

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.<sup>1</sup> 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

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<sup>1</sup> Editorial, *Mr. Gonzales's Record*, WASHINGTON POST, Nov. 22, 2004.

“where they were neither limited nor safeguarded.”<sup>2</sup>

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.”<sup>3</sup> 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

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<sup>2</sup> p. 14.

<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup>

6. Mr. Gonzales has contended that the president is constitutionally authorized to detain anyone—citizen or non-citizen—whether found in the United

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<sup>4</sup> Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq; Practice Is Called Serious Breach of Geneva Conventions*, WASHINGTON POST, Oct. 24, 2004.

<sup>5</sup> 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.<sup>6</sup>

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,

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<sup>6</sup> Stuart Taylor, *America's Best Choice?*, LEGAL TIMES, Nov. 15, 2004.

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