Republicans on Capitol Hill were notably reluctant to back Defense Secretary Donald Rumsfeld. And NEWSWEEK has learned that U.S. soldiers and CIA operatives could be accused of war crimes. Among the possible charges: homicide involving deaths during interrogations. "The photos clearly demonstrate to me the level of prisoner abuse and mistreatment went far beyond what I expected, and certainly involved more than six or seven MPs," said GOP Sen. Lindsey Graham, a former military prosecutor. He added: "It seems to have been planned."

Indeed, the single most iconic image to come out of the abuse scandal--that of a hooded man standing naked on a box, arms outspread, with wires dangling from his fingers, toes and penis--may do a lot to undercut the administration's case that this was the work of a few criminal MPs. That's because the practice shown in that photo is an arcane torture method known only to veterans of the interrogation trade. "Was that something that [an MP] dreamed up by herself? Think again," says Darius Rejali, an expert on the use of torture by democracies. "That's a standard torture. It's called 'the Vietnam.' But it's not common knowledge. Ordinary American soldiers did this, but someone taught them."

Who might have taught them? Almost certainly it was their superiors up the line. Some of the images from Abu Ghraib, like those of naked prisoners terrified by attack dogs or humiliated before grinning female guards, actually portray "stress and duress" techniques officially approved at the highest levels of

the government for use against terrorist suspects. It is unlikely that President George W. Bush or senior officials ever knew of these specific techniques, and late last week Defense spokesman Larry DiRita said that "no responsible official of the Department of Defense approved any program that could conceivably have been intended to result in such abuses." But a NEWSWEEK investigation shows that, as a means of pre-empting a repeat of 9/11, Bush, along with Defense Secretary Rumsfeld and Attorney General John Ashcroft, signed off on a secret system of detention and interrogation that opened the door to such methods. It was an approach that they adopted to sidestep the historical safeguards of the Geneva Conventions, which protect the rights of detainees and prisoners of war. In doing so, they overrode the objections of Secretary of State Colin Powell and America's top military lawyers--and they left underlings to sweat the details of what actually happened to prisoners in these lawless places. While no one deliberately authorized outright torture, these techniques entailed a systematic softening up of prisoners through isolation, privations, insults, threats and humiliation--methods that the Red Cross concluded were "tantamount to torture."

The Bush administration created a bold legal framework to justify this system of interrogation, according to internal government memos obtained by NEWSWEEK. What started as a carefully thought-out, if aggressive, policy of interrogation in a covert war--designed mainly for use by a handful of CIA professionals--evolved into ever-more ungoverned tactics that ended up in the hands of untrained MPs in a big, hot war. Originally, Geneva Conventions protections were stripped only from Qaeda and Taliban prisoners. But later Rumsfeld himself, impressed by the success of techniques used against Qaeda suspects at Guantanamo Bay, seemingly set in motion a process that led to their use in Iraq, even though that war was supposed to have been governed by the Geneva Conventions. Ultimately, reservist MPs, like those at Abu Ghraib, were drawn into a system in which fear and humiliation were used to break prisoners' resistance to interrogation.

"There was a before-9/11 and an after-9/11," as Cofer Black, the onetime director of the CIA's counterterrorist unit, put it in testimony to Congress in early 2002. "After 9/11 the gloves came off." Many Americans thrilled to the martial rhetoric at the time, and agreed that Al Qaeda could not be fought according to traditional rules. But it is only now that we are learning what, precisely, it meant to take the gloves off.

The story begins in the months after September 11, when a small band of conservative lawyers within the Bush administration staked out a forward-leaning legal position. The attacks by Al Qaeda on the World Trade Center and the Pentagon, these lawyers said, had plunged the country into a new kind of war. It was a conflict against a vast, outlaw, international enemy in which the rules of war, international treaties and even the Geneva Conventions did not apply. These positions were laid out in secret legal opinions drafted by lawyers from the Justice Department's Office of Legal Counsel, and then endorsed by the Department of Defense and ultimately by White House counsel Alberto **Gonzales**, according to copies of the opinions and other internal legal memos obtained by NEWSWEEK.

The Bush administration's emerging approach was that America's enemies in this war were "unlawful" combatants without rights. One Justice Department memo, written for the CIA late in the fall of 2001, put an extremely narrow interpretation on the international anti-torture convention, allowing the agency to use a whole range of techniques--including sleep deprivation, the use of phobias and the deployment of "stress factors"--in interrogating Qaeda suspects. The only clear prohibition was "causing severe physical or mental pain"--a subjective judgment that allowed for "a whole range of things in between," said one former administration official familiar with the opinion. On Dec. 28, 2001, the Justice Department Office of Legal Counsel weighed in with another opinion, arguing that U.S. courts had no jurisdiction to review the treatment of foreign prisoners at Guantanamo Bay. The appeal of Gitmo from the start was that, in the view of administration lawyers, the base existed in a legal twilight zone--or "the legal equivalent of outer space," as one former administration lawyer described it. And on Jan. 9, 2002,

John Yoo of Justice's Office of Legal Counsel coauthored a sweeping 42-page memo concluding that neither the Geneva Conventions nor any of the laws of war applied to the conflict in Afghanistan.

Cut out of the process, as usual, was Colin Powell's State Department. So were military lawyers for the uniformed services. When State Department lawyers first saw the Yoo memo, "we were horrified," said one. As State saw it, the Justice position would place the United States outside the orbit of international treaties it had championed for years. Two days after the Yoo memo circulated, the State Department's chief legal adviser, William Howard Taft IV, fired a memo to Yoo calling his analysis "seriously flawed." State's most immediate concern was the unilateral conclusion that all captured Taliban were not covered by the Geneva Conventions. "In previous conflicts, the United States has dealt with tens of thousands of detainees without repudiating its obligations under the Conventions," Taft wrote. "I have no doubt we can do so here, where a relative handful of persons is involved."

The White House was undeterred. By Jan. 25, 2002, according to a memo obtained by NEWSWEEK, it was clear that Bush had already decided that the Geneva Conventions did not apply at all, either to the Taliban or Al Qaeda. In the memo, which was written to Bush by **Gonzales**, the White House legal counsel told the president that Powell had "requested that you reconsider that decision." **Gonzales** then laid out startlingly broad arguments that anticipated any objections to the conduct of U.S. soldiers or CIA interrogators in the future. "As you have said, the war against terrorism is a new kind of war," **Gonzales** wrote to Bush. "The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians." **Gonzales** concluded in stark terms: "In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions."

Gonzales also argued that dropping Geneva would allow the president to "preserve his flexibility" in the war on terror. His reasoning? That U.S. officials might otherwise be subject to war-crimes prosecutions under the Geneva Conventions. **Gonzales** said he feared "prosecutors and independent counsels who may in the future decide to pursue unwarranted charges" based on a 1996 U.S. law that bars "war crimes," which were defined to include "any grave breach" of the Geneva Conventions. As to arguments that U.S. soldiers might suffer abuses themselves if Washington did not observe the conventions, **Gonzales** argued wishfully to Bush that "your policy of providing humane treatment to enemy detainees gives us the credibility to insist on like treatment for our soldiers."

When Powell read the **Gonzales** memo, he "hit the roof," says a State source. Desperately seeking to change Bush's mind, Powell fired off his own blistering response the next day, Jan. 26, and sought an immediate meeting with the president. The proposed anti-Geneva Convention declaration, he warned, "will reverse over a century of U.S. policy and practice" and have "a high cost in terms of negative international reaction." Powell won a partial victory: On Feb. 7, 2002, the White House announced that the United States would indeed apply the Geneva Conventions to the Afghan war--but that Taliban and Qaeda detainees would still not be afforded prisoner-of-war status. The White House's halfway retreat was, in the eyes of State Department lawyers, a "hollow" victory for Powell that did not fundamentally change the administration's position. It also set the stage for the new interrogation procedures unguided by international law.

What Bush seemed to have in mind was applying his broad doctrine of pre-emption to interrogations: to get information that could help stop terrorist acts before they could be carried out. This was justified by what is known in counterterror circles as the "ticking time bomb" theory--the idea that when faced with an imminent threat by a terrorist, almost any method is justified, even torture.

With the legal groundwork laid, Bush began to act. First, he signed a secret order granting new powers

to the CIA. According to knowledgeable sources, the president's directive authorized the CIA to set up a series of secret detention facilities outside the United States, and to question those held in them with unprecedented harshness. Washington then negotiated novel "status of forces agreements" with foreign governments for the secret sites. These agreements gave immunity not merely to U.S. government personnel but also to private contractors. (Asked about the directive last week, a senior administration official said, "We cannot comment on purported intelligence activities.")

The administration also began "rendering"--or delivering terror suspects to foreign governments for interrogation. Why? At a classified briefing for senators not long after 9/11, CIA Director George Tenet was asked whether Washington was going to get governments known for their brutality to turn over Qaeda suspects to the United States. Congressional sources told NEWSWEEK that Tenet suggested it might be better sometimes for such suspects to remain in the hands of foreign authorities, who might be able to use more aggressive interrogation methods. By 2004, the United States was running a covert charter airline moving CIA prisoners from one secret facility to another, sources say. The reason? It was judged impolitic (and too traceable) to use the U.S. Air Force.

At first--in the autumn of 2001--the Pentagon was less inclined than the CIA to jump into the business of handling terror suspects. Rumsfeld himself was initially opposed to having detainees sent into DOD custody at Guantanamo, according to a DOD source intimately involved in the Gitmo issue. "I don't want to be jailer to the goddammed world," said Rumsfeld. But he was finally persuaded. Those sent to Gitmo would be hard-core Qaeda or other terrorists who might be liable for war-crimes prosecutions, and who would likely, if freed, "go back and hit us again," as the source put it.

In mid-January 2002 the first plane-load of prisoners landed at Gitmo's Camp X-Ray. Still, not everyone was getting the message that this was a new kind of war. The first commander of the MPs at Gitmo was a one-star from the Rhode Island National Guard, Brig. Gen. Rick Baccus, who, a Defense source recalled, mainly "wanted to keep the prisoners happy." Baccus began giving copies of the Qur'an to detainees, and he organized a special meal schedule for Ramadan. "He was even handing out printed 'rights cards'," the Defense source recalled. The upshot was that the prisoners were soon telling the interrogators, "Go f--- yourself, I know my rights." Baccus was relieved in October 2002, and Rumsfeld gave military intelligence control of all aspects of the Gitmo camp, including the MPs.

Pentagon officials now insist that they flatly ruled out using some of the harsher interrogation techniques authorized for the CIA. That included one practice--reported last week by The New York Times--whereby a suspect is pushed underwater and made to think he will be drowned. While the CIA could do pretty much what it liked in its own secret centers, the Pentagon was bound by the Uniform Code of Military Justice. Military officers were routinely trained to observe the Geneva Conventions. According to one source, both military and civilian officials at the Pentagon ultimately determined that such CIA techniques were "not something we believed the military should be involved in."

But in practical terms those distinctions began to matter less. The Pentagon's resistance to rougher techniques eroded month by month. In part this was because CIA interrogators were increasingly in the same room as their military-intelligence counterparts. But there was also a deliberate effort by top Pentagon officials to loosen the rules binding the military.

Toward the end of 2002, orders came down the political chain at DOD that the Geneva Conventions were to be reinterpreted to allow tougher methods of interrogation. "There was almost a revolt" by the service judge advocates general, or JAGs, the top military lawyers who had originally allied with Powell against the new rules, says a knowledgeable source. The JAGs, including the lawyers in the office of the chairman of the Joint Chiefs, Gen. Richard Myers, fought their civilian bosses for months--but finally lost. In April 2003, new and tougher interrogation techniques were approved. Covertly, though, the

JAGs made a final effort. They went to see Scott Horton, a specialist in international human-rights law and a major player in the New York City Bar Association's human-rights work. The JAGs told Horton they could only talk obliquely about practices that were classified. But they said the U.S. military's 50-year history of observing the demands of the Geneva Conventions was now being overturned. "There is a calculated effort to create an atmosphere of legal ambiguity" about how the conventions should be interpreted and applied, they told Horton. And the prime movers in this effort, they told him, were DOD Under Secretary for Policy Douglas Feith and DOD general counsel William Haynes. There was, they warned, "a real risk of a disaster" for U.S. interests.

The approach at Gitmo soon reflected these changes. Under the leadership of an aggressive, self-assured major general named Geoffrey Miller, a new set of interrogation rules became doctrine. Ultimately what was developed at Gitmo was a "72-point matrix for stress and duress," which laid out types of coercion and the escalating levels at which they could be applied. These included the use of harsh heat or cold; withholding food; hooding for days at a time; naked isolation in cold, dark cells for more than 30 days, and threatening (but not biting) by dogs. It also permitted limited use of "stress positions" designed to subject detainees to rising levels of pain.

While the interrogators at Gitmo were refining their techniques, by the summer of 2003 the "postwar" insurgency in Iraq was raging. And Rumsfeld was getting impatient about the poor quality of the intelligence coming out of there. He wanted to know: Where was Saddam? Where were the WMD? Most immediately: Why weren't U.S. troops catching or forestalling the gangs planting improvised explosive devices by the roads? Rumsfeld pointed out that Gitmo was producing good intel. So he directed Steve Cambone, his under secretary for intelligence, to send Gitmo commandant Miller to Iraq to improve what they were doing out there. Cambone in turn dispatched his deputy, Lt. Gen. William (Jerry) Boykin--later to gain notoriety for his harsh comments about Islam--down to Gitmo to talk with Miller and organize the trip. In Baghdad in September 2003, Miller delivered a blunt message to Brig. Gen. Janis Karpinski, who was then in charge of the 800th Military Police Brigade running Iraqi detentions. According to Karpinski, Miller told her that the prison would thenceforth be dedicated to gathering intel. (Miller says he simply recommended that detention and intelligence commands be integrated.) On Nov. 19, Abu Ghraib was formally handed over to tactical control of military-intelligence units.

By the time Gitmo's techniques were exported to Abu Ghraib, the CIA was already fully involved. On a daily basis at Abu Ghraib, says Paul Wayne Bergin, a lawyer for MP defendant Sgt. Javal Davis, the CIA and other intel officials "would interrogate, interview prisoners exhaustively, use the approved measures of food and sleep deprivation, solitary confinement with no light coming into cell 24 hours a day. Consequently, they set a poor example for young soldiers but it went even further than that."

Today there is no telling where the scandal will bottom out. But it is growing harder for top Pentagon officials, including Rumsfeld himself, to absolve themselves of all responsibility. Evidence is growing that the Pentagon has not been forthright on exactly when it was first warned of the alleged abuses at Abu Ghraib. U.S. officials continued to say they didn't know until mid-January. But Red Cross officials had alerted the U.S. military command in Baghdad at the start of November. The Red Cross warned explicitly of MPs conducting "acts of humiliation such as [detainees'] being made to stand naked... with women's underwear over the head, while being laughed at by guards, including female guards, and sometimes photographed in this position." Karpinski recounts that the military-intel officials there regarded this criticism as funny. She says: "The MI officers said, 'We warned the [commanding officer] about giving those detainees the Victoria's Secret catalog, but he wouldn't listen.'" The Coalition commander in Iraq, Lt. Gen. Ricardo Sanchez, and his Iraq command didn't begin an investigation until two months later, when it was clear the pictures were about to leak.

Now more charges are coming. Intelligence officials have confirmed that the CIA inspector general is conducting an investigation into the death of at least one person at Abu Ghraib who had been subject to questioning by CIA interrogators. The Justice Department is likely to open full-scale criminal investigations into this CIA-related death and two other CIA interrogation-related fatalities.

As his other reasons for war have fallen away, President Bush has justified his ouster of Saddam Hussein by saying he's a "torturer and murderer." Now the American forces arrayed against the terrorists are being tarred with the same epithet. That's unfair: what Saddam did at Abu Ghraib during his regime was more horrible, and on a much vaster scale, than anything seen in those images on Capitol Hill. But if America is going to live up to its promise to bring justice and democracy to Iraq, it needs to get to the bottom of what happened at Abu Ghraib.

GRAPHIC: PHOTO: At the scene: Rumsfeld on his whirlwind trip to Iraq last week; PHOTO: 'Flexibility:' Powell was sidelined while **Gonzales** (below right) scoffed at 'quaint' Geneva strictures; PHOTO: What The Rules Say: The four Geneva Conventions are meant to lessen the horrors of war. The United States is among more than 150 signatories, but White House lawyers and human-rights groups disagree on the words exact meaning. Some basic areas of dispute;; PHOTO: PRISONERS OF WAR: Geneva III defines the rights of POWs, including not only captured armed forces, militias and resistance groups but civilian support staff. POWs can refuse to answer questions beyond name, rank and serial number and are guaranteed basic levels of humane treatment. Two 1977 protocols, not U.S.-signed, extend coverage to insurgents as long as they obey the laws of war.; PHOTO: CIVILIANS RIGHTS: Geneva IV covers the treatment of anyone who has no active part in a conflict. It forbids physical or moral coercion to obtain information and bans not only acts of brutality but (like Geneva III) outrages upon personal dignity, in particular humiliating and degrading treatment under any circumstances.; PHOTO: UNLAWFUL COMBATANTS: The Pentagon insists suspected Qaeda followers have no rights under Geneva III. "Should any doubt arise," Geneva III says, all belligerents are covered until "a competent tribunal" finds otherwise. No such tribunal has been announced.; PHOTO: Excellent briefing thanks meacham; PHOTO: Freedom: A father greets his sons last week on their release from incarceration at Abu Ghraib; PHOTO: Savagery: Terror chieftain al-Zarqawi recorded the beheading of Nicholas Berg, a U.S. civilian

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HEADLINE: A Tortured Debate

BYLINE: By Michael Hirsh, John Barry and Daniel Klaidman; With Michael Isikoff, Mark Hosenball and Tamara Lipper in Washington

HIGHLIGHT:

Amid feuding and turf battles, lawyers in the White House discussed specific terror-interrogation techniques like 'water-boarding' and 'mock burials'

BODY:

Ibn al-Shaykh al-Libi was America's first big trophy in the war on terror: a senior Qaeda operative captured amid the fighting in Afghanistan. What is less known is that al-Libi, who ran Qaeda training camps, quickly became the subject of a bitter feud between the FBI and the CIA over how to interrogate terror suspects. At the time of al-Libi's capture on Nov. 11, 2001, the questioning of detainees was still the FBI's province. For years the bureau's "bin Laden team" had sought to win suspects over with a carrots-and-no-sticks approach: favors in exchange for cooperation. One terrorist, in return for talking, even wangled a heart transplant for his child.

With al-Libi, too, the initial approach was to read him his rights like any arrestee, one former member of the FBI team told NEWSWEEK. "He was basically cooperating with us." But this was post-9/11; President Bush had declared war on Al Qaeda, and in a series of covert directives, he had authorized the CIA to set up secret interrogation facilities and to use new, harsher methods. The CIA, says the FBI source, was "fighting with us tooth and nail."

The handling of al-Libi touched off a long-running battle over interrogation tactics inside the administration. It is a struggle that continued right up until the Abu Ghraib scandal broke in April--and it extended into the White House, with Condoleezza Rice's National Security Council pitted against lawyers for the White House counsel and the vice president. Indeed, one reason the prison abuse scandal won't go away--two months after gruesome photos were published worldwide--is that a long paper trail of memos and directives from inside the administration has emerged, often leaked by those who disagreed with rougher means of questioning.

Last week the White House dismissed news accounts of one such memo, an explosive August 2002 brief from the Justice Department's Office of Legal Counsel disclosed by The Washington Post. The memo, drafted by former OLC lawyer John Yoo, has been widely criticized for seeming to flout conventions against torture. It defends most interrogation methods short of severe, intentionally inflicted pain and permanent damage. White House officials told reporters that such abstract legal reasoning was insignificant and did not reflect the president's orders. But NEWSWEEK has learned that Yoo's August 2002 memo was prompted by CIA questions about what to do with a top Qaeda captive, Abu Zubaydah, who had turned uncooperative. And it was drafted after White House meetings convened by George W. Bush's chief counsel, Alberto **Gonzales**, along with Defense Department general counsel William Haynes and David Addington, Vice President Dick Cheney's counsel, who discussed specific

interrogation techniques, says a source familiar with the discussions. Among the methods they found acceptable: "water-boarding," or dripping water into a wet cloth over a suspect's face, which can feel like drowning; and threatening to bring in more-brutal interrogators from other nations.

Al-Libi's capture, some sources say, was an early turning point in the government's internal debates over interrogation methods. FBI officials brought their plea to retain control over al-Libi's interrogation up to FBI Director Robert Mueller. The CIA station chief in Afghanistan, meanwhile, appealed to the agency's hawkish counterterrorism chief, Cofer Black. He in turn called CIA Director George Tenet, who went to the White House. Al-Libi was handed over to the CIA. "They duct-taped his mouth, cinched him up and sent him to Cairo" for more-fearsome Egyptian interrogations, says the ex-FBI official. "At the airport the CIA case officer goes up to him and says, 'You're going to Cairo, you know. Before you get there I'm going to find your mother and I'm going to f--- her.' So we lost that fight." (A CIA official said he had no comment.)

The FBI, with its "law enforcement" mind-set, found itself more and more marginalized. The struggle extended to the Guantanamo Bay detention center in early 2002, as "high value" suspects were shipped there for interrogation. Frustrated FBI officials, along with military interrogators like those from the Naval Criminal Investigation Service, found themselves "like kids with their noses pressed up against the glass," says a source involved in the early days at Gitmo. "Law enforcement had a long history of interrogating people. The intelligence community did not. Back in the cold war, they'd debriefed defectors. But that was all. So the intelligence community, once it got the mission, was searching for effective techniques of interrogation--and in their inexperience were floundering for a while."

Even within the CIA and the Defense Intelligence Agency, the debates never ceased. CIA officials remembered all too well how the agency was blamed in the 1970s human-rights backlash over covert plots. The agency, say senior intelligence officials, made sure it had explicit, written authorization from lawyers and senior policymakers before using new interrogation techniques. At the same time the agency felt intense pressure to extract information from suspects. So it began experimenting with methods like water-boarding and open-handed slapping. The CIA also asked to use "mock burial," in which a top Qaeda captive would be led to believe he was going to be buried alive. Administration officials declined to say whether the proposal was ever adopted. "My overwhelming impression is that everyone was focused on trying to avoid torture, staying within the line, while doing everything possible to save American lives," Tim Flanigan, formerly Bush's deputy White House counsel, told NEWSWEEK.

As with al-Libi, the internal debates usually turned on what to do with a specific Qaeda detainee. That's what happened in the summer of 2002 after the capture of Abu Zubaydah, who refused to cooperate after an initial spate of talkativeness. Frustrated CIA officials went to OLC lawyer Yoo for an opinion on bolder methods.

Another high-value Qaeda suspect captured toward the end of 2002, Mohamed al Qatani, provoked a major change of approach at Guantanamo Bay. "There was a spike in a lot of intel that we were picking up in terms of more attacks" on America, said Gen. James Hill, chief of the U.S. Southern Command. "We weren't getting anything out of him" using standard techniques outlined in Army Field Manual 34-52. So CIA and military-intel interrogators came up with new tactics based on the sorts of methods that U.S. Special Forces are specifically trained to resist, a Defense source says. The Special Forces' Survival, Evasion, Resistance and Escape course culminates in interrogations that include some physical roughing up; sensory, food and sleep deprivation, and a "water pit" in which detainees have to stand on tip-toe to keep from drowning.

Some inside the military criminal-investigation units at Gitmo, especially Navy personnel, approached

Navy Secretary Alberto Mora with their concerns about violations of the Geneva Conventions. Perturbed, Mora in January 2003 went to see the Defense Department's Haynes and argued that the DOD was getting into unethical territory, and he warned of unhappiness among the uniformed military on this issue. Haynes concurred. On Jan. 15, 2003, according to a chronology supplied by Pentagon officials, Defense Secretary Donald Rumsfeld suspended use of the heightened techniques. Haynes, on Rumsfeld's orders, then set up an Interrogation Working Group that issued a March 6, 2003, memo on accepted practices, which in turn was based on the reasoning of Yoo's August 2002 Justice Department brief.

It's still not clear whether these first decisions made in the war on terror eventually led to the abuses at Abu Ghraib. What does seem clear is that despite early efforts to vet interrogation techniques, the administration grew less and less careful as pressure built to get good intelligence. White House officials last week insisted that President Bush had made clear in an early-2002 policy directive that torture would not be used during the interrogation of Qaeda detainees. "The instructions went out to our people to adhere to the law," Bush himself told reporters. But the law according to whom? Bush originally said this was a war in which the old rules did not apply. But he may be learning now that they do.

GRAPHIC: PHOTO: Paper trail: The May 2003 report on interrogation policy; an injured detainee in Samarra--'He tripped,' said his GI captors; PHOTO: Painful Topic: Attorney General Ashcroft testifies on the Hill; an Iraqi mother and child hold a photo showing the boy's dead father and a U.S. soldier at Abu Ghraib; Rumsfeld during his May visit to the prison

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HEADLINE: Exclusive - **Gonzales's** Views on the Question of Torture

BYLINE: Michael Isikoff and Daniel Klaidman

BODY:

The confirmation hearings of White House counsel Alberto **Gonzales** to replace John Ashcroft as attorney general will spotlight long-running disputes within the president's legal team over the conduct of the war on terror. **Gonzales's** precise position was often a mystery. "When everybody else in the room was arguing, he's sitting there silently," says one former colleague. But **Gonzales** ultimately signed off on all of the administration's most controversial legal moves--including declaring U.S. citizens "enemy combatants" without permitting them to see lawyers and authorizing unorthodox interrogation techniques that critics say set the stage for the Abu Ghraib scandal.

One legal issue that worried **Gonzales** from the start, sources tell NEWSWEEK, was that U.S. officials--even those inside the White House--might one day be charged with "war crimes" as a result of some of the new measures. **Gonzales** first raised the issue in a Jan. 25, 2002, memo to President George W. Bush arguing against granting Geneva Convention protections to Taliban and Qaeda prisoners captured in Afghanistan. He noted that a 1996 U.S. law permitted prosecution for violating Geneva Convention bans on "inhumane treatment." A de-termination by Bush that the Geneva Conventions did not apply to the Afghan prisoners "substantially reduces the threat of domestic criminal prosecution under the War Crimes Act" by future "prosecutors and independent counsels" who might view administration actions in a different light, **Gonzales** wrote. The same concern later prompted **Gonzales**--at the request of the then CIA Director George Tenet--to seek a memo from the Justice Department's Office of Legal Counsel concluding the president could authorize the use of torture as a wartime interrogation technique (thereby immunizing CIA agents from being charged with violating a federal antitorture law). The disclosure of the Aug. 1, 2002, memo to **Gonzales** set off a firestorm, and top Justice officials demanded the White House repudiate the far-reaching legal claim. **Gonzales** later seemed to do that at a White House press briefing. But privately, some associates say, **Gonzales** was very much involved in the torture memo from the start. "The White House got exactly what it wanted," says one Justice official. Since then, NEWSWEEK has learned, the Justice Department's internal watchdog unit has quietly opened an inquiry into whether the lawyers who sent the memo to **Gonzales** breached their ethical obligations by seeming to condone torture.

Senate Democrats are expected to press for full disclosures on these and related matters. But privately, even they acknowledge his confirmation is all but assured.

GRAPHIC: PHOTO: 'What It Wanted': **Gonzales** has OK'd the Bush administration's contentious legal moves

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HEADLINE: Torture's Path

BYLINE: By Michael Isikoff, Daniel Klaidman and Michael Hirsh

HIGHLIGHT:

The paper trail is long, and it isn't pretty. But it's sure to produce some tough Senate questions for Alberto **Gonzales**.

BODY:

The CIA had a question for the top lawyers in the Bush administration: how far could the agency go in interrogating terror suspects--in particular, Abu Zubaydah, the close-mouthed Qaeda lieutenant who was resisting standard methods? So in July of 2002 the president's chief counsel, Alberto **Gonzales**, convened his colleagues in his cozy, wood-paneled White House office. One by one, the lawyers went over five or six pressure techniques proposed by the CIA. One such technique, a participant recalls, was "waterboarding" (making a suspect think he might drown). Another, mock burial, was nixed as too harsh. A third, the open-handed slapping of suspects, drew much discussion. The idea was "just to shock someone with the physical impact," one lawyer explained, with "little chance of bone damage or tissue damage." **Gonzales** and the lawyers also discussed in great detail how to legally justify such methods.

Among those at that first White House meeting was Justice Department lawyer John Yoo, who sat on a couch along the wall. And partly out of the discussions in **Gonzales**'s office came the most notorious legal document to emerge from last spring's Abu Ghraib interrogation scandal. This was an Aug. 1, 2002, memo--drafted by Yoo, signed by Assistant Attorney General Jay Bybee and addressed to **Gonzales**--which provoked outrage among human-rights advocates by narrowly defining torture. The memo concluded, among other things, that only severe pain or permanent damage that was "specifically intended" constituted torture. Mere "cruel, inhuman or degrading" treatment did not qualify.

At the White House meeting, **Gonzales** was concerned about observing the law, the participant recalls. "We didn't want to go over the line," he says. But **Gonzales**'s worry was: "Are we forward-leaning enough on this?" "That's a phrase I heard **Gonzales** use many times," recalls this lawyer. "Lean forward" had become a catchphrase for the administration's offensive approach to the war on terror. "And the second part of that statement was always, 'Prevent an attack, save lives.' If **Gonzales** had any role in this, it was to be the fair arbiter of 'Are we doing enough?'"

Such aggressiveness after 9/11 was typical for Alberto **Gonzales**, the soft-spoken Harvard Law graduate who has been George W. Bush's lawyer since the latter's days in the Texas governor's mansion. **Gonzales**'s legal and ethical advice will be the focus of confirmation hearings next month on his nomination as Bush's second-term attorney general. In the first months after 9/11, **Gonzales** helped to craft some of the most momentous and controversial decisions of Bush's presidency. Among them: to

create military commissions for the trials of terrorists, to designate U.S. citizens as "enemy combatants" and to disregard the Geneva Conventions in the treatment of prisoners at Guantanamo Bay. But until now he has steered clear of the spotlight. "He's kind of an enigma," says one lawyer who worked with him. "His defining characteristic is loyalty to the president."

Yet memos reviewed by NEWSWEEK and interviews with key principals show that **Gonzales's** advice to the president reflected the bold views laid out in the Aug. 1 memo and other documents. Sources close to the Senate Judiciary Committee say a chief focus of the hearings will be **Gonzales's** role in the so-called "torture memo," as well as his legal judgment in urging Bush to sidestep the Geneva Conventions. In a Jan. 25, 2002, memo to Bush, **Gonzales** said the new war on terror "renders obsolete Geneva's strict limitations on questioning of enemy prisoners." Some State Department lawyers charge that **Gonzales** misrepresented so many legal considerations and facts (including hard conclusions by State's Southeast Asia bureau about the nature of the Taliban) that one lawyer considers the memo to be "an ethical breach." In response, a senior White House official says **Gonzales's** memo was only a "draft" and just one part of an extensive decision-making process in which all views were aired.

By several accounts, **Gonzales** and his team were constantly looking to push legal limits, to widen and maximize Bush's powers. Just two weeks after September 11, an earlier secret memo drafted by Yoo had landed on **Gonzales's** desk, arguing there were effectively "no limits" on Bush's powers to respond to the attacks. Startlingly, the memo said the president could deploy military force "pre-emptively" against terror groups or entire countries that harbored them, "whether or not they can be linked to the specific terror incidents of Sept. 11." The president's decisions "are for him alone and are unreviewable," the memo said. Never before disclosed, the Sept. 25, 2001, memo was quietly posted on an obscure government Web site late last week. The 15-page memo is the earliest known statement of Bush's doctrine of pre-emptive war.

Last June, **Gonzales** indicated he no longer held some of the extreme views of the president's "unlimited" powers first laid out in this memo. Amid the furor over the Abu Ghraib Prison photos that depicted Iraqis being abused and humiliated by U.S. soldiers, **Gonzales** insisted to reporters that the "torture" memo of Aug. 1 and other documents then making headlines were little more than "irrelevant" legal theorizing. It is not surprising why **Gonzales** was distancing himself: the Justice Department's Office of Professional Responsibility recently launched an investigation into the origins of the Aug. 1 memo. The probe will look into whether the lawyers were irresponsible in pushing beyond the normal boundaries of advocacy. In a tense meeting last June, Jack Goldsmith, then head of the Justice Department's Office of Legal Counsel, told **Gonzales** he was withdrawing the Aug. 1 memo. Goldsmith then resigned--at least partly due to his discomfort about the memo. It was only then that **Gonzales** decided to distance himself from it. (Goldsmith declined to comment.)

But there is no evidence that **Gonzales** ever rejected such reasoning before the Abu Ghraib scandal came to light. On the contrary, sources say, he and his staff relied heavily on John Yoo and his legal theories. Most observers still expect **Gonzales** to be confirmed by the GOP-majority Senate. Yet it's clear he'll face some tough questioning first.

GRAPHIC: PHOTO: Hooded: A detainee being held near Balad airfield in Iraq; PHOTO: Company man: **Gonzales** deplaning from Air Force One

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Review

Torture and Truth

By [Mark Danner](#)

Article 15-6 Investigation of the 800th Military Police Brigade (The Taguba Report)
by Major General Antonio M. Taguba

Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation
by Delegates of the International Committee of the Red Cross, February 2004

Last November in Iraq, I traveled to Fallujah during the early days of what would become known as the "Ramadan Offensive"—when suicide bombers in the space of less than an hour destroyed the Red Cross headquarters and four police stations, and daily attacks by insurgents against US troops doubled, and the American adventure in Iraq entered a bleak tunnel from which it has yet to emerge. I inquired of a young man there why the people of that city were attacking Americans more frequently each day. How many of the attacks, I wanted to know, were carried out by foreign fighters? How many by local Islamists? And how many by what US officers called "FRL's"—former regime loyalists?^[1]

The young man—I'll call him Salih—listened, answered patiently in his limited but eloquent English, but soon became impatient with what he plainly saw as my American obsession with categories and particulars. Finally he interrupted my litany of questions, pushed his face close to mine, and spoke to me slowly and emphatically:

For Fallujans it is a *shame* to have foreigners break down their doors. It is a *shame* for them to have foreigners stop and search their women. It is a *shame* for the foreigners to put a bag over their heads, to make a man lie on the ground with your shoe on his neck. This is a great *shame*, you understand? This is a great *shame* for the whole tribe.

It is the *duty* of that man, and of that tribe, to get revenge on this soldier—to kill that man. Their duty is to attack them, to *wash the shame*. The shame is a *stain*, a dirty thing; they have to *wash* it. No sleep—we cannot sleep until we have revenge. They have to kill soldiers.

He leaned back and looked at me, then tried one more time. "The Americans," he said, "*provoke* the people. They don't *respect* the people."

I thought of Salih and his impatience as I paged through the reports of General Taguba and the Red Cross, for they treat not just of "abuses" or "atrocities" but the entire American "liberation" of Iraq and how it has gone wrong; they are dispatches from the scene of a political disaster. Salih came strongly to mind as I read one of the less lurid sections of the Red Cross report, entitled "Treatment During Arrest," in which the anonymous authors tell how Iraqis they'd interviewed described "a fairly consistent pattern... of brutality by members of the [Coalition Forces] arresting them":

Arresting authorities entered houses usually after dark, breaking down doors, waking up residents roughly, yelling orders, forcing family members into one room under military guard while searching the rest of the house and further breaking doors, cabinets and other property. They arrested suspects, tying their hands in the back with flexi-cuffs, hooding them, and taking them away. Sometimes they arrested all adult males present in a house, including elderly, handicapped or sick people...pushing people around, insulting, taking aim with rifles, punching and kicking and striking with rifles.

Of course, this is war; those soldiers had intelligence to gather, insurgents to find, a rebellion to put down. However frightening such nighttime arrests might be, Iraqis could at least expect that these soldiers were accountable, that they had commanding officers and a clear chain of command, that there were bases to which one could go and complain. These were, after all, Americans. And yet:

In almost all instances..., arresting authorities provided no information about who they were, where their base was located, nor did they explain the cause of arrest. Similarly, they rarely informed the arrestee or his family where he was being taken and for how long, resulting in the de facto "disappearance" of the arrestee.... Many [families] were left without news for months, often fearing that their relatives were dead.

We might pass over with a shiver the word "disappearance," with its unfortunate associations, and say to ourselves, once again, that this was war: insurgents were busy killing American soldiers and had to be rooted out, even if it meant one or two innocent civilians were sucked up into the system. And then one comes upon this quiet little sentence:

Certain [Coalition Forces] military intelligence officers told the ICRC that in their estimate between 70 percent and 90 percent of the persons deprived of their liberty in Iraq had been arrested by mistake.
[emphasis added]

Abu Ghraib contained within its walls last fall—as the war heated up and American soldiers, desperate for "actionable intelligence," spent many an autumn

evening swooping down on Iraqi homes, kicking in doors, and carrying away hooded prisoners into the night—well over eight thousand Iraqis. Could it be that "between 70 percent and 90 percent" of them were "arrested by mistake"? And if so, which of the naked, twisted bodies that television viewers and news paper readers around the world have been gazing at these last weeks were among them? Perhaps the seven bodies piled up in that great coil, buttocks and genitals exposed to the camera? Or the bodies bound one against another on the cellblock floor? Or the body up against the bars, clenched before the teeth of barking police dogs?

Consider the naked body wearing only the black hood, hands clasped above its head: Pfc Lyndie England, she of the famous leash, frames the body like a car salesman displaying next year's model, grinning back at the camera, pointing to its genitals with her right hand, flashing a thumbs-up with her left. This body belongs to Hayder Sabbar Abd, a thirty-four-year-old Shiite from Nasiriya, also known as Abu Ghraib Prisoner Number 13077. Last June, at a military checkpoint in the south, according to *The New York Times*, Mr. Abd "tried to leave the taxi he was riding in." Suspicious behavior, rendered more suspicious by the fact that Mr. Abd had served eighteen years in the Iraqi army, part of that time in the Republican Guard. The Americans took him to a detention center at Baghdad airport, and from there to the big military prison at Um Qasr, and finally, after three months, to Abu Ghraib. A strange odyssey through Occupied Iraq, made stranger by the fact that during that time, Mr. Abd says, "he was never interrogated, and never charged with a crime." "The truth is," he told Ian Fisher of *The New York Times*, "we were not terrorists. We were not insurgents. We were just ordinary people. And American intelligence knew this."

As I write, we know nothing of what "American intelligence knew"—apart from a hint here or there, this critical fact is wholly absent from both reports, as it has been from the public hearings of Secretary of Defense Donald Rumsfeld and other officials. General Taguba, following his orders, concentrates instead on the activities of the military police, hapless amateurs who were "tasked" to "set physical and mental conditions for favorable interrogation of witnesses" and whose work, thanks to digital photography, has now been displayed so vividly to the citizens of the world. It is this photography that has let us visualize something of what happened to Mr. Abd one night in early November, following a fight among prisoners, when he and six other men were brought to what was known as "the hard site" at Abu Ghraib, the wing for the most dangerous prisoners:

The seven men were all placed in hoods, he said, and the beating began. "They beat our heads on the walls and the doors," he said. "I don't really know: I couldn't see." He said his jaw had been broken, badly enough that he still has trouble eating. In all, he said, he believes that he received about 50 blows over about two hours.

"Then the interpreter told us to strip," he said. "We told him: 'You are Egyptian, and you are a Muslim. You know that as Muslims we can't do that.' When we refused to take off our clothes, they beat us and tore our clothes off with a blade."

It was at this moment in the interview...that several pages of the

photographs made public last week were produced.... He quickly and unemotionally pointed out all his friends—Hussein, Ahmed, Hashim—naked, hooded, twisted around each other.

He also saw himself, as degraded as possible: naked, his hand on his genitals, a female soldier, identified in another report as Pvt. Lynndie England, pointing and smiling with a cigarette in her mouth. Mr. Abd said one of the soldiers had removed his hood, and the translator ordered him to masturbate while looking at Private England....

"She was laughing, and she put her hands on her breasts," Mr. Abd said. "Of course, I couldn't do it. I told them that I couldn't, so they beat me in the stomach, and I fell to the ground. The translator said, 'Do it! Do it! It's better than being beaten.' I said, 'How can I do it?' So I put my hand on my penis, just pretending."

All the while, he said, the flash of the camera kept illuminating the dim room that once held prisoners of Mr. Hussein....^[2]

Such scenes, President Bush tells us, "do not represent America." But for Iraqis, what does? To Salih and other Iraqis they represent the logical extension of treatment they have seen every day under a military occupation that began harshly and has grown, under the stress of the insurgency, more brutal. As another young Iraqi man told me in November,

The attacks on the soldiers have made the army close down. You go outside and there's a guy on a Humvee pointing a machine gun at you. You learn to raise your hands, to turn around. You come to hate the Americans.

This of course is a prime goal of the insurgents; they cannot defeat the Americans militarily but they can defeat them politically. For the insurgents, the path to such victory lies in provoking the American occupiers to do their political work for them; the insurgents ambush American convoys with "improvised explosive devices" placed in city neighborhoods so the Americans will respond by wounding and killing civilians, or by imprisoning them in places like Abu Ghraib.^[3] The insurgents want to place the outnumbered, overworked American troops under constant fear and stress so they will mistreat Iraqis on a broad scale and succeed in making themselves hated.

In this project, as these reports make clear, the methods used at Abu Ghraib played a critical part. For if Americans are learning about these "abuses" for the first time, news about what has been happening at Abu Ghraib and other prisons has been spreading throughout Iraq for many months. And if the Iraqis, with their extensive experience of Abu Ghraib and the purposes it served in the national imagination, do not regard such methods as "abuses," neither do the investigators of the Red Cross:

These methods of physical and psychological coercion were used by the military intelligence in a systematic way to gain confessions and extract

information or other forms of co-operation from persons who had been arrested in connection with suspected security offences or deemed to have an "intelligence value." [emphasis added]

What, according to the Red Cross, were these "methods of physical and psychological coercion"?

- Hooding, used to prevent people from seeing and to disorient them, and also to prevent them from breathing freely. One or sometimes two bags, sometimes with an elastic blindfold over the eyes which, when slipped down, further impeded proper breathing. Hooding was sometimes used in conjunction with beatings thus increasing anxiety as to when blows would come. The practice of hooding also allowed the interrogators to remain anonymous and thus to act with impunity. Hooding could last for periods from a few hours to up to two to four consecutive days...;
- Handcuffing with flexi-cuffs, which were sometimes made so tight and used for such extended periods that they caused skin lesions and long-term after-effects on the hands (nerve damage), as observed by the ICRC;
- Beatings with hard objects (including pistols and rifles), slapping, punching, kicking with knees or feet on various parts of the body (legs, sides, lower back, groin)...;
- Being paraded naked outside cells in front of other persons deprived of their liberty, and guards, sometimes hooded or with women's underwear over the head...;
- Being attached repeatedly over several days...with handcuffs to the bars of their cell door in humiliating (i.e. naked or in underwear) and/or uncomfortable position causing physical pain;
- Exposure while hooded to loud noise or music, prolonged exposure while hooded to the sun over several hours, including during the hottest time of the day when temperatures could reach...122 degrees Fahrenheit...or higher;
- Being forced to remain for prolonged periods in stress positions such as squatting or standing with or without the arms lifted.

The authors of the Red Cross report note that when they visited the "isolation section" of Abu Ghraib in mid-October 2003, they "directly witnessed and documented a variety of methods used to secure the cooperation" of prisoners, among them "the practice of keeping [prisoners] completely naked in totally empty concrete cells and in total darkness..." When the Red Cross delegates "requested an explanation from the authorities...the military intelligence officer in charge of the interrogation explained that this practice was 'part of the process.'"

The ICRC medical delegate examined persons...presenting signs of concentration difficulties, memory problems, verbal expression difficulties, incoherent speech, acute anxiety reactions, abnormal behavior and suicidal tendencies. These symptoms appeared to have been caused by the methods and duration of interrogation.

This "process" is not new; indeed, like so many of the news stories presented as "revelation" during these last few months, it has appeared before in the American press. After the arrest in Pakistan more than a year ago of Khalid Sheikh Mohammed, the al-Qaeda operations chief, "senior American officials" told *The New York Times* that "physical torture would not be used against Mr. Mohammed":

They said his interrogation would rely on what they consider acceptable techniques like sleep and light deprivation and the temporary withholding of food, water, access to sunlight and medical attention.

American officials acknowledged that such techniques were recently applied as part of the interrogation of Abu Zubaydah, the highest-ranking Qaeda operative in custody until the capture of Mr. Mohammed. Painkillers were withheld from Mr. Zubaydah, who was shot several times during his capture in Pakistan.^[4]

In the same article, published more than a year ago, a number of American officials discussed the "methods and techniques" applied in interrogations at Afghanistan's Bagram Air Base, at Guantanamo, and at other secret prisons now holding the thousands who have been arrested and confined by American and allied forces since the attacks of September 11:

Routine techniques include covering suspects' heads with black hoods for hours at a time and forcing them to stand or kneel in uncomfortable positions in extreme cold or heat.... In some cases, American officials said, women are used as interrogators to try to humiliate men....

Disorientation is a tool of interrogation and therefore a way of life. To that end, the building—an unremarkable hangar—is lighted twenty-four hours a day, making sleep almost impossible, said Muhammad Shah, an Afghan farmer who was held there for eighteen days.

Colonel King said it was legitimate to use lights, noise and vision restriction, and to alter, without warning, the time between meals, to blur a detainee's sense of time. He said sleep deprivation was "probably within the lexicon...."

Two former prisoners said they had been forced to stand with their hands chained to the ceiling and their feet shackled in the isolation cells.

The "methods of physical and psychological coercion" that the Red Cross delegates witnessed at Abu Ghraib were indeed, as the "military intelligence officer in charge of the interrogation" told them frankly, "part of" a "process" that has been deployed by American interrogators in the various American-run secret prisons

throughout the world since September 11. What separates Abu Ghraib from the rest is not the "methods of physical and psychological coercion used" but the fact that, under the increasing stress of the war, the pressing need for intelligence, and the shortage of available troops and other resources in Iraq, military policemen like Pfc England, who had little or no training, were pressed into service to "soften up" the prisoners and, as the Taguba report puts it, set "the conditions for successful exploitation of the internees." And so when Specialist Sabrina Harman was asked about the prisoner who was placed on a box with electric wires attached to his fingers, toes, and penis, in an image now famous throughout the world, she replied that "her job was to keep detainees awake," that "MI [military intelligence] wanted to get them to talk," and that it was the job of her and her colleagues "to do things for MI and OGA [Other Government Agencies, a euphemism for the CIA] to get these people to talk." The military police, who, General Taguba notes, had "no training in interrogation," were told, in the words of Sergeant Javal S. Davis, to "loosen this guy up for us." "Make sure he has a bad night." "Make sure he gets the treatment."

As for the unusual methods used—"breaking of chemical lights and pouring the phosphoric liquid on detainees," "using military working dogs to frighten and intimidate detainees," "beating detainees with a broom handle and a chair," "threatening male detainees with rape," "sodomizing a detainee with a chemical light and perhaps a broom stick," and the rest of the sad litany General Taguba patiently sets out Sergeant Davis told investigators that he "assumed that if they were doing things out of the ordinary or outside the guidelines, someone would have said something. Also the wing belongs to MI and it appeared MI personnel approved of the abuse."

Many of the young Americans smiling back at us in the photographs will soon be on trial. It is unlikely that those who ran "the process" and issued the orders will face the same tribunals. Iraqis will be well aware of this, even if Americans are not. The question is whether Americans have traveled far enough from the events of September 11 to go beyond the photographs, which show nothing more than the amateur stooges of "the process," and look squarely at the process itself, the process that goes on daily at Abu Ghraib, Guant-namo, Bagram, and other secret prisons in Iraq and around the world.

To date the true actors in those lurid scenes, who are professionals and no doubt embarrassed by the garish brutality of their apprentices in the military police, have remained offstage. None has testified. The question we must ask in coming days, as Specialist Jeremy Sivits and other young Americans face public courts-martial in Baghdad, is whether or not we as Americans can face a true revelation. We must look squarely at the photographs and ask: Is what has changed only what we know, or what we are willing to accept?

—May 12, 2004
(This is the first of two articles.)

Notes

^[1] See my "Delusions in Baghdad," *The New York Review*, December 18, 2003.

^[2] See "Iraqi Recounts Hours of Abuse by US Troops," *The New York Times*, May 5, 2004, p. A1.

^[3] See my "Iraq: The New War," *The New York Review*, September 25, 2003.

^[4] See Don Van Natta Jr., "Questioning Terror Suspects in a Dark and Surreal World," *The New York Times*, March 9, 2003.

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Feature

The Logic of Torture

By [Mark Danner](#)

1.

We've now had fifteen of the highest-level officials involved in this entire operation, from the secretary of defense to the generals in command, and nobody knew that anything was amiss, no one approved anything amiss, nobody did anything amiss. We have a general acceptance of responsibility, but there's no one to blame, except for the people at the very bottom of one prison.

—Senator Mark Dayton (D-Minn.), Armed Services Committee, May 19, 2004

What is difficult is separating what we now know from what we have long known but have mostly refused to admit. Though the events and disclosures of the last weeks have taken on the familiar clothing of a Washington scandal—complete with full-dress congressional hearings, daily leaks to reporters from victim and accused alike, and of course the garish, spectacular photographs and videos from Abu Ghraib—beyond that bright glare of revelation lies a dark area of unacknowledged clarity. Behind the exotic brutality so painstakingly recorded in Abu Ghraib, and the multiple tangled plotlines that will be teased out in the coming weeks and months about responsibility, knowledge, and culpability, lies a simple truth, well known but not yet publicly admitted in Washington: that since the attacks of September 11, 2001, officials of the United States, at various locations around the world, from Bagram in Afghanistan to Guantanamo in Cuba to Abu Ghraib in Iraq, have been torturing prisoners. They did this, in the felicitous phrasing of General Taguba's report, in order to "exploit [them] for actionable intelligence" and they did it, insofar as this is possible, with the institutional approval of the United States government, complete with memoranda from the President's counsel and officially promulgated decisions, in the case of Afghanistan and Guantanamo, about the nonapplicability of the Geneva Conventions and, in the case of Iraq, about at least three different sets of interrogation policies, two of them modeled on earlier practice in Afghanistan and Cuba.¹¹

They did it under the gaze of Red Cross investigators, whose confidential reports—which, after noting that "methods of physical and psychological coercion were used by the military intelligence in a systematic way to gain confessions and extract

information," then set out these "methods" in stark and sickening detail^[2]—were handed over to American military and government authorities and then mysteriously "became lost in the Army's bureaucracy and weren't adequately addressed."^[3] Or so three of the highest-ranking military officers in the land blandly explained to senators on the Armed Services Committee on May 19. On that same day, as it happened, an unnamed "senior Army officer who served in Iraq" told reporters for *The New York Times* that in fact the Army *had* addressed the Red Cross report—"by trying to curtail the international organization's spot inspections of the prison":

After the International Committee of the Red Cross observed abuses in one cellblock on two unannounced inspections in October and complained in writing on Nov. 6, the military responded that inspectors should make appointments before visiting the cellblock. That area was the site of the worst abuses. . . . Brig. Gen. Janis Karpinski, commander of the 800th Military Police Brigade, whose soldiers guarded the prisoners, said that despite the serious allegations in the Red Cross report, senior officers in Baghdad had treated it in "a light-hearted manner."^[4]

Why had these "senior officers" treated the grave allegations of the Red Cross, now the subject of so much high-level attention, in "a lighthearted manner"? The most plausible answer is that they did so not because they were irresponsible or incompetent or evil but because they were well aware that this report—like the others that had been issued by the Red Cross, and by Amnesty International and Human Rights Watch and other wellknown organizations—would have no bearing whatever on what the American military did or did not do in Iraq.

The officers almost certainly knew that, whatever the investigators of the Red Cross observed and wrote, American policies in Abu Ghraib prison were governed by entirely different concerns, and were sanctioned, even as the insurgency in Iraq gained strength and the demand for "actionable intelligence" became more urgent, by their most senior commanders— among others, by Lieutenant General Ricardo Sanchez, the overall commander in Iraq, who on October 12 (about the time Red Cross investigators were making their two unannounced inspections) signed a classified memorandum calling for interrogators at Abu Ghraib to work with military police guards to "manipulate an internee's emotions and weaknesses" and to assume control over the "lighting, heating . . . food, clothing, and shelter" of those they were questioning.^[5]

Six weeks later, Brigadier General Karpinski herself wrote to Red Cross officials to say that "military necessity" required the isolation of prisoners of "significant intelligence value" who were not, she asserted, entitled to "obtain full [Geneva Convention] protection," despite the Bush administration's stated position that the conventions would be "fully applicable" in Iraq.^[6] We now have a good deal of evidence about how military policemen at Abu Ghraib, who had been ordered (according to Sergeant Samuel Provance, one of the first soldiers in military intelligence to speak to reporters) to "strip down prisoners and embarrass them as a way to help 'break' them,"^[7] attempted, whether enthusiastically or reluctantly, to fulfill these orders.

2.

We can begin with the story of the as-yet-anonymous prisoner who on January 21, 2004, gave a sworn statement—obtained by *The Washington Post*—to the military's Criminal Investigation Division about his time in Abu Ghraib:

The first day they put me in a dark room and started hitting me in the head and stomach and legs.

They made me raise my hands and sit on my knees. I was like that for four hours. Then the interrogator came and he was looking at me while they were beating me. Then I stayed in this room for 5 days, naked with no clothes. . . . They put handcuffs on my hand and they cuffed me high for 7 or 8 hours. And that caused a rupture to my right hand and I had a cut that was bleeding and had pus coming from it. They kept me this way on 24, 25, and 26 October. And in the following days, they also put a bag over my head, and of course, this whole time I was without clothes and without anything to sleep on. And one day in November, they started different type of punishment, where an American Police came in my room and put the bag over my head and cuffed my hands and he took me out of the room into the hallway. He started beating me, him, and 5 other American Police. I could see their feet, only, from under the bag.

A couple of those police they were female because I heard their voices and I saw two of the police that were hitting me before they put the bag over my head. One of them was wearing glasses. I couldn't read his name because he put tape over his name. Some of the things they did was make me sit down like a dog, and they would hold the string from the bag and they made me bark like a dog and they were laughing at me. . . . One of the police was telling me to crawl in Arabic, so I crawled on my stomach and the police were spitting on me when I was crawling and hitting me. . . .

Then the police started beating me on my kidneys and then they hit me on my right ear and it started bleeding and I lost consciousness. . . .

A few days before they hit me on my ear, the American police, the guy who wears glasses, he put red woman's underwear over my head. And then he tied me to the window that is in the cell with my hands behind my back until I lost consciousness. And also when I was in Room #1 they told me to lay down on my stomach and they were jumping from the bed onto my back and my legs. And the other two were spitting on me and calling me names, and they held my hands and legs. After the guy with the glasses got tired, two of the American soldiers brought me to the ground and tied my hands to the door while laying down on my stomach. One of the police was pissing on me and laughing on me. . . . And the soldier and his friend told me in a loud voice to lie down, so I did that. And then the policeman was opening my legs, with a bag over my head, and he sat down between my legs on his knees and I was

looking at him from under the bag and they wanted to do me because I saw him and he was opening his pants, so I started screaming loudly and the other police starting hitting me with his feet on my neck and he put his feet on my head so I couldn't scream. . . . And then they put the loudspeaker inside the room and they closed the door and he was yelling in the microphone. . . .

They took me to the room and they signaled me to get on to the floor. And one of the police he put a part of his stick that he always carries inside my ass and I felt it going inside me about 2 centimeters, approximately. And I started screaming, and he pulled it out and he washed it with water inside the room. And then two American girls that were there when they were beating me, they were hitting me with a ball made of sponge on my dick. And when I was tied up in my room, one of the girls, with blonde hair, she is white, she was playing with my dick. . . . And they were taking pictures of me during all these instances.

[8]

What is one to make of this Dantesque nightmare journey? The very outlandishness of the brutality might lead one to think such acts, if not themselves fantasies, must be the product of a singularly sadistic mind—and that indeed, as the Army has maintained, we are dealing here with the abuses of a half-dozen or so unstable personalities, left unsupervised, their natures darkened and corrupted by the stresses of war and homesickness and by the virtually unlimited power that had been granted them. That the abuse reported by many other Abu Ghraib detainees in their affidavits, and depicted in the photographs, is very similar does not of course disprove the Army's "few bad apples" defense; on the contrary, perhaps these half-dozen or so miscreants simply terrorized their cellblock, inflicting similar abhorrent acts on anyone they pleased. But then we come upon the following report, written by the Reuters bureau chief in Baghdad and published in the magazine *Editor and Publisher*, about the treatment of three Iraqi employees of Reuters—two cameramen and a driver—who were filming near the site of the downing of a US helicopter near Fallujah in early January when troops of the 82nd Airborne Division arrived:

When the soldiers approached them they were standing by their car, a blue Opel. Salem Uraiby [who had worked for Reuters as a cameraman for twelve years] shouted "Reuters, Reuters, journalist, journalist." At least one shot was fired into the ground close to them.

They were thrown to the ground and soldiers placed guns to their heads. Their car was searched. Soldiers found their camera equipment and press badges and discovered no weapons of any kind. Their hands were cuffed behind their backs and they were thrown roughly into a Humvee where they lay on the floor. . . .

Once they arrived at the US base (this was [forward operating base] Volturno near Fallujah) they were kept in a holding area with around 40 other prisoners in a large room with several open windows. It was bitterly cold. . . .

Bags were alternately placed on their heads and taken off again. Deafening music was played on loudspeakers directly into their ears and they were told to dance around the room. Sometimes when they were doing this, soldiers would shine very bright [flashlights] directly into their eyes and hit them with the [flashlights]. They were told to lie on the floor and wiggle their backsides in the air to the music. They were told to do repeated press ups and to repeatedly stand up from a crouching position and then return to the crouching position.

Soldiers would move between them, whispering things in their ear. . . . Salem says they whispered that they wanted to have sex with him and were saying "come on, just for two minutes." They also said he should bring his wife so they could have sex with her. . . .

Soldiers would whisper in their ears "One, two, three . . ." and then shout something loudly right beside their ear. All of this went on all night. . . . Ahmad said he collapsed by morning. Sattar said he collapsed after Ahmad and began vomiting. . . .

When they were taken individually for interrogation, they were interrogated by two American soldiers and an Arab interpreter. All three shouted abuse at them. They were accused of shooting down the helicopter. Salem, Ahmad, and Sattar all reported that for their first interrogation they were told to kneel on the floor with their feet raised off the floor and with their hands raised in the air.

If they let their feet or hands drop they were slapped and shouted at. Ahmad said he was forced to insert a finger into his anus and lick it. He was also forced to lick and chew a shoe. For some of the interrogation tissue paper was placed in his mouth and he had difficulty breathing and speaking. Sattar too said he was forced to insert a finger into his anus and lick it. He was then told to insert this finger in his nose during questioning, still kneeling with his feet off the ground and his other arm in the air. The Arab interpreter told him he looked like an elephant. . . .

Ahmad and Sattar both said that they were given badges with the letter "C" on it. They did not know what the badges meant but whenever they were being taken from one place to another in the base, if any soldier saw their badge they would stop to slap them or hurl abuse.¹⁹¹

Different soldiers, different unit, different base; and yet it is obvious that much of what might be called the "thematic content" of the abuse is very similar: the hooding, the loud noises, the "stress positions," the sexual humiliations, the threatened assaults, and the forced violations—all seem to emerge from the same script, a script so widely known that apparently even random soldiers the Reuters staffers encountered in moving about the Voltorno base knew their parts and were able to play them. All of this, including the commonly recognized "badge," suggests a clear program that had been purposely devised and methodically distributed with the intention, in the words of General Sanchez's October 12 memorandum, of helping American troops "manipulate an internee's emotions and weaknesses."

3.

I think what happened is that you took a sophisticated concept at Gitmo, where the Geneva Convention did not apply . . . and you put it in the hands of people [in Iraq] who should have been driving trucks, or doing something else instead of guarding prisoners. It was a disaster waiting to happen.

—Senator Lindsey Graham (R-S.C.), Armed Services Committee

What "sophisticated concept" does Senator Graham have in mind? How can what seems to be random and bizarre brutality possibly be described as "sophisticated"?

Though we are limited here to what is publicly known, as Senator Graham with his security clearances is not, it is still possible to chart, in the history of "extreme interrogation" since the late Fifties, a general move toward more "scientific" and "touch-less" techniques, the lineaments of which are all too evident in the morbid accounts now coming out of Iraq. The most famous compilation of these techniques can be found in the CIA's manual *KUBARK Counterintelligence Interrogation*, produced in 1963, and in particular its chapter "The Coercive Counterintelligence Interrogation of Resistant Sources," which includes the observation that

All coercive techniques are designed to induce regression. . . . The result of external pressures of sufficient intensity is the loss of those defenses most recently acquired by civilized man. . . . "Relatively small degrees of homeostatic derangement, fatigue, pain, sleep, loss, or anxiety may impair these functions."¹⁹

The intent of such "homeostatic derangement," according to the CIA manual, is to induce "the debility-dependence-dread state," causing the prisoner to experience the "emotional and motivational reactions of intense fear and anxiety." . . .

The circumstances of detention are arranged to *enhance within the subject his feelings of being cut off from the known and the reassuring, and of being plunged into the strange*. . . . Control of the source's environment permits the interrogator to determine his diet, sleep pattern and other fundamentals. Manipulating these into irregularities, so that the subject becomes disorientated, is very likely to create feelings of fear and helplessness. [emphasis added]

Thus the hooding, the sleep deprivation, the irregular and insufficient meals, and the exposure to intense heat and cold. As a later version of the manual puts it, the "questioner"

is able to manipulate the subject's environment, to create unpleasant or intolerable situations, to disrupt patterns of time, space, and sensory perception. . . . Once this disruption is achieved, the subject's resistance is seriously impaired. He experiences a kind of psychological shock, which may only last briefly, but during which he is far . . . likelier to comply. . . . Frequently the subject will experience a feeling of guilt. *If the "questioner" can intensify these guilt feelings, it will increase the*

subject's anxiety and his urge to cooperate as a means of escape.^[11]
[emphasis added]

Viewed in this light, the garish scenes of humiliation pouring out in the photographs and depositions from Abu Ghraib—the men paraded naked down the cellblock with hoods on their heads, the forced masturbation, the forced homosexual activity, and all the rest—begin to be comprehensible; they are in fact staged operas of fabricated shame, intended to "intensify" the prisoner's "guilt feelings, increase his anxiety and his urge to cooperate." While many of the elements of abuse seen in the reports from Iraq, particularly the sensory deprivation and "stress positions," resemble methods used by modern intelligence services, including the Israelis and the British in Northern Ireland, some of the techniques seem clearly designed to exploit the particular sensitivities of Arab culture to public embarrassment, particularly in sexual matters.

The American military, of course, is well aware of these cultural sensitivities; last fall, for example, the Marine Corps offered to its troops, along with a weeklong course on Iraq's customs and history, a pamphlet which included these admonitions:

Do not shame or humiliate a man in public. Shaming a man will cause him and his family to be anti-Coalition.

The most important qualifier for all shame is for a third party to witness the act. If you must do something likely to cause shame, remove the person from view of others.

Shame is given by placing hoods over a detainee's head. Avoid this practice.

Placing a detainee on the ground or putting a foot on him implies you are God. This is one of the worst things we can do.

Arabs consider the following things unclean:

Feet or soles of feet.

Using the bathroom around others. Unlike Marines, who are used to open-air toilets, Arab men will not shower/use the bathroom together.

Bodily fluids. . .^[12]

These precepts, intended to help Marines get along with the Iraqis they were occupying by avoiding doing anything, however unwittingly, that might offend them, are turned precisely on their heads by interrogators at Abu Ghraib and other American bases. Detainees are kept hooded and bound; made to crawl and grovel on the floor, often under the feet of the American soldiers; forced to put shoes in their mouths. And in all of this, as the Red Cross report noted, the *public* nature of the humiliation is absolutely critical; thus the parading of naked bodies, the forced masturbation in front of female soldiers, the confrontation of one naked prisoner with one or more others, the forcing together of naked prisoners in "human

pyramids." And all of this was made to take place in full view not only of foreigners, men and women, but also of that ultimate third party: the ubiquitous digital camera with its inescapable flash, there to let the detainee know that the humiliation would not stop when the act itself did but would be preserved into the future in a way that the detainee would not be able to control. Whatever those taking them intended to do with the photographs, for the prisoners the camera had the potential of exposing his humiliation to family and friends, and thus served as a "shame multiplier," putting enormous power in the hands of the interrogator. The prisoner must please his interrogator, else his shame would be unending.

If, as the manuals suggest, the road to effective interrogation lay in "intensifying guilt feelings," and with them "the subject's anxiety and his urge to cooperate as a means of escape," then the bizarre epics of abuse coming out of Abu Ghraib begin to come into focus, slowly resolving from what seems a senseless litany of sadism and brutality to a series of actions that, however abhorrent, conceal within them a certain recognizable logic. Apart from the Reuters report, we don't know much about what went on in the interrogation rooms themselves; up to now, the professionals working within those rooms have mostly refused to talk.^[13] We do know, from the statements of several of the military policemen, that the interrogators gave them specific instructions: "Loosen this guy up for us. Make sure he has a bad night. Make sure he gets the treatment." When one of these soldiers, Sergeant Javal S. Davis, was asked why he didn't protest the abusive behavior, he answered that he "assumed that if they were doing anything out of the ordinary or outside the guidelines, someone would have said something. Also, the wing belongs to [Military Intelligence] and it appeared that MI personnel approved the abuse." He went on, speaking about one of the other accused policemen:

The MI staffs, to my understanding, have been giving Graner compliments on the way he has been handling the MI holds [i.e., prisoners held by military intelligence]. Example being statements like "Good job, they're breaking down real fast"; "They answer every question"; "They're giving out good information, finally"; and "Keep up the good work"—stuff like that.^[14]

As a lawyer for another of the accused, Staff Sergeant Ivan Fredericks, told reporters,

The story is not necessarily that there was a direct order. Everybody is far too subtle and smart for that. . . . Realistically, there is a description of an activity, a suggestion that it may be helpful and encouragement that this is exactly what we needed.

These statements were made by accused soldiers who have an obvious motive to shift the blame. Though few in military intelligence have spoken, and three have reportedly claimed the equivalent of Fifth Amendment protection,^[15] one who has talked to journalists, Sergeant Samuel Provan, confirmed Sergeant Davis's assertion that the policemen were following orders:

Military intelligence was in control. Setting the conditions for

interrogations was strictly dictated by military intelligence. They weren't the ones carrying it out, but they were the ones telling the MPs to wake the detainees up every hour on the hour. . . .

Provance told the reporters that "the highest ranking officers at the prison were involved and that the Army appears to be trying to deflect attention away from the military intelligence's role."⁽¹⁶⁾

One needn't depend on the assertions of those accused to accept that what happened in Abu Ghraib and elsewhere in Iraq was not the random brutality of "a few bad apples" (which, not surprisingly, happens to be the classic defense governments use in torture cases). One needn't depend on the wealth of external evidence, including last fall's visit to Abu Ghraib by Major General Geoffrey Miller, then the commander of Guantanamo (and now commander of Abu Ghraib), in which, according to the Taguba report, he "reviewed current Iraqi Theater ability to rapidly exploit internees for actionable intelligence"⁽¹⁷⁾; or Lieutenant General Sanchez's October 12 memorandum, issued after General Miller's visit, instructing intelligence officers to work more closely with military policemen to "manipulate an internee's emotions and weaknesses"; or statements from Thomas M. Pappas, the colonel in charge of intelligence, that he felt "enormous pressure," as the insurgency increased in intensity, to "extract more information from prisoners."⁽¹⁸⁾ The internal evidence—the awful details of the abuse itself and the clear logical narrative they take on when set against what we know of the interrogation methods of the American military and intelligence agencies—is quite enough to show that what happened at Abu Ghraib, whatever it was, did not depend on the sadistic ingenuity of a few bad apples.

This is what we know. The real question now, as so often, is not what we know but what we are prepared to do.

4.

Should we remain in Algeria? If you answer "yes," then you must accept all the necessary consequences.
—Colonel Philippe Mathieu, *The Battle of Algiers* (1965)

When, as a young intelligence officer, the late General Paul Aussaresses arrived in war-torn Algeria a halfcentury ago and encountered his first captured insurgent, he discovered that methods of interrogation were widely known and fairly simple:

When I questioned them I started by asking what they knew and they clearly indicated that they were not about to talk. . . .

Then without any hesitation, the policemen showed me the technique used for "extreme" interrogations: first, a beating, which in most cases was enough; then other means, such as electric shocks . . . ; and finally water. Torture by electric shock was made possible by generators used to power field radio transmitters, which were extremely common in Algeria. Electrodes were attached to the prisoner's ears or testicles, then electric charges of varying intensity were turned on. This was

apparently a well-known procedure. . . .^[9]

Aussaresses remarks that "almost all the French soldiers who served in Algeria knew more or less that torture was being used but didn't question the methods because they didn't have to face the problem directly." When as a responsible officer he gives a full report to his commander on his methods— which are yielding, as he notes, "very detailed explanations and other names, allowing me to make further arrests"— he encounters an interesting response:

"Are you sure there aren't other ways of getting people to talk?" he asked me nervously. "I mean methods that are . . ."

"Faster?" I asked.

"No, that's not what I mean."

"I know what you mean, Colonel. You're thinking of cleaner ways. You feel that none of this fits in with our humanistic tradition."

"Yes, that's what I mean," answered the Colonel.

"Even if I did agree with you, sir, to carry out the mission you've given me, I must avoid thinking in moral terms and only do what is most useful."

Aussaresses's logic is that of a practical soldier: a traditional army can defeat a determined guerrilla foe only through superior intelligence; superior intelligence can be wrested from hardened insurgents in time to make it "actionable" only through the use of "extreme interrogation"—torture; therefore, to have a chance of prevailing in Algeria the French army must torture. He has nothing but contempt for superior officers, like his colonel, who quail at the notion of "getting their hands dirty"—to say nothing of the politicians who, at the least sign of controversy over the methods he is obliged to employ, would think nothing of abandoning him as "a rotten apple."

It has long since become clear that President Bush and his highest officials, as they confronted the world on September 11, 2001, and the days after, made a series of decisions about methods of warfare and interrogation that General Aussaresses, the practical soldier, would have well understood. The effect of those decisions— among them, the decision to imprison indefinitely those seized in Afghanistan and elsewhere in the war on terror, the decision to designate those prisoners as "unlawful combatants" and to withhold from them the protections of the Geneva Convention, and finally the decision to employ "high pressure methods" to extract "actionable intelligence" from them—was officially to transform the United States from a nation that did not torture to one that did. And the decisions were not, at least in their broad outlines, kept secret. They were known to officials of the other branches of the government, and to the public.

The direct consequences of those decisions, including details of the methods of interrogation applied in Guantanamo and at Bagram Air Base, began to emerge

more than a year ago. It took the Abu Ghraib photographs, however, set against the violence and chaos of an increasingly unpopular war in Iraq, to bring Americans' torture of prisoners up for public discussion. And just as General Ausaresses would recognize some of the methods Americans are employing in their secret interrogation rooms—notably, the practice of "water-boarding," strapping prisoners down and submerging them until they are on the point of drowning, long a favorite not only of the French in Algeria but of the Argentines, Uruguayans, and others in Latin America^[20]—the general would smile disdainfully at the contradictions and hypocrisies of America's current scandal over Abu Ghraib: the senior American officers in their ribbons prevaricating before the senators, the "disgust" expressed by high officials over what the Abu Ghraib photographs reveal, and the continuing insistence that what went on in Abu Ghraib was only, as President Bush told the nation, "disgraceful conduct by a few American troops, who dishonored our country and disregarded our values." General Ausaresses argued frankly for the necessity of torture but did not reckon on its political cost to what was, in the end, a political war. The general justified torture, as so many do, on the "ticking bomb" theory, as a means to protect lives immediately at risk; but in Algeria, as now in Iraq, torture, once sanctioned, is inevitably used much more broadly; and finally it becomes impossible to weigh what the practice gains militarily in "actionable intelligence" against what it loses politically, in an increasingly estranged population and an outraged world. Then as now, this was a political judgment, not a military one; and those who made it helped lose the generals' war.

A half-century later, the United States is engaged in another political war: not only the struggle against the insurgency in Iraq but the broader effort, if you credit the administration's words, to "transform the Middle East" so that "it will no longer produce ideologies of hatred that lead men to fly airplanes into buildings in New York and Washington." We can't know the value of the intelligence the torturers managed to extract, though top commanders admitted to *The New York Times* on May 27 that they learned "little about the insurgency" from the interrogations. What is clear is that the Abu Ghraib photographs and the terrible story they tell have done great damage to what was left of America's moral power in the world, and thus its power to inspire hope rather than hatred among Muslims. The photographs "do not represent America," or so the President asserts, and we nod our heads and agree. But what exactly does this mean? As so often, it took a comic, Rob Corddry on *The Daily Show with Jon Stewart*, to point out the grim contradiction in this:

There's no question what took place in that prison was horrible. But the Arab world has to realize that the US shouldn't be judged on the actions of a . . . well, we shouldn't be judged on actions. It's our principles that matter, our inspiring, abstract notions. Remember: Just because torturing prisoners is something we did, doesn't mean it's something we *would* do.

Over the next weeks and months, Americans will decide how to confront what their fellow citizens did at Abu Ghraib, and what they go on doing at Bagram and Guantanamo and other secret prisons. By their actions they will decide whether they will begin to close the growing difference between what Americans say they are and what they actually do. Iraqis and others around the world will be watching to see whether all the torture will be stopped and whether those truly responsible for it,

military and civilian, will be punished. This is, after all, as our President never tires of saying, a war of ideas. Now, as the photographs of Abu Ghraib make clear, it has also become a struggle over what, if anything, really does represent America.

—May 27, 2004
(This is the second of two articles.)

Notes

^[1] "In Abu Ghraib prison alone, senior officials have testified that no less than three sets of interrogation policies were put in play at different times— those cited in Army field manuals, those used by interrogators who previously worked in Afghanistan and a third set created by Iraq's commanding general after policies used at Guantanamo Bay," from Craig Gordon, "High-Pressure Tactics: Critics Say Bush Policies— Post 9/11—Gave Interrogators Leeway to Push Beyond Normal Limits," *Newsday*, May 23, 2004.

^[2] See my "Torture and Truth," *The New York Review*, June 10, 2004, the first part of the present article, which takes up the Red Cross report in detail.

^[3] See Edward Epstein, "Red Cross Reports Lost, Generals Say: 'The System Is Broken,' Army Commander Tells Senate Panel about Abu Ghraib Warnings," *San Francisco Chronicle*, May 20, 2004.

^[4] See Douglas Jehl and Eric Schmitt, "Officer Says Army Tried to Curb Red Cross Visits to Prison in Iraq," *The New York Times*, May 19, 2004.

^[5] See R. Jeffrey Smith, "Memo Gave Intelligence Bigger Role: Increased Pressure Sought on Prisoners," *The Washington Post*, May 21, 2004.

^[6] See Douglas Jehl and Neil A. Lewis, "US Disputed Protected Status of Iraq Inmates," *The New York Times*, May 23, 2004.

^[7] See Josh White and Scott Higham, "Sergeant Says Intelligence Directed Abuse," *The Washington Post*, May 20, 2004.

^[8] See "Translation of Sworn Statement Provided by _____, Detainee # _____, 1430/21 Jan 04," available along with thirteen other affidavits from Iraqis, at "Sworn Statements by Abu Ghraib Detainees," www.washingtonpost.com. The name was withheld by *The Washington Post* because the witness "was an alleged victim of sexual assault."

^[9] See Greg Mitchell, "Exclusive: Shocking Details on Abuse of Reuters Staffers in Iraq," *Editor and Publisher*, May 19, 2004, which includes excerpts from the Baghdad bureau chief's report.

^[10] See *KUBARK Counterintelligence Interrogation— July 1963*, archived at "Prisoner Abuse: Patterns from the Past," National Security Archive Electronic Briefing Book No. 122, p. 83; www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122. "KUBARK" is a CIA codename.

^[11] See *Human Resource Exploitation Training Manual—1983*, National Security Archive Electronic Briefing Book No. 122, "Non-coercive Techniques"; www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122.

^[12] See "Semper Sensitive: From a Handout That Accompanies a Weeklong Course on Iraq's Customs and History," Marine Division School, *Harper's*, June 2004, p. 26. For a discussion of shame and the American occupation of Iraq, see my "Torture and Truth."

^[13] Though we do know something of what has gone on at other American interrogation centers, for example, the American air base at Bagram, Afghanistan. See Don Van Natta Jr., "Questioning Terror Suspects in a Dark and Surreal World," *The New York Times*, March 9, 2003, and my "Torture and Truth."

^[14] See Scott Higham and Joe Stephens, "Punishment and Amusement," *The Washington Post*

^[15] Richard A. Serrano, "Three Witnesses in Abuse Case Aren't Talking: Higher-ups and a Contractor Out to Avoid Self-incrimination," *San Francisco Chronicle*, May 19, 2004.

^[16] See White and Higham, "Intelligence Officers Tied to Abuses in Iraq."

^[17] See General Antonio M. Taguba, "Article 15-6 Investigation of the 800th Military Police Brigade" (The Taguba Report), page 7.

^[18] See Douglas Jehl, "Officers Say US Colonel at Abu Ghraib Prison Felt Intense Pressure to Get Inmates to Talk," *The New York Times*, May 18, 2004.

^[19] See Paul Aussaresses, *The Battle of the Casbah: Terrorism and Counter-Terrorism in Algeria, 1955-1957*, translated by Robert L. Miller (Enigma, 2002).

^[20] See James Risen, David Johnston, and Neil A. Lewis, "Harsh CIA Methods Cited in Top Qaeda Interrogations," *The New York Times*, May 13, 2004.

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Review

Abu Ghraib: The Hidden Story

By [Mark Danner](#)

Final Report of the Independent Panel to Review DoD Detention Operations (The Schlesinger Report)

by James R. Schlesinger, Harold Brown, Tillie K. Fowler, and General Charles A. Horner (USAF-Ret.)

August 2004, 102 pp. plus appendices

AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade

by Major General George R. Fay

August 2004, 142 pp.

"Free societies in the Middle East will be hopeful societies, which no longer feed resentments and breed violence for export... The terrorists are fighting freedom with all their cunning and cruelty because freedom is their greatest fear—and they should be afraid, because freedom is on the march."

—President George W. Bush,
Republican National Convention, New York, September 2, 2004

"It was discovered that freedom in this land is not ours. It is the freedom of the occupying soldiers in doing what they like...abusing women, children, men, and the old men and women whom they arrested randomly and without any guilt. No one can ask them what they are doing, because they are protected by their freedom.... No one can punish them, whether in our country or their country. They expressed the freedom of rape, the freedom of nudity and the freedom of humiliation."

—Sheik Mohammed Bashir,
Friday prayers, Um al-Oura, Baghdad, June 11, 2004^[1]

They have long since taken their place in the gallery of branded images, as readily recognizable in much of the world as Marilyn struggling with her billowing dress or Michael dunking his basketball: Hooded Man, a dark-caped figure tottering

on a box, supplicant arms outstretched, wires trailing from his fingers; and Leashed Man, face convulsed in humiliation above his leather collar, naked body twisted at the feet of the American female in camouflage pants who gazes down at him without expression, holding the leash casually in hand. The ubiquity of these images in much of the world suggests not only their potency but their usefulness and their adaptability. For the first of the many realities illuminated by the Global War on Terror—or the GWOT, as the authors of the latest reports listed here designate it—is the indisputable fact that much of the world sees America rather differently from the way Americans see themselves.

Out of the interlocking scandals and controversies symbolized by Hooded Man and Leashed Man, the pyramids of naked bodies, the snarling dogs, and all the rest, and known to the world by the collective name of Abu Ghraib, one can extract two "master narratives," both dependent on the power and mutability of the images themselves. The first is that of President Bush, who presented the photographs as depicting "disgraceful conduct by a few American troops, who dishonored our country and disregarded our values"—behavior that, the President insisted, "does not represent America." And the aberrant, outlandish character of what the photographs show—the nudity, the sadism, the pornographic imagery—seemed to support this "few bad apples" argument, long the classic defense of states accused of torture.

The facts, however, almost from day one, did not: the Red Cross report, the Army's own Taguba report, even the photographs themselves, some of which depicted military intelligence soldiers assisting in abuses they supposedly knew nothing about—all strongly suggested that the images were the brutal public face of behavior that involved many more people than the seven military police who were quickly charged. The new reports not only decisively prove what was long known, widening the circle of direct blame for what happened at Abu Ghraib to nearly fifty people, including military intelligence soldiers and officers—although subsequent disclosures suggest the number is at least twice that. More important, the reports suggest how procedures that "violated established interrogation procedures and applicable laws" in fact had their genesis not in Iraq but in interrogation rooms in Afghanistan and Guantánamo Bay, Cuba—and ultimately in decisions made by high officials in Washington.

As General George R. Fay writes, in a section of his report that was classified and kept from the public,

Policies and practices developed and approved for use on Al Qaeda and Taliban detainees [in Afghanistan and Guantánamo] who were not afforded the protection of the Geneva Conventions, now applied to detainees who did fall under the Geneva Conventions' protections.

According to General Fay, these "policies and practices" included, among others, "removing clothing, isolating people for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation."

What we know as "the Abu Ghraib scandal" has in fact become an increasingly complex story about how Americans in Afghanistan and Cuba and Iraq came to

commit acts, with the apparent approval of the highest officials, that clearly constitute torture. The images themselves, however, having helped force open the door to broader questions of how the Bush administration has treated prisoners in the War on Terror, are now helping as well to block that door; for the images, by virtue of their inherent grotesque power, strongly encourage the view that "acts of brutality and purposeless sadism," which clearly did occur, lay at the heart of Abu Ghraib. Even public officials charged with investigating the scandal—these are the fourth and fifth full reports on the matter, with at least four more to come—at the same time seek to contain it by promoting the view that Abu Ghraib in its essence was about individual misbehavior and sadism: "Animal House on the night shift," as former secretary of defense James Schlesinger characterized it, even as his own report showed in detail that it was a great deal more.

The second "master narrative" of Abu Ghraib is that of the Muslim preacher Sheik Mohammed Bashir, quoted above, and many other Arabs and Muslims who point to the scandal's images as perfect symbols of the subjugation and degradation that the American occupiers have inflicted on Iraq and the rest of the Arab world. In this sense the Hooded Man and the Leashed Man fill a need, serving as powerful brand images advertising a preexisting product. Imagine, for a moment, an Islamic fundamentalist trying to build a transnational movement by arguing that today "nations are attacking Muslims like people attacking a plate of food," and by exhorting young Muslims to rise up and follow the Prophet's words:

And why should ye not fight in the cause of Allah and of those who, being weak, are ill-treated (and oppressed)?—women and children—whose cry is: "Oh Lord, rescue us from this town, whose people are oppressors; and raise for us from thee one who will help!"

For such an Islamic fundamentalist, quoting these words to give legitimacy to his call for jihad against the United States—as Osama bin Laden did in his famous 1998 fatwa "Jihad Against Jews and Crusaders"^[2]—what better image of Arab ill-treatment and oppression could be devised than that of a naked Arab man lying at the feet of a short-haired American woman in camouflage garb, who stares immodestly at her Arab pet while holding him by the throat with a leash? Had bin Laden sought to create a powerful trademark image for his international product of global jihad, he could scarcely have done better hiring the cleverest advertising firm on Madison Avenue.

And not only are these photographs perfect masterpieces of propaganda; they have, to paraphrase Henry Kissinger, the considerable advantage of being true. Or, to put it another way: if the Hooded Man and the Leashed Man and the naked human pyramids and the rest shocked Americans because of their perverse undermining of the normal, they shocked Iraqis and other Arabs because the images seemed to confirm so vividly and precisely a reality that many had suspected and feared but had tried not to believe.

1.

"I always knew the Americans would bring electricity back to Baghdad. I just never thought they'd be shooting it up my ass."

—Young Iraqi translator, Baghdad, November 2003

On first setting eyes on the Hooded Man in April, I thought instantly of this joke, which I'd heard in a Baghdad street six months before. At that moment, the insurgency, wholly unanticipated by American officers on the ground and stubbornly denied by their political masters in Washington, had been gaining strength for months.^[3] Enormous suicide bombings had killed hundreds, had driven the United Nations, the Red Cross, and many other international organizations from the country, and had turned Baghdad into a city of stone, its public buildings and hotels and many of its roads encircled by massive concrete blast barriers and its American occupation government wholly inaccessible behind the barbed-wire and machine-gun nests of the grim fortress called the Green Zone.

The only Americans most Iraqis saw were the sunglasses-wearing machine-gunners atop the up-armored Humvees and Bradley fighting vehicles that barreled through traffic several times a day. These patrols were coming under increasingly frequent attack, usually from the ubiquitous "improvised explosive devices," or IEDs, which insurgents concealed in garbage cans or behind telephone poles. By November the number of attacks against Americans had doubled, to nearly forty a day. In May 2003, the month President Bush declared that "major combat" was over, forty-one Americans died in Iraq; in November, six months later, 110 died. And by and large, as was clear in Iraq at the time, and as these reports amply confirm, the American officers had very little idea who was killing their troops and had become increasingly desperate to find out. General Fay writes in his report that

as the pace of operations picked up in late November—early December 2003, it became a common practice for maneuver elements to round up large quantities of Iraqi personnel [i.e., civilians] in the general vicinity of a specified target as a cordon and capture technique. Some operations were conducted at night....

Representatives of the Red Cross, who visited Abu Graib nearly thirty times in this period, offered a more vivid account of "cordon and capture":

Arresting authorities entered houses usually after dark, breaking down doors, waking up residents roughly, yelling orders, forcing family members into one room under military guard while searching the rest of the house and further breaking doors, cabinets and other property. They arrested suspects, tying their hands in the back with flexi-cuffs, hooding them, and taking them away. Sometimes they arrested all adult males present in a house, including elderly, handicapped or sick people. Treatment often included pushing people around, insulting, taking aim with rifles, punching and kicking and striking with rifles. Individuals were often led away in whatever they happened to be wearing at the time of arrest—sometimes in pyjamas or underwear...^[4]

In this way the Americans arrested thousands of Iraqis—or, as Schlesinger puts it, "they reverted to rounding up any and all suspicious-looking persons—all too often including women and children. The flood of incoming detainees contrasted sharply with the trickle of released individuals." Soon the population of the US military's

detention system approached ten thousand and very few Iraqis did not have some family member or friend who had gained intimate familiarity with American "cordon and capture." When Sheik Bashir complained to the Sunni faithful at the Um al-Oura mosque that Friday in June of the occupying soldiers "abusing women, children, men, and the old men and women whom they arrested randomly and without any guilt," he had no need to point to photographs. In Baghdad and Falluja eight months before, I had heard the same bitter complaints, not only about the brutality of the tactics but about the obvious randomness of the arrests, which General Fay now confirms:

SCT Jose Garcia, assigned to the Abu Ghraib Detainee Assessment Board, estimated that 85–90 percent of the detainees were of no intelligence value.... Large quantities of detainees with little or no intelligence value swelled Abu Ghraib's population and led to a variety of overcrowding difficulties.... Complicated and unresponsive release procedures ensured that these detainees stayed at Abu Ghraib—even though most had no value.

Among the many disadvantages of these nighttime sweeps as a tactic for fighting an insurgency was that prisoners scooped up in this way soon flooded the system, inundating the very prisons where detainees were meant to be "exploited for actionable intelligence." And having filled Abu Ghraib largely with Iraqis of "no intelligence value"—whose families in most cases had no way to confirm where they were—the overwhelmed American command could not devise a way to get them out again, especially when faced with the strong opposition of those who had arrested them in the first place:

Combat Commanders desired that no security detainee be released for fear that any and all detainees could be threats to coalition forces.... The [chief of intelligence, Fourth Infantry Division] informed [Major General] Fast that the Division Commander did not concur with the release of any detainees for fear that a bad one may be released along with the good ones.

Major General Fast, the senior intelligence officer in Iraq, described the attitude of the combat commanders as, "We wouldn't have detained them if we wanted them released." A sensible attitude, one might think, but as General Fay points out, the combat soldiers, in their zeal to apprehend Iraqis who might conceivably be supporting those shadowy figures attacking American troops, neglected to filter out those who clearly didn't belong in prison. The capturing soldiers

failed to perform the proper procedures at the point-of-capture and beyond with respect to handling captured enemy prisoners of war and detainees (screening, tactical interrogation, capture cards, sworn statements, transportation, etc.). Failure of capturing units to follow these procedures contributed to facility overcrowding, an increased drain on scarce interrogator and linguist resources to sort out the valuable detainees from innocents who should have been released soon after capture, and ultimately, to *less actionable intelligence*. [My emphasis.]

The system was self-defeating and, not surprisingly, "interrogation operations in Abu Ghraib suffered from the effects of a broken detention operations system." Indeed, these reports are full of "broken systems" and "under-resourced" commands, from Abu Ghraib itself, a besieged, sweltering, stinking hell-hole under daily mortar attack that lacked interpreters, interrogators, guards, detainee uniforms, and just about everything else, including edible food, and that, at its height, was staggering under an impossible prisoner-to-guard ratio of seventy-five to one, all the way up to the command staff of Lieutenant General Ricardo Sanchez, which lacked, among other vital resources, two thirds of its assigned officers. In Iraq, as the Schlesinger report puts it bluntly, "there was not only a failure to plan for a major insurgency, but also to quickly and adequately adapt to the insurgency that followed after major combat operations." And though they don't say so explicitly, it is clear that the writers of these reports put much of the blame for this not on the commanders on the ground but on the political leadership in Washington, who, rather than pay the political cost of admitting the need for more troops—admitting, that is, that they had made mistakes in planning for the war and in selling it to the public—decided to "tough it out," at the expense of the men and women in the field and, ultimately, the Iraqis they had been sent to "liberate." All told, the reports offer a vivid and damning picture of a war that is understaffed, undersupplied, underresourced, and, above all, undermanned.

In this sense Abu Ghraib is at once a microcosm of the Iraq war in all its failures and the proverbial canary in the mineshaft, warning of what is to come. In fighting a guerrilla war, the essential weapon is not tanks or helicopters but intelligence, and the single essential tool to obtain it is reliable political support among the population. In such a war, arresting and imprisoning thousands of civilians in murky defined "cordon and capture" raids is a blatantly self-defeating tactic, and an occupying army's resort to it means not only that the occupier lacks the political support necessary to find and destroy the insurgents but that it has been forced by the insurgents to adopt tactics that will further lessen that support and create still more insurgents. It is, in short, a strategy of desperation and, in the end, a strategy of weakness.

By late summer 2003—a time when Bush administration officials had expected to start "drawing down" American forces "in theater" until a stabilization force of no more than 30,000 Americans remained in Iraq—the US military, even with 130,000 troops, was losing the initiative to an insurgency that seemed to have come out of nowhere and, after carrying out its increasingly bloody IED attacks and suicide bombings, regularly managed to disappear back into the same place. Officials in Washington were growing worried and impatient, and intelligence officers in Iraq were feeling the pressure.

In mid-August, a captain in military intelligence (MI) sent his colleagues an e-mail—recently shown to me—in which, clearly responding to an earlier request from interrogators, he sought to define "unlawful combatants," distinguishing them from "lawful combatants [who] receive protections of the Geneva Convention and gain combat immunity for their warlike acts." After promising to provide "an ROE"—rules of engagement—"that addresses the treatment of enemy combatants, specifically, unprivileged belligerents," the captain asks the interrogators for

"input...concerning what their special interrogation knowledge base is and more importantly, what techniques would they feel would be effective techniques." Then, reminding the intelligence people to "provide Interrogation techniques 'wish list' by 17 AUG 03," the captain signs off this way:

The gloves are coming off gentlemen regarding these detainees, Col Boltz has made it clear that we want these individuals broken. Casualties are mounting and we need to start gathering info to help protect our fellow soldiers from any further attacks. I thank you for your hard work and your dedication.

MI ALWAYS OUT FRONT!

On August 31 Major General Geoffrey Miller, the commander of the US detention camp in Guantánamo, would arrive, ordered to Iraq "to review current Iraqi Theater ability to rapidly exploit internees for actionable intelligence." He and his team would bring with them news and advice drawn from the American government's and the US military's latest thinking on interrogation. For those at Abu Ghraib charged with "breaking" prisoners, help was on the way.

2.

"In the case of Khalid Shaikh Mohammed, a high-level detainee who is believed to have helped plan the attacks of Sept. 11, 2001, CIA interrogators used graduated levels of force, including a technique known as "water-boarding," in which a prisoner is strapped down, forcibly pushed under water and made to believe he might drown."⁵¹

—*The New York Times*, May 13, 2004

In the matter of Americans' use of torture there are, to paraphrase Donald Rumsfeld, the things we know, the things we know we don't know, and the things we don't know we don't know. We know, for example, that much of the 9/11 Commission report's meticulous account of the unfolding of the World Trade Center plot comes from secret interrogations of Khalid Shaikh Mohammed and other "high value detainees." We know we don't know where he and his score or so fellows are being held—and neither, reportedly, does President Bush, who "informed the CIA that he did not want to know where they are"⁶¹ — though it is likely that the CIA is holding them at a secret military base somewhere in Asia, perhaps in Afghanistan, Thailand, or even Jordan. We know we don't know specifically what "graduated levels of force" means, though we have a general idea:

After apprehending suspects, US take-down teams—a mix of military special forces, FBI agents, CIA case officers and local allies —aim to disorient and intimidate them on the way to detention facilities.

According to Americans with direct knowledge and others who have witnessed the treatment, captives are "softened up" by MPs and US Army Special Forces troops who beat them up and confine them in tiny

rooms. The alleged terrorists are commonly blindfolded and thrown into walls, bound in painful positions, subjected to loud noises and deprived of sleep.^[7]

We do know, finally, what "water-boarding" is, though it is not clear what version of this torture the Americans are applying. There is, for example, the version French policemen and soldiers used on prisoners during the Algerian War, as in this account from Bechir Boumaza, a thirty-one-year-old Algerian interrogated in Paris in 1958:

I was taken off the bar [on which he had been hung and subjected to electric torture] and my guards started their football again [beating and kicking him], perhaps for a quarter hour. Then they led me, still naked and blindfolded, into a neighboring room on the same floor. I heard: "We'll have to kill him, the bastard."

Then they laid me on a bench, flat on my stomach, head extending into the air, and tied my arms against my body with cords. Again the same question, which I refused to answer. By tilting the bench very slowly, they dipped my head into a basin filled with stinking liquid—dirty water and urine, probably. I was aware of the gurgling liquid reaching my mouth, then of a dull rumbling in my ears and a tingling sensation in my nose.

"You asked for a drink—take all you want."

The first time I did drink, trying to appease an insupportable thirst. I wanted to vomit immediately.

"He's puking, the bastard."

And my head was pushed back into the basin....

From time to time one of them would sit on my back and bear down on my thighs. I could hear the water I threw up fall back into the basin. Then the torture would continue.^[8]

The Latin American version, called *el submarino*, uses a wooden table, an oil drum filled with water, and a set of hooks linking the two, so that when the interrogators lift the table, the prisoner's head is submerged. Here is the account of Irina Martinez, an Argentine student activist, who was arrested at her parents' house in Buenos Aires in 1977, during the Dirty War:

She was immediately blindfolded. Her first torture session was in a basement full of soldiers, where she was stripped naked, tied, and beaten. "They slapped my face, pinched my breasts. 'You have to talk, this is your last opportunity, and this is your salvation.' And then they put me on a table. And I thought, 'Well, if they are going to kill me, I hope they kill me pretty soon.' They pushed my head underwater, so I could not breathe. They take you out, ask you things, they put you in, they take you out—so you cannot breathe all the time. 'Who did you

receive this from? Who do you know? Who can control anything when you cannot breathe? They pull you out, you try to grab for air, so they put you back in so you swallow water, and it is winter and you are very cold and very scared and they do that for a long time. Even if you are a good swimmer you cannot stand it anymore...."^[9]

Water-boarding, as those Americans who used the method on Khalid Shaikh Mohammed and other "high value detainees" surely know, is very effective in inducing fear; as a Uruguayan army interrogator put it, "There is something more terrifying than pain, and that is the inability to breathe." It is most effective, as these examples show, when combined with other techniques, including stress positions, sensory and sleep deprivation, and direct "physical coercion," or beatings.

We don't know precisely when the officers of the CIA began applying such "enhanced interrogation techniques," as the agency calls them, to their "high-value detainees," but we can see signs of the trend toward using these techniques very soon after the attacks of September 11, and also signs of strong interest in learning immediately the results of interrogation coming from high up in the security bureaucracies, including from the office of Secretary of Defense Rumsfeld. As early as October 2001, after the capture of John Walker Lindh in Afghanistan, a Navy admiral told the intelligence officer interrogating Lindh that "the secretary of defense's counsel has authorized him to 'take the gloves off' and ask whatever he wanted."^[10]

Lindh's interrogators stripped the young American, who had been shot in the foot, taped him to a stretcher, propped it up against a shipping container in the cold open air of Afghanistan, and proceeded to interrogate him in marathon sessions that went on for days. According to documents that were leaked to a *Los Angeles Times* reporter, Lindh's responses during these interrogation sessions were cabled back to the Defense Department as often as every hour. During the coming months and years, as the United States gradually built a network of secret and semisecret prisons in Bagram and Kandahar, Afghanistan; Guantánamo, Cuba; Qatar and Diego Garcia, as well as Abu Ghraib and Camp Cropper, Iraq, this direct attention from senior officials in Washington has remained constant. As Lieutenant Colonel Steven Jordan, the head of the Joint Intelligence and Debriefing Center at Abu Ghraib, told General Taguba in December 2003, "Sir, I was told a couple times...that some of the reporting was getting read by Rumsfeld, folks out of Langley [CIA headquarters], some very senior folks." For Jordan, that meant a lot of pressure to produce. It also meant that what went on at Abu Ghraib and other interrogation centers was very much the focus of the most senior officials in Washington.

3.

In an earlier article in these pages,^[11] I wrote about the case of an Iraqi man who had spent time in Abu Ghraib and had given a sworn statement, after his release, to investigators of the US Army's Criminal Investigation Command (CID). This statement had been leaked, along with those of twelve other detainees, to *The Washington Post*, which posted them on its Web site. Here now is General Fay's full account of what happened to the anonymous prisoner, and his analysis of who was

responsible:

In October 2003, DETAINEE-07, reported alleged multiple incidents of physical abuse while in Abu Ghraib. DETAINEE-07 was a [military intelligence] hold and considered of potentially high value. He was interrogated on 8, 21 and 29 October; 4 and 23 November and 5 December. DETAINEE-07's claims of physical abuse (hitting) started on his first day of arrival. He was left naked in his cell for extended periods, cuffed in his cell in stressful positions ("High cuffed"), left with a bag over his head for extended periods, and denied bedding or blankets. DETAINEE-07 described being made to "bark like a dog, being forced to crawl on his stomach while MPs spit and urinated on him, and being struck causing unconsciousness."

On another occasion DETAINEE-07 was forced to lie down while MPs jumped onto his back and legs. He was beaten with a broom and a chemical light was broken and poured over his body. DETAINEE-04 witnessed the abuse with the chem.-light. During this abuse a police stick was used to sodomize DETAINEE-07 and two female MPs were hitting him, throwing a ball at his penis, and taking photographs. This investigation surfaced no photographic evidence of the chemical light abuse or sodomy. DETAINEE-07 also alleged that CIVILIAN-17, MP Interpreter, Titan Corp., hit DETAINEE-07 once, cutting his ear to an extent that required stitches. He told SOLDIER-25, analyst, B/321 [Military Intelligence Brigade], about this hitting incident during an interrogation. SOLDIER-25 asked the MPs what had happened to the detainee's ear and was told he had fallen in his cell. SOLDIER-25 did not report the detainee's abuse. SOLDIER-25 claimed the detainee's allegation was made in the presence of CIVILIAN-21, Analyst/Interrogator, CACI [Corporation], which CIVILIAN-21 denied hearing this report. Two photos taken at 2200 hours, 1 November 2003, depict a detainee with stitches in his ear; however, we could not confirm the photo was DETAINEE-07.

Based on the details provided by the detainee and the close correlation to other known MP abuses, it is highly probable DETAINEE-07's allegations are true. SOLDIER-25 failed to report the detainee's allegation of abuse. His statements and available photographs do not point to direct [military intelligence] involvement. However, MI interest in this detainee, his placement in Tier 1A of the Hard Site, and initiation of the abuse once he arrived there, combine to create a circumstantial connection to MI (knowledge or implicit tasking of the MPs to "set conditions") which are difficult to ignore. MI should have been aware of what was being done to this detainee based on the frequency of interrogations and high interest in his intelligence value.

What is interesting here is not simply that General Fay confirms the account of Detainee-07 but the strange Kabuki dance the general performs when he comes to the point of assigning responsibility. During a period of about two months, military police beat the detainee savagely into unconsciousness, ripped his ear, urinated on

him, "high-cuffed" him to the bars of his cell for hours so that the skin of his hand split and oozed pus, and sodomized him with a police baton—to give only a brief summary of what, in the detainee's statement, is an exhaustive and exhausting catalog of imaginative and extremely disgusting tortures carried out over many days. Now during this time, as General Fay meticulously confirms, military intelligence soldiers interrogated Detainee-07 on at least six occasions, as befits a prisoner judged of "potentially high value." General Fay, however, finds here only a "circumstantial connection to MI," concluding that the intelligence officers "should have been aware of what was being done to this detainee."

The problem here is that it is quite obvious from the report that military intelligence officers *were* "aware of what was being done to the detainee" —indeed, that they *ordered* it. Throughout the general's patient recounting of his forty-four "serious incidents"—his careful sifting of them into categories ("Nudity/Humiliation," "Assault," "Sexual Assault," "Use of Dogs," "The 'Hole,'" and "Other"), his determination to classify them according to responsibility ("MI," "MP," "MI/MP," or "UNK," for unknown), and his dogged effort to separate what he calls "violent/sexual abuse incidents" (which is to say those, generally speaking, committed by military police, which were not a matter of policy) from "misinterpretation/confusion incidents" (those committed by military intelligence soldiers, who, however, were "confused" about what was permitted at Abu Ghraib as a matter of policy)—throughout all this runs a tone of faintly hysterical absurdity. Throughout we see distinctions that are not distinctions at all, and that recall nothing so much as the darkest passages of *Catch-22*; for example, this passage, on "sleep adjustment":

Sleep adjustment was brought with 519 [Military Intelligence Battalion] from Afghanistan. It is also a method used at GTMO [Guantánamo].... At Abu Ghraib, however, the MPs were not trained, nor informed as to how they actually should do the sleep adjustment. The MPs were just told to keep a detainee awake for a time specified by the interrogator. The MPs used their own judgment as to how to keep them awake. Those techniques included taking the detainees out of their cells, stripping them and giving them cold showers. CPT Wood stated she did not know this was going on and thought the detainees were being kept awake by the MPs banging on the cell doors, yelling, and playing loud music.

Abu Ghraib was a mess; training was deficient; the chain of command was dysfunctional. But that military intelligence soldiers would have had no idea what was being done to prisoners whom they spent hours and hours each day interrogating is simply not credible.

What is credible, or at least comprehensible, is the subtle bureaucratic strategy that has been adopted in these reports, and which has been visible, indeed obvious, from the moment the story of Abu Ghraib broke. For at that moment, in late April, a bureaucratic and political war erupted over torture and its implications, and over Abu Ghraib and how broad-reaching and damaging the scandal that bore its name

was going to be. On one side were those within the administration, many of whom had opposed the use of "enhanced interrogation tactics" from the beginning, including many in the judge advocate generals' offices of the various military services and career lawyers in the Justice Department, who for the last four months have been leaking a veritable flood of documents detailing legally questionable and politically damaging administration decisions about torture and interrogation. On the other side are those at the highest political levels of the Department of Defense, the Department of Justice, and the White House who have struggled, so far successfully, to keep Abu Ghraib from becoming what it early on threatened to be: a scandal that could bring down many senior officials in the Department of Defense, and perhaps the administration itself.

With no fear of a full, top-to-bottom investigation from a Congress that is firmly in Republican hands, administration officials, and particularly those at the Department of Defense, have managed to orchestrate a slowly unfolding series of inquiries, almost all of them carried out within the military by officers who by definition can only direct their gaze down the chain of command, not up it, and who are each empowered to examine only a limited and precisely defined number of links in the chain that connects the highest levels of the government to what happened on the ground in Abu Ghraib and elsewhere in the war on terror. Thus General Taguba investigated the military police, General Paul Mikolashek, as the Army's inspector general, reported on detention procedures, General Fay on military intelligence, and so on.

Beyond the reports themselves, the key strategy of the defense is both to focus on the photographs and to isolate the acts they depict—which, if not the most serious, are those with the most political effect—from any inference that they might have resulted, either directly or indirectly, from policy. Thus the dogged effort to isolate these acts as "violence/sexual abuse incidents" that originated wholly in the minds of sadistic military police during the wee hours, and that, above all, had nothing whatever to do with what was done "to set the conditions" for interrogation—even though this division is quite artificial and many of the latter activities, as vividly demonstrated by the sufferings of Detainee-07, were conducted by precisely the same people and were equally, or more, disgusting, sadistic, and abusive.

Only against this background can one properly appreciate the opening paragraph of former secretary Schlesinger's report, five powerfully peculiar sentences, in which the bureaucratic priorities of this political containment effort have thoroughly corrupted the language:

The events of October through December 2003 on the night shift of Tier 1 at Abu Ghraib prison were acts of brutality and purposeless sadism. We now know these abuses occurred at the hands of both military police and military intelligence personnel. The pictured abuses, unacceptable even in wartime, were not part of authorized interrogations nor were they even directed at intelligence targets. They represent deviant behavior and a failure of military leadership and discipline. However, we do know that some of the egregious abuses at Abu Ghraib which were not photographed did occur during interrogation sessions and that abuses during interrogation sessions

occurred elsewhere.

Mr. Schlesinger and his fellow commissioners begin by defining all the events at Abu Ghraib as "acts of brutality and purposeless sadism," though they admit, in the next sentence, that they in fact occurred "at the hands of both military police and military intelligence." The next sentence abruptly and arbitrarily narrows the subject from "the events...on the night shift" to "the pictured abuses"—that is, those in the photographs—which the writers say were not "even directed at intelligence targets." These "represent deviant behavior"—except for the fact, as they go on to concede in the fifth sentence (where perhaps counsel intervened), that "some of the egregious abuses...which were not photographed did occur during interrogation sessions." It is a strange tangle of self-contradictory and oddly qualified sentences which seems designed to allow Mr. Schlesinger and others in the administration to contend that their report proved decisively that the abuses at Abu Ghraib were nothing more than the photographs—an argument that in fact the report that follows decisively disproves.

The "celebrity abuses"—those known through the photographs—are segregated firmly within the realm of "acts of brutality and purposeless sadism," as Mr. Schlesinger calls them—"Animal House on the night shift"—and thereby sealed off entirely from the responsibility of policymakers. Even now seven hapless MPs are being prosecuted—two have already pleaded guilty—but only, in effect, for taking pictures; that is, only for those acts which can be said to have taken place outside the realm of interrogation or of acts "setting the conditions for interrogation." On the other hand, acts of brutality that can't be attributed entirely to sadistic military police, and which clearly involved military intelligence and the process of interrogation—those, that is, that risk implicating policymakers, who in the end are responsible for deciding what the interrogators can and cannot do—are ascribed in the reports to "misinterpretation/confusion" on the part of the intelligence people about what interrogation techniques could and could not be used at Abu Ghraib. These actions, after all, are where the political danger lies; for knowledge about "interrogation techniques" leads to knowledge about the official doctrine that allowed those techniques, doctrine leads to policy, and policy leads to power.

4.

Nixon: Do you think we want to go this route now? Let it hang out?

Dean: Well, it isn't really that.

Haldeman: It's a limited hang-out.

Ehrlichman: It's a modified, limited hang-out.

—The White House, March 22, 1973

The delicate bureaucratic construction now holding the Abu Ghraib scandal firmly in check rests ultimately on President Bush's controversial decision, on February 7,

2002, to withhold protection of the Geneva Convention both from al-Qaeda and from Taliban fighters in Afghanistan. The decision rested on the argument, in the words of White House Counsel Alberto Gonzalez, that "the war against terrorism is a new kind of war," in fact, a "new paradigm [that] renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions...." In a prefiguring of later bureaucratic wars, lawyers in the State Department and many in the military services fought against this decision, arguing, prophetically, that it "would undermine the United States military culture, which is based on a strict adherence to the law of war."

For torture, this decision was Original Sin: it made legally possible the adoption of the various "enhanced interrogation techniques" that have been used at CIA secret prisons and at the US military's prison at Guantánamo Bay. As it turns out, however, for the administration, Bush's decision was also Amazing Grace, because, by implying that the US military must adhere to wholly different rules when interrogating, say, Taliban prisoners in Guantánamo, who do not enjoy Geneva Convention protection, and Iraqi insurgents at Abu Ghraib, who do, it makes it possible to argue that American interrogators, when applying the same techniques at Abu Ghraib that they had earlier used in Afghanistan or at Guantánamo, were in fact taking part not in "violent/sexual abuse incidents," like their sadistic military police colleagues, but instead in "misinterpretation/confusion incidents."

A central figure in all this is Major General Geoffrey Miller, who when last we saw him, in late August 2003, was on his way from Guantánamo, where he commanded the detention facility, to Abu Ghraib, where he had been ordered "to review current Iraqi Theater ability to rapidly exploit internees for actionable intelligence." General Miller's report, which remains secret but was made available to me, recommends, among other things, that those in charge of Abu Ghraib should "dedicate and train a detention guard force subordinate to [the Joint Interrogation and Debriefing Center] that sets conditions for the successful interrogation and exploitation of internees/detainees. This action," he adds, "is now in progress." The MPs, in other words, should be working for the interrogators and spending significant time "softening up" prisoners, by keeping them awake, "making sure this one has a bad night," etc.—doing, that is, precisely what the accused military police, no doubt self-servingly, claimed they were doing in at least some of those dreadful photographs.

Before he left Iraq, General Miller also "left behind a whole series of [Standard Operating Procedures] that could be used as a start point for [Abu Ghraib] interrogation operations." After returning to Guantánamo, the general dispatched to Iraq a follow-up team who, according to General Fay, brought with it the secretary of defense's letter of April 16, 2003, "outlining the techniques authorized for use with the GTMO detainees." Various parts of the bureaucracy, both inside and outside the Department of Defense, had been fighting over these interrogation techniques since the previous December. On December 2, Secretary Rumsfeld had approved, among other techniques, yelling at detainees, use of stress positions, use of isolation, deprivation of light and auditory stimuli, use of hoods, use of twenty-hour interrogation, removal of clothing, use of mild physical contact, and "use of detainees' individual phobias (such as fear of dogs) to induce stress."

Six weeks later, reportedly after vigorous opposition from lawyers in the Department of the Navy, among others, Rumsfeld rescinded these instructions and convened a working group to recommend suitable methods for Guantánamo. Though the derivation of interrogation techniques eventually adopted for Iraq is almost Talmudic in its intricacy, and though the list of methods permitted changed at least three times during the critical fall of 2003, Fay makes it clear in his report that Lieutenant General Sanchez's command in Iraq "relied heavily on the series of SOPs [standard operating procedures] which MG G. Miller provided to develop not only the structure, but also the interrogation policies for detainee operations." Other sources include, according to a classified section of Fay's report made available to me, the interrogation policy of the shadowy, elite unit Joint Task Force-121, which spent its time searching for "high value targets" in Iraq. "At some point," Fay says, the leading military intelligence battalion at Abu Ghraib "came to possess the JTF-121 interrogation policy" and the first set of interrogation rules used by this unit "were derived almost verbatim from JTF-121 policy," which

included the use of stress positions during fear-up harsh interrogation approaches, as well as presence of military working dogs, yelling, loud music, and light control. The memo also included sleep management and isolation approaches.

On September 14, Lieutenant General Sanchez signed a policy that included elements of the JTF-121 procedures and elements drawn from General Miller's GTMO policy, including the use of dogs, stress positions, yelling, loud music, light control, and isolation, among other techniques.

The policy at Abu Ghraib would change at least twice more but what is critical here is Fay's point, included in a still-secret section of the report, that "policies and practices developed and approved for use on Al Qaeda and Taliban detainees who were not afforded the protection of the Geneva Conventions, now applied to detainees who did fall under the Geneva Conventions' protections." Sanchez later tried to define, unilaterally, some of his detainees as "unlawful combatants" —and the e-mail I quoted earlier, sent in August 2003 by a captain in military intelligence, suggests that interrogators feeling the pressure to produce results were eager that this be done. But in fact, as Schlesinger points out, Sanchez had no authority to make such a determination.

This confusion over doctrine supposedly allowed some of the more gruesome practices that are so patiently set out in General Fay's report, including sensory deprivation, routine nudity and humiliation, "exploiting the Arab fear of dogs," and prolonged isolation of a particularly revolting kind:

DETAINEE-14 was detained in a totally darkened cell measuring about 2 meters long and less than a meter across, devoid of any window, latrine or water tap, or bedding. On the door the [Red Cross] delegates noticed the inscription "the Gollum," and a picture of the said character from the film trilogy "Lord of the Rings."

Detainee-14 was one of eight detainees to whom General Sanchez denied the Red

Cross access.

The fact is that countless details in these reports give the lie to any supposed rigid division between the "violent/sexual acts incidents" and the "misinterpretation/confusion incidents," not only because in many cases military police really were setting "the conditions for the successful interrogation and exploitation of internees/detainees," as Major General Miller recommended they should, but because general practices, like the extensive use of nudity, "likely contributed," as General Fay wrote in his report, to "an escalating 'de-humanization' of the detainees and set the stage for additional and more severe abuses to occur."

There simply was no clear dividing line, no point where sadistic abuses became instances of "misinterpretation/confusion"—where, that is, an interrogator simply erred in applying a technique that while permitted in Afghanistan or Guantánamo, constituted a violation in Iraq of the Geneva Conventions. How isolated could the so-called "Animal House on the night shift" abuses of the military police have been from military intelligence when, as we learn in the Fay report, one of the most notorious images, that of "several naked detainees stacked in a 'pyramid,'" served as a "screen saver" on one of the computers in the military intelligence office?

5.

James Harding (Financial Times): Mr. President, I want to return to the question of torture. What we've learned from these memos this week is that the Department of Justice lawyers and the Pentagon lawyers have essentially worked out a way that US officials can torture detainees without running afoul of the law. So when you say you want the US to adhere to international and US laws, that's not very comforting. This is a moral question: Is torture ever justified?

President Bush: Look, I'm going to say it one more time. ...Maybe I can be more clear. The instructions went out to our people to adhere to law. That ought to comfort you. We're a nation of law. We adhere to laws. We have laws on the books. You might look at these laws, and that might provide comfort for you. And those were the instructions...from me to the government.

—News conference, Sea Island, Georgia, June 10, 2004

As I write, four months have passed since a series of bizarre photographs were broadcast on American television and entered the consciousness of the world. Seven military police, those "few bad apples," have been indicted and two have pled guilty. According to the military's latest account, reported in *The New York Times*, thirteen service members have been discharged, and fifty-four have suffered some form of "lesser disciplinary action," while fifty-seven others have been "referred to court-martial proceedings"—although it is impossible to know how many such "proceedings" will result in actual charges and trials, and it seems unlikely that any would before the election. What has been on trial, thus far, however is the acts depicted in the photographs and these acts, while no doubt constituting abuse, have been carefully insulated from any charge that they represent, or derived from, US

policy—a policy that permits torture. Thus far, in the United States at least, there has been relatively little discussion about torture and whether the agents of the US government should be practicing it.

The twenty-seven military intelligence officers and soldiers implicated in General Fay's report, meanwhile, have so far escaped indictment. A number of them have claimed the equivalent of Fifth Amendment protection and military prosecutors have so far declined to bring cases against them. Until they do, or offer grants of immunity for their testimony, it will be difficult to prosecute successfully the remaining military policemen, who include those men and women accused of the most serious photographed crimes. On the other hand, at least some of the military intelligence officers may be in a position to implicate officials above them. Such a threat, however implicit, might be a powerful lever to dissuade the administration from prosecution, at least before the election.

As for Major General Geoffrey Miller, the former commander of GTMO, he is now in command of Abu Ghraib. It is unclear precisely who ordered Major General Miller to make his "assessment visit" to Abu Ghraib late last summer, and if it is true, as seems likely and as many believe, that these orders originated at the top levels of the Pentagon—perhaps even from the office of the country's leading "intelligence junkie," Donald Rumsfeld—then no proof of this has emerged. Nor, at this point, would such proof, or anything short of evidence linking Rumsfeld to what was shown in the photographs, make a decisive difference. The fact that the legal trail at Abu Ghraib has been directed toward the abuses that appear in the photographs means that the question of policy—of whether the United States should be torturing prisoners, of what the political and moral costs of this will finally be, and of what responsibility those who ultimately direct that policy really bear—has hardly been seriously debated, whether in Congress or anywhere else. Only now, more than four months after the photographs were broadcast to the world, and after eight prominent retired generals and admirals wrote to President Bush publicly demanding a truly independent and far-reaching investigation, has there been some small sign that the administration, perhaps finally pressed by a reluctant Republican Senate, might be forced to go beyond the piecemeal and dilatory efforts it has so far grudgingly made.

If that does happen, it will have been long in coming—and again, almost certainly, and critically for the administration, no results could be known until after the election. So far, officials of the Bush administration, who counted on the fact that the public, and much of the press, could be persuaded to focus on the photographs—the garish signboards of the scandal and not the scandal itself—have been proved right. This makes Abu Ghraib a peculiarly contemporary kind of scandal, with most of its plotlines exposed to view—but with few willing to follow them and fewer still to do much about them. As with other controversies over the Iraq war, the revelations have been made, the behavior exposed, but the moral will to act, or even to debate what action might be warranted, seems mostly lacking.

Meantime the Hooded Man has taken his place among the symbols calling forth, in some parts of the world, a certain image of the United States and what it stands for. Sheik Bashir, who said of the occupying soldiers that "no one can punish

them, whether in our country or their country," has thus far been proved right. Only those at the lowest rung of the ladder have so far been punished and the matter of what was actually happening within the interrogation rooms of Abu Ghraib, not to mention in the secret detention centers of the CIA, has hardly been debated. The Iraqis know this, even if many Americans do not. Meanwhile the political damage to US interests in the world has been very great. As the military strategist Anthony Cordesman put it,

We need to understand that this image is going to be used for years to come. We are dealing with an ideological climate in which the extremists are the threat, not the moderates. And they are going to use these images for years to come, and they are going to couple them to images like Israeli treatment of the Palestinians and find ways of tying this to all their conspiracy theories and hostile images of the West. And the end result is that they will be tools for insurgents and extremists and terrorists.^[1,2]

There is no weighing such ongoing damage against the intelligence that these techniques may have gained. How can such things as these be quantified? According to the Schlesinger report,

There were five cases of detainee deaths as a result of abuse by U.S. personnel during interrogations.... There are 23 cases of detainee deaths still under investigation....

The words are blunt, though a writer less fond of euphemism might have put the matter even more plainly: "American interrogators have tortured at least five prisoners to death." And from what we know, Mr. Schlesinger's figures, if anything, substantially understate the case.

It has become a cliché of the Global War on Terror—the GWOT, as these reports style it—that at a certain point, if the United States betrays its fundamental principles in the cause of fighting terror, then "the terrorists will have won." The image of the Hooded Man, now known the world over, raises a stark question: Is it possible that that moment of defeat could come and go, and we will never know it?

—September 9, 2004

Notes

^[1] See Edward Cody, "Iraqis Put Contempt for Troops on Display," *The Washington Post*, June 12, 2004.

^[2] See Osama bin Laden, "Jihad Against Jews and Crusaders," February 28, 1998, in *Voices of Terror*, edited by Walter Laqueur (Reed, 2004), pp. 410–412.

^[3] See my "Delusions in Baghdad," *The New York Review*, December 18, 2003.

^[4] See my "Torture and Truth" and "The Logic of Torture," the first articles in the present series, in *The New York Review*, June 10 and June 24, 2004, respectively.

^[5] See James Risen, David Johnston, and Neil A. Lewis, "Harsh CIA Methods Cited in Top Qaeda Interrogations," *The New York Times*, May 13, 2004.

^[6] See Risen, Johnston, and Lewis, "Harsh CIA Methods Cited in Top Qaeda Interrogations."

^[7] See Dana Priest and Barton Gellman, "US Decries Abuse but Defends Interrogations," *The Washington Post*, December 26, 2002.

^[8] See *The Gangrene*, translated by Robert Silvers (Lyle Stuart, 1960), pp. 81–82.

^[9] See John Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture* (University of California Press, 2000), pp. 170–171.

^[10] See Richard A. Serrano, "Prison Interrogators' Gloves Came Off Before Abu Ghraib," *Los Angeles Times*, June 9, 2004.

^[11] See "The Logic of Torture."

^[12] Anthony Cordesman, "Goal in Iraq Is to 'Get the Best Compromise You Can,'" interview with Bernard Gwertzman, Council on Foreign Relations, May 11, 2004.

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Denied: A Shield for Terrorists

President Reagan has faced more important but probably no tougher decisions than whether to seek ratification of revisions to the 1949 Geneva Conventions. If he said yes, that would improve protection for prisoners of war and civilians in wartime, but at the price of new legal protection for guerrillas and possible terrorists. He decided to say no, a judgment that deserves support.

The 1949 Geneva Convention on laws of war needs updating. The lines have blurred separating civilians and combatants and regular and irregular troops. In 1977, a protocol packed with valuable additions was signed by a hundred nations, including the United States, pending Senate ratification. The new provisions strengthen procedures for extraditing and prosecuting terrorists, make it easier to punish the taking of hostages and the indiscriminate use of force, enhance rights to check on troops missing in action and prisoners of war, and add protection for medical personnel.

Article I of the protocol, however, says that the provisions apply to nations and "peoples" who "are fighting against colonial domination and alien occu-

pation and against racist regimes in the exercise of their right of self-determination." Nice words, but also possible grounds for giving terrorists the legal status of P.O.W.'s. The protocol also provides that regional groups like the Organization for African Unity and the League of Arab States could decide which "peoples" constituted a legitimate party in armed conflict.

The President could have asked the Senate to ratify with reservations. But that would have opened the door to all signatories to pick and choose what to obey. Nations might also have read that as legitimizing terrorists. So Mr. Reagan made the sound choice. He notified the Senate that he would not submit the revision or protocol because it was "fundamentally and irreconcilably flawed."

Apparently many nations are having second thoughts. Only about 40 signatories have ratified the protocol, not including the Soviet Union, France or Israel. Another international meeting is in order to plug the dangerous loopholes and reaffirm the important new benefits.

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BYLINE: By **TIM GOLDEN**; Jack Begg contributed research for this article.

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BODY:

In early November 2001, with Americans still staggered by the Sept. 11 attacks, a small group of White House officials worked in great secrecy to devise a new system of justice for the new war they had declared on terrorism.

Determined to deal aggressively with the terrorists they expected to capture, the officials bypassed the federal courts and their constitutional guarantees, giving the military the authority to detain foreign suspects indefinitely and prosecute them in tribunals not used since World War II.

The plan was considered so sensitive that senior White House officials kept its final details hidden from the president's national security adviser, Condoleezza Rice, and the secretary of state, Colin L. Powell, officials said. It was so urgent, some of those involved said, that they hardly thought of consulting Congress.

White House officials said their use of extraordinary powers would allow the Pentagon to collect crucial intelligence and mete out swift, unmerciful justice. "We think it guarantees that we'll have the kind of treatment of these individuals that we believe they deserve," said Vice President Dick Cheney, who was a driving force behind the policy.

But three years later, not a single terrorist has been prosecuted. Of the roughly 560 men being held at the United States naval base at Guantanamo Bay, Cuba, only 4 have been formally charged. Preliminary hearings for those suspects brought such a barrage of procedural challenges and public criticism that verdicts could still be months away. And since a Supreme Court decision in June that gave the detainees the right to challenge their imprisonment in federal court, the Pentagon has stepped up efforts to send home hundreds of men whom it once branded as dangerous terrorists.

"We've cleared whole forests of paper developing procedures for these tribunals, and no one has been tried yet," said Richard L. Shiffrin, who worked on the issue as the Pentagon's deputy general counsel for intelligence matters. "They just ended up in this Kafkaesque sort of purgatory."

The story of how Guantanamo and the new military justice system became an intractable legacy of Sept. 11 has been largely hidden from public view.

But extensive interviews with current and former officials and a review of confidential documents reveal that the legal strategy took shape as the ambition of a small core of conservative administration officials whose political influence and bureaucratic skill gave them remarkable power in the aftermath of the attacks.

The strategy became a source of sharp conflict within the Bush administration, eventually pitting the highest-profile cabinet secretaries -- including Ms. Rice and Defense Secretary Donald H. Rumsfeld -- against one another over issues of due process, intelligence-gathering and international law.

In fact, many officials contend, some of the most serious problems with the military justice system are rooted in the secretive and contentious process from which it emerged.

Military lawyers were largely excluded from that process in the days after Sept. 11. They have since waged a long struggle to ensure that terrorist prosecutions meet what they say are basic standards of fairness. Uniformed lawyers now assigned to defend Guantanamo detainees have become among the most forceful critics of the Pentagon's own system.

Foreign policy officials voiced concerns about the legal and diplomatic ramifications, but had little influence. Increasingly, the administration's plan has come under criticism even from close allies, complicating efforts to transfer scores of Guantanamo prisoners back to their home governments.

To the policy's architects, the attacks on the World Trade Center and the Pentagon represented a stinging challenge to American power and an imperative to consider measures that might have been unimaginable in less threatening times. Yet some officials said the strategy was also shaped by longstanding political agendas that had relatively little to do with fighting terrorism.

The administration's claim of authority to set up military commissions, as the tribunals are formally known, was guided by a desire to strengthen executive power, officials said. Its legal approach, including the decision not to apply the Geneva Conventions, reflected the determination of some influential officials to halt what they viewed as the United States' reflexive submission to international law.

In devising the new system, many officials said they had Osama bin Laden and other leaders of Al Qaeda in mind. But in picking through the hundreds of detainees at Guantanamo Bay, military investigators have struggled to find more than a dozen they can tie directly to significant terrorist acts, officials said. While important Qaeda figures have been captured and held by the C.I.A., administration officials said they were reluctant to bring those prisoners before tribunals they still consider unreliable.

Some administration officials involved in the policy declined to be interviewed, or would do so only on the condition they not be identified. Others defended it strongly, saying the administration had a responsibility to consider extraordinary measures to protect the country from a terrifying enemy.

"Everybody who was involved in this process had, in my mind, a white hat on," Timothy E. Flanigan, the former deputy White House counsel, said in an interview. "They were not out to be cowboys or create a radical new legal regime. What they wanted to do was to use existing legal models to assist in the process of saving lives, to get information. And the war on terror is all about information."

As the policy has faltered, other current and former officials have criticized it on pragmatic grounds, arguing that many of the problems could have been avoided. But some of the criticism also has a moral tone.

"What several of us were concerned about was due process," said John A. Gordon, a retired Air Force general and former deputy C.I.A. director who served as both the senior counterterrorism official and homeland security adviser on President Bush's National Security Council staff. "There was great concern that we were setting up a process that was contrary to our own ideals."

An Aggressive Approach

The administration's legal approach to terrorism began to emerge in the first turbulent days after Sept. 11, as the officials in charge of key agencies exhorted their aides to confront Al Qaeda's threat with bold imagination.

"Legally, the watchword became 'forward-leaning,'" said a former associate White House counsel, Bradford Berenson, "by which everybody meant: 'We want to be aggressive. We want to take risks.'"

That challenge resounded among young lawyers who were settling into important posts at the White House, the Justice Department and other agencies. Many of them were members of the Federalist Society, a conservative legal fraternity. Some had clerked for Supreme Court justices, Clarence Thomas and Antonin Scalia in particular. A striking number had clerked for a prominent Reagan appointee, Lawrence H. Silberman of the United States Court of Appeals for the District of Columbia Circuit.

One young lawyer recalled looking around the room during a meeting with Attorney General John Ashcroft. "Of 10 people, 7 of us were former Silberman clerks," he said.

Mr. Berenson, then 36, had been consumed with the nomination of federal judges until he was suddenly reassigned to terrorism issues and thrown into intense, 15-hour workdays, filled with competing urgencies and intermittent new alerts.

"All of a sudden, the curtain was lifted on this incredibly frightening world," he said. "You were spending every day looking at the dossiers of the world's leading terrorists. There was a palpable sense of threat."

As generals prepared for war in Afghanistan, lawyers scrambled to understand how

the new campaign against terrorism could be waged within the confines of old laws.

Mr. Flanigan was at the center of the administration's legal counteroffensive. A personable, soft-spoken father of 14 children, his easy manner sometimes belied the force of his beliefs. He had arrived at the White House after distinguishing himself as an agile legal thinker and a Republican stalwart: During the Clinton scandals, he defended the independent counsel, Kenneth W. Starr, saying he had conducted his investigation "in a moderate and appropriate fashion." In 2000, he played an important role on the Bush campaign's legal team in the Florida recount.

In the days after the Sept. 11 attacks, Mr. Flanigan sought advice from the Justice Department's Office of Legal Counsel on "the legality of the use of military force to prevent or deter terrorist activity inside the United States," according to a previously undisclosed department memorandum that was reviewed by The New York Times.

The 20-page response came from John C. Yoo, a 34-year-old Bush appointee with a glittering resume and a reputation as perhaps the most intellectually aggressive among a small group of legal scholars who had challenged what they saw as the United States' excessive deference to international law. On Sept. 21, 2001, Mr. Yoo wrote that the question was how the Constitution's Fourth Amendment rights against unreasonable search and seizure might apply if the military used "deadly force in a manner that endangered the lives of United States citizens."

Mr. Yoo listed an inventory of possible operations: shooting down a civilian airliner hijacked by terrorists; setting up military checkpoints inside an American city; employing surveillance methods more sophisticated than those available to law enforcement; or using military forces "to raid or attack dwellings where terrorists were thought to be, despite risks that third parties could be killed or injured by exchanges of fire."

Mr. Yoo noted that those actions could raise constitutional issues, but said that in the face of devastating terrorist attacks, "the government may be justified in taking measures which in less troubled conditions could be seen as infringements of individual liberties." If the president decided the threat justified deploying the military inside the country, he wrote, then "we think that the Fourth Amendment should be no more relevant than it would be in cases of invasion or insurrection."

The prospect of such military action at home was mostly hypothetical at that point, but with the government taking the fight against terrorism to Afghanistan and elsewhere around the world, lawyers in the administration took the same "forward-leaning" approach to making plans for the terrorists they thought would be captured.

The idea of using military commissions to try suspected terrorists first came to Mr. Flanigan, he said, in a phone call a couple of days after the attacks from William P. Barr, the former attorney general under whom Mr. Flanigan had served as head of the Justice Department's Office of Legal Counsel during the first Bush administration.

Mr. Barr had first suggested the use of military tribunals a decade before, to try suspects in the bombing of Pan Am Flight 103 over Lockerbie, Scotland. Although the idea made little headway at the time, Mr. Barr said he reminded Mr. Flanigan that the Legal Counsel's Office had done considerable research on the question. Mr. Flanigan had an aide call for the files.

"I thought it was a great idea," he recalled.

Military commissions, he thought, would give the government wide latitude to hold, interrogate and prosecute the sort of suspects who might be silenced by lawyers in criminal courts. They would also put the control over prosecutions squarely in the hands of the president.

The same ideas were taking hold in the office of Vice President Cheney, championed by his 44-year-old counsel, David S. Addington. At the time, Mr. Addington, a longtime Cheney aide with an indistinct portfolio and no real staff, was not well-known even in the government. But he would become legendary as a voraciously hard-working official with strongly conservative views, an unusually sharp pen and wide influence over military, intelligence and other matters. In a matter of months, he would make a mark as one of the most important architects of the administration's legal strategy against foreign terrorism.

Beyond the prosecutorial benefits of military commissions, the two lawyers saw a less tangible, but perhaps equally important advantage. "From a political standpoint," Mr. Flanigan said, "it communicated the message that we were at war, that this was not going to be business as usual."

Changing the Rules

In fact, very little about how the tribunal policy came about resembled business as usual. For half a century, since the end of World War II, most major national-security initiatives had been forged through interagency debate. But some senior Bush administration officials felt that process placed undue power in the hands of cautious, slow-moving foreign policy bureaucrats. The sense of urgency after Sept. 11 brought that attitude to the surface.

Little more than a week after the attacks, officials said, the White House counsel, Alberto F. Gonzales, set up an interagency group to draw up options for prosecuting terrorists. They came together with high expectations.

"We were going to go after the people responsible for the attacks, and the operating assumption was that we would capture a significant number of Al Qaeda operatives," said Pierre-Richard Prosper, the State Department official assigned to lead the group. "We were thinking hundreds."

Mr. Prosper, then 37, had just been sworn in as the department's ambassador-at-large for war crimes issues. As a prosecutor, he had taken on street gangs and drug Mafias and had won the first genocide conviction before the International Criminal Tribunal for Rwanda. Even so, some administration lawyers eyed him suspiciously -- as more diplomat than crime-fighter.

Mr. Gonzales had made it clear that he wanted Mr. Prosper's group to put forward military commissions as a viable option, officials said. The group laid out three others -- criminal trials, military courts-martial and tribunals with both civilian and military members, like those used for Nazi war criminals at Nuremberg.

Representatives of the Justice Department's criminal division, which had prosecuted a string of Qaeda defendants in federal district court over the previous decade,

argued that the federal courts could do the job again. The option of toughening criminal laws or adapting the courts, as several European countries had done, was discussed, but only briefly, two officials said.

"The towers were still smoking, literally," Mr. Prosper said. "I remember asking: Can the federal courts in New York handle this? It wasn't a legal question so much as it was logistical. You had 300 Al Qaeda members, potentially. And did we want to put the judges and juries in harm's way?"

Lawyers at the White House saw criminal courts as a minefield, several officials said.

Much of the evidence against terror suspects would be classified intelligence that would be difficult to air in court or too sketchy to meet federal standards, the lawyers warned. Another issue was security: Was it safe to try Osama bin Laden in Manhattan, where he was facing federal charges for the 1998 bombings of American Embassies in East Africa?

Then there was a tactical question. To act pre-emptively against Al Qaeda, the authorities would need information that defense lawyers and due-process rules might discourage suspects from giving up.

Mr. Flanigan framed the choice starkly: "Are we going to go with a system that is really guaranteed to prevent us from getting information in every case or are we going to go another route?"

Military commissions had no statutory rules of their own. In past American wars, when such tribunals had been used to carry out battlefield justice against spies, saboteurs and others accused of violating the laws of war, they had generally hewed to prevailing standards of military justice. But the advocates for commissions in the Bush administration saw no reason they could not adapt the rules, officials said. Standards of proof could be lowered. Secrecy provisions could be expanded. The death penalty could be more liberally applied.

But some members of the interagency group saw it as more complicated. Terrorism had not been clearly established as a war crime under international law. Writing new law for a military tribunal might end up being more difficult than prosecuting terrorism cases in existing courts.

By late October 2001, the White House lawyers had grown impatient with what they saw as the dithering of Mr. Prosper's group and what one former official called the "cold feet" of some of its members. Mr. Flanigan said he thought the government needed to move urgently in case a major terrorist linked to the attacks was apprehended.

He gathered up the research that the Prosper group had completed on military commissions and took charge of the matter himself. Suddenly, the other options were off the table and the Prosper group was out of business.

"Prosper is a thoughtful, gentle, process-oriented guy," the former official said. "At that time, gentle was not an adjective that anybody wanted."

A Secretive Circle

With the White House in charge, officials said, the planning for tribunals moved forward more quickly, and more secretly. Whole agencies were left out of the discussion. So were most of the government's experts in military and international law.

The legal basis for the administration's approach was laid out on Nov. 6 in a confidential 35-page memorandum sent to Mr. Gonzales from Patrick F. Philbin, a deputy in the Legal Counsel's office. (Attorney General Ashcroft has refused recent Congressional requests for the document, but a copy was reviewed by The Times.)

The memorandum's plain legalese belied its bold assertions.

It said that the president, as commander in chief, has "inherent authority" to establish military commissions without Congressional authorization. It concluded that the Sept. 11 attacks were "plainly sufficient" to warrant applying the laws of war.

Opening a debate that would later divide the administration, the memorandum also suggested that the White House could apply international law selectively. It stated specifically that trying terrorists under the laws of war "does not mean that terrorists will receive the protections of the Geneva Conventions or the rights that laws of war accord to lawful combatants."

The central legal precedent cited in the memorandum was a 1942 case in which the Supreme Court upheld President Franklin D. Roosevelt's use of a military commission to try eight Nazi saboteurs who had sneaked into the United States aboard submarines. Since that ruling, revolutions had taken place in both international and military law, with the adoption of the Geneva Conventions in 1949 and the Uniform Code of Military Justice in 1951. Even so, the Justice memorandum said the 1942 ruling had "set a clear constitutional analysis" under which due process rights do not apply to military commissions.

Roosevelt, too, created his military commission without new and explicit Congressional approval, and authorized the military to fashion its own procedural rules. He also established himself, rather than a military judge, as the "final reviewing authority" for the case.

Mr. Addington seized on the Roosevelt precedent as a model, two people involved in the process said, despite vast differences. Roosevelt acted against enemy agents in a traditional war among nations. Mr. Bush would be asserting the same power to take on a shadowy network of adversaries with no geographic boundaries, in a conflict with no foreseeable end.

Mr. Addington, who drafted the order with Mr. Flanigan, was particularly influential, several officials said, because he represented Mr. Cheney and brought formidable experience in national-security law to a small circle of senior officials. Mr. Addington turned down several requests for interviews and a spokesman for the vice president's office declined to comment.

"He was probably the only one there who would know what an order would look like, what it would say," a former Justice Department official said, noting Mr. Addington's work at the Defense Department, the C.I.A., and Congressional intelligence committees. "He didn't have authority over anyone. But he's a persuasive guy."

To many officials outside the circle, the secrecy was remarkable.

While Mr. Ashcroft and his deputy, Larry D. Thompson, were closely consulted, the head of the Justice Department's criminal division, Michael Chertoff, who had argued for trying terror suspects in federal court, saw the military order only when it was published, officials said. Mr. Rumsfeld was kept informed of the plan mainly through his general counsel, William J. Haynes II, several Pentagon officials said.

Many of the Pentagon's experts on military justice, uniformed lawyers who had spent their careers working on such issues, were mostly kept in the dark. "I can't tell you how compartmented things were," said retired Rear Adm. Donald J. Guter, who was then the Navy's senior military lawyer, or judge advocate general. "This was a closed administration."

A group of experienced Army lawyers had been meeting with Mr. Haynes repeatedly on the process, but began to suspect that what they said did not resonate outside the Pentagon, several of them said.

On Friday, Nov. 9, Defense Department officials said, Mr. Haynes called the head of the team, Col. Lawrence J. Morris, into his office to review a draft of the presidential order. He was given 30 minutes to study it but was not allowed to keep a copy or even take notes.

The following day, the Army's judge advocate general, Maj. Gen. Thomas J. Romig, hurriedly convened a meeting of senior military lawyers to discuss a response. The group worked through the Veterans Day weekend to prepare suggestions that would have moved the tribunals closer to existing military justice. But when the final document was issued that Tuesday, it reflected none of the officers' ideas, several military officials said. "They hadn't changed a thing," one official said.

In fact, while the military lawyers were pulling together their response, they were unaware that senior administration officials were already at the White House putting finishing touches on the plan. At a meeting that Saturday in the Roosevelt Room, Mr. Cheney led a discussion among Attorney General Ashcroft, Mr. Haynes of the Defense Department, the White House lawyers and a few other aides.

Senior officials of the State Department and the National Security Council staff were excluded from final discussions of the policy, even at a time when they were meeting daily about Afghanistan with the officials who were drafting the order. According to two people involved in the process, Mr. Cheney advocated withholding the draft from Ms. Rice and Secretary Powell.

When the two cabinet members found out about the military order -- upon its public release -- Ms. Rice was particularly angry, several senior officials said. Spokesmen for both officials declined to comment.

Mr. Bush played only a modest role in the debate, senior administration officials said. In an initial discussion, he agreed that military commissions should be an option, the officials said. Later, Mr. Cheney discussed a draft of the order with Mr. Bush over lunch, one former official said. The president signed the three-page order on Nov. 13.

No ceremony accompanied the signing, and the order was released to the public that day without so much as a press briefing. But its historic significance was unmistakable.

The military could detain and prosecute any foreigner whom the president or his representative determined to have "engaged in, aided or abetted, or conspired to commit" terrorism. Echoing the Roosevelt order, the Bush document promised "free and fair" tribunals but offered few guarantees: There was no promise of public trials, no right to remain silent, no presumption of innocence. As in 1942, guilt did not necessarily have to be proven beyond a reasonable doubt and a death sentence could be imposed even with a divided verdict.

Despite those similarities, some military and international lawyers were struck by the differences.

"The Roosevelt order referred specifically to eight people, the eight Nazi saboteurs," said Mr. Shiffrin, who was then the Defense Department's deputy general counsel for intelligence matters and had studied the Nazi saboteurs' case. "Here we were putting in place a parallel system of justice for a universe of people who we had no idea about -- who they would be, how many of them there would be. It was a very dramatic measure."

Mounting Criticism

The White House did its best to play down the drama, but criticism of the order was immediate and widespread.

Civil libertarians and some Congressional leaders saw an attempt to supplant the criminal justice system. Critics also worried about the concentration of power: The president or his proxies would define the crimes (often after an act had been committed); set the rules for trial; and choose the judges, juries and appellate panels.

Senator Patrick J. Leahy, the Vermont Democrat who was then chairman of the Senate Judiciary Committee, was among a handful of legislators who argued that the administration's plan required explicit Congressional authorization. The Congress had just passed the Patriot Act by a huge margin, and Mr. Leahy proposed authorizing military commissions, but with some important changes, including a presumption of innocence for defendants and appellate review by the Supreme Court.

Critics seized on complaints from abroad, including an announcement from the Spanish authorities that they would not extradite some terrorist suspects to the United States if they would face the tribunals. "We are the most powerful nation on earth," Mr. Leahy said. "But in the struggle against terrorism, we don't have the option of going it alone. Would these military tribunals be worth jeopardizing the cooperation we expect and need from our allies?"

Senators called for Mr. Rumsfeld and Mr. Ashcroft to testify about the tribunals plan. Instead, the administration sent Mr. Prosper from the State Department and Mr. Chertoff of the Justice Department -- both of whom had questioned the use of commissions and were later excluded from the administration's final deliberations.

But the Congressional opposition melted in the face of opinion polls showing strong support for the president's measures against terrorism.

There was another reason fears were allayed. With the order signed, the Pentagon was writing rules for exactly how the commissions would be conducted, and an early draft that was leaked to the news media suggested defendants' rights would be expanded. Mr. Rumsfeld, who assembled a group of outside legal experts -- including some who had worked on World War II-era tribunals -- to consult on the rules, said critics' concerns would be taken into account.

But all of the critics were not outside the administration.

Many of the Pentagon's uniformed lawyers were angered by the implication that the military would be used to deliver "rough justice" for the terrorists. The Uniform Code of Military Justice had moved steadily into line with the due-process standards of the federal courts, and senior military lawyers were proud and protective of their system. They generally supported using commissions for terrorists, but argued that the system would not be fair without greater rights for defendants.

"The military lawyers would from time to time remind the civilians that there was a Constitution that we had to pay attention to," said Admiral Guter, who, after retiring as the Navy judge advocate general, signed a "friend of the court" brief on behalf of plaintiffs in the Guantanamo Supreme Court case.

Even as uniformed lawyers were given a greater role in writing rules for the commissions, they still felt out of the loop.

In early 2002, Admiral Guter said, during a weekly lunch with Mr. Haynes and the top lawyers for the military branches, he raised the issue with Mr. Haynes directly: "We need more information."

Mr. Haynes looked at him coldly. "No, you don't," he quoted Mr. Haynes as saying.

Mr. Haynes declined to comment on the exchange.

Lt. Col. William K. Lietzau, a Yale-trained Marine lawyer on Mr. Haynes's staff, often found himself in the middle. "I could see how the JAGs were frustrated that the task of setting up the commissions hadn't been delegated to them," he said, referring to the senior military lawyers. "On the other hand, I could see how some of their recommendations frustrated the leadership because they didn't always appear to embrace the paradigm shift needed to deal with terrorism."

Some Justice Department officials also urged changes in the commission rules, current and former officials said. While Attorney General Ashcroft staunchly defended the policy in public, in a private meeting with Pentagon officials, he said some of the proposed commission rules would be seen as "draconian," two officials said.

On nearly every issue, interviews and documents show, the harder line was staked out by White House lawyers: Mr. Addington, Mr. Gonzales and Mr. Flanigan. They opposed allowing civilian lawyers to assist the tribunal defendants, as military courts-martial permit, or allowing civilians to serve on the appellate panel that would oversee the commissions. They also opposed granting defendants a presumption of innocence.

In the end, Mr. Rumsfeld compromised. He granted defendants a presumption of innocence and set "beyond a reasonable doubt" as a standard for proving guilt. He also allowed the defendants to hire civilian lawyers, but restricted the lawyers' access to case information. And he gave the presiding officer at a tribunal license to admit any evidence he thought might be convincing to a "reasonable person."

One right the administration sought to deny the prisoners was the ability to appeal the legality of their detentions in federal court. The administration had done its best to decide the question when searching for a place to detain hundreds of prisoners captured in Afghanistan. Every location it seriously considered -- including an American military base in Germany and islands in the South Pacific -- was outside the United States and, the administration believed, beyond the reach of the federal judiciary.

On Dec. 28, 2001, after officials settled on Guantanamo Bay, Mr. Philbin and Mr. Yoo told the Pentagon in a memorandum that it could make a "very strong" claim that prisoners there would be outside the purview of American courts. But the memorandum cautioned that a reasonable argument could also be made that Guantanamo "while not part of the sovereign territory of the United States, is within the territorial jurisdiction of a federal court." That warning would come back to haunt the administration.

A Shift in Power

Some of the officials who helped design the new system of justice would later explain the influence they exercised in the chaotic days after Sept. 11 as a response to a crisis. But a more enduring shift of power within the administration was taking place -- one that became apparent in a decision that would have significant consequences for how terror suspects were interrogated and detained.

At issue was whether the administration would apply the Geneva Conventions to the conflicts with Al Qaeda and the Taliban and whether those enemies would be treated as prisoners of war.

Based on the advice of White House and Justice Department lawyers, Mr. Bush initially decided on Jan. 18, 2002, that the conventions would not apply to either conflict. But at a meeting of senior national security officials several days later, Secretary of State Powell asked him to reconsider.

Mr. Powell agreed that the conventions did not apply to the global fight against Al Qaeda. But he said troops could be put at risk if the United States disavowed the conventions in dealing with the Taliban -- the de facto government of Afghanistan. Both Mr. Rumsfeld and the chairman of the Joint Chiefs of Staff, Gen. Richard B. Myers, supported his position, Pentagon officials said.

In a debate that included the administration's most experienced national-security officials, a voice heard belonged to Mr. Yoo, only a deputy in the Office of Legal Counsel. He cast Afghanistan as a "failed state," and said its fighters should not be considered a real army but a "militant, terrorist-like group." In a Jan. 25 memorandum, the White House counsel, Mr. Gonzales, characterized that opinion as "definitive," although it was not the final basis for the president's decision.

The Gonzales memorandum suggested that the "new kind of war" Mr. Bush wanted to fight could hardly be reconciled with the "quaint" privileges that the Geneva Conventions gave to prisoners of war, or the "strict limitations" they imposed on interrogations.

Military lawyers disputed the idea that applying the conventions would necessarily limit interrogators to the name, rank and serial number of their captives. "There were very good reasons not to designate the detainees as prisoners of war, but the claim that they couldn't be interrogated was not one of them," Colonel Lietzau said. Again, though, such questions were scarcely heard, officials involved in the discussions said.

Mr. Yoo's rise reflected a different approach by the Bush administration to sensitive legal questions concerning foreign affairs, defense and intelligence.

In past administrations, officials said, the Office of Legal Counsel usually weighed in with opinions on questions that had already been deliberated by the legal staffs of the agencies involved. Under Mr. Bush, the office frequently had a first and final say. "O.L.C. was definitely running the show legally, and John Yoo in particular," a former Pentagon lawyer said. "He's kind of fun to be around, and he has an opinion on everything. Even though he was quite young, he exercised disproportionate authority because of his personality and his strong opinions."

Mr. Yoo's influence was amplified by friendships he developed not just with Mr. Addington and Mr. Flanigan, but also Mr. Haynes, with whom he played squash as often as three or four times a week at the Pentagon Officers Athletic Club.

If the Geneva Conventions debate raised Mr. Yoo's stature, it had the opposite effect on lawyers at the State Department, who were later excluded from sensitive discussions on matters like the interrogation of detainees, officials from several agencies said.

"State was cut out of a lot of this activity from February of 2002 on," one senior administration official said. "These were treaties that we were dealing with; they are meant to know about that."

The State Department legal adviser, William H. Taft IV, was shunned by the lawyers who dominated the detainee policy, officials said. Although Mr. Taft had served as the deputy secretary of defense during the Reagan administration, more conservative colleagues whispered that he lacked the constitution to fight terrorists.

"He was seen as ideologically squishy and suspect," a former White House official said. "People did not take him very seriously."

Through a State Department spokesman, Richard A. Boucher, Mr. Taft declined to comment.

The rivalries could be almost adolescent. When field trips to Guantanamo Bay were arranged for administration lawyers, the invitations were sometimes relayed last to the State Department and National Security Council, officials said, in the hope that lawyers there would not be able to go on short notice.

It was on the first field trip, 10 days after detainees began to arrive there on Jan. 11, 2002, that White House lawyers made clear their intention to move forward quickly with military commissions.

On the flight home, several officials said, Mr. Addington urged Mr. Gonzales to seek a blanket designation of all the detainees being sent to Guantanamo as eligible for trial under the president's order. Mr. Gonzales agreed.

The next day, the Pentagon instructed military intelligence officers at the base to start filling out one-page forms for each detainee, describing their alleged offenses. Weeks later, Mr. Haynes issued an urgent call to the military services, asking them to submit nominations for a chief prosecutor.

The first trials, many military and administration officials believed, were just around the corner.

Next: A Policy Unravels

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GRAPHIC: Photos: Seen through a night vision scope, marines escorted prisoners into a detention center in Kandahar, Afghanistan in late 2001. Many were later sent to Guantanamo Bay. (Photo Pool photo by U.S.M.C. Sgt. Thomas Michael Corcoran)(pg. 12)

The courtroom at Guantanamo Bay, where some preliminary hearings have taken place. Of the roughly 560 men being held at the base, only 4 have been formally charged. (Photo by Angel Franco/The New York Times)
(Photo by Hannah Fairfield/The New York Times)(pg. 13)

A prisoner at the Guantanamo Bay camp in February 2002. (Photo by Lynne Sladky/Associated Press)(pg. 1)Chart/Photos: "Behind Closed Doors, a New Code Is Written" A policy for military tribunals emerged from a small group of senior administration officials who exercised unusual power in days after Sept. 11. Key Players OFFICE OF THE VICE PRESIDENT DICK CHENEY -- Vice president of the United States Guided pivotal discussions as the presidential order was being written. DAVID S. ADDINGTON -- Counsel to Vice President Cheney One of the two main authors. WHITE HOUSE COUNSEL ALBERTO F. GONZALES -- White House counsel Often contributed to discussions. TIMOTHY E. FLANIGAN -- Deputy White House counsel One of the two main authors. Has since left the administration. Other Players They were closely informed about the plan and contributed to discussions. JUSTICE DEPARTMENT JOHN ASHCROFT -- Attorney general JOHN C. YOO -- Lawyer in Justice Dept.'s Office of Legal Counsel Has since left the administration. DEFENSE DEPARTMENT DONALD H. RUMSFELD -- Secretary of defense WILLIAM J. HAYNES -- General counsel to Defense Dept. Outside the Circle Did not see the presidential order until it was made public. NATIONAL SECURITY COUNCIL CONDOLEEZZA RICE -- National security adviser STATE DEPARTMENT COLIN L. POWELL -- Secretary of state (pg. 13)

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BYLINE: By **TIM GOLDEN**; Don Van Natta Jr. contributed reporting for this article.

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BODY:

When hundreds of prisoners arrived at the American naval base in Guantanamo Bay, Cuba, in early 2002, the Bush administration laid out a straightforward plan: once the men were interrogated, the worst of the lot would be prosecuted before special military tribunals devised to bring terrorists to justice quickly.

A year later, with no trials yet in sight, some officials at the highest levels of the Bush administration began privately venting their frustration about both the slow pace of the Pentagon's new courts and the soundness of their rules. Attorney General John Ashcroft was especially vocal.

"Timothy McVeigh was one of the worst killers in U.S. history," Mr. Ashcroft said at one meeting of senior officials, according to two of those present. "But at least we had fair procedures for him."

The administration invoked extraordinary wartime powers to set up the new system of military justice, arguing that the Sept. 11 attacks and the continuing threat they exposed justified the use of legal authorities that had not been exercised since World War II. But as officials sought to apply those powers to a very different kind of conflict, they became mired in problems they are still struggling to solve.

Although White House lawyers said they rushed to devise a new judicial structure that could handle serious Qaeda terrorists, many of the detainees sent to Guantanamo turned out to be low-level militants, Taliban fighters and men simply caught in the wrong place at the wrong time. The Pentagon's efforts to gather intelligence from more valuable prisoners were also deeply flawed, military intelligence officers said, complicating the prosecution of some detainees and nearly paralyzing efforts to release others.

Interviews with dozens of officials show that the myriad problems ignited an often fierce behind-the-scenes struggle that set the Pentagon and its allies in the White House against adversaries at the National Security Council, the State Department and Justice Department. The friction among officials like Defense Secretary Donald H. Rumsfeld; the national security adviser, Condoleezza Rice; and Mr. Ashcroft sheds new light on the internal dynamics of an administration that has shown a remarkably united public front.

In many cases, officials said, the battles were fueled by the discontent of military, foreign-policy and other officials who had been excluded from a role in shaping the policy after Sept. 11.

"Anytime you have a process which is not inclusive, you end up giving people a reason to be opposed to it," said Timothy E. Flanigan, a former deputy White House counsel who helped craft the legal strategy. "That was certainly the case here."

The Pentagon continues to defend military commissions, as the tribunals are called, as an important tool against terrorism. But in several instances, military officials said, Mr. Rumsfeld and his deputy, Paul D. Wolfowitz, resisted moving forward with prosecutions, in part because they felt the cases were weak.

As prosecutors prepare for their first two trials, now scheduled for December and January, the commissions have been roiled by vigorous attacks from the uniformed lawyers assigned to the defendants. Defense challenges have prompted the removal of half of the officers appointed to hear the first cases, and have called into question the independence of the presiding officer.

On Monday, Oct. 25, a federal district court judge in Washington is expected to hear arguments in a lawsuit by one of the defense lawyers challenging the commissions as unconstitutional. Already, White House and Pentagon lawyers are considering ways to revise the tribunals after Election Day, administration officials said.

As the Sept. 11 attacks have receded, political and diplomatic opposition to the administration's use of wartime powers has grown. Now, critics argue that the delays in moving forward with the commissions has weakened their legal justification as well.

"When commissions have been done in the past, they have either been authorized by Congress or done on the battlefield, typically during declared wars," said Neal K. Katyal, a Georgetown University law professor who will argue the case in federal court. "But here, you have a commission set up unilaterally by the president, at a time when war has not been declared, thousands of miles from a battlefield and now more than three years after the attacks."

Hunting for Defendants

With American military, intelligence and law-enforcement efforts focused on Al Qaeda, administration officials expected to corner many of its members in Afghanistan, sweep up others around the world and start prosecuting the terrorists within months.

Mr. Rumsfeld had not been intimately involved in developing the plan for prosecuting terrorist suspects. But once the prisoners started to arrive from Afghanistan, he took a strong interest in Guantanamo's potential as a source of intelligence, officials said.

He was soon disappointed.

Experienced interrogators, analysts and interpreters were all in short supply. Few, if any, military intelligence officers had significant expertise on Al Qaeda or Afghanistan. Even plywood interrogation huts were scarce: One senior interrogator said he finally bribed some Navy Seabees with cases of beer to build two more.

"Guantanamo had been a backwater location for many years," said Gen. James T. Hill, who oversees the base as commander of the United States Southern Command. "Now, all of a sudden, we were involved in strategic intelligence-gathering from an enemy unlike any we've encountered on the battlefield before, in a Guantanamo environment that at the beginning was very austere. So all of this had to evolve."

It did not evolve fast enough for Mr. Rumsfeld, who ordered an overhaul of the intelligence effort in September 2002.

Three months later, he authorized the use of more coercive interrogation techniques, taking advantage of a decision by the White House that the detainees were not protected by the Geneva Conventions. Although Mr. Rumsfeld later disallowed some of the most severe methods, including the removal of clothing and the use of dogs to induce stress, disclosures about the harsh methods lent credence to charges of abuse leveled by former detainees.

But intelligence-gathering was only part of the problem. It quickly became apparent that few of the prisoners captured in Afghanistan were the sort of hardened terrorists the administration had hoped for.

"It became obvious to us as we reviewed the evidence that, in many cases, we had simply gotten the slowest guys on the battlefield," said Lt. Col. Thomas S. Berg, a member of the original military legal team set up to work on the prosecutions. "We literally found guys who had been shot in the butt."

The reserve officer chosen by Mr. Rumsfeld to lead the intelligence operation at Guantanamo, Maj. Gen. Michael E. Dunlavey, was told after his arrival there in February 2002 that as many as half of the initial detainees were thought to be of little or no intelligence value, two officers familiar with the briefings said. He also found that the prisoners included elderly and emotionally disturbed Afghan men, including one tribal elder so wizened that interrogators nicknamed him "Al Qaeda Claus."

Barely a month after taking command, General Dunlavey flew to Afghanistan and Kuwait to complain directly to military commanders there. But while the commanders acknowledged that prisoner screening could be improved, they said they had no other place to put suspects who might be of some intelligence value or threat, a senior officer familiar with the meetings recalled.

"Basically, they said, 'General, please shut up and go home,'" the officer said.

The lack of solid information about the detainees undermined a basic premise of the

administration's legal plan. The order that established the military commissions on Nov. 13, 2001, authorized the Pentagon to hold and prosecute any foreigners designated by the president as suspected terrorists.

On Jan. 22, 2002, at the request of the White House counsel, Alberto R. Gonzales, Pentagon lawyers directed intelligence officers at Guantanamo to fill out a one-page form for each prisoner, certifying the president's "reason to believe" their involvement with terrorism, officials said.

But within weeks, intelligence officers began reporting back to the Pentagon that they did not have enough evidence on most prisoners to even complete the forms, officials said. By March 21, Defense Department officials indicated they would hold the Guantanamo prisoners indefinitely and on different legal grounds -- as "enemy combatants" in a war against the United States.

"We are within our rights, and I don't think anyone disputes it, that we may hold enemy combatants for the duration of the conflict," William J. Haynes II, the Pentagon's general counsel, said then. "And the conflict is still going and we don't see an end in sight right now."

Emerging Divisions

As accounts of the problems at Guantanamo reached Washington in the spring of 2002, the question of how to deal with the detainees began to divide the Bush administration.

In public, the administration continued to maintain that the prisoners were both frighteningly dangerous and a likely font of vital intelligence. "They may well have information about future terrorist attacks against the United States," said Vice President Dick Cheney. "We need that information."

But at the State Department, diplomats were awash in complaints from foreign governments, many of them allies in the Afghan war, about the open-ended imprisonment of their citizens. F.B.I. agents and Justice Department officials were struck by how few strong prosecution cases there seemed to be, current and former officials said.

Officials said that C.I.A. officers who were trying to recruit some Guantanamo detainees as agents raised another fear: that the camp could become America's madrasa, or Islamic school, radicalizing prisoners by its harsh conditions, the indoctrination of militant leaders and the detainees' focused study of the Koran -- the only book they were initially given to read.

Officials on the National Security Council staff were particularly uneasy. The discussions that produced the president's Nov. 13 military order had been dominated by a small circle of White House lawyers overseen by Mr. Cheney. Ms. Rice, like Secretary of State Colin L. Powell, had been excluded, officials said, an embarrassing slight given her role as a mediator on national security issues.

Mr. Bush later brought the council staff back into the process, assigning it to draw up a broader strategy to deal with the thousands of prisoners in Afghanistan. Two senior aides, Elliott Abrams and John B. Bellinger III, convened an interagency group to

study the issue.

The men made an odd team: Mr. Bellinger, the council's legal adviser, was a measured former Justice Department official with a degree from Princeton and a taste for monogrammed dress shirts. Mr. Abrams, known as a bare-knuckled bureaucratic infighter, was making his return to government after being convicted of lying to Congress in the Iran-contra scandal and later pardoned by the first President Bush.

"They were very persistent," one senior administration official from another agency said of the National Security Council aides. "They kept pressing: Did all the detainees really belong there? What was the plan to start transferring them out?"

The council officials also worried what might happen after such transfers.

"There was real concern that if detainees were harshly treated and deprived of due process, they were going to end up turning against the United States, if they had not already," said retired Gen. John A. Gordon, a former deputy director of the C.I.A. who became President Bush's deputy national security adviser for counterterrorism. "We were not making any converts."

The Defense Department was notably unresponsive to prodding by other agencies. Requests for information were answered slowly, if at all, officials said. Promised policy changes -- new criteria to improve the screening of detainees being sent to Guantanamo, or proposed terms for their transfer home -- were delayed repeatedly.

"We provided them with only the information that we, in our arrogance -- or the arrogance of our leadership -- thought they needed," one former Pentagon official said. He added that he and others went into interagency meetings on Guantanamo with a standard script, dictated by their superiors: "Back off -- we've got this under control."

The National Security Council officials were notably unsuccessful in pushing for a major public diplomacy effort to counter the widely seen images of shackled detainees in orange jumpsuits.

Members of Congress, journalists and others were eventually allowed to visit the base on tightly controlled tours. But the Pentagon, citing security concerns, refused to release even basic information about the prisoners, or say publicly what they were accused of having done.

"Rumsfeld was very clear that he wanted the Department to be driving this bus," said a former Army secretary, Thomas E. White, who was closely involved in the Guantanamo policy. "He reigned supreme in the government. The vice president backed him up, and that was his power base."

Documenting the Problems

Stymied by the Pentagon, National Security Council aides eventually began playing their own game of hardball.

In August 2002, at what officials said was the council's request, the C.I.A. dispatched

a senior Arab-speaking intelligence analyst to assess the detainees and talk to intelligence officers at the base. He produced a top-secret report of about 15 pages that, according to several officials who read it, described many of the detainees as having no meaningful ties to Al Qaeda.

It also hinted that the harsh conditions, lack of reading materials and, in some cases, extended isolation bordered on abusive and might prove counterproductive, those officials said.

Back in Washington, administration officials said, the report made its way to Ms. Rice, who began building an alliance of dissenters within the administration's national security team.

She turned first to Mr. Powell, officials said. Her staff also sought out the president's Homeland Security adviser, Tom Ridge, and set up an off-the-record dinner at which he debriefed General Dunlavey, the Guantanamo commander, who was a friend of Mr. Ridge's from his days as a lawyer in Erie, Pa.

Ms. Rice also found a powerful ally at the Department of Justice.

Early on, Justice had seemed firmly with the administration's hard-liners. In December 2001, Attorney General Ashcroft defended the president's military order before the Senate, going so far as to warn those who saw an assault on civil liberties, "Your tactics only aid terrorists, for they erode our national unity and diminish our resolve."

But by the fall of 2002, some senior Justice Department officials were uneasy with the Pentagon's handling of the detainees, the slow progress of the military commissions and the seemingly improvised nature of decisions about how to prosecute suspected terrorists.

The administration had used the federal courts to convict John Walker Lindh, a young California man captured by the military in Afghanistan, but ordered the transfer to military custody of Jose Padilla, a young American arrested by the F.B.I. in Chicago. The Justice Department had insisted on trying Zacarias Moussaoui, a French-born member of Al Qaeda arrested in Minnesota. But the Pentagon had held onto Yaser E. Hamdi, an American-born Saudi captured in Afghanistan, eventually moving him from Guantanamo to join Mr. Padilla in a naval brig in South Carolina.

"There was not a real process for determining who was an enemy combatant," said Viet D. Dinh, a former Justice Department official who worked on terrorism issues under Mr. Ashcroft. "And the ad hoc nature of that process gave a lot of power to the Pentagon."

With the federal courts starting to consider cases involving detainees, a split developed over whether to allow Mr. Hamdi and Mr. Padilla, in particular, some access to lawyers. Behind the disagreement was a philosophical difference about how best to achieve the shared goal of strengthening presidential power. A more reasonable position, many argued, would avoid review and possible reversal by the courts. Others, led by the vice president's influential counsel, David S. Addington, advocated taking the most aggressive stance they felt they could defend, officials said.

"Addington's position was, 'We think what we're doing is right -- why should we stop doing it?'" a former White House official said. "If the courts tell us we're wrong, we'll stop then."

A spokesman for the vice president's office said Mr. Addington would not comment.

Officials of the Justice Department's criminal division, who worked closely with the F.B.I., were grappling with other questions. They saw the Guantanamo detentions as a source of cascading problems: angry foreign allies, a tarnishing of America's image overseas and declining cooperation in international counterterrorism efforts.

"This was an issue of basic fairness," one former senior official involved in the discussions said. "The never-ending detentions were creating a lot of animosity among our allies. We pushed hard for them to move quicker. The attorney general pushed hard for it. They didn't, and there was an immense amount of frustration."

Dissenters Make Gains

Eventually, the critics began to gain ground. At Ms. Rice's initiative, several officials said, members of the cabinet-level "principals' committee" on national security matters were called to a meeting about the Guantanamo situation on Friday, Oct. 18, 2002.

"We are not serving the president's interest; we are not serving the interests of the country," one senior official quoted her as saying. "Security has got to be paramount, but we have got to work better with other countries, and we have got to have better procedures."

Mr. Powell echoed the call for the release or transfer of less-important detainees. "He wanted to get down to the hard-core element that needed to be detained," a senior official who attended the meeting said, "and he realized that there was a body of people we needed to move."

As for the most discussed of the elderly Afghans -- Faiz Muhammad, or "Al Qaeda Claus" -- Ms. Rice told the Pentagon: "Just get rid of this guy," one senior official said. A week after the meeting, Mr. Muhammad flew back to Afghanistan with three other detainees.

Several officials said Mr. Rumsfeld did not seem to appreciate his colleagues' growing involvement, but was also impatient with Guantanamo's problems.

"Certainly Don was ambivalent," another senior administration official said. "That phrase, 'I don't want to be the world's jailer,' that was one of the expressions he used."

The chief Pentagon spokesman, Lawrence Di Rita, said the defense secretary grew tired of hearing "that at lower levels, there was this anxiety or that anxiety" about Guantanamo, and ordered a series of briefings to keep his cabinet-level counterparts informed about operations there.

But several officials said that with preparations for war in Iraq moving forward and the Guantanamo intelligence issues unresolved, Mr. Rumsfeld's enthusiasm for the

military commissions had waned.

By late 2002, officials said, secret plans for the tribunals cited prospective defendants including several men identified as high-level Qaeda figures and thought to be held by the C.I.A.: Abu Zubaydah, Ibn al-Sheikh al-Libi and Ramzi bin al-Shibh. But with both the C.I.A. captives and more important Guantanamo detainees, interrogation was given priority over prosecution, officials said.

At a Pentagon briefing on Oct. 19, the day after the interagency gathering, Mr. Rumsfeld instructed his lawyers to clear their prosecution plans with other top national-security officials. While officials said the briefings were partly intended as a show of openness, it effectively postponed action on the tribunals for months.

At Ms. Rice's urging, Mr. Rumsfeld also agreed to give comprehensive briefings on Guantanamo to cabinet-level national-security officials and their deputies. Officials said the higher-level presentation was delivered on Jan. 16, 2003, by Marshall S. Billingslea, a 31-year-old acting assistant secretary who was a favorite of Mr. Rumsfeld.

"It was basically a sales job: 'What we are doing down there is valuable, it's producing results,'" a former Pentagon official who viewed the briefing said. "They were factual reports, but they were also very much a public-relations job."

Tweaking the Policy

In late 2002, partly in response to the mounting pressure, the Pentagon began to make some significant changes in its detention policies. By the time they took effect, though, many of the difficulties at Guantanamo were becoming harder to solve.

According to Pentagon documents reviewed by The New York Times, Mr. Wolfowitz approved several new measures on Dec. 26, 2002, including revised criteria for sending prisoners to Guantanamo, a policy to transfer detainees back to their home countries and a requirement to periodically assess whether those who remained at Guantanamo should stay.

Oddly, the Defense Department made no mention of what it called the "combatant-commander review" process. Mr. Haynes, who had pushed for the procedure, touted it in a draft op-ed article dated March 16, 2003, saying it went "far beyond anything required by international law." But other officials objected to disclosing the review effort, and the article was never submitted for publication.

The internal struggle over the prisoners' fate began to play out in dysfunctional weekly meetings at which officials from across the government assembled by secure video link to consider individual detainees put forward by the Pentagon for outright release or transfer to the custody of their home governments.

At Mr. Rumsfeld's insistence, the group tried to resolve the cases of at least 10 Guantanamo detainees a week, but that almost never happened. Information on the prisoners was often inconclusive. And while foreign-policy officials emphasized the diplomatic costs of the open-ended detentions, none of the officials wanted to take responsibility for releasing a potentially dangerous prisoner.

"There was tremendous concern in the interagency process about letting someone go who might come back to haunt us," Mr. White, the former Army secretary, recalled. The desire to release men who might be innocent, he added, "was a fairly small upside, compared to the possible downside of misjudging some guy who then goes out and commits some terrible act."

The process, some officials said, turned upside down not only any presumption of innocence but the American justice system's traditional premise that it is preferable to free a guilty man than to wrongly convict one who is innocent. It was also ineffective: by early 2004, the Pentagon had managed to transfer only 13 prisoners overseas.

"We don't want to be in a situation where we're reckless," the under secretary of defense who oversaw detainee issues, Douglas J. Feith, said in an interview. "But if you're unwilling to take risks, then you can't transfer people and then you wind up creating other risks."

Some other senior officials, who spoke on the condition of anonymity, said that was just what happened for the better part of a year.

"There were lots of factors that needed to be weighed -- not just the risks," one administration official involved in the process said. "It can hurt us if we let the wrong guy out. But it can also hurt the country and hurt the president if people think we are holding people who should not be held, that we don't have fair procedures, or that we are mistreating them."

Even when the Pentagon was willing to release prisoners, it had trouble persuading foreign governments to take over their custody because of its rigid rules. According to administration officials and diplomats, the Defense Department initially demanded that foreign governments adopt the Bush administration's wartime legal framework, taking custody of the detainees as "enemy combatants," and promising to hold them "until the end of hostilities" by terrorists against the United States. It also insisted that Washington be able to retrieve the detainees at any subsequent time if they were needed for intelligence purposes.

"The rest of the world failed to see this as a real war, rather than a law-enforcement situation," said Lt. Col. William K. Lietzau, a war-crimes expert who worked in the Pentagon general counsel's office. "When we went to another country and told them, 'We need you to hold onto these people,' they looked differently at which laws applied."

Pressure for Action

At a White House meeting in late February 2003 -- more than a year after the presidential order that created the commissions -- Mr. Ashcroft finally lost his patience.

"When are those commissions going to get moving?" officials quoted him as demanding.

Pentagon officials pledged to get started by the end of March, and began a flurry of preparations that included hiring commission lawyers, fine-tuning procedures and

even building a provisional courthouse at Guantanamo, officials said.

Defense Department officials had been searching for cases that would be easy to win in a system that still had kinks to be worked out. They did not expect that one kink would be public opinion overseas.

The officials settled on two British-born detainees at Guantanamo, in whom the Justice Department had taken a particular interest. The men, Feroz Abbasi and Moazzam Begg, spoke English, cooperated with interrogators and had ample dossiers in the data banks of British intelligence, several officials said. Neither ranked as a senior Qaeda operative, but both had enticing connections.

Mr. Abbasi, then 21, told his captors in Afghanistan that he had traveled there with a man whom the F.B.I. later identified as Earnest James Ujaama, an American convert to Islam who later pleaded guilty to illegally supporting the Taliban.

Officials said that Mr. Begg, 35, had drawn the interest of American and British counterterrorism officials since at least 1999, in part for what they said was his relationship with Abu Hamza al-Masri, a militant cleric at the Finsbury Park mosque in London..

Lawyers for both Mr. Abbasi and Mr. Begg denied that they were involved in terrorism and insisted that any confessions they were said to have made had probably been coerced.

In a letter dated Oct. 16, 2002, Michael Chertoff, the head of the Justice Department's criminal division, asked the Pentagon to allow federal prosecutors to try the two British detainees or, after their trial by military commission, let them use the men as witnesses against Mr. Ujaama and Mr. Masri. Eight months later, Defense Department officials said, they won agreement from the British government on a series of secret terms for the military trials, including diplomatic access to the men and a promise that they would not be subject to the death penalty. On July 3, 2003, Mr. Bush designated the two men and four other defendants for the first set of tribunals.

News of the men's prosecution became public in Britain just as Prime Minister Tony Blair was beginning a major public relations campaign to overcome his unpopular support for the Iraq war. Within days, he was under renewed attack in Parliament, this time over the detainees, and promising that any tribunals would follow "proper international law."

Mr. Blair's critics saw his inability to regain custody of a total of nine British detainees at Guantanamo as proof of his subjugation to Washington. After meetings with Mr. Blair the next week, Mr. Bush agreed to negotiate.

Neither government has disclosed details of the talks that followed. According to the accounts of several officials involved, American representatives grew distressed as the talks dragged on for months with the chief British negotiator, Attorney General Peter Goldsmith. Officials said Lord Goldsmith, who was himself under fire in Britain for his support of the Iraq war, would not budge from a basic demand: that verdicts of the military commissions be reviewed by civilian courts.

Bush administration officials argued that such a change would have rendered the

commissions unworkable. Instead, they made a remarkable counteroffer, promising to send any convicted British defendants home to serve their sentences -- a step that would almost certainly set off a review of the cases by British courts.

"We knew what that meant," one United States official said. "They would be released as soon as they set foot back there."

Yet even that proposal was rejected by Lord Goldsmith, officials said. During a state visit to Britain in late November 2003, Mr. Bush finally agreed to shelve the cases of the two British suspects for the foreseeable future, American officials said.

Losing Control

As the commissions moved toward their first trial this year, the Defense Department's control over the process began to falter.

The collapse of negotiations with the British government and a decision by the Supreme Court to hear a case challenging the detentions at Guantanamo prompted yet another push by the Pentagon to get the commissions going. A retired Army lawyer with a reputation for independence, Maj. Gen. John D. Altenburg Jr., was hired to supervise the tribunals process, and refinements to the rules continued.

What was more difficult to manage was the handful of scrappy military lawyers who had been appointed as defense counsel for the prisoners.

"They expected us to stay within the box they designed for us -- accept the rules, accept the process and just fight on the facts," said Lt. Cmdr. Philip Sundel, a Navy lawyer who was hired in March 2003 as one of the first two members of the defense team. "That was never going to happen."

One of the lawyers' first moves was to file a "friend of the court" brief to the Supreme Court on behalf of the Guantanamo detainees. Another was to challenge the Defense Department on speaking to the news media. When their blistering brief drew wide attention, Commander Sundel said, "We made it clear that if they tried to keep us gagged, we would sue."

It worked. The Pentagon relented and the lawyers used their new platform to attack the commissions process as unfair, unconstitutional and worse. In April, another member of the defense team, Lt. Cmdr. Charles Swift, filed suit in Federal District Court to block the commissions altogether.

While the defense was gaining momentum, the office of the commission prosecutors was in turmoil. The chief prosecutor, Col. Frederick L. Borch, left the commission and two prosecutors were reassigned after a dispute that officials said involved the supposed "hand-picking" of the commission panels.

Still, officials said, the resources of the prosecution team substantially outweighed those of the defense, and as the first hearings drew closer, the defense counsel complained that the deck was being further stacked against them.

While the defendants had a right to remain silent, they noted, information from coercive interrogations was determined to be admissible. The commissions were

supposed to presume the innocence of the defendants, yet senior military officials had repeatedly branded the Guantanamo detainees as dangerous terrorists. And although the commissions were to judge guilt "beyond a reasonable doubt," the rules of evidence allowed for evidence that, as one of the lawyers put it, "would be laughed out of any other court."

General Altenburg said in an interview he understood that public perceptions of the fairness of the commissions would be vitally important. But when preliminary hearings for the first four cases began in late August, neither he nor the panel he chose seemed ready for the scrutiny.

The impartiality of the retired Army lawyer presiding over the trials, Col. Peter S. Brownback III, was impugned by the defense, which pointed to his long friendship with General Altenburg. Other military officers on the panel, which combines the functions of judge and jury, were challenged for conflicts of interest or inexperience. Even the court interpreters were criticized for mistranslating key statements into Arabic for some of the defendants.

Weeks later, with most of the lawyers in the prosecutors' office demanding Colonel Brownback's removal, the chief prosecutor asked whether he could impartially continue. Colonel Brownback declined to step down, but General Altenburg removed two panel members and an alternate in response to the defense challenges.

That left only three members, the minimum needed to hold a commission -- and two fewer than the number required to hear a felony case in a regular military court-martial.

An Uncertain Future

Nearly three years after Mr. Bush signed his military order, senior officials have begun to acknowledge privately that the fate of both Guantanamo and the military commissions is uncertain.

Military officials say construction is soon to begin at Guantanamo on a second permanent prison unit, a \$24-million compound that will house 200 high-security detainees. Another, \$31 million unit, able to hold 100 detainees in supermax security, opened in April.

Yet in Washington, a senior legal official acknowledged that the administration still had "a major decision" to make about the base's future after the Supreme Court on June 28 upheld the right of the detainees to petition the federal courts for their freedom.

"Do we want to take them to Guantanamo?" the official asked in an interview. "Maybe not. Maybe Guantanamo is no longer a viable option."

In the meantime, the administration is redoubling efforts to broker agreements with foreign governments willing to take over custody of many of the roughly 560 prisoners still being held.

"We're making an effort," said Mr. Feith. "We're not eliminating the risks, we're managing them."

But even after long and complex negotiations with an assortment of foreign governments, the outcome of some of the 56 transfers has so far been less than promising.

In June, Russian prosecutors abruptly freed seven former Guantanamo prisoners whom other Russian officials had promised to prosecute upon their return. United States officials said they did not receive so much as a warning.

In another case, a 31-year-old Dane was sent home last February after signing an agreement to refrain from further militant activity. But last month, he said in an interview that he was on his way to Chechnya to fight with other Muslims, and invited Americans to use his earlier pledge "as toilet paper." (The man later retracted those statements, and Danish officials promised to keep him under close watch.)

In recent days, Pentagon officials have also confirmed reports that at least nine Afghans and a Pakistani who were formerly held at Guantanamo have rejoined militant forces after being freed outright. After refusing for months to discuss such mistakes, Defense Department officials now cite them as a sobering justification for the security concerns that have dominated their approach at Guantanamo.

The Pentagon has also put in place its third successive system to evaluate the prisoners' continuing status as enemy combatants. Administration officials hope that the latest version -- at which the detainees may plead their case with the help of a military aide, but without access to lawyers, witnesses or exculpatory information -- will help to persuade the court that the men have been given adequate review.

But critics insist that the changes the Pentagon has made at Guantanamo and to the military commissions amount to half-measures that will not fix a system that is fundamentally at odds with the country's legal values.

"As soon as the process was set up, it started to become something they never wanted it to be," said Commander Sundel. "But it is astounding that a small group of people could create an entirely new judicial process -- without many of the due-process guarantees we expect -- and think it could survive real challenges."

URL: <http://www.nytimes.com>

CORRECTION-DATE: October 26, 2004

CORRECTION:

A front-page article yesterday about the Bush administration's policy on prosecuting terrorists misstated the offense to which Elliott L. Abrams, now a member of the National Security Council, pleaded guilty in 1991 -- and for which he was later pardoned -- in connection with the Iran-contra scandal. It was withholding information from Congress, not lying to Congress.

GRAPHIC: Photos: William J. Haynes II, Defense Department general counsel, on March 21, 2002. (Photo by Joe Marquette/Associated Press)
 (Photo by Essam al-Ghalib/Arab News)
 Faiz Muhammad, whom the prison guards called Al Qaeda Claus, was released from Guantanamo Bay in October, 2002. His wristband shows his birth year as 1931, but he says he is 105 years old. (Photo by Paula Bronstein/Getty Images)
 U.S. Army Pfc. Jodi Smith watches detainees at Guantanamo Bay. (Photo by U.S. Navy via Reuters)(pg. A8)
 Camp Delta at the United States naval base at Guantanamo Bay. (Photo by Jez Coulson/Insight-Visual)
 Lawyers for the detainees, left to right: Navy Lt. Cmdr. Charles Swift, Air Force Lt. Col. Sharon Shaffer, Air Force Col. Will Gunn, Navy Lt. Cmdr. Philip Sundel. (Photo by Matthew Cavanaugh for The New York Times)
 (Photo by Press Association)(pg. A9)Chart: "After 9/11, a New Doctrine"SEPT. 11, 2001 -- The United States is attacked.NOV. 13, 2001 -- President Bush signs a military order authorizing the Defense Department to detain terrorist suspects and prosecute them by military commission.JAN. 11, 2002 -- The first 20 detainees arrive at Guantanamo Bay Naval Station.MARCH 21, 2002 -- Pentagon officials issue rules for the military commissions, but also say that detainees might not be released even if acquitted by tribunals.APRIL 3, 2002 -- One detainee, Yasser Esam Hamdi, left, is found to be a citizen of the United States and is moved to a naval brig in South Carolina.JULY 31, 2002 -- A federal judge dismisses lawsuits brought by two groups of detainees, saying that U.S. courts had no jurisdiction over prisoners in Guantanamo Bay.OCT. 18, 2002 -- First meeting on Guantanamo of national security Principals Committee.OCT. 26, 2002 -- Four detainees, including Faiz Muhammad, below left, arrive home in Afghanistan.DEC. 26, 2002 -- The Pentagon approves new procedures to screen prisoners sent to Guantanamo, review those being held and transfer others to their home governments.LATE FEB. 2003 -- At a meeting of national security officials, the Defense Dept. says it will begin military commission trials by the end of March.MARCH 11, 2003 -- A three-judge panel of the federal appeals court in Washington, D.C., rules that the Guantanamo prisoners have no right to challenge their detentions in U.S. courts.JULY 3, 2003 -- President Bush designates the first six prisoners to be tried before military commissions.NOV. 10, 2003 -- The Supreme Court agrees to decide whether prisoners are allowed to challenge their detention in the federal courts.NOV. 21, 2003 -- The military trials of two British citizens, Feroz Abbasi, near right, and Moazzam Begg, far right, at Guantanamo Bay are set aside by President Bush and Prime Minister Tony Blair after months of unsuccessful negotiations between the two governments.FEB. 12, 2004 -- Senior Defense Department officials say they are planning to keep most of the detainees indefinitely.FEB. 24, 2004 -- For the first time, Pentagon officials bring charges against two detainees described as senior members of Al Qaeda.APR. 7, 2004 -- Lt. Cmdr. Charles Swift, below left, the appointed military lawyer for Salim Ahmed Hamdan, a detainee facing prosecution, files a federal suit challenging the military tribunal system.JUNE 28, 2004 -- The Supreme Court rules that prisoners must be given the ability to challenge their detention in court.AUG. 24, 2004 -- Preliminary hearings begin at Guantanamo in the first four military commission cases. (pg. A8)

LOAD-DATE: October 25, 2004

Rewarding Mr. Gonzales, The New York Times, January 5, 2005

Last week, the Bush administration put another spin on the twisted legal reasoning behind the brutalization of prisoners at military jails, apparently in hopes of smoothing the promotion of Alberto Gonzales, the White House counsel. Mr. Gonzales, who oversaw earlier memos condoning what amounts to torture and scoffed at the Geneva Conventions, is being rewarded with the job of attorney general.

But the document only underscored the poor choice Mr. Bush made when he decided to elevate a man so closely identified with the scandal of Abu Ghraib, the contempt for due process at Guantanamo Bay and the seemingly unending revelations of the abuse of Afghan and Iraqi prisoners by American soldiers. Like Defense Secretary Donald Rumsfeld, the other chief architect of these policies, Mr. Gonzales shamed the nation and endangered American soldiers who may be taken prisoner in the future by condoning the sort of atrocious acts the United States has always condemned.

The Senate Judiciary Committee will question Mr. Gonzales tomorrow, even though the White House has not released documents that are essential to a serious hearing. The committee has an obligation to demand these documents, and to compel Mr. Gonzales to account for administration policies, before giving him the top law-enforcement job.

After Sept. 11, 2001, with Americans intent on punishing those behind the terrorist attacks and preventing another calamity at home, the Bush administration had its lawyers review the legal status of Taliban and Al Qaeda prisoners, with an eye to getting around the Geneva Conventions, other international accords and United States law on the treatment of prisoners.

Mr. Gonzales was the center of this effort. On Jan. 25, 2002, he sent Mr. Bush a letter assuring him that the war on terror "renders obsolete Geneva's strict limitations on questioning of enemy prisoners." That August, Mr. Gonzales got a legal opinion from Jay Bybee, then the assistant attorney general, arguing that the president could suspend the Geneva Conventions at will and that some forms of torture "may be justified." Mr. Rumsfeld's lawyers produced documents justifying the abuse of prisoners sent from Afghanistan to Guantanamo Bay. Mr. Gonzales approved those memos or didn't object. We don't know which because the White House won't release the documents.

On Thursday, more than eight months after the rotten fruits of those legal briefs were shown to the world at Abu Ghraib, the Justice Department issued yet another legal opinion. This time it rejected Mr. Bybee's bizarre notion that the president could be given the legal go-ahead to authorize torture simply by defining the word so narrowly as to exclude almost anything short of mortal injury. We were glad to see that turnaround, although it was three years too late. Prisoners have already been systematically hurt, degraded, tortured and even killed. The nation's international reputation is deeply scarred.

The new memo said that "torture is abhorrent," but it raised more questions than it answered, like this one: If Mr. Bybee's views were so obviously outlandish, why were

they allowed to stand for so long?

And the new memo still goes beyond the limits of American values and international conventions. The administration now recognizes that the anti-torture accord forbids the deliberate use of severe physical or mental pain and suffering to compel a prisoner to divulge information or cooperate in some other way -- but it continues to draw fine lines about what that means.

For instance, the Geneva Conventions say that it is torture when a prisoner suffers mentally from the use of mind-altering drugs or the threat of imminent death. But the administration's lawyers have decided that temporary trauma doesn't count, and that mental suffering is real only if it lasts for years. More than once, American soldiers have taken an Iraqi teenager and compelled him to dig his grave, then forced him to kneel, put a gun to his head and pulled the trigger in a mock execution. Is that not torture unless he's still upset about it in five years?

Even if the new memo could somehow magically sweep away all these deeply troubling aspects of the Gonzales nomination, there are other big questions about his background. As White House counsel, he recently oversaw the feckless vetting of Bernard Kerik as the nominee for secretary of homeland security. He was a primary agent behind unacceptably restrictive secrecy policies, the proposed constitutional amendment banning gay marriage and the excessive authority to abuse civil liberties granted by the Patriot Act. In Texas, as Governor Bush's legal adviser, Mr. Gonzales wrote briefs that were notoriously sloppy in response to condemned prisoners' appeals for clemency.

Republicans expect an easy confirmation, given their Senate majority. But at the very least, Mr. Gonzales should account for his actions. He should unequivocally renounce torture, without any fine-print haggling, as well as the other illegal treatment of prisoners in military jails. And he should explain how he will use his new job to clean up the mess he helped create.

January 6, 2005

Newly Released Reports Show Early Concern on Prison Abuse

By KATE ZERNIKE

In late 2002, more than a year before a whistle-blower slipped military investigators the graphic photographs that would set off the Abu Ghraib prison abuse scandal, an F.B.I. agent at the American detention center in Guantánamo Bay, Cuba, sent a colleague an e-mail message complaining about the military's "coercive tactics" with detainees, documents released yesterday show.

"You won't believe it!" the agent wrote.

Two years later, the frustration among F.B.I. agents had grown. Another agent sent a colleague an e-mail message saying he had seen reports that a general from Guantánamo had gone to Abu Ghraib to "Gitmo-ize" it. "If this refers to intell gathering as I suspect," he wrote, according to the documents, "it suggests he has continued to support interrogation strategies we not only advised against, but questioned in terms of effectiveness."

When the Abu Ghraib scandal broke last spring, officials characterized the abuse as the aberrant acts of a small group of low-ranking reservists, limited to a few weeks in late 2003. But thousands of pages in military reports and documents released under the Freedom of Information Act to the American Civil Liberties Union in the past few months have demonstrated that the abuse involved multiple service branches in Afghanistan, Iraq and Cuba, beginning in 2002 and continuing after Congress and the military had begun investigating Abu Ghraib.

Yesterday, in response to some of the documents, the Pentagon said it would investigate F.B.I. reports that military interrogators in Guantánamo abused prisoners by beating them, grabbing their genitals and chaining them to the cold ground.

Questions on the handling of detainees will be central to Senate hearings today on the nomination of the White House counsel, Alberto R. Gonzales, as attorney general and to the court-martial of the accused leader of the Abu Ghraib abuse, which begins Friday in Texas.

An article in today's issue of The New England Journal of Medicine says that military medical personnel violated the Geneva Conventions by helping design coercive interrogation techniques based on detainee medical information. Some doctors told the journal that the military had instructed them not to discuss the deaths that occurred in detention.

No one predicted the acts that showed up in snapshots from Abu Ghraib - naked detainees piled in a pyramid or leashed and crawling - but the documents showed many warnings of mistreatment, most explicitly from the F.B.I.

"Basically, it appears that the lawyer worked hard to write a legal justification for the type of interviews they (the Army) want to conduct here," one agent said in an e-mail message from Guantánamo in

December 2002.

The Pentagon now says 137 military members have been disciplined or face courts-martial for abusing detainees. A separate federal investigation in Virginia is looking into possible abuses by civilians hired as interrogators. Several military investigations are still pending, including ones into the deaths of about a dozen detainees.

The charges against the 137 service members, officials say, reflect a zero-tolerance attitude toward abuse - and a small percentage of the 167,000 troops in Afghanistan and Iraq.

"Our policy is clear," said Lt. Col. John A. Skinner, a Pentagon spokesman. "It has always been the humane treatment of detainees."

Civil liberties groups complain that no high-level officers have been held accountable for abuse.

"When you see the same thing happening in three different places, you see abuses being committed with impunity, then it ceases to be the sole responsibility of the individual soldiers," Reed Brody, special counsel to Human Rights Watch, said. "At a certain point, it becomes so widespread that it makes it look like a policy."

Colonel Skinner said that while Defense Secretary Donald H. Rumsfeld has said he believes the abuse was limited, "the secretary has also been clear that we're going to have multiple lines of inquiry to really fully understand what took place, and to have the appropriate investigations to find out any wrongdoing that's occurred." Three of eight military reports on the abuse, he said, have yet to be concluded.

An Army officer, Brig. Gen. John T. Furlow, will lead the new investigation at Guantánamo.

Officials have defended some cases of harsh treatment by saying it was simply the cost of the so-called global war on terror. The Special Operations task force was assigned to track down terrorists in Iraq and Afghanistan. But many of the detainees were not terrorists. In Iraq, 70 percent to 90 percent of those detained, according to military intelligence estimates reported by the International Committee of the Red Cross, "had been arrested by mistake." A military report on Iraqi prisons said that many detainees were held for several months for things like expressing "displeasure or ill will" toward the American occupying forces.

The Bush administration decided in February 2002 that the Geneva Conventions did not apply to members of Al Qaeda and that while they did apply to the Taliban, prisoners taken in Afghanistan were not entitled to the protections of the conventions. Many detainees were taken to Guantánamo, held indefinitely and interrogated with harsh techniques approved for by Mr. Rumsfeld in April 2003. The administration said detainees in Iraq were covered by the conventions, which should have protected them from threats or harassment in interrogations, or from physical or mental torture.

But a military report by a former defense secretary, James R. Schlesinger, which was released in August, concluded that harsh tactics intended for use only at Guantánamo - threatening detainees with dogs, leaving them naked in extreme heat or cold, shackling them upright to keep them awake - "migrated" improperly to Afghanistan and then to Iraq.

"The AC had been turned off, making the temperature in the unventilated room probably well over 100 degrees," one F.B.I. agent reported from Guantánamo in August. "The detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out

throughout the night."

The earliest abuses on record in Iraq apparently came in May 2003. On May 15, two marines in Karbala held a 9-millimeter pistol to the head of a bound detainee while a third took a picture. One marine, according to military records, then poured a glass of water on the detainee's head. In June 2003, according to records, a marine ordered four Iraqi children who had been detained for looting to stand next to a shallow ditch, then fired a pistol in a mock execution.

In August, a marine put a match to a puddle of hand sanitizer that had spilled in front of an Iraqi detainee, igniting a flame that severely burned the detainee's hands.

In April of 2004, marines shocked detainees with wires from an electric transformer - "the detainee 'danced' as he was shocked," an investigative report said. And in June, Defense Intelligence agents reported members of a military Special Operations task force repeatedly punching a detainee in the face. The agents also reported finding prisoners with burn marks on their backs and complaining of kidney pain.

C.I.A. agents reported concerns that the Special Operations task force had abused detainees a year before the Defense Intelligence agents had, leading the C.I.A. to order its agents not to participate in task force interrogations. A military investigation found no evidence of abuse. The F.B.I. also warned its agents at Guantánamo and in Iraq not to participate in military interrogations that used tactics like harsh light, excessively loud music and extreme temperatures, which were not accepted F.B.I. practices.

The Red Cross reported concerns about mistreatment in all three places and raised concerns about medical personnel at Guantánamo sharing health information with military units that planned interrogations. The New England Journal report went further, saying the doctors helped design interrogation strategies using private medical records.

The Pentagon denied that any doctors had taken part in any mistreatment of prisoners but said yesterday that it was reviewing its medical policies regarding detainees.

The F.B.I. complaints began in December 2002, according to the documents. A year later, an agent complained that "these tactics have produced no intelligence of a threat neutralization nature to date."

But agents struggled with what they could complain about, believing that, in some cases, tactics they considered harsh or abusive had high-level approval.

"This technique and all of those used in the scenarios was approved by the dep sec def," or deputy secretary of defense, one agent wrote from Guantánamo in January 2004.

An agent in Iraq reported seeing military interrogators yelling at detainees, covering them with hoods and subjecting them to loud music. That went beyond acceptable F.B.I. practice, the agent wrote, but had been "authorized by the president under his executive order." An e-mail message from the agent made several references to President Bush's signing of an order allowing such techniques.

"We know what's permissible for F.B.I. agents but are less sure what is permissible for military interrogators," the agent wrote.

After Abu Ghraib, when the F.B.I. asked agents to report any abuse they had seen, agents reported 26 incidents they believed to be mistreatment. But the bureau's general counsel said 17 of those were

allowed under Pentagon policy.

The Pentagon and the White House say that no executive order existed.

But earlier memorandums from the White House and the Pentagon on interrogation techniques could have created confusion.

The A.C.L.U. argues that whether or not an executive order existed, the fact that an F.B.I. agent believed so demonstrates the uncertainty over what was permissible.

"It's this climate of confusion and the creation of a legal framework that allowed detainee rights to be violated that has to be parked on the doorstep of leading government officials," said Anthony Romero, the executive director of the A.C.L.U.

Most of the 137 people who have been charged or disciplined, were members of the Army. Of those, 46 resulted in nonjudicial or administrative punishments, which generally mean fines or reductions in rank.

Fourteen marines have been convicted by courts-martial, including one who shocked a detainee with electrical wires. That marine was sentenced to one year's confinement. The marine who conducted the mock execution received a reduction in rank, 30 days' hard labor and 6 months' forfeiture of pay.

One Special Operations member, the Pentagon said, admitted using a stun gun on detainees.

The Pentagon said the punishments reflected different levels of involvement, but the A.C.L.U. and human rights groups said that many serious cases were not given appropriate punishments. After an Army specialist shot a detainee in Tikrit in September 2003, an investigation found probable cause to charge him with murder, records showed. Instead, the specialist was demoted to private and discharged.

Another report on Abu Ghraib cited 34 military intelligence soldiers, including the top two officers at the prison. But only one soldier has been punished, and the two officers have not been charged. A military investigation implicated 28 soldiers in the deaths of two men at the Bagram detention center in Afghanistan; but only one has been charged.

January 26, 2005

EDITORIAL

The Wrong Attorney General

Alberto Gonzales's nomination as attorney general goes before the Senate at a time when the Republican majority is eager to provide newly elected President Bush with the cabinet of his choice, and the Democrats are leery of exposing their weakened status by taking fruitless stands against the inevitable. None of that is an excuse for giving Mr. Gonzales a pass. The attorney general does not merely head up the Justice Department. He is responsible for ensuring that America is a nation in which justice prevails. Mr. Gonzales's record makes him unqualified to take on this role or to represent the American justice system to the rest of the world. The Senate should reject his nomination.

The biggest strike against Mr. Gonzales is the now repudiated memo that gave a disturbingly narrow definition of torture, limiting it to physical abuse that produced pain of the kind associated with organ failure or death. Mr. Gonzales's attempts to distance himself from the memo have been unconvincing, especially since it turns out he was the one who requested that it be written. Earlier the same year, Mr. Gonzales himself sent President Bush a letter telling him that the war on terror made the Geneva Conventions' strict limitations on the questioning of enemy prisoners "obsolete."

These actions created the legal climate that made possible the horrific mistreatment of Iraqi prisoners being held in Abu Ghraib prison. The Bush administration often talks about its desire to mend fences with the rest of the world, particularly the Muslim world. Making Mr. Gonzales the nation's chief law enforcement officer would set this effort back substantially.

Other parts of Mr. Gonzales's record are also troubling. As counsel to George Bush when he was governor of Texas, Mr. Gonzales did a shockingly poor job of laying out the legal issues raised by the clemency petitions from prisoners on death row. And questions have been raised about Mr. Gonzales's account of how he got his boss out of jury duty in 1996, which allowed Mr. Bush to avoid stating publicly that he had been convicted of drunken driving.

Senate Democrats, who are trying to define their role after the setbacks of the 2004 election, should stand on principle and hold out for a more suitable attorney general. Republicans also have reason to oppose this nomination. At the confirmation hearings, Senator Lindsey Graham, Republican of South Carolina, warned that the administration's flawed legal policies and mistreatment of detainees had hurt the country's standing and "dramatically undermined" the war on terror. Given the stakes in that war, senators of both parties should want an attorney general who does not come with this nominee's substantial shortcomings.

December 15, 2004

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick L. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Hatch and Ranking Member Leahy:

As health professional members of Physicians for Human Rights' Asylum Network with experience examining or treating survivors of torture, we are deeply committed to preventing torture wherever it might be inflicted, regardless of pretext or attempted justification. We are, therefore, extremely concerned about the nomination of White House Counsel Alberto R. Gonzales to the position of Attorney General of the United States. Mr. Gonzales has taken positions that contravene the United States' historical commitment to domestic and international law prohibiting torture. There is reason to believe that these positions, which would eviscerate U.S. obligations under international treaties established for the protection of all, including Americans, have led to the torture and ill treatment of many individuals held in U.S. custody.

For over ten years, Physicians for Human Rights has documented the physical and psychological sequelae of torture, and our experience with torture survivors offers grim testimony to the importance of treaties like the Geneva Conventions and the Convention Against Torture. There should be no place in the U.S. government for any official who condones the crime of torture, for which there exists unequivocal legal prohibition. We urge you, therefore, to scrutinize closely the record of Mr. Gonzales before making any determinations on his suitability for the position of Attorney General.

As White House Counsel, Mr. Gonzales oversaw the development of detainee interrogation policies that were applied in Afghanistan, Iraq, Guantánamo and elsewhere. On January 25, 2002, he wrote a memo to President Bush that advised against applying the Geneva Conventions to detainees captured in Afghanistan. Despite the treaty's express terms, which state that it governs all conflicts "at any time and in any place whatsoever," Mr. Gonzales dismissed the Geneva Conventions, calling their strict limitations on questioning of enemy prisoners "obsolete." Although U.S. military leaders, including Secretary of State Colin Powell, warned that making such a determination would undermine the U.S. military culture of treating prisoners humanely, Mr. Gonzales advised the President that such arguments were unpersuasive. On February 7, 2002, based on Mr. Gonzales' advice, President Bush issued a memorandum denying protections of the Geneva Conventions to those captured in Afghanistan.

The warnings of U.S. military leaders and Secretary Powell about the potential harm caused by a decision to disregard the Geneva Conventions proved well-founded. As early as December 2002, there were widespread reports of U.S. government personnel using internationally prohibited interrogation techniques against detainees in Afghanistan

and elsewhere. In the spring of 2004, the global community witnessed images of detainees at Abu Ghraib prison being subjected to torture and ill treatment, which included the use of dogs, hooding, stress positions, and forced nudity. Many believe the abuse occurred as a result of the interpretation Mr. Gonzales and others offered government and military officials on the Geneva Conventions. Investigations into the abuse determined that some U.S. interrogators who employed torture at Abu Ghraib reasonably believed that their actions had been authorized.

In addition, Mr. Gonzales solicited a memorandum from the Justice Department in the summer of 2002 regarding the use of torture. That memo asserted the President's right to order the torture of detainees, a position that violates U.S. treaty obligations under the Convention Against Torture and other international agreements. The memo also radically altered the definition of torture. It defined "torture" so narrowly as to exclude all but treatment "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." With respect to mental pain or suffering, the memo said that it does not amount to torture unless it results in "significant psychological harm of significant duration, e.g., lasting for months or even years." This definition of torture contravenes the Convention Against Torture, a treaty the U.S. has ratified, and condones practices that the U.S. itself condemns in its annual Human Rights Report.

The Justice Department definition of torture also contradicts our knowledge of the impact of torture and cruel, inhuman and degrading treatment on individuals who experience it. From our experience, torture and ill treatment have long-lasting effects that take many psychological and physical forms which go far beyond the Justice Department's stated interpretations. Indeed, we have found that is no limit to the number of forms that torture and ill treatment can take. Forced nakedness combined with the threat of assault, hearing the sounds of others being abused, and the display of torture devices during "interrogation" with or without specific reference to them are just a few examples from our experience that have had profound psychological effects but would not meet the narrow definition of torture put forth by the Department of Justice.

For these reasons, we urge the Judiciary Committee to conduct a thorough review of Mr. Gonzales' record, in particular his role in setting Administration policy on detention, interrogation, and torture. We urge you to secure his commitment to upholding international treaty obligations, including the Geneva Conventions and the Convention Against Torture, and to clarify his position on whether the President has the right to disregard those obligations. We also ask you to seek his approval of the establishment of an independent commission to investigate torture and ill treatment at Abu Ghraib, Guantánamo Bay and other detention facilities around the world.

In light of the recent *New York Times* article detailing International Committee of the Red Cross findings of torture by U.S. military at Guantánamo Bay as recently as June 2004, Mr. Gonzales must be held accountable for his role in the formulation of a policy that permits such abuse. Decisions regarding any possible future role for him in the U.S.

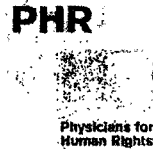
government must be made only after considering these serious concerns on human rights and the rule of law.

Sincerely,

William A. Manteris DMD

A handwritten signature in cursive script that reads "Will A Manteris DMD".

Physician for Human Rights Examiner



January 21, 2005

FOR IMMEDIATE RELEASE

Contact:

Barbara Ayotte, 617.301.4210; 617.549.0152 cell; bayotte@phrusa.org
www.phrusa.org

**Physicians for Human Rights Opposes Nomination of Alberto Gonzales
to Attorney General; Opposition is a First for the Human Rights Group**

Physicians for Human Rights (PHR) announced today its opposition to the confirmation of White House Legal Counsel Alberto Gonzales to be Attorney General of the United States. As the top legal officer of the nation, the Attorney General has the responsibility to assure that all agencies of government prevent torture and cruel, inhuman and degrading treatment. Mr. Gonzales has not acknowledged the widespread use of torture by US forces in Iraq, Afghanistan, Guantánamo and elsewhere. His record, along with the statements he made at his confirmation hearings and his written responses to Senators' questions, demonstrate that he is unwilling to make a commitment to assure that torture is not used in the interrogation of detainees.

"No country can call itself dedicated to protecting and promoting the dignity of human beings if its highest legal officer equivocates or hedges on a commitment to prevent torture," said Leonard S. Rubenstein, PHR's executive director. "The American people deserve an Attorney General who is devoted to this most cherished human right."

Physicians for Human Rights has never before opposed a nominee for public office in the United States and doing so represents an extraordinary step for the organization, requiring a two-thirds vote of its board of directors. In this case, the organization's extensive experience in documenting and seeking to prevent torture makes opposition to the Gonzales nomination an imperative.

Mr. Gonzales should have been forthright in explaining how as Attorney General he would take action to stop future use of torture, especially in view of his prior involvement in subverting the Geneva Conventions and other international agreements, his participation in the 2002 memorandum that permitted torture – both explicitly and through a strained interpretation of law that excluded egregious abuse from the definition of torture – and in view of the horrific evidence of torture inflicted by US forces during the past three years. Instead, at his confirmation hearing, Mr. Gonzales provided no such assurances. He offered generalities and evaded all questions asking him to articulate how he would seek to prevent torture through actions and interpretations of law. In the written responses he provided to questions for Senators, Mr. Gonzales continued to equivocate.

In fact, Mr. Gonzales played a leadership role in creating policies that led to torture and ill treatment and evading responsibilities under international human rights and humanitarian law. In January 2002, against the warning of Secretary of State Colin Powell and others, he drafted a memorandum to President Bush that denied wholesale the protection of the Geneva Conventions to al Qaeda and Taliban detainees without any of the case-by-case review the Conventions require to make such a determination. In his written responses, Mr. Gonzales defended the decision not to apply the Geneva Conventions to al Qaeda and Taliban fighters and said that case-by-case reviews required by the Conventions were unnecessary. He also participated in decisions to deny any form of independent review of the detention of these individuals, a decision later held by the Supreme Court to violate the Constitution.

In the summer of 2002, Mr. Gonzales solicited a legal opinion from the Justice Department regarding the use of torture. That memo asserted the President's right to order the torture of detainees, a position that violates domestic law and US treaty obligations under the Convention against Torture and other international agreements.

The Justice Department 2002 opinion also defined torture so narrowly as to exclude all but treatment "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death," opening the door to the use of a wide range of techniques that have long been considered methods of torture. The record of subsequent action by the Defense Department shows that the memorandum was used to justify acts that, under any acceptable definition, would amount to torture.

During his confirmation hearings on January 6, 2005, Mr. Gonzales was repeatedly invited by Senators from both parties to distance himself from these views, clarify his role in the process, and accept accountability for the abuses that occurred. Mr. Gonzales declined to do so, instead offering lip service to the prohibition against torture while at the same time offering evasive and equivocal answers that indicated his unwillingness to be bound by that prohibition.

When asked whether US personnel can legally engage in torture under any circumstances, Mr. Gonzales replied, "I don't believe so, but I'd want to get back to you on that." He also refused to reject the reasoning of the August 2002 Justice Department opinion, stating that he did not "have a disagreement with the conclusions then reached by the department." This is shocking, considering that the Justice Department itself recently repudiated this aspect of the opinion.

Equally troubling, when asked whether he believes the President can order torture despite international and domestic law prohibiting its use, Mr. Gonzales refused to answer. When pressed, he offered an evasive response, saying that there "may come an occasion when the Congress might pass a statute that the President may view as unconstitutional."

Finally, Mr. Gonzales did not even acknowledge the scope of the use of torture by US forces and the need for leadership by the Attorney General to end it. He did not affirm that clear guidance on interrogations consistent with obligations under international treaties and US laws is still needed. Despite the voluminous record now demonstrating the extensive use of torture and cruel, inhuman and degrading treatment, he treated the problem as an aberration limited to a few soldiers at Abu Ghraib. He cast doubt on the legitimacy of repeated concerns raised by the FBI about abusive interrogation practices carried out at Guantánamo. A nominee for Attorney General who refuses to acknowledge the existence of illegal, abhorrent conduct cannot inspire any confidence that he will deal appropriately with this problem when in office.

As Attorney General, Mr. Gonzales would be obligated to take aggressive steps to stop torture, including repudiating aspects of the December 30, 2004 Office of Legal Counsel memorandum that continue to permit psychological torture. Yet he gave no indication that he would seek any change in practices that have led to such torture and ill treatment.

In fact, Mr. Gonzales does not believe there is any legal prohibition against such ill treatment of foreign detainees. In his written responses, he said that the Administration has decided that the Convention Against Torture's ban on cruel, inhuman or degrading treatment does not apply to foreign detainees held outside the United States.

Based on his record, his responses at the hearing, and his written answers, Physicians for Human Rights believes that Mr. Gonzales lacks the commitment to human rights and the rule of law needed to stop torture and cruel, inhuman, and degrading treatment. His confirmation would risk maintaining a climate of uncertainty and permissiveness among military, civilian, and intelligence officials who detain and interrogate foreign prisoners and who send detainees to other countries to be interrogated and tortured.

"Torture by US forces will continue until there is an airtight policy prohibiting its use. By failing to offer the slightest hint of support for such a policy, let alone a commitment to implementing one, Mr. Gonzales has proven that he is unfit to serve as the nation's top law enforcement officer," said Rubenstein.

Founded in 1986, Physicians for Human Rights (PHR) mobilizes the health professions to promote health by protecting human rights. As a founding member of the International Campaign to Ban Landmines, PHR shared the 1997 Nobel Peace Prize. www.phrusa.org

717

REFUGE
155 AVENUE OF THE AMERICAS
4TH FLOOR
NEW YORK NY 10013
TEL: 212-352-1430 FAX: 212-924-2314

January 5, 2005

Hon. Patrick Leahy
United States Senate
Washington D.C. 20002

Re: Nomination of Alberto Gonzales

Dear Senator Leahy,

I am the managing director of *REFUGE*, a program that assists survivors of torture and their families now living in New York City. *REFUGE* is a member of the National Consortium of Torture Treatment Programs and is funded by both the Torture Victims Relief Act (TVRA) and the United Nations Voluntary Fund for Victims of Torture.

My colleagues and I have seen first-hand the physical, emotional and psychological pain that torture inflicts on its victims. This pain is often lifelong – and is suffered by the victim’s family and community, often for generations to come.

I write to respectfully ask you to oppose the nomination of Alberto Gonzales. Mr. Gonzales is a major architect of the Bush Administration’s policy on torture and detention. A vote for his confirmation is a vote in support of the attitude, policy and actions that have perpetrated torture in the name of the United States citizens.

No promise that Mr. Gonzales may now make to abide by the Convention Against Torture or the Geneva Convention is credible. No promise he may now make can undo the damage he has done to countless people. No promise he may now make can reinstate the respect we have lost in the world for the abuse of human rights that Mr. Gonzales helped to commit.

Please hold Mr. Gonzales accountable and oppose his nomination.

Sincerely yours,

Carol Prendergast
Managing Director

The Republican (Western Massachusetts)

January 23, 2005

Editorial

Gonzales Nomination Leaves Many Questions

When Alberto Gonzales appeared before the Senate Judiciary Committee earlier this month, some of his answers to questions about the treatment of prisoners in Iraq, Afghanistan and elsewhere left some Democratic committee members wanting more. So they asked a series of follow-up questions to be answered in writing. And when Gonzales provided his answers, those same senators still found themselves wanting more.

So they decided to delay - for at least one week - a committee vote on his nomination to succeed John Ashcroft as attorney general. It was the right move.

There are real questions about Gonzales' fitness to serve as attorney general. His nomination should not move forward until those questions are answered.

He has written that certain provisions of the Geneva Conventions - which provide for the treatment of enemy prisoners - are "quaint" or "obsolete." Gonzales approved a memorandum saying that the president "wasn't bound by laws prohibiting torture and that government agents who might torture prisoners at his direction couldn't be prosecuted by the Justice Department."

Gonzales has said he believes that the president of the United States has the authority to order the detention of enemy combatants indefinitely during wartime. He has repeatedly backed the provisions in the USA Patriot Act that infringe most broadly on civil liberties and the fundamental right of the citizens to be left alone.

When he was attorney general of Texas - while George W. Bush was governor - he wrote a memo directly contradicting a federal law that grants foreign nationals access to American courts when they are accused of a crime.

And the list goes on and on.

The president has nominated Alberto Gonzales to be the chief law enforcement officer in the United States. The attorney general sits at the very top of the U.S. Department of Justice. The person in that position must possess a scrupulousness that is beyond question.

Gonzales has not, to date, demonstrated that he has the qualities that an individual needs to be elevated to one of the most significant positions in this nation.

GENERAL DAVID M. BRAHMS (RET. USMC) ADMIRAL LEE F. GUNN (RET. USN)
GENERAL JAMES CULLEN (RET. USA) GENERAL JOSEPH HOAR (RET. USMC)
GENERAL JOHN L. FUGH (RET. USA) ADMIRAL JOHN D. HUTSON (RET. USN)
GENERAL ROBERT GARD (RET. USA) GENERAL RICHARD OMEARA (RET. USA)

September 7, 2004

The Honorable George W. Bush
President of the United States
1600 Pennsylvania Avenue
Washington, DC 20500

Dear President Bush:

As retired professional military and civilian leaders of the U.S. Armed Forces, we have worked for decades to defend the national security of the United States and to uphold the honor, integrity and effectiveness of its military and intelligence services. We have greatly valued the opportunity to serve, and we remain committed to this critically important cause.

It is thus with regret that we, the undersigned, write to express our deep concern about the serious allegations of wrongdoing in U.S. military and intelligence detention and interrogation practices in the global “war on terror.” We urge you to commit – immediately and publicly – to support the creation of a comprehensive, independent commission to investigate and report on the truth about all of these allegations, and to chart a course for how practices that violate the law should be addressed.

The photographs of torture and other abuse that emerged from the U.S. detention facility at Abu Ghraib horrified us all, and were met appropriately with condemnation in the United States and around the world. Several of those accused of these abuses are now being prosecuted, and we trust that additional prosecutions, if appropriate, will be brought as promptly as possible.

While we do not wish to prejudge the guilt or innocence of anyone accused of wrongdoing, we cannot ignore that there are now dozens of well-documented allegations of torture, abuse, and otherwise questionable detention practices that appear to have been imposed upon individuals held in U.S. custody at detention facilities from Iraq to Afghanistan to Guantanamo Bay.¹ These reports have implicated both U.S. military and intelligence agencies, ranging from junior enlisted members to senior command officials,

¹ See, e.g., Report of the International Committee of the Red Cross On The Treatment By The Coalition Forces Of Prisoners Of War And Other Protected Persons By The Geneva Conventions In Iraq During Arrest, Internment And Interrogation, February 2004; Report of Major General Antonio Taguba, “Article 15-6: Investigation of the 800th Military Police Brigade”; Department of the Army The Inspector General, “Detainee Operations Inspection,” July 21, 2004.

as well as civilian contractors. As of the date of this letter, no fewer than a hundred criminal, military, and administrative inquiries have been launched into apparently improper or unlawful U.S. practices related to detention and interrogation. Given the range of individuals and locations involved in these reports, it is simply no longer possible to view these allegations as a few instances of an isolated problem.

Understanding what has gone wrong and what can be done to avoid systemic failure in the future is essential not only to ensure that those who may be responsible are held accountable for any wrongdoing, but also to ensure that the effectiveness of the U.S. military and intelligence operations is not compromised by an atmosphere of permissiveness, ambiguity, or confusion. This is fundamentally a command responsibility.

The well-developed system of national and international laws governing detention and interrogation was designed – and has long been followed by the United States – for critical policy reasons in the United States’ self-interest. Experience and common sense have shown that information gathered through physical torture or dehumanizing humiliation is notoriously unreliable. It has a demoralizing, dehumanizing effect not only on those subject to violations, but also on our own troops – those who may be directly involved, and those unfairly tarred with the same brush. Violation of basic rules of international law by those acting under U.S. control also puts U.S. forces at greater risk. It jeopardizes the United States’ moral and practical authority to promote democracy and human rights abroad. And it seriously undermines the United States’ ability to “win the hearts and minds” of the global community – a goal essential to defeating terrorism over the long term.

While we welcome the investigations now underway into instances of abuse in U.S. detention and interrogation practices, none of them is sufficiently comprehensive or independent to effectively identify and recommend how to address any underlying causes of such widespread abuse.

For example, the excellent investigative report by Major General Antonio Taguba looked only at the role of U.S. military police at Abu Ghraib; a subsequent internal investigation looked into the role of military intelligence forces at that facility. But early accounts have suggested that a critical part of what went wrong at Abu Ghraib was the *relationship* – and failures in the command structure – between intelligence and police operations. Only a more overarching inquiry can fully understand that interaction, and recommend appropriate corrective measures.

Similarly, while Major General Taguba’s investigation was admirable in its thoroughness and clarity, informal investigations such as his, which are authorized by Army Regulation 15-6, are limited in scope and power. They do not require sworn statements or provide subpoena power. Such internal military investigations likewise generally lack the authority to examine the full chain of command, or the role of other U.S. government agencies in abuse. Investigations that are purely internal to the military, however competent, cannot examine the whole picture. The same is true for investigations of

particular individuals; our criminal and military justice systems are designed to evaluate the facts and dispense justice in the individual case – not to evaluate broader problems.

Finally, internal investigations by their nature also suffer from a critical lack of independence. Americans have never thought it wise or fair for one branch of government to police itself. But that has been exactly the case in many of the abuse inquiries to date, including the investigative “panel” that released its report in late August 2004. That panel was comprised of four members of the Secretary’s own Defense Policy Board – members selected by the Secretary himself. The panel also lacked subpoena powers.

For these reasons, we urge you to commit – immediately and publicly – to support the creation of an independent commission to investigate and report on the detention and interrogation practices of U.S. military and intelligence agencies deployed in the global “war on terror.”

To overcome the deficiencies of existing investigations, such a commission – modeled on successful efforts such as the just-concluded 9/11 Commission – would satisfy the following criteria:

1. It must be bipartisan and led by recognized experts of unimpeachable credibility in military and intelligence operations, human rights and international law.
2. It must be fundamentally independent of the Executive Branch, with commission members selected jointly by appropriate congressional and executive officials.
3. It must have access to classified information and a mandate to inquire into information from all relevant agencies and all levels of authority.
4. It must have the power to take testimony under oath, and to subpoena witnesses.
5. It must be empowered to offer whistleblower protection to all those with relevant knowledge, including those who may fear retribution for testifying truthfully.
6. It must review and build on the findings of investigations already underway.
7. It should, to the extent consistent with U.S. national security classification needs, be open to the public – a feature unique to democracy and essential to the commission’s credibility in the United States and around the world.

Whether this commission begins its work before or after the upcoming presidential election, there should be no question that as president, you will actively support the creation and work of such a commission. The integrity, effectiveness, and honor of the U.S. Armed Forces and related agencies were badly – we hope not irrevocably – damaged when the Abu Ghraib photos came to light. Subsequent allegations raise similarly serious questions concerning U.S. detention policy. It is past time to begin a

comprehensive inquiry into what has gone wrong in U.S. military and intelligence detentions since September 11 – an inquiry led by a body empowered to get at the truth.

We urge you to commit to such an inquiry today.

Sincerely,

General David M. Brahms (Ret. USMC)
General James Cullen (Ret. USA)
General Robert Gard (Ret. USA)
Admiral Lee F. Gunn (Ret. USN)
General John L. Fugh (Ret. USA)
General Joseph Hoar (Ret. USMC)
Admiral John D. Hutson (Ret. USN)
General Richard Omeara (Ret. USA)

Biographical information on the signatories is attached.

**BIOGRAPHICAL INFORMATION
ON SIGNATORIES OF LETTER TO PRESIDENT BUSH**

For individual contact information, call:

David Danzig, 212-845-5252

DanzigD@humanrightsfirst.org

Biographical information on:

General David M. Brahms (Ret. USMC)

General James Cullen (Ret. USA)

General Robert Gard (Ret. USA)

Admiral Lee F. Gunn (Ret. USN)

General John L. Fugh (Ret. USA)

General Joseph Hoar (Ret. USMC)

Admiral John D. Hutson (Ret. USN)

General Richard Omeara (Ret. USA)

General David M. Brahms (Ret. USMC)

Brigadier General David M. Brahms served in the Marine Corps from 1963-1988. He served as the Marine Corps' senior legal adviser from 1983 until his retirement in 1988. General Brahms currently practices law in Carlsbad, California and sits on the board of directors of the Judge Advocates Association.

General James Cullen (Ret. USA)

James Cullen is a retired Brigadier General in the United States Army Reserve Judge Advocate General's Corps and last served as the Chief Judge (IMA) of the U.S. Army Court of Criminal Appeals. He currently practices law in New York City.

General John L. Fugh (Ret. USA)

General Fugh was The Judge Advocate General of the U.S. Army, retiring from that post in July 1993 as a Major General. General Fugh was 15 years old when he migrated to the United States with his family from China. He was the first Chinese-American to attain General officer status in the U.S. Army. General Fugh currently lives in the Washington, D.C. metropolitan area.

General Robert Gard (Ret. USA)

Robert Gard is a retired Lieutenant General who served in the United States Army; his military assignments included combat service in Korea and Vietnam. He is currently a consultant on international security and president emeritus of the Monterey Institute for International Studies.

Admiral Lee F. Gunn (Ret. USN)

Vice Admiral Gunn served as the Inspector General of the Department of the Navy until his retirement in August 2000. Admiral Gunn commanded the USS BARBEY and the Destroyer Squadron "Thirty-one," a component of the U.S. Navy's Anti-Submarine Warfare Destroyer Squadrons. Gunn is from Bakersfield, California and is a graduate of the University of California, Los Angeles. He received his commission from the Naval ROTC program at UCLA in June 1965.

General Joseph Hoar (Ret. USMC)

General Hoar served as Commander-in-Chief, U.S. Central Command. After the first Gulf War, General Hoar led the effort to enforce the naval embargo in the Red Sea and the Persian Gulf, and to enforce the no-fly zone in the south of Iraq. He oversaw the humanitarian and peacekeeping operations in Kenya and Somalia and also led the U.S. Marine Corps support for operations in Rwanda, and the evacuation of U.S. civilians from Yemen during the 1994 civil war. He was the Deputy for Operations for the Marine Corps during the Gulf War and served as General Norman Schwartzkopf's Chief of Staff at Central Command. General Hoar presently runs a consulting business in California.

Admiral John D. Hutson (Ret. USN)

Rear Admiral John D. Hutson served as the Navy's Judge Advocate General from 1997 to 2000. Admiral Hutson now serves as President and Dean of the Franklin Pierce Law Center in Concord, New Hampshire.

General Richard Omeara (Ret. USA)

Brigadier General Richard Omeara is a combat decorated veteran who fought in Vietnam before earning his law degree and joining the Army's Judge Advocate General Corps. He retired from the Army Reserves in 2002 and now teaches courses on Human Rights and History at Kean University and at Monmouth University.

Brigadier General David M. Brahms (Ret. USMC)	General Joseph Hoar (Ret. USMC)
Brigadier General James Cullen (Ret. USA)	Rear Admiral John D. Hutson (Ret. USN)
Brigadier General Evelyn P. Foofe (Ret. USA)	Lieutenant General Claudia Kennedy (Ret. USA)
Lieutenant General Robert Gard (Ret. USA)	General Merrill McPeak (Ret. USAF)
Vice Admiral Lee F. Gunn (Ret. USN)	Major General Melvyn Montano (USA Nat. Guard)
Rear Admiral Don Guter (Ret. USN)	General John Shalikhvili (Ret. USA)

The Honorable Arlen Specter, Chairman
 The Honorable Patrick Leahy, Ranking Member
 Senate Judiciary Committee
 224 Dirksen Senate Office Building
 Washington, DC 20510

AN OPEN LETTER TO THE SENATE JUDICIARY COMMITTEE:

Dear Chairman Specter and Senator Leahy:

We, the undersigned, are retired professional military leaders of the U.S. Armed Forces. We write to express our deep concern about the nomination of Alberto R. Gonzales to be Attorney General, and to urge you to explore in detail his views concerning the role of the Geneva Conventions in U.S. detention and interrogation policy and practice.

During his tenure as White House Counsel, Mr. Gonzales appears to have played a significant role in shaping U.S. detention and interrogation operations in Afghanistan, Iraq, Guantanamo Bay, and elsewhere. Today, it is clear that these operations have fostered greater animosity toward the United States, undermined our intelligence gathering efforts, and added to the risks facing our troops serving around the world. Before Mr. Gonzales assumes the position of Attorney General, it is critical to understand whether he intends to adhere to the positions he adopted as White House Counsel, or chart a revised course more consistent with fulfilling our nation's complex security interests, and maintaining a military that operates within the rule of law.

Among his past actions that concern us most, Mr. Gonzales wrote to the President on January 25, 2002, advising him that the Geneva Conventions did not apply to the conflict then underway in Afghanistan. More broadly, he wrote that the "war on terrorism" presents a "new paradigm [that] renders obsolete Geneva's" protections.

The reasoning Mr. Gonzales advanced in this memo was rejected by many military leaders at the time, including Secretary of State Colin Powell who argued that abandoning the Geneva Conventions would put our soldiers at greater risk, would "reverse over a century of U.S. policy and practice in supporting the Geneva Conventions," and would "undermine the protections of the rule of law for our troops, both in this specific conflict [Afghanistan] and in general." State Department adviser William H. Taft IV agreed that this decision "deprives our troops [in Afghanistan] 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." Mr. Gonzales' recommendation also ran counter to the wisdom of former U.S. prisoners of war. As Senator John McCain has observed: "I am certain we all would have been a lot worse off if there

had not been the Geneva Conventions around which an international consensus formed about some very basic standards of decency that should apply even amid the cruel excesses of war.”

Mr. Gonzales’ reasoning was also on the wrong side of history. Repeatedly in our past, the United States has confronted foes that, at the time they emerged, posed threats of a scope or nature unlike any we had previously faced. But we have been far more steadfast in the past in keeping faith with our national commitment to the rule of law. During the Second World War, General Dwight D. Eisenhower explained that the allies adhered to the law of war in their treatment of prisoners because “the Germans had some thousands of American and British prisoners and I did not want to give Hitler the excuse or justification for treating our prisoners more harshly than he already was doing.” In Vietnam, U.S. policy required that the Geneva Conventions be observed for *all* enemy prisoners of war – both North Vietnamese regulars and Viet Cong – even though the Viet Cong denied our own prisoners of war the same protections. And in the 1991 Persian Gulf War, the United States afforded Geneva Convention protections to more than 86,000 Iraqi prisoners of war held in U.S. custody. The threats we face today – while grave and complex – no more warrant abandoning these basic principles than did the threats of enemies past.

Perhaps most troubling of all, the White House decision to depart from the Geneva Conventions in Afghanistan went hand in hand with the decision to relax the definition of torture and to alter interrogation doctrine accordingly. Mr. Gonzales’ January 2002 memo itself warned that the decision not to apply Geneva Convention standards “could undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat, and could introduce an element of uncertainty in the status of adversaries.” Yet Mr. Gonzales then made that very recommendation with reference to Afghanistan, a policy later extended piece by piece to Iraq. Sadly, the uncertainty Mr. Gonzales warned about came to fruition. As James R. Schlesinger’s panel reviewing Defense Department detention operations concluded earlier this year, these changes in doctrine have led to uncertainty and confusion in the field, contributing to the abuses of detainees at Abu Ghraib and elsewhere, and undermining the mission and morale of our troops.

The full extent of Mr. Gonzales’ role in endorsing or implementing the interrogation practices the world has now seen remains unclear. A series of memos that were prepared at his direction in 2002 recommended official authorization of harsh interrogation methods, including waterboarding, feigned suffocation, and sleep deprivation. As with the recommendations on the Geneva Conventions, these memos ignored established U.S. military policy, including doctrine prohibiting “threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation.” Indeed, the August 1, 2002 Justice Department memo analyzing the law on interrogation references health care administration law more than five times, but never once cites the U.S. Army Field Manual on interrogation. The Manual was the product of decades of experience – experience that had shown, among other things, that such interrogation methods produce unreliable results and often impede further intelligence collection. Discounting the Manual’s wisdom on this central point shows a disturbing disregard for the decades of hard-won knowledge of the professional American military.

The United States' commitment to the Geneva Conventions – the laws of war – flows not only from field experience, but also from the moral principles on which this country was founded, and by which we all continue to be guided. We have learned first hand the value of adhering to the Geneva Conventions and practicing what we preach on the international stage. With this in mind, we urge you to ask of Mr. Gonzales the following:

- (1) Do you believe the Geneva Conventions apply to all those captured by U.S. authorities in Afghanistan and Iraq?
- (2) Do you support affording the International Committee of the Red Cross access to all detainees in U.S. custody?
- (3) What rights under U.S. or international law do suspected members of Al Qaeda, the Taliban, or members of similar organizations have when brought into the care or custody of U.S. military, law enforcement, or intelligence forces?
- (4) Do you believe that torture or other forms of cruel, inhuman and degrading treatment – such as dietary manipulation, forced nudity, prolonged solitary confinement, or threats of harm – may lawfully be used by U.S. authorities so long as the detainee is an “unlawful combatant” as you have defined it?
- (5) Do you believe that CIA and other government intelligence agencies are bound by the same laws and restrictions that constrain the operations of the U.S. Armed Forces engaged in detention and interrogation operations abroad?

Signed,

Brigadier General David M. Brahms (Ret. USMC)
Brigadier General James Cullen (Ret. USA)
Brigadier General Evelyn P. Foote (Ret. USA)
Lieutenant General Robert Gard (Ret. USA)
Vice Admiral Lee F. Gunn (Ret. USN)
Rear Admiral Don Guter (Ret. USN)
General Joseph Hoar (Ret. USMC)
Rear Admiral John D. Hutson (Ret. USN)
Lieutenant General Claudia Kennedy (Ret. USA)
General Merrill McPeak (Ret. USAF)
Major General Melvyn Montano (Ret. USA Nat. Guard)
General John Shalikashvili (Ret. USA)

**BIOGRAPHICAL INFORMATION
ON SIGNATORIES OF LETTER TO SENATE JUDICIARY**

Biographical information on:

Brigadier General David M. Brahms (Ret. USMC)	General Joseph Hoar (Ret. USMC)
Brigadier General James Cullen (Ret. USA)	Rear Admiral John D. Hutson (Ret. USN)
Brigadier General Evelyn P. Foote (Ret. USA)	Lieutenant General Claudia Kennedy (Ret. USA)
Lieutenant General Robert Gard (Ret. USA)	General Merrill McPeak (Ret. USAF)
Vice Admiral Lee F. Gunn (Ret. USN)	Major General Melvyn Montano (Ret. USA Nat. Guard)
Rear Admiral Don Guter (Ret. USN)	General John Shalikashvili (Ret. USA)

Brigadier General David M. Brahms (Ret. USMC)

General Brahms served in the Marine Corps from 1963-1988. He served as the Marine Corps' senior legal adviser from 1983 until his retirement in 1988. General Brahms currently practices law in Carlsbad, California and sits on the board of directors of the Judge Advocates Association.

Brigadier General James Cullen (Ret. USA)

General Cullen is a retired Brigadier General in the United States Army Reserve Judge Advocate General's Corps and last served as the Chief Judge (IMA) of the U.S. Army Court of Criminal Appeals. He currently practices law in New York City.

Brigadier General Evelyn P. Foote (Ret. USA)

General Foote was Commanding General of Fort Belvoir in 1989. She was recalled to active duty in 1996 to serve as Vice Chair of the Secretary of the Army's Senior Review Panel on Sexual Harassment. She is President of the Alliance for National Defense, a non-profit organization.

Lieutenant General Robert Gard (Ret. USA)

General Gard is a retired Lieutenant General who served in the United States Army; his military assignments included combat service in Korea and Vietnam. He is currently a consultant on international security and president emeritus of the Monterey Institute for International Studies.

Vice Admiral Lee F. Gunn (Ret. USN)

Admiral Gunn served as the Inspector General of the Department of the Navy until his retirement in August 2000. Admiral Gunn commanded the USS BARBEY and the Destroyer Squadron "Thirty-one," a component of the U.S. Navy's Anti-Submarine Warfare Destroyer Squadrons.

Rear Admiral Don Guter (Ret. USN)

Admiral Guter served as the Navy's Judge Advocate General from 2000 to 2002. Admiral Guter is currently CEO of Vinson Hall Corporation/Executive Director of the Navy Marine Coast Guard Residence Foundation in McLean, Virginia.

General Joseph Hoar (Ret. USMC)

General Hoar served as Commander-in-Chief, U.S. Central Command. After the first Gulf War, General Hoar led the effort to enforce the naval embargo in the Red Sea and the Persian Gulf, and to enforce the no-fly zone in the south of Iraq. He oversaw the humanitarian and peacekeeping operations in Kenya and Somalia and also led the U.S. Marine Corps support for operations in Rwanda, and the evacuation of U.S. civilians from Yemen during the 1994 civil war. He was the Deputy for Operations for the Marine Corps during the Gulf War and served as General Norman Schwarzkopf's Chief of Staff at Central Command. General Hoar presently runs a consulting business in California.

Rear Admiral John D. Hutson (Ret. USN)

Admiral John D. Hutson served as the Navy's Judge Advocate General from 1997 to 2000. Admiral Hutson now serves as President and Dean of the Franklin Pierce Law Center in Concord, New Hampshire.

Lieutenant General Claudia J. Kennedy (Ret. USA)

General Kennedy is the first and only woman to achieve the rank of three-star general in the United States Army. Kennedy served as Deputy Chief of Staff for Army Intelligence, Commander of the U.S. Army Recruiting Command, and as Commander of the 703d military intelligence brigade in Kunia, Hawaii.

General Merrill A. McPeak (Ret. USAF)

General McPeak served as the Chief of Staff of the U.S. Air Force. Previously, McPeak served as Commander in Chief of the U.S. Pacific Air Forces. He is a command pilot, having flown more than 6,000 hours, principally in fighter aircraft.

Major General Melvyn Montano (Ret. USA Nat. Guard)

General Montano was the adjutant general in charge of the National Guard in New Mexico from 1994 till 1999. He served in Vietnam and was the first Hispanic Air National Guard officer appointed as an adjutant general in the country.

General John Shalikashvili (Ret. USA)

General Shalikashvili was Chairman of the Joint Chiefs of Staff (Department of Defense) from 1993 till 1997. Prior to serving as Chairman, he served as NATO's Supreme Allied Commander for Europe, and also as the commander-in-chief of the United States European Command. He was until recently a visiting professor at The Stanford Institute for International Studies.

ATTORNEY GENERAL

Let Gonzales explain views on human rights

BY ANTHONY ROMERO

www.aclu.org < <http://www.aclu.org>>

President Bush's nomination of Alberto Gonzales as the country's highest-ranking law-enforcement officer is truly a historic moment for Hispanics. We ought to be proud that we finally possess the political clout to demand attention from Republicans and Democrats alike. Indeed, there is much in Gonzales' background that will be appealing to Hispanics of all political persuasions.

On a personal level, he and I have much in common. His father has a second-grade education, while my dad finished the fourth grade. His mother didn't finish high school; neither did mine. He grew up in a two-bedroom house in Houston; I grew up in a two-bedroom apartment in New York and later in New Jersey. His parents emigrated from Mexico; mine are from Puerto Rico. He beat all the odds to get into Rice and Harvard, while I was a scholarship student at Princeton and Stanford.

Notwithstanding Gonzales' impressive background and the American Dream he epitomizes, there are some important questions that demand answers.

Troubling statements

First, I should note that as a matter of policy, my own organization has demanded answers to certain questions, even though we don't take positions on elections or political appointments. But as an organization that has fought more than 80 years for the rights of immigrants and others, we are asking the Senate to engage in a full and thorough review of Gonzales' positions. Hispanics -- indeed all Americans -- should demand explanations for some very troubling statements attributed to Gonzales on human rights and civil liberties.

As White House counsel, Gonzales advised President Bush in a controversial Jan. 25, 2002, memorandum that the rules protecting prisoners of war were 'quaint' and 'obsolete.' The memo to Bush on the Geneva Conventions addressed an issue that Secretary of State Colin Powell had asked the White House to consider: whether individuals apprehended in the Afghanistan conflict should be awarded human-rights protections under international law.

Awaiting confirmation

Powell apparently believed that prisoners detained by the United States should be afforded the legal protections of the Geneva Conventions. It also appears that Gonzales was the recipient of several other (now disavowed) memos that condoned the use of torture and the indefinite detention of prisoners apprehended in Afghanistan. Whether or not Gonzales approved the analyses of the men who wrote those memos (John C. Yoo and Jay S. Bybee) remains to be seen in the coming confirmation process.

Many Hispanics -- indeed many Americans -- may be asking themselves, Why should I care about the Geneva Conventions and the possible torture of foreigners?

The answer is simple: With so many Americans now serving in Iraq (10 percent of them Hispanic, according to government statistics), the only assurance that our own men and women in uniform will be afforded due process and have their human rights respected if they are captured by the enemy is the Geneva Conventions. That's probably why Powell was encouraging Gonzales to reassess his position.

In addition, America is known the world over for its belief in and commitment to human rights. Those are core American values for Republicans and Democrats alike. Hispanics in particular understand that the road to securing our human and civil rights has been a long one -- and as a group that has suffered discrimination and injustice, we have to fight for those values for all people.

Do not prejudge him
Gonzales will have an opportunity to explain his positions on these issues to fellow Hispanics and the American public during his Senate confirmation process. We ought not to prejudge his answers or candidacy -- either positively or negatively -- but we should demand clear answers on whether he stands by his 2002 memo and whether he believes that the memos he received about torture, detention and interrogation were correct.

Gonzales deserves an opportunity to answer questions about his thoughts and positions with minimal interference from White House advisors. After all, it's his reputation that's on the line. And the Senate must be encouraged to conduct a full and thorough review of Gonzales' positions.

Our democracy will be all the stronger if we engage in that process. As my abuela used to tell me whenever I wanted to avoid her tough questions, 'Nene, no se puede tapar el cielo con la mano.' ('My son, you can't cover the sky with your hand.') And abuela was always right.

Anthony Romero is the executive director of the American Civil Liberties Union.

PEN

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PEN American Center is an association of writers and editors working to advance literature,
 to defend free expression, and to foster international literary fellowship.

January 4, 2005

Senator Patrick J. Leahy
 433 Russell Senate Office Building
 Washington, D.C. 20510-4502
 Fax: (202) 224-3479

Dear Senator Leahy:

As you prepare for the Judiciary Committee's hearings on the nomination of Alberto Gonzales to the office of Attorney General of the United States, we entreat you to reflect on the global impact of the abusive practices we now know have been routine not only at the Abu Ghraib prison in Iraq but also in U.S.-run detention facilities around the world.

As an organization that is called upon to defend writers and journalists who are jailed or persecuted for their work, PEN American Center has handled hundreds of cases where our colleagues have been tortured, often until they confessed to crimes they did not commit. In every case, we have challenged their convictions and appealed for their release in part by referring to international laws prohibiting torture. Until very recently, we were confident when we did so that our appeals were echoed by the U.S. government and underscored by our country's 1994 ratification of the UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.

In the past month, however, information released in a Freedom of Information action has shredded the Administration's assertions that the Abu Ghraib abuses were isolated incidents perpetrated by rogue servicemen and women. We now know that Congressional investigations into the Abu Ghraib abuses were shamefully inadequate, that torture has occurred routinely at Guantánamo, in Afghanistan, and at secret U.S. detention facilities in several countries, including the United States, and that the abuses documented in the photographs of ordinary U.S. soldiers are not at the center but rather the periphery of an international scandal. While the Administration denies that the United States is also delivering detainees for "torture by proxy," there are growing indications that official U.S. conduct includes not only torture in U.S.-controlled facilities but also the rendition of detainees to countries where they are likely to face additional, even more brutal interrogations.

As the co-convenor of meetings that led to Justice and Defense Department memos justifying some forms of torture and as the author of the memo dismissing the "quaint" protections of the Geneva Convention, Alberto Gonzales helped devise an extra-constitutional legal system in which torture is both condoned and routine. In doing so, he and the Administration he served have violated the UN Convention Against Torture.

The Convention Against Torture, originally signed by Ronald Reagan and supported by George H. W. Bush, reflects an American rejection of torture that has not lessened in the wake of the September 11, 2001 terrorist attacks. A July 2004 survey by the University of Maryland's Program of International Policy Attitudes confirmed that two-thirds of Americans believe that governments should never use physical torture; 81 percent oppose beatings, submersion, and electric shocks; 89 percent reject sexual humiliation; three in four reject forcing detainees to be naked in any circumstances. Seven in ten Americans agree with the Supreme Court that detainees are entitled to an independent hearing to challenge their detention.

We ask that you treat these hearings not as a pro forma review of a Cabinet appointment, but as an opportunity for Senate to re-ratify the UN Convention Against Torture. We ask you to renounce current U.S. practices and policies and commit to enforcing the absolute letter and spirit of both U.S. and international law. Failure to secure such guarantees will betray a core value of the United States and the clear will of the American people. Worse, it will strike a blow to the democratic aspirations of men and women in countries around the world where justice is routinely perverted by torture.

Thank you for your attention to this matter.

Sincerely,



Salman Rushdie
President, PEN American Center

CC: Members of the U.S. Senate Judiciary Committee

735

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January 5, 2005

Via fax or e-mail

Hon. Patrick J. Leahy,
Hon. Edward M. Kennedy,
Hon. Joseph R. Biden, Jr.,
Hon. Herbert Kohl,
Hon. Dianne Feinstein,
Hon. Russell D. Feingold,
Hon. Charles E. Schumer,
Hon. Richard J. Durbin, *United States Senators.*

RE: Alberto Gonzales nomination

Dear Senators:

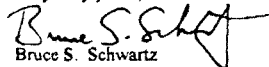
I am writing as a fellow Democrat to urge that you oppose, in every honorable way, President Bush's nomination of Alberto Gonzales to be Attorney General of the United States. Mr. Gonzales has been an apologist for torture, illegal detentions, and kangaroo court methods. His opinions pertaining to the war against Islamist Terrorism and the War in Iraq have demonstrated bad lawyering and disastrous strategic judgment. I believe he is unfit to be the chief law enforcement officer of a "nation conceived in liberty."

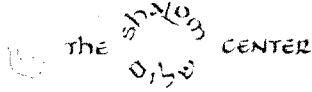
From public statements I gather most of you are prepared to put Mr. Gonzales through some hard questioning. The administration seems to be backpedaling on some of its more barbaric stances to help the nominee – but they cannot be trusted to follow through. I realize it may not be possible to prevent the Republican majority from confirming Gonzales, but I hope you make them pay a price. If you cannot block the nomination, the goal should be to educate the public so that more of them understand how the administration has violated human rights, compromised constitutional protections, and shredded our reputation in the world – and for no strategic gain.

To achieve that calls for drama and coherence. Unfortunately, the format of congressional hearings tends to undermine those qualities. Too many speeches, uncoordinated questioning from different Senators, lack of follow-up: these are the things that raise the snore factor. One longs to see moments of clarity, like the famous confrontation between Joseph Welch and Sen. McCarthy in 1954 ("Have you no sense of decency, sir? At long last, have you left no sense of decency?"). To that end I would hope the several of you can agree on a lead interlocutor – in a sense, almost a prosecutor – to carry the rhetorical case against Mr. Gonzales and the evil policies he has championed.

And finally, I ask that you please not go wobbly just because the administration has started to "soften" its positions. As Sen. Leahy said on Monday, "There is much to answer for." Mr. Gonzales is among those who ought to answer for it. A Cabinet position is not the right answer. I will thank you for standing fast.

Very truly yours,


Bruce S. Schwartz



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Seeking Peace / Torture:

Sen. Specter: Challenge Atty-Gen-Designate Who Approved Torture

21 Philadelphia Rabbis sign letter; 8 meet with Senator, 12/28/2004

Hon. Arlen Specter
United States Senate

Dear Senator Specter,

Some of us are meeting with you to discuss two important questions: the rest, who could not arrange to do so at this time, thank you as well for your time and attention. We also join in blessing you with *refuah shleymah*, the fullest of healing.

We come to discuss: —

The question of whether the Senate should confirm Alberto Gonzales to become Attorney General of the United States.

The nomination and confirmation of Federal judges in the light of *Roe v. Wade*.

The first of these will come before you very soon; so we think it important to put our views on paper for you to peruse.

We are deeply concerned that Mr. Gonzales as White House counsel advised the President that the President

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was authorized under the Constitution to annul the Geneva Conventions and to authorize the use of torture by United States forces and agents in the process of interrogating prisoners.

That memo was not merely theoretical: It had a major effect on the chain of command and the behavior of American forces and agents in Guantanamo and at Abu Ghraib, and at other prisons in various places where the United States has either itself used methods named as torture by the Geneva Conventions or has "rendered" its prisoners to foreign governments known to use extremely brutal methods of torture.

In our view, Mr. Gonzales' advice that the President was legally entitled to authorize such behavior casts great doubt on his worthiness to become Attorney General.

We believe that the only way for him to assuage that doubt is for him to unequivocally affirm before the Judiciary Committee that —

He denounces and will oppose the use of torture;

That he will uphold, obey, and enforce the Supreme Court ruling that it is unconstitutional to imprison anyone designated as an "enemy combatant" for months without access to lawyers or the right to challenge their detentions in court;

That he affirms the binding legality of the Geneva Conventions and the laws of war;



Free Our Time!

That he rejects the practice of "extraordinary rendition," at home and abroad, by which some prisoners are sent to countries that practice extreme torture for interrogation.

That these provisions of the Constitution and laws of the United States apply to the President as well as to all other Federal officials.

And that if confirmed he will use the full power and authority of the Department of Justice to enforce these laws.

We take this position not only out of love for the Constitution and laws of the United States, not only out of deep concern for the safety of American soldiers and civilians who may well be endangered if the protections of the Geneva Conventions are denigrated and diminished by the United States, but out of moral and ethical values deeply affirmed by Torah and by the religious traditions of many communities and peoples.

From the standpoint of Torah, all human beings are created in the Image of God.

Torture shatters and defiles that Image. In every shriek of those in unbearable pain, in every crazed nightmare of those who are denied sleep for days and weeks at a time, in every muffled moan of those plunged under water for minutes at a time, trying not to breathe lest they drown, God is broken. God is defiled.

And the very Geneva Conventions that Mr. Gonzales said were obsolete were

adopted by the nations of the world very shortly after, and because of, World War II. They are one of the most sacred legacies of the dead of the Nazi Holocaust, bequeathed from their suffering to the human race as a whole.

We know that some have argued that the President is entitled to have almost anyone he wishes in his Cabinet. But the power to reject such appointments was placed by the Constitution in the hands of the Senate precisely to check and balance the likelihood that Presidents might appoint officials who might then assist the President to puff up his power beyond Constitutional limits, and to break the law.

Our Founders knew perfectly well of British kings who had used torture or otherwise broken the bounds of legitimate law. They intended to make that impossible in our republic.

We urge you therefore to use wisely the authority that the Founders so wisely put in your hands.

If Mr. Gonzales fails or refuses to make these commitments that we have outlined, we urge you to vote against confirming his nomination and against sending it to the floor, and we urge you to use the full power of Senators to oppose his confirmation.

We believe you share our deep concern for moral values and for those aspects of our tradition that are universally relevant. And we believe that you stand also for an overarching vision of the Constitution; that you will not be, in the

words of one writer, "victimized by the age in which [you] live." So we will look forward to your decision on this question.

With the blessings of shalom.

Rabbi Avruhm Addison, immediate past president, VAAD Philadelphia Board of Rabbis
Rabbi Rebecca Alpert, Temple University
Rabbi Phyllis Berman, Riverside Language Program
Rabbi Andrew Busch, Beth David Reform Congregation
Rabbi Henry Cohen, Beth David Reform Congregation
Rabbi Sue Levi Elwell, director, Union for Reform Judaism
Rabbi Dayle Friedman
Rabbi Nancy Fuchs Kreimer, immediate past president, Reconstructionist Rabbinical Association
Rabbi Julie Greenberg, Congregation Leyv Ha'ir / Heart of the City
Rabbi Linda Holtzman, Reconstructionist Rabbinical College
Rabbi Myriam Klotz
Rabbi Yael Levy, Mishkan Shalom
Rabbi Mordechai Liebling, The Shefa Fund
Rabbi Marc J. Margolius, Jewish Community Centers
Rabbi Geela Rayzel Raphael
Rabbi Margot Stein
Rabbi Jeffrey Sultar, Mishkan Shalom
Rabbi David Teutsch, past president, Reconstructionist Rabbinical College
Rabbi Arthur Waskow, The Shalom Center
Rabbi Avi Winokur, Society Hill

Synagogue
Rabbi Shawn Zevit, Jewish
Reconstructionist Federation

Two other rabbis who hoped to meet
with you and had expressed general
agreement with these views are now in
Israel. We could not reach them to make
sure they wanted to sign this specific
letter with this specific text. They are -

Rabbi Leonard Gordon, Germantown
Jewish Centre
Rabbi David Straus, Main Line Reform
Temple

(The institutions noted above are for
identification only.)

.....
**The Shalom Center / web: <http://www.shalomctr.org> / email: ShalomCtr@aol.com
mail: 6711 Lincoln Drive, Philadelphia, PA 19119, USA / tel: (215) 844-8494**

Slate (South Carolina)
Sat, Jan. 15, 2005

Editorial: Torture taint should disqualify nominee Gonzales

AFTER LAST WEEK'S confirmation hearing for Alberto Gonzales, even senators who disliked the nomination said he would be confirmed, for no other reason than he is the one President Bush asked for. "There's a lower standard, frankly, for attorney general than for judge, because you give the president who he wants," said Sen. Charles Schumer, D-N.Y.

There's a sad symmetry in this. Mr. Gonzales' work as legal counsel to the president on the issue of torture has been rejected by the U.S. Supreme Court and disowned by the White House — only after it backfired politically and legally. His principal qualification is unambiguous loyalty to the president. In short, his selection reflects what sadly seems to be the overriding attribute this president wants in his subordinates. **That might be good enough for the president, but it does not make him the right choice to be the nation's top lawyer; in fact, in this case it should mean just the opposite.**

Mr. Gonzales has helped this administration pursue the human equivalent of the hidden-ball trick. Guantanamo Bay, Cuba, was chosen as the U.S. detention facility for "enemy combatants" under the assumption that it could be defined as a legal no-man's-land, a place where the laws of the United States do not apply. It would be years before the U.S. Supreme Court ruled, as Sen. Lindsey Graham put it, that "Gitmo is not Mars." The administration took other actions, including denying legal counsel to detainees, that it thought were unlikely to withstand court scrutiny, so it endeavored instead to stall definitive rulings as long as it could.

Few of these actions can rise to the appropriately high standard delineated by Sen. Graham during the confirmation hearing: "I do believe we have lost our way, and my challenge to you as a leader of this nation is to help us find our way without giving up our obligation and right to fight our enemy."

But will Mr. Gonzales lead the Justice Department to meet that standard?

His answers during the confirmation hearing showed less of the firm moral base the position requires, and more of a tendency to look at things in a lawyerly way, in the Clintonian sense of the term. He said his new zeal to keep to the legal straight-and-narrow on torture stems from a new understanding that he would represent not just the president anymore, but the whole United States. But shouldn't advising the president have been enough of a guide for Mr. Gonzales to strive to uphold bedrock American principles? He treats the now-discredited legal opinions as if they have been vaporized. But they had, and are still having, real-world effects, some of them disastrous to the U.S. cause (such as Abu Ghraib). And which represents the real Alberto Gonzales: the man who appeared before the Senate or the one who advised President Bush?

This administration, and far more importantly this nation, must make a clean break from the policies identified with Mr. Gonzales. Making him attorney general of the United States accomplishes the opposite.

This nomination tells the world that no minds have been changed in this country about the use of torture; it says America sees no conflict between detaining suspects without legal counsel and trying to hold our constitutional democracy aloft as an example to the world.

Sen. Graham seems to understand that Alberto Gonzales is not the best choice. Both he and Sen. Jim DeMint have a duty, if they truly see the problems with this nomination, to vote against it, as loyal Republicans and as Americans. Only when they and others do so might this president finally see the need for change in key elements of his war strategy, and start making top personnel decisions based on that new understanding. This must happen, for the sake of the nation.

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Co-Presidents

January 20, 2005

The Honorable Arlen Specter
 Chair
 Committee on the Judiciary
 United States Senate
 Washington, D.C. 20510

The Honorable Patrick Leahy
 Ranking Minority Member
 Committee on the Judiciary
 United States Senate
 Washington, D.C. 20510

RE: The Society of American Law Teachers'
 Opposition to the Nomination of Alberto Gonzales
 to be Attorney General of the United States

Dear Senators Specter and Leahy:

The Society of American Law Teachers (SALT) opposes – and urges all members of the committee to vote against – the nomination of Alberto Gonzales to be the Attorney General of the United States. SALT is the largest organization of law professors in the United States, representing more than 900 professors at more than 160 law schools.

This is the first time that SALT ever has taken a position with respect to a nominee for a position in the Executive Branch. We take this stand because, as law teachers, we have a special obligation to maintain the rule of law, and confirming Mr. Gonzales as Attorney General would work grievous damage to that principle.

The Attorney General is the chief law enforcement officer of the nation. Mr. Gonzales has proven himself unfit for this job by dereliction of his individual responsibility as an attorney in advising the President with respect to the treatment of prisoners held by the United States.

The seriousness of our concerns cannot be overstated. Mr. Gonzales both flouted legal requirements and did so with respect to a subject that implicates our fundamental morality: how we as a nation treat those whom we hold prisoner. To our dismay, Mr. Gonzales was unwilling either to concede that he had erred in legal positions that he advanced as the President's Counsel or to acknowledge that prisoner mistreatment is both unlawful and inherently wrong, even when the Senate Judiciary Committee gave him ample opportunity to do so.

At the heart of our concern is the necessity that this nation follow the law and be humane in its treatment of those whom it imprisons. The descriptions and images of our abuse of prisoners at Guantánamo Bay and in Iraq surely offend all who are aware of the role of torture in human conflict. Some people argue that the United States is in a position different from that of other governments because we have been attacked by terrorists. But that reasoning has been cited by every regime that has engaged in torture, from the Russians in Chechnya, to the French in Algeria, to the Germans confronting resistance in occupied nations. Torture is abhorrent to civilized society and to U.S. and international law; there can be no justification for its use. Confirmation of this nominee will be read by the world as legitimizing the abuse of prisoners in Guantánamo Bay, Afghanistan, Abu Ghraib, and elsewhere.

We must emphasize that the prohibition against torture is well established under customary international law. In 1948, in response to Nazi atrocities, the General Assembly of the United Nations added the prohibition against torture to the landmark Universal Declaration of Human Rights. Article 5 states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." This ban on torture and other ill-treatment has subsequently been incorporated into the extensive network of international and regional human rights treaties, including Article 7 of the International Covenant on Civil and Political Rights (ICCPR), ratified by 153 countries, including the United States in 1992, and the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention against Torture), ratified by 136 countries, including the United States in 1994.

Lawyers are bound by rules of ethics in our actions as counselors. The Texas Disciplinary Rules of Professional Conduct, which licensed attorneys violate at peril of disciplinary sanctions, begin with this standard:

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

When Mr. Gonzales counseled his client, President George W. Bush, in a January 2002 memorandum, that the international law regarding treatment of prisoners of war and other detainees was "obsolete" and " quaint," he strayed from that standard.

The Texas rule not only states a general proposition, but also contains a more specific prohibition against attorney wrongdoing. Rule 1.02(c) of the Texas Attorney Conduct Code provides:

A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal

Not only should the lawyer not assist a client in breaking the law, but she or he "shall make reasonable efforts under the circumstances to persuade the client to take corrective action." Did Mr. Gonzales counsel his client about the legal, moral, political, and diplomatic dangers of ignoring the international rules of war? He did not. Instead, he advised his client that the Geneva Conventions did not apply to Afghanistan war prisoners, and he did so in order to avoid potential prosecution of his client for war crimes. In his now-infamous January 25, 2002 memorandum, Mr. Gonzales, bypassing the armed forces' counsel and disregarding the advice of the Secretary of State's Legal Adviser, agreed with his client that the Taliban and Al Qaeda were outside the scope of the Geneva Conventions. His reasoning was that if the Geneva Conventions did not apply, there would be a substantially reduced threat

to his client of "domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441)," a 1996 law carrying the death penalty. Otherwise, Mr. Gonzales advised his client, the prohibition of such crimes as "outrages against personal dignity" would apply, presumably to those carrying out administration policy, whether or not the individual detained qualified as a prisoner of war. He also advised his client that a determination that the Geneva Conventions did not apply to the Taliban "would mean that Section 2441 [authorizing domestic criminal prosecution under the War Crimes Act] would not apply to actions taken with respect to the Taliban." (Gonzales January 25, 2002 Memorandum for the President, p.2.) The January 25 memorandum explicitly counsels the client on how to avoid prosecution for war crimes. Indeed, Mr. Gonzales reassured his client that a presidential determination that the Geneva Conventions did not apply "would provide a solid defense to any future prosecution."

A second Texas rule requires that "In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice." (Rule II (2.01) of the Texas Disciplinary Rules of Professional Conduct.) The drafters of that Rule caution that "A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront . . . [A] lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client." Further, the comment advises that purely technical legal advice can be inadequate, and that "[a]lthough a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."

In his January 25, 2002 Memorandum, Mr. Gonzales rationalized and laid the basis for prisoner mistreatment by U.S. forces with his interpretation that the protections of the Geneva Conventions do not apply to this new, unconventional type of war. His failure to provide independent counsel to his client with regard to the use of torture was an abrogation of his professional obligations.

Six months later, Mr. Gonzales requested that the Office of Legal Counsel (OLC) of the Department of Justice formulate a policy on detainee interrogations in the so-called War on Terror. In response, then-Assistant Attorney General (now Judge) Jay S. Bybee of the OLC sent to Mr. Gonzales an August 1, 2002 Memorandum on "Standards of Conduct for Interrogation," which narrowed the definition of torture from that set forth in Article 1 of the Convention Against Torture. Mr. Bybee's memorandum limited torture to the infliction of "physical pain . . . equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death." The memorandum said that such pain "must be inflicted with specific intent," and indicated that the President may authorize torture in certain instances. In contrast, torture under both the Convention Against Torture and the U.S. Anti-Torture Statute encompasses all forms of severe pain and suffering, and does not require the specific intent to cause such suffering. Moreover, Article 3 of the Convention Against Torture clarifies that "no exceptional circumstances whatsoever, whether a state of war or a threat of war" justify torture.

Subsequent to public outcry in 2004 over the torture of Iraqi detainees by U.S. military and intelligence personnel in Abu Ghraib, the Bush administration has been under increasing scrutiny for its interrogation practices in Guantánamo Bay, Iraq, and elsewhere. Finally, on December 30, 2004, the Department of Justice published a revised policy on interrogations of detainees, which retracted two aspects of the earlier memorandum, and qualified a third. Torture, according to the DOJ, no longer is limited to the most extreme forms of physical abuse, and the specific intent to cause such abuse is not required. With regard to presidential authority to authorize torture, the new policy states only that President Bush has no apparent intention to experience such authority at the present time.

The consequences of Mr. Gonzales's unprofessional and unethical representation are monumental, with results that may well haunt our children. Mr. Gonzales's advice to his client and the advice of the Justice Department set the imprimatur of purported legality upon policies and procedures that supported the now well-documented torture and abuse of detainees.

While Mr. Gonzales repudiated "torture" in his hearing before the Senate Judiciary Committee, this statement unfortunately comes in the context of the legal machinations to define the brutal physical and psychological mistreatment of prisoners as something other than torture. As noted above, the Justice Department felt compelled to revise its legal opinion in a new opinion issued in December 2004. Further, a reading of the hearing transcript suggests that a deliberate but unstated distinction was drawn by Mr. Gonzales between "torture" and other coercive and inhumane acts that he might not define as torture, but that nonetheless would violate the Geneva Convention and other controlling authorities.

There is a related issue that should be of concern to members of the Senate and the American public. One of the distinctive qualities of our Republic is the constitutional requirement that Presidents are bound by a nation's laws. Our laws include restrictions on how prisoners are treated. In his testimony, and in his role as the President's advisor, Mr. Gonzales refused to state that the President is not permitted to waive the law when he believes that he is doing so in his role as Commander-in-Chief. In other words, a prospective Attorney General believes that the President may put himself above the laws of the United States.

We are teachers of law, responsible for the ethical and professional training of future lawyers. The role of lawyers in our society often is an uneasy one. Lawyers sometimes are seen as enabling borderline practices, as being silver-tongued apologists for wrong behavior. The ethical standards demonstrated by those military attorneys who voiced their concerns about torture demonstrate the highest standards of our profession. We urge the Senate to reject the nomination of Alberto Gonzales and await a nominee who honors the rule of law.

Yours very truly,

Professor José Robert (Beto) Juárez, Jr.
Professor Holly Maguigan
Co-Presidents



HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE

ABRAHAM D. SOFAER
GEORGE P. SHULTZ SENIOR FELLOW

The Hon. Patrick J. Leahy
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

January 21, 2005

Dear Senator Leahy:

I have read your letter of January 19, 2005, and am prepared to provide my views to you on the issue you raised.

First, I must disassociate myself from those who have attacked Alberto R. Gonzales in connection with issues related to the Torture Convention. I support his appointment and urge you to vote for his confirmation. Judge Gonzales has relied on the opinions of other attorneys on this and other issues, and a distinction must be maintained concerning those opinions and his own considered judgments. Moreover, attorneys acting ethically and in good faith can reach different conclusions on issues. It is unhelpful in developing national policy when personal attacks are launched on those with whom we disagree, despite ample grounds for professional differences.

Second, I have read some but not all the documents to which you refer in your letter, and given the time available have relied on the material quoted in your letter and on my recollection with regard to the intentions of the Bush Administration in submitting the Convention for ratification.

Third, the issue in your letter, as you state, is not whether acts amounting to torture under the Convention are forbidden in areas within the jurisdiction of the US, but to which the Eighth Amendment would not apply. As I understand it, Judge Gonzales has made clear that he believes the Torture Convention and US law require the US government to undertake to prevent and to punish acts amounting to torture committed by US officials anywhere in the world.

Having made these disclaimers, I do not hesitate to say that I disagree with the merits and wisdom of the conclusion reached by the Department of Justice and cited in the response of Judge Gonzales concerning the geographic reach of Article 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Article 16 on its face limits the obligation of the United States to undertake to prevent cruel, inhuman, or degrading acts not amounting to torture to "territory under its jurisdiction." Within such territory, the US is obliged to undertake to prevent such "other" acts, even if they do not amount to torture.

As you state in your letter, the Senate agreed to ratify the Torture Convention at the urging of the Reagan and Bush Administrations, and one of its reservations was that in applying Article 16 the US government would not be obliged to undertake to enforce its provisions, anywhere, in a manner inconsistent with the US interpretation of its almost identically worded Eighth Amendment prohibiting cruel and unusual punishment. As I testified at the time, in writing and orally, the purpose of this reservation was to prevent any tribunal or state from claiming that the US would have to follow a different and broader meaning of the language of Article 16 than the meaning of those same words in the Eighth Amendment. The words of the reservation support this understanding, in that they relate to the meaning of the terms involved, not to their geographic application: "the United States considers itself bound by the obligation under article 16 . . . only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments . . ." (Emphasis added.) The Department of Justice at the time characterized this reservation as "modest," and explained its purpose as being to use established meanings under the Eighth Amendment instead of the Treaty's vague terms that had not yet evolved under international law. No evidence of which I am aware indicates that the reservation was intended to enable the US to refuse to enforce Article 16 in any territory "under its jurisdiction."

The Department of Justice contends, as I understand it, that Article 16 has no application outside the territory of the US, because the Supreme Court has interpreted the Eighth Amendment to be inapplicable beyond our territorial limits. The Department reasons that, since the Senate reservation limited enforcement of Article 16 to the US understanding of the Eighth Amendment's language, and since the Supreme Court has concluded that the Eighth Amendment is inapplicable beyond US territory, Article 16 itself is inapplicable beyond US territory. On the basis of my understanding of the purposes of the Convention, and of the purpose of the reservation related to Article 16 and the Eighth Amendment, I disagree with the Department's view and would urge the Attorney General Designate to accept a different view.

The US has been in the vanguard of efforts to protect human rights within the US and abroad. As President Bush has repeatedly affirmed, the dignity and equality of all human beings stems from natural law, i.e. the principle that the Creator of life has endowed us all equally with the right to be protected from abhorrent conduct. We agreed in the Torture Convention that all humans should be protected against official acts amounting to torture, or "other acts" covered by Article 16, and we undertook to "take effective legislative, administrative, judicial or other measures to prevent acts of torture" and the other acts covered by Article 16, when they occur "in any territory" under US jurisdiction. Article 2 of the Treaty requires us to take measures against acts of torture in territory under our jurisdiction, and we understand this to mean any territory, not just the

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territory of the US to which the Eighth Amendment is applicable. Since the underlying objective is the same everywhere – to prevent official acts of torture, cruelty, or other abuse covered by the meanings of the words involved which are within our legal capacity to prevent – no good reason can be given to conclude that the geographic scope of the words in Article 16 should be narrower than the geographic scope of the same words in Article 2.

In conclusion, the reference in the reservation to the Eighth Amendment's language was intended to prevent inconsistent interpretation of our obligations under Article 16, not to excuse us from abiding by its obligations within the "territory" to which it applies by its terms, i.e., territory that is within the jurisdiction of the United States. To interpret it to limit our obligation under Article 16 would arguably allow US officials to act inconsistently with the Treaty – and inconsistently with the Eighth Amendment – in parts of the world in which we have jurisdiction to prevent them from doing so. Judge Gonzales said in his testimony that "we want to be in compliance, as a substantive matter under the Fifth, Eighth and 14th Amendment." I imagine that he and any other person who shares the President's beliefs would not condone or seek to protect any official from the full, potential consequences of behavior so offensive as to violate the cruel and unusual punishment clause in any place where the US has jurisdiction to prevent and punish such conduct.

I hope that these views are helpful to you and the Committee.

Sincerely,



United States Senate

WASHINGTON, DC 20510

April 11, 2000

President William Jefferson Clinton
The White House
Washington, D.C.

Dear Mr. President:

In light of the very serious problems caused by the recent increase in oil prices, we know you will share our view that we should explore every possible alternative to stop OPEC and other oil-producing states from entering into agreements to restrict oil production in order to drive up the price of oil.

This conduct is nothing more than an old-fashioned conspiracy in restraint of trade which has long been condemned under U.S. law, and which should be condemned under international law.

After some considerable research, we suggest that serious consideration be given to two potential lawsuits against OPEC and the nations conspiring with it:

- 1) A suit in Federal district court under U.S. antitrust law.
- 2) A suit in the International Court of Justice at the Hague based, perhaps, upon an advisory opinion under "the general principles of law recognized by civilized nations," which includes prohibiting oil cartels from conspiring to limit production and raise prices.

1) A suit in Federal district court under U.S. antitrust law.

A case can be made that your Administration can sue OPEC in Federal district court under U.S. antitrust law. OPEC is clearly engaging in a "conspiracy in restraint of trade" in violation of the Sherman Act (15 U.S.C. Sec. 1). The Administration has the power to sue under 15 U.S.C. Sec. 4 for injunctive relief to prevent such collusion.

In addition, the Administration should consider suing OPEC for treble damages under the Clayton Act (15 U.S.C. Sec. 15a), since OPEC's behavior has caused an "injury" to U.S. "property." After all, the U.S. government is a major consumer of petroleum products and must now pay higher prices for these products. In *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), the Supreme Court held that the consumers who were direct purchasers of certain hearing aides who alleged that collusion among manufacturers had led to an increase in prices had standing to sue those manufacturers under the Clayton Act since "a consumer deprived of money by reason of allegedly anticompetitive conduct is injured in 'property' within the meaning of [the Clayton Act]." Indirect purchasers would appear to be precluded from suit, even in a class action, under *Illinois Brick v. Illinois* 431 U.S. 720 (1977), but this would not bar the United States Government, as a direct purchaser, from having the requisite standing.

One potential obstacle to such a suit is whether the Foreign Sovereign Immunities Act (“FSIA”) provides OPEC, a group of sovereign foreign nations, with immunity from suit in U.S. courts. To date, there has been a ruling on this issue in only one case. In International Association of Machinists v. OPEC, 477 F. Supp. 553 (1979), the District Court for the Central District of California held that the nations which comprise OPEC were immune from suit in the United States under the FSIA. We believe that this opinion was wrongly decided and that other district courts, including the D.C. District, can and should revisit the issue.

This decision in Int. Assoc. of Machinists turned on the technical issue of whether or not the nations which comprise OPEC are engaging in “commercial activity” or “governmental activity” when they cooperate to sell their oil. If they are engaging in “governmental activity,” then the FSIA shields them from suit in U.S. courts. If, however, these nations are engaging in “commercial activity,” then they are subject to suit in the U.S. The California District Court held that OPEC activity is “governmental activity.” We disagree. It is certainly a governmental activity for a nation to regulate the extraction of petroleum from its territory by ensuring compliance with zoning, environmental and other regulatory regimes. It is clearly a commercial activity, however, for these nations to sit together and collude to limit their oil production for the sole purpose of increasing prices.

The 9th Circuit affirmed the District Court’s ruling in Int. Assoc. of Machinists in 1981 (649 F.2d 1354), but on the basis of an entirely different legal principle. The 9th Circuit held that the Court could not hear this case because of the “act of state” doctrine, which holds that a U.S. court will not adjudicate a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state.

The 9th Circuit itself acknowledged in its Int. Assoc. of Machinists opinion that “The [act of state] doctrine does not suggest a rigid rule of application,” but rather application of the rule will depend on the circumstances of each case. The Court also noted that, “A further consideration is the availability of internationally-accepted legal principles which would render the issues appropriate for judicial disposition.” The Court then quotes from the Supreme Court’s opinion in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964):

It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.

Since the 9th Circuit issued its opinion in 1981, there have been major developments in international law that impact directly on the subject matter at issue. As we discuss in greater

detail below, the 1990's have witnessed a significant increase in efforts to seek compliance with basic international norms of behavior through international courts and tribunals. In addition, there is strong evidence of an emerging consensus in international law that price fixing by cartels violates such international norms. Accordingly, a court choosing to apply the act of state doctrine to a dispute with OPEC today may very well reach a different conclusion than the 9th Circuit reached almost twenty years ago.

You should also examine whether the anticompetitive conduct of the international oil cartel is being effectuated by private companies who are subject to the enforcement of U.S. antitrust laws (for example, former state oil companies that have now been privatized) rather than sovereign foreign states. If such private oil companies are determined to in fact be participating in the anticompetitive conduct of the oil cartel, then we would urge that these companies be named as defendants in an antitrust lawsuit in addition to the OPEC members.

2) A suit in the International Court of Justice at the Hague based upon "the general principles of law recognized by civilized nations," which includes prohibiting oil cartels from conspiring to limit production and raise prices.

In addition to such domestic antitrust actions, we believe you should give serious consideration to bringing a case against OPEC before the International Court of Justice (the "ICJ") at the Hague. You should consider both a direct suit against the conspiring nations as well as a request for an advisory opinion from the Court through the auspices of the U.N. Security Council. The actions of OPEC in restraint of trade violate "the general principles of law recognized by civilized nations." Under Article 38 of the Statute of the ICJ, the Court is required to apply these "general principles" when deciding cases before it.

This would clearly be a cutting-edge lawsuit, making new law at the international level. But there have been exciting developments in recent years which suggest that the ICJ would be willing to move in this direction. In a number of contexts, we have seen a greater respect for and adherence to fundamental international principles and norms by the world community. For example, we have seen the establishment of the International Criminal Court in 1998, the International Criminal Tribunal for Rwanda in 1994, and the International Criminal Tribunal for the former Yugoslavia in 1993. Each of these bodies has been active, handing down numerous indictments and convictions against individuals who have violated fundamental principles of human rights. For example, as of December 1, 1999 the Yugoslavia tribunal alone had handed down 91 public indictments.

Today, adherence to international principles has spread from the tribunals in the Hague to individual nations around the world. Recently, the exiled former dictator of Chad, Hissene Habre, was indicted in Senegal on charges of torture and barbarity stemming from his reign, where he allegedly killed and tortured thousands. This case is similar to the case brought against former Chilean dictator Augusto Pinochet by Spain on the basis of his alleged atrocities in Chile. At the request of the Spanish government, Pinochet was detained in London for months until an English court determined that he was too ill to stand trial.

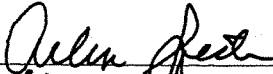


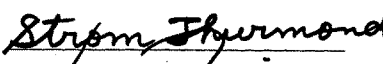
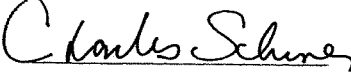
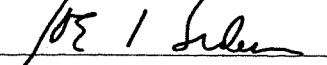
The emerging scope of international law was demonstrated in an advisory opinion sought by the U.N. General Assembly in 1996 to declare illegal the use or threat to use nuclear weapons. Such an issue would ordinarily be thought beyond the scope of a judicial determination given the doctrines of national sovereignty and the importance of nuclear weapons to the defense of many nations. The ICJ ultimately ruled eight to seven, however, that the use or threat to use nuclear weapons "would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law." The fact that this issue was subject to a decision by the ICJ, shows the rapidly expanding horizons of international law.

While these emerging norms of international behavior have tended to focus more on human rights than on economic principles, there is one economic issue on which an international consensus has emerged in recent years -- the illegitimacy of price fixing by cartels. For example, on April 27, 1998, the Organization for Economic Cooperation and Development issued an official "Recommendation" that all twenty-nine member nations "ensure that their competition laws effectively halt and deter hard core cartels." The recommendation defines "hard core cartels" as those which, among other things, fix prices or establish output restriction quotas. The Recommendation further instructs member countries "to cooperate with each other in enforcing their laws against such cartels."

On October 9, 1998, eleven Western Hemisphere countries held the first "Antitrust Summit of the Americas" in Panama City, Panama. At the close of the summit, all eleven participants issued a joint communique in which they express their intention "to affirm their commitment to effective enforcement of sound competition laws, particularly in combating illegal price-fixing, bid-rigging, and market allocation." The communique further expresses the intention of these countries to "cooperate with one another ... to maximize the efficacy and efficiency of the enforcement of each country's competition laws." One of the countries participating in this communique, Venezuela, is a member of OPEC.

The behavior of OPEC and other oil-producing nations in restraint of trade violates U.S. antitrust law and basic international norms, and it is injuring the United States and its citizens in a very real way. Consideration of such legal action could provide an inducement to OPEC and other oil-producing countries to raise production to head off such litigation.

We hope that you will seriously consider judicial action to put an end to such behavior.

ARLEN SPECTER
PENNSYLVANIA

COMMITTEES:
JUDICIARY
APPROPRIATIONS
VETERANS' AFFAIRS
ENVIRONMENT AND PUBLIC WORKS

United States Senate

WASHINGTON, DC 20510-3802

April 25, 2001

President George Walker Bush
The White House
Washington, D.C.

Dear Mr. President:

In light of the energy crisis and the high prices of OPEC oil, we know you will share our view that we must explore every possible alternative to stop OPEC and other oil-producing states from entering into agreements to restrict oil production in order to drive up the price of oil.

This conduct is nothing more than an old-fashioned conspiracy in restraint of trade which has long been condemned under U.S. law, and which should be condemned under international law.

After some research, we suggest that serious consideration be given to two potential lawsuits against OPEC and the nations conspiring with it:

- 1) A suit in Federal district court under U.S. antitrust law.
- 2) A suit in the International Court of Justice at the Hague based upon "the general principles of law recognized by civilized nations."

1) A suit in Federal district court under U.S. antitrust law.

A strong case can be made that your Administration can sue OPEC in Federal district court under U.S. antitrust law. OPEC is clearly engaging in a "conspiracy in restraint of trade" in violation of the Sherman Act (15 U.S.C. Sec. 1). The Administration has the power to sue under 15 U.S.C. Sec. 4 for injunctive relief to prevent such collusion.

In addition, the Administration has the power to sue OPEC for treble damages under the Clayton Act (15 U.S.C. Sec. 15a), since OPEC's behavior has caused an "injury" to U.S. "property." After all, the U.S. government is a consumer of petroleum products and must now pay higher prices for these products. In *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), the Supreme Court held that the consumers of certain hearing aides who alleged that collusion among manufacturers had led to an increase in prices had standing to sue those manufacturers under the Clayton Act since "a consumer deprived of money by reason of allegedly anticompetitive conduct is injured in 'property' within the meaning of [the Clayton Act]."

One issue that would be raised by such a suit is whether the Foreign Sovereign Immunities Act ("FSIA") provides OPEC, a group of sovereign foreign nations, with immunity from suit in U.S. courts. To date, only one Federal court, the District Court for the Central District of California, has reviewed this issue. In *International Association of Machinists v.*

OPEC, 477 F. Supp. 553 (1979), the Court held that the nations which comprise OPEC were immune from suit in the United States under the FSIA. We believe that this opinion was wrongly decided and that other district courts, including the D.C. District, can and should revisit the issue.

This decision in Int. Assoc. of Machinists turned on the technical issue of whether or not the nations which comprise OPEC are engaging in "commercial activity" or "governmental activity" when they cooperate to sell their oil. If they are engaging in "governmental activity," then the FSIA shields them from suit in U.S. courts. If, however, these nations are engaging in "commercial activity," then they are subject to suit in the U.S. The California District Court held that OPEC activity is "governmental activity." We disagree. It is certainly a governmental activity for a nation to regulate the extraction of petroleum from its territory by ensuring compliance with zoning, environmental and other regulatory regimes. It is clearly a commercial activity, however, for these nations to sit together and collude to limit their oil production for the sole purpose of increasing prices.

The 9th Circuit affirmed the District Court's ruling in Int. Assoc. of Machinists in 1981 (649 F.2d 1354), but on the basis of an entirely different legal principle. The 9th Circuit held that the Court could not hear this case because of the "act of state" doctrine, which holds that a U.S. court will not adjudicate a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state.

The 9th Circuit itself acknowledged in its Int. Assoc. of Machinists opinion that "The [act of state] doctrine does not suggest a rigid rule of application," but rather application of the rule will depend on the circumstances of each case. The Court also noted that, "A further consideration is the availability of internationally-accepted legal principles which would render the issues appropriate for judicial disposition." The Court then quotes from the Supreme Court's opinion in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964):

It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.

Since the 9th Circuit issued its opinion in 1981, there have been major developments in international law that impact directly on the subject matter at issue. As we discuss in greater detail below, the 1990's have witnessed a significant increase in efforts to seek compliance with basic international norms of behavior through international courts and tribunals. In addition, there is strong evidence of an emerging consensus in international law that price fixing by cartels violates such international norms. Accordingly, a court choosing to apply the act of state

doctrine to a dispute with OPEC today may very well reach a different conclusion than the 9th Circuit reached almost twenty years ago.

2) A suit in the International Court of Justice at the Hague based upon "the general principles of law recognized by civilized nations."

In addition to such domestic antitrust actions, we believe you should give serious consideration to bringing a case against OPEC before the International Court of Justice (the "ICJ") at the Hague. You should consider both a direct suit against the conspiring nations as well as a request for an advisory opinion from the Court through the auspices of the U.N. Security Council. The actions of OPEC in restraint of trade violate "the general principles of law recognized by civilized nations." Under Article 38 of the Statute of the ICJ, the Court is required to apply these "general principles" when deciding cases before it.

This would clearly be a cutting-edge lawsuit, making new law at the international level. But there have been exciting developments in recent years which suggest that the ICJ would be willing to move in this direction. In a number of contexts, we have seen a greater respect for and adherence to fundamental international principles and norms by the world community. For example, we have seen the establishment of the International Criminal Court in 1998, the International Criminal Tribunal for Rwanda in 1994, and the International Criminal Tribunal for the former Yugoslavia in 1993. Each of these bodies has been active, handing down numerous indictments and convictions against individuals who have violated fundamental principles of human rights.

Today, adherence to international principles has spread from the tribunals in the Hague to individual nations around the world. The exiled former dictator of Chad, Hissene Habre, was indicted in Senegal on charges of torture and barbarity stemming from his reign, where he allegedly killed and tortured thousands. This case is similar to the case brought against former Chilean dictator Augusto Pinochet by Spain on the basis of his alleged atrocities in Chile. At the request of the Spanish government, Pinochet was detained in London for months until an English court determined that he was too ill to stand trial.

While these emerging norms of international behavior have tended to focus more on human rights than on economic principles, there is one economic issue on which an international consensus has emerged in recent years -- the illegitimacy of price fixing by cartels. For example, on April 27, 1998, the Organization for Economic Cooperation and Development issued an official "Recommendation" that all twenty-nine member nations "ensure that their competition laws effectively halt and deter hard core cartels." The recommendation defines "hard core cartels" as those which, among other things, fix prices or establish output restriction quotas. The Recommendation further instructs member countries "to cooperate with each other in enforcing their laws against such cartels."

On October 9, 1998, eleven Western Hemisphere countries held the first "Antitrust

Summit of the Americas" in Panama City, Panama. At the close of the summit, all eleven participants issued a joint communique in which they express their intention "to affirm their commitment to effective enforcement of sound competition laws, particularly in combating illegal price-fixing, bid-rigging, and market allocation." The communique further expresses the intention of these countries to "cooperate with one another ... to maximize the efficacy and efficiency of the enforcement of each country's competition laws."

The behavior of OPEC and other oil-producing nations in restraint of trade violates U.S. antitrust law and basic international norms, and it is injuring the United States and its citizens in a very real way. We hope you will seriously consider judicial action to put an end to such behavior.

We hope that you will seriously consider judicial action to put an end to such behavior.

Alex Feste

Hub Kohl

Charles Scherer

Strom Thurmond

Miss Dewine

**Star Tribune (Minneapolis, MN)
January 8, 2005**

Editorial: Gonzales; Democrats should reject him

Democrats in the U.S. Senate have many well-founded reasons to oppose with all their might President Bush's nomination of Alberto Gonzales to be attorney general. But one reason stands out above all others, and Democrats should pound it home: Gonzales believes the president of the United States has the power, as commander in chief, to permit the use of torture by American forces by immunizing from prosecution anyone who does it.

This reasoning was put forward in an August 2002 memo, called the Bybee memo, from the Department of Justice to the White House. Gonzales testified before the Senate Judiciary Committee Thursday that he, as the president's lawyer, simply passed the memo along. It wasn't his job, he said, to warn the president of the memo's implications or to disagree with it. Gonzales has a peculiar notion of his role as the president's attorney; others quite rightly characterize his behavior as a dereliction of duty. In fact, there's good reason to believe Gonzales was an active participant in the memo's construction.

But whatever his role, Gonzales clearly agreed with the memo, and does to this day.

Sen. Patrick Leahy, D-Vt., the ranking Democrat on the committee, tried every way he could to get Gonzales to answer "yes" or "no" to a simple question: "Now, as attorney general, would you believe the president has the authority to exercise a commander-in-chief override and immunize acts of torture?" Gonzales tried all kinds of tacks to avoid answering: The question is hypothetical because Bush opposes the use of torture, etc. Leahy persisted, and finally Gonzales said, "Senator, I do believe there may come an occasion when the Congress might pass a statute that the president may view as unconstitutional," and therefore he can ignore it. The answer was disingenuous because the issue isn't laws Congress might pass, but established U.S. and international laws that prohibit the use of torture. Thus, the only reasonable way to interpret Gonzales' answer in the context it was asked is that, indeed, the president has the power to permit torture by immunizing those who do it.

The White House has done its darnedest to frustrate Judiciary Committee inquiries into Gonzales' role in the torture scandal. Leahy Thursday held aloft a hefty file of unanswered questions and letters he had sent to the White House seeking information on Gonzales' views about torture and his role in framing policies that led to the Abu Ghraib scandal and the abuse of prisoners at Guantanamo Bay. Despite that, Leahy and his colleagues got Gonzales on the record saying that he does believe the president has the power to override U.S. laws.

That's all the Democrats need to oppose Gonzales' confirmation en masse, and they should. Torture is always out of bounds, no matter the circumstance; it is immoral, ineffective and puts captured American forces at risk. Previous congresses and presidents

have enacted laws and ratified international treaties to that effect.

The United States does not need an attorney general who believes that this president has the right to override those laws and treaties at his whim. Even if Gonzales is eventually confirmed, as it appears he will be, Senate Democrats must be on the record upholding the powerful principle that the United States unequivocally rejects torture.



December 8, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the
Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Member, Committee
on the Judiciary
United States Senate
Washington, D.C. 20510



INTERNATIONAL LEAGUE
FOR HUMAN RIGHTS



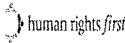
Partners for Justice

Dear Senator Hatch and Senator Leahy:

We are writing to you concerning the confirmation hearings the Senate Judiciary Committee will conduct on the nomination of Alberto R. Gonzales to be Attorney General of the United States.



We represent the leading US-based organizations that promote respect for fundamental rights and freedoms of people all across the world. This is the first time we have collectively expressed concern about any of President Bush's cabinet-level appointments. We feel that we must do so now because the public record suggests that Judge Gonzales was an architect of policies that undercut some of America's most fundamental moral and legal principles.



While a number of our organizations do not take formal positions in support or opposition to nominees, we urge the Committee to conduct a thorough investigation of the nominee's views, statements, and actions concerning human rights and the responsibility of the government to abide by America's treaty obligations. We recognize that concerns about Judge Gonzales's record on civil liberties and civil rights have already been brought to your attention, and in this letter we focus on U.S. obligations under international human rights treaties.



Physicians for
Human Rights



THE CARTER CENTER



It is now widely known that Judge Gonzales was actively involved as Counsel to the President in providing guidance on several of the most important questions decided by the Bush Administration concerning human rights and the laws of war. In particular, Judge Gonzales authored a crucial legal memo that advised the President that the Geneva Conventions should not apply to the war in Afghanistan, despite the warnings of senior military leaders and Secretary of State Powell that such a decision could undermine the U.S. military's standards of conduct. He also solicited and reviewed two memoranda from the Justice Department concerning the law applicable to torture.



RFK Memorial
Center for
Human Rights

The President's decision not to apply the Geneva Conventions, based on Judge Gonzales's advice, led to the use of illegal and abusive methods of interrogation in Afghanistan and at the Guantánamo detention facility. Methods used in Guantánamo and Afghanistan were later applied in Iraq,

where, according to the Schlesinger Report on Defense Department detention operations, commanders used reasoning from the memos Judge Gonzales authorized to approve techniques such as the use of dogs, stress positions, and forced nudity in interrogations.

The memoranda Judge Gonzales solicited concerning torture asserted astonishing theories concerning the permissible scope of executive branch action, including the theory that Congress literally cannot prohibit the President from ordering torture if he does so in furtherance of his role as Commander in Chief. These memos show a startling disregard for the most basic constitutional principle that the President is not above the law. Judge Gonzales has never stated whether he agrees or disagrees with their specific arguments. Nor has he ever made clear to what extent these memos were used as a basis for U.S. policy in the treatment of detainees.

It is vital that the Committee explore in detail Judge Gonzales's role in decisions concerning the detention and interrogation of prisoners in U.S. custody around the world, the application of the Geneva Conventions to the conflicts in Afghanistan and Iraq, the use of military commissions to try prisoners, Administration efforts to resist judicial oversight of its actions, and other related issues. The Committee should also examine Judge Gonzales's role as advisor to President Bush when he served as Governor of Texas. Judge Gonzales served as Governor Bush's principal advisor on death penalty clemency issues and played a lead role in rejecting requests from the Department of State that Texas take steps to fulfill U.S. obligations under the Vienna Convention on Consular Relations.

The Committee should refuse to proceed with deliberations on the nomination until the Administration has assured the Committee that all relevant documents, including internal memos about the origins and implementation of interrogation policies that Judge Gonzales either wrote or reviewed, have been given to the Committee. The American people need to have confidence that the Committee has conducted a complete and transparent investigation into all of Judge Gonzales's actions, even if they have not been publicly reported, and have explored his current views concerning human rights and international law.

The treatment of prisoners in U.S. custody since 9/11 and the various legal memoranda written to justify U.S. policies have represented extraordinary setbacks for the protection of human rights. The policies that led to torture of prisoners in Iraq can be cited by governments around the world to justify torturing their own citizens. They have made U.S. citizens and soldiers less secure, compromised the U.S. government's ability to combat terrorism, and tarnished the image of the United States in the world.

Before determining whether Judge Gonzales should head the Department of Justice, the Committee needs to determine whether he has shown contempt for international law and U.S. obligations under duly ratified treaties. It should consider whether he has engaged in a pattern of conduct which seriously erodes the protections afforded to U.S. citizens under international treaties. The Committee must seek specific commitments from Judge Gonzales that if confirmed as Attorney General he will respect and enforce, across all agencies of the U.S. government, America's obligations under the laws of war and under laws and treaties that prohibit torture and cruel treatment. It is vital that anyone confirmed to serve as Attorney General demonstrate an unwavering commitment to upholding and enforcing the law.

Sincerely,



William Schulz
Amnesty International USA



Gay McDougall
Global Rights



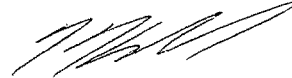
Michael Posner
Human Rights First



Robin Phillips
Minnesota Advocates for Human Rights



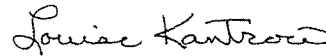
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Ken Roth
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International League for Human Rights



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The Carter Center

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Terror Suspect Alleges Torture

Detainee Says U.S. Sent Him to Egypt Before Guantanamo

By Dana Priest and Dan Eggen
Washington Post Staff Writers
Thursday, January 6, 2005; Page A01

U.S. authorities in late 2001 forcibly transferred an Australian citizen to Egypt, where, he alleges, he was tortured for six months before being flown to the U.S. military prison at Guantanamo Bay, Cuba, according to court papers made public yesterday in a petition seeking to halt U.S. plans to return him to Egypt.

Egyptian-born Mamdouh Habib, who was detained in Pakistan in October 2001 as a suspected al Qaeda trainer, alleges that while under Egyptian detention he was hung by his arms from hooks, repeatedly shocked, nearly drowned and brutally beaten, and he contends that U.S. and international law prohibits sending him back.

Habib's case is only the second to describe a secret practice called "rendition," under which the CIA has sent suspected terrorists to be interrogated in countries where torture has been well documented. It is unclear which U.S. agency transferred Habib to Egypt.

Habib's is the first case to challenge the legality of the practice and could have implications for U.S. plans to send large numbers of Guantanamo Bay detainees to Egypt, Yemen, Saudi Arabia and other countries with poor human rights records.

The CIA has acknowledged that it conducts renditions, but the agency and Bush administration officials who have publicly addressed the matter say they never intend for the captives to be tortured and, in fact, seek pledges from foreign governments that they will treat the captives humanely.

A Justice Department spokesman declined to comment on Habib's allegations, which were filed in November but made public only yesterday after a judge ruled that his petition contained no classified information. The department has not addressed the allegation that he was sent to Egypt.

An Egyptian official reached last night said he could not comment on Habib's allegations but added: "Accusations that we are torturing people tend to be mythology."

The authority under which renditions and other forcible transfers may be legally performed is reportedly summarized in a March 13, 2002, memo titled "The President's Power as Commander in Chief to Transfer Captive Terrorists to the Control and Custody of Foreign Nations." Knowledgeable U.S. officials said White House counsel Alberto R. Gonzales participated in its production.

The administration has refused a congressional request to make it public. But it is referred to in an August 2002 Justice Department opinion -- which Gonzales asked for and helped draft -- defining torture in a narrow way and concluding that the president could legally permit torture in fighting

terrorism.

When the August memo became public, Bush repudiated it, and last week the Justice Department replaced it with a broader interpretation of the U.N. Convention Against Torture, which prohibits the practice under all circumstances. The August memo is expected to figure prominently in today's confirmation hearing for Gonzales, Bush's nominee to run the Justice Department as attorney general.

In a statement he planned to read at his hearing, made public yesterday, Gonzales said he would combat terrorism "in a manner consistent with our nation's values and applicable law, including our treaty obligations."

Also yesterday, the American Civil Liberties Union released new documents showing that 26 FBI agents reported witnessing mistreatment of Guantanamo Bay detainees, indicating a far broader pattern of alleged abuse there than reported previously.

The records, obtained in an ongoing ACLU lawsuit, also show that the FBI's senior lawyer determined that 17 of the incidents were "DOD-approved interrogation techniques" and did not require further investigation. The FBI did not participate in any of the interviews directly, according to the documents.

The new ACLU documents detail abuses seen by FBI personnel serving in Afghanistan, Iraq and Guantanamo Bay, including incidents in which military interrogators grabbed prisoners' genitals, bent back their fingers and, in one case, placed duct tape over a prisoner's mouth for reciting the Koran.

In late 2002, an FBI agent recounted that one detainee at Guantanamo Bay had been subjected to "intense isolation" for more than three months and that his cell was constantly flooded with light. The agent reported that "the detainee was evidencing behavior consistent with extreme psychological trauma," including hearing voices, crouching in a corner for hours and talking to imaginary people.

According to the e-mails, military interrogators at Guantanamo Bay tried to hide some of their activities from FBI agents, including having a female interrogator rub lotion on a prisoner during Ramadan -- a highly offensive tactic to an observant Muslim man.

Habib was taken to the Guantanamo Bay prison in May 2002.

Three Britons released from the prison -- Rhuheh Ahmed, Asif Iqbal and Shafiq Rasul -- have said Habib was in "catastrophic shape" when he arrived. Most of his fingernails were missing, and while sleeping he regularly bled from his nose, mouth and ears but U.S. officials denied him treatment, they said.

Habib's attorney, Joseph Margulies, said Habib had moved to Australia in the 1980s but eventually decided to move his family to Pakistan. He was there in late 2001 looking for a house and school for his children, Margulies said. U.S. officials accuse Habib of training and raising money for al Qaeda, and say he had advance knowledge of the Sept. 11, 2001, attacks. Australian media have reported that authorities in that country cleared him of having terrorist connections in 2001 and have quoted his Australian attorney as saying he was tortured in Egypt.

On Oct. 5, 2001, Pakistani authorities seized Habib, and over three weeks, he asserts in a memorandum filed in U.S. District Court in the District of Columbia, three Americans interrogated him.

The petition says he was taken to an airfield where, during a struggle, he was beaten by several people who spoke American-accented English. The men cut off his clothes, one placed a foot on his neck "and

posed while another took pictures," the document says.

He was then flown to Egypt, it alleges, and spent six months in custody in a barren, 6-foot-by-8-foot cell, where he slept on the concrete floor with one blanket. During interrogations, Habib was "sometimes suspended from hooks on the wall" and repeatedly kicked, punched, beaten with a stick, rammed with an electric cattle prod and doused with cold water when he fell asleep, the petition says.

He was suspended from hooks, with his feet resting on the side of a large cylindrical drum attached to wires and a battery, the document says. "When Mr. Habib did not give the answers his interrogators wanted, they threw a switch and a jolt of electricity" went through the drum, it says. "The action of Mr. Habib 'dancing' on the drum forced it to rotate, and his feet constantly slipped, leaving him suspended by only the hooks on the wall . . . This ingenious cruelty lasted until Mr. Habib finally fainted."

At other times, the petition alleges, he was placed in ankle-deep water that his interrogators told him "was wired to an electric current, and that unless Mr. Habib confessed, they would throw the switch and electrocute him."

Habib says he gave false confessions to stop the abuse.

The State Department's annual human rights report has consistently criticized Egypt for practices that include torturing prisoners.

After six months in Egypt, the petition says, Habib was flown to Bagram Air Base in Afghanistan.

U.S. intelligence officials have said renditions -- and the threat of renditions -- are a potent device to induce suspected terrorists to divulge information. Habib's petition says the threat that detainees at Bagram would be sent to Egypt prompted many of them to offer confessions.

His petition argues that his "removal to Egypt would be unquestionably unlawful" in part because he "faces almost certain torture."

The U.N. Convention Against Torture says no party to the treaty "shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

"The fact that the United States would contemplate sending him to Egypt again is astonishing to me," said Margulies, the attorney.

Researcher Julie Tate contributed to this report.

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The Gonzales Record

Thursday, January 6, 2005; Page A18

THE SENATE JUDICIARY Committee begins confirmation hearings today for Alberto R. Gonzales, President Bush's choice to head the Justice Department. Mr. Gonzales is in some respects an attractive nominee: His life story is compelling, his views on some issues are comparatively moderate and his calm demeanor would be a reassuring change from that of his predecessor, John D. Ashcroft. Yet senators must scrutinize Mr. Gonzales's record. The man who has served as White House counsel these past four years must not become attorney general without clarifying his role in decisions that helped lead to the prisoner abuse scandal and to restrictions of civil liberties. More broadly, the Senate should ask whether Mr. Gonzales is capable of giving Mr. Bush dispassionate legal advice, rather than -- as he seems to have done so often in the past -- telling the president what he wants to hear.

The concerns about Mr. Gonzales begin with his having urged Mr. Bush to deny that the Geneva Conventions apply in Afghanistan. The "new paradigm" of the war on terrorism, reads a January 2002 draft memorandum written in his name, "renders obsolete Geneva's strict limitations on questioning of enemy prisoners." Mr. Gonzales's aggressive advice was directly counter to that of both the State Department and the military brass. And while Mr. Bush eventually declared that the conventions did apply, he followed Mr. Gonzales's advice not to fully comply with them. Rather, he took the unnecessary step of declaring all detainees "unlawful combatants," and therefore beyond the conventions' protection, without complying with the process international law contemplates for that judgment. This move proved fateful when the headquarters of Lt. Gen. Ricardo S. Sanchez, citing the president's position on "unlawful combatants," approved such interrogation techniques in Iraq as hooding, forcing prisoners into "stress positions" and menacing detainees with dogs.

Mr. Gonzales commissioned the now-infamous torture memorandum from the Justice Department's Office of Legal Counsel. The memo followed a meeting in his office regarding the interrogation of a key al Qaeda detainee, in which participants discussed such methods as "waterboarding," mock burial and slapping.

Mr. Gonzales played a key role in the formation of military commissions, a system that, three years after detainees began arriving at Guantanamo Bay, Cuba, has yet to produce a single trial. The military commissions are now the subject of litigation, with one judge having already declared them illegal. Last year the Supreme Court rejected other Bush administration policies in the war on terrorism as well: its contention that American citizens like Jose Padilla and Yaser Esam Hamdi could be indefinitely detained without access to attorneys and the notion that Guantanamo could operate without judicial supervision.

Across a range of areas, in short, Mr. Gonzales appears to have given the president legal advice that may have empowered him in the short term -- to lock up people he deemed dangerous, to try detainees using

a system untested for decades, even to torture -- but that have a great disservice to the president and the country in the long run. Positions he has advocated have damaged U.S. prestige, courted judicial rebuke and greatly complicated the long-term goal of establishing legal regimes that will stand over the course of a long war.

When Mr. Bush was governor of Texas, Mr. Gonzales as his chief counsel gave him only the most cursory briefings on upcoming executions, omitting important facts and mitigating circumstances, according to a 2003 article in the Atlantic Monthly. Perhaps this was what Mr. Bush wanted. But the attorney general's job is not to give the president what he wants.

Senators should with great care ask Mr. Gonzales to fill in the aspects of his record that are not known and to explain how he justifies those decisions that appear to have harmed the nation. The country needs an attorney general capable and confident enough to stand up for the law and deliver arm's-length legal advice. Before voting to confirm, senators need to satisfy themselves that -- notwithstanding his history -- Mr. Gonzales can and will deliver such advice.

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A Degrading Policy

WASHINGTON POST Wednesday, January 26, 2005; Page A20

ALBERTO R. GONZALES was vague, unresponsive and misleading in his testimony to the Senate Judiciary Committee about the Bush administration's detention of foreign prisoners. In his written answers to questions from the committee, prepared in anticipation of today's vote on his nomination as attorney general, Mr. Gonzales was clearer -- disturbingly so, as it turns out. According to President Bush's closest legal adviser, this administration continues to assert its right to indefinitely hold foreigners in secret locations without any legal process; to deny them access to the International Red Cross; to transport them to countries where torture is practiced; and to subject them to treatment that is "cruel, inhumane or degrading," even though such abuse is banned by an international treaty that the United States has ratified. In effect, Mr. Gonzales has confirmed that the Bush administration is violating human rights as a matter of policy.

Mr. Gonzales stated at his hearing that he and Mr. Bush oppose "torture and abuse." But his written testimony to the committee makes clear that "abuse" is, in fact, permissible -- provided that it is practiced by the Central Intelligence Agency on foreigners held outside the United States. The Convention Against Torture, which the United States ratified in 1994, prohibits not only torture but "cruel, inhumane or degrading treatment." The Senate defined such treatment as abuse that would violate the Fifth, Eighth or 14th amendments to the Constitution -- a standard that the Bush administration formally accepted in 2003.

But Mr. Gonzales revealed that during his tenure as White House counsel, the administration twisted this straightforward standard to make it possible for the CIA to subject detainees to such practices as sensory deprivation, mock execution and simulated drowning. The constitutional amendments, he told the committee, technically do not apply to foreigners held abroad; therefore, in the administration's view the torture treaty does not bind intelligence interrogators operating on foreign soil. "The Department of Justice has concluded," he wrote, that "there is no legal prohibition under the Convention Against Torture on cruel, inhuman or degrading treatment with respect to aliens overseas."

According to most legal experts, this is a gross distortion of the law. The Senate cited the constitutional amendments in ratifying the treaty precisely to set a clear standard that could be applied to foreigners. Nevertheless, Mr. Gonzales uses this false loophole to justify practices that contravene fundamental American standards. He was asked if there were any legal prohibition against U.S. personnel using simulated drowning and mock executions as well as sleep deprivation, dogs to inspire fear, hooding, forced nudity, the forced injection of mood-altering drugs and the threat of sending a detainee to another country for torture, among other abuses. He answered: "Some might . . . be permissible in certain circumstances."

This is not a theoretical matter. The CIA today is holding an undetermined number of prisoners, believed to be in the dozens, in secret facilities in foreign countries. It has

provided no account of them or their treatment to any outside body, and it has allowed no visits by the Red Cross. According to numerous media reports, it has subjected the prisoners to many of the abuses Mr. Gonzales said "might be permissible." It has practiced such mistreatment in Iraq, even though detainees there are covered by the Geneva Conventions; according to official investigations by the Pentagon, CIA treatment of prisoners there and in Afghanistan contributed to the adoption of illegal methods by military interrogators.

In an attempt to close the loophole, Sen. Richard J. Durbin (D-Ill.), Sen. John McCain (R-Ariz.) and Sen. Joseph I. Lieberman (D-Conn.) sought to attach an amendment to the intelligence reform legislation last fall specifying that "no prisoner shall be subject to torture or cruel, inhumane or degrading treatment or punishment that is prohibited by the Constitution, laws or treaties of the United States." The Senate adopted the provision unanimously. Later, however, it was stripped from the bill at the request of the White House. In his written testimony, Mr. Gonzales affirmed that the provision would have "provided legal protections to foreign prisoners to which they are not now entitled." Senators who supported the amendment consequently face a critical question: If they vote to confirm Mr. Gonzales as the government's chief legal authority, will they not be endorsing the systematic use of "cruel, inhumane and degrading" practices by the United States?



The Washington Times

www.washingtontimes.com

In defense of Judge Gonzales

By John Cornyn
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The nomination of Judge Alberto Gonzales to serve as our nation's 80th Attorney General -- and our first of Hispanic descent -- is the American dream come true. Yet his nomination faces noisy, if ultimately futile and unjustified, opposition.

The son of migrant workers, Mr. Gonzales grew up in Humble, Texas. His childhood home, where his mother still lives today, was built by his father and uncle. As a child, he sold soft drinks at Rice University football games and dreamed about someday enrolling there as a student.

Mr. Gonzales is the first person in his family to go to college. After graduating from Rice and Harvard Law School, he joined a prestigious international law firm headquartered in Texas and became one of its first minority partners. He eventually caught the eye of a Texas governor who saw a uniquely talented yet modest man and appointed him general counsel, secretary of state, Texas supreme court justice, and eventually, counsel to the president.

Thus, the nomination of Judge Gonzales combines stellar legal credentials with an inspiring American success story. Despite this, some liberal legal elites and special interest groups in Washington have already sharply attacked his nomination, citing his legal work in support of the war against terrorism.

These attacks against the nomination of Judge Gonzales are the flimsiest I've seen yet. Take, for example, the criticism that Judge Gonzales advised the president to deny prisoner of war status to al Qaeda and Taliban fighters, even while insisting that their treatment be humane in all instances.

According to Article 4 of the 1949 Geneva Convention, though, only lawful combatants are eligible for POW protections. The Red Cross's own guidelines state that to earn POW status, combatants must satisfy all four conditions of lawful combat: being commanded by a person responsible for his subordinates, having a fixed distinctive sign recognizable at a distance, carrying arms openly, and conducting their operations in accordance with the laws and customs of war.

Accordingly, Mr. Bush determined that the United States shall treat all detainees humanely, but that as a legal matter, neither al Qaeda nor the Taliban militia are legally entitled to the convention's protections. The former is not even a state, let alone a party to the Geneva Convention, while the latter does not comply with all four required conditions of lawful combat.

The president's determination was clearly correct. His interpretation of the convention is not only well-grounded in the text, structure and history of the convention, as documented in authoritative international law treatises, it has also been affirmed by three federal courts across the country.

In addition, the administration's position has been endorsed by numerous legal scholars

and international legal experts across the political spectrum, as well as the September 11 commission.

Professor Kenneth Anderson, a former general counsel of numerous liberal organizations, including the Soros Foundations and the Open Society Institute, agreed in an amicus brief to the U.S. Supreme Court that "[t]he President's conclusion that the members of al Qaeda, and the Taliban, are unlawful combatants is clearly correct." That brief was also signed by numerous former Carter administration officials, former State Department legal advisers, retired judge advocates general and military commanders and other international law specialists. Even the Washington advocacy director for Human Rights Watch, Tom Malinowski, a vocal Bush administration critic, has grudgingly conceded that the administration interpretation was "probably correct."

The administration's Geneva position is not only legally correct, but also essential as a matter of national security. After all, al Qaeda fighters are not professional soldiers -- they are war criminals.

Extending POW protection to al Qaeda would be dangerous to our soldiers. For example, the Geneva Convention guarantees POWs access to a variety of devices that could easily be turned into weapons against their captors. POWs are even entitled to a monetary allowance to purchase goods and preferential customs treatment for shipments they receive from the outside world.

Moreover, recognition of POW status would dramatically disable us from obtaining the intelligence needed to prevent further attacks on U.S. civilians and soldiers. For example, questioners could not entice detainees to respond by offering creature comforts or other preferential treatment -- even though that is standard operating procedure in police stations across our country. And because the convention prohibits the holding of detainees in isolation, al Qaeda fighters would be able to coordinate with each other to thwart effective questioning. POW status even confers broad combat immunity against criminal prosecution before civilian and military tribunals alike.

Do Judge Gonzales's critics really believe that al Qaeda fighters deserve to be treated better than an American citizen accused of a crime?

Finally, giving POW status to unlawful combatants would actually badly undermine international law itself. The laws of war are specifically designed to encourage combatants to comply with international law by offering better treatment in the event of capture. After all, as a renowned treatise on the law governing prisoners of war explains, "the only effective sanction against perfidious attacks in civilian dress is deprivation of prisoner-of-war status."

This is not the first time there has been an effort to extend the Geneva Convention to cover terrorists. Nearly two decades ago, President Reagan rejected a proposed amendment to the Geneva Convention -- known as Protocol I of 1977 -- to extend POW status to unlawful combatants, and every subsequent president has taken the same view. As Mr. Reagan rightly argued, "we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law."

Time and time again, Judge Gonzales has dutifully advised Mr. Bush of his legal duties and responsibilities in the war on terrorism. Now opponents of his nomination want to punish him for it. Two years ago, I joined nine fellow freshmen -- Republicans and Democrats alike -- to declare that the Senate's confirmation process is badly broken and that we need a fresh start. Confirming Judge Gonzales by repudiating baseless criticisms of his nomination would be an excellent start.

Republican Senator John Cornyn of Texas is chairman of the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Property Rights. He served previously as Texas Attorney General and state supreme court justice.

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Abu Ghraib accountability

By Nat Hentoff

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Although there was considerable media coverage of Alberto Gonzales' confirmation hearing for attorney general, a look at the full transcript still raises, for me, serious questions about his fitness to be our chief law enforcement officer.

At the start, Mr. Gonzales told the senators and the rest of us: "I think it is important to stress at the outset that I am and will remain deeply committed to ensuring that the United States government complies with all of its legal obligations as it fights the war on terror, whether those obligations arise from domestic or international law. These obligations include, of course, honoring Geneva Conventions whenever they apply."

Sen. Ted Kennedy asked the nominee if the media reports were accurate that Mr. Gonzales had chaired meetings that covered specific ways to make detainees talk. For example, having them feel they were about to be drowned or buried alive. Mr. Gonzales answered: "I have a recollection that we had some discussions in my office." But, he said, "it is not my job to decide which types of methods of obtaining information from terrorists would be most effective. That job falls to folks within the agencies."

So, "the agencies," including the CIA, can do whatever they consider effective; and Mr. Gonzales suggests that he had no role as to the lawfulness of those methods when he was counsel to the president, our commander in chief? Should he not have told the president that the Geneva Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment forbids "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession"? And should he not have been interested in trying to find out how many of those detainees had been sufficiently screened when captured in order to indicate whether they actually were terrorists or suspects or indiscriminately rounded up?

Sen. Russ Feingold asked Mr. Gonzales whether the president has "the authority to authorize violations of the criminal law under duly enacted statutes (by Congress) simply because he's commander in chief." Mr. Gonzales said: "To the extent that there is a decision made to ignore a statute, I consider that a very significant decision, and one that I would personally be involved with ... with a great deal of care and seriousness." "Well," Mr. Feingold said, "that sounds to me like the president still remains above the law." When Mr. Kennedy asked the same question, Mr. Gonzales said it was "a very, very difficult question." So, what does he believe about the separation of powers?

Another question from Mr. Kennedy: "Do you believe that targeting persons based on their religion or national origin rather than specific suspicion or connection with terrorist

organizations is an effective way of fighting terrorism? And can we get interest from you [that], as attorney general, you'd review the so-called anti-terrorism programs that have an inordinate and unfair impact on Arab and Muslim?" Mr. Gonzales responded: "I will commit to you that I will review it. As to whether or not it's effective will depend on the outcome of my review." But Mr. Gonzales didn't answer the first crucial part of the question: Is targeting people based on religion, without specific suspicion, effective? And, I would add, isn't it broadly discriminatory?

Asked by Sen. Patrick Leahy about increasing reports of abuse of detainees in Iraq and Guantanamo Bay, Mr. Gonzales said: "I categorically condemn the conduct that we see reflected in these pictures at Abu Ghraib.

"I would refer you to the eight complete investigations of what happened at Abu Ghraib and Guantanamo Bay, and there are still three ongoing," he added. But none of the investigations have gone so far up the chain of command as the Defense Department and the Justice Department to determine the accountability of high-level policy-makers there.

As The Washington Post noted in a lead editorial on Jan. 7, "The record of the past few months suggests that the administration will neither hold any senior official accountable nor change the policies that have produced this shameful record." Nor did the senators ask themselves about Stuart Taylor's charge in the Jan. 8 National Journal that "Congress continues to abdicate its constitutional responsibility to provide a legislative framework" for the treatment of detainees. The White House strongly resists Congress' involvement.

"No longer," Mr. Taylor insisted, "should executive fiat determine such matters as how much evidence is necessary to detain such suspects (and) how long they can be held without criminal charges." As U.S. attorney general, will Mr. Gonzales move to reinstate the constitutional separation of powers to prevent further shame to the United States for the widespread abuses of detainees under the executive branch's parallel legal system of which Alberto Gonzales was a principal architect?