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HUMAN RIGHTS FIRST OPPOSES ALBERTO GONZALES TO BE ATTORNEY GENERAL

Human Rights First's Analysis of Gonzales' Testimony before the Senate Judiciary Committee and His Written Answers to Supplemental Questions

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Alberto Gonzales, the President's nominee to be the United States' chief law enforcer, is 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 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.

The memo that follows provides a detailed explanation of Human Rights First's reasons for opposing the confirmation of Alberto Gonzales.

GONZALES ON THE ISSUES

As counsel to the President Alberto Gonzales (1) Commissioned and disseminated an Office of Legal Counsel (OLC) memo that relaxed the federal prohibition against torture; (2) advised the President that the "war on terror" rendered provisions of the Geneva Conventions obsolete; and (3) expressed an expansive view on Executive Branch powers, arguing that applying a congressional prohibition against an act of torture ordered by the President would be unconstitutional. In the three sections that follow we assess what we now know about Gonzales' views, based both on his writings and comments before the January 6 hearing and on his statements at the hearing and his written follow-up answers, which he provided to the Senate Judiciary Committee on January 18. While Mr. Gonzales made some important statements at the hearing, including a condemnation of the practice of rendition and a commitment to providing the International Committee of the Red Cross greater access to detainees, many of his responses to questions were incomplete, inaccurate or evasive.

THE TORTURE MEMOS

In 2002, Mr. Gonzales asked the Office of Legal Counsel to prepare legal opinions on interrogation standards under the Convention against Torture as implemented by federal statute (18 U.S.C. §§ 2340, 2340A) and binding international law obligations. The memo addressed to Gonzales (the "Bybee memo") served as the direct legal underpinning for harsh interrogation tactics employed on individuals detained by the United States in Afghanistan, Iraq and at Guantanamo Bay. The Bybee memo served as a basis for interrogation tactics that have reportedly included "waterboarding," denial of pain killer medication, simulated drowning, and threatening to transfer detainees to other countries' interrogators.

The Bybee memo also figures prominently in the Defense Department's Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (April 4, 2003) (the "Working Group Report"), with many paragraphs excerpted verbatim. The Working Group Report in turn supported the actual policy implemented by the Defense Department at Guantanamo Bay on April 16, 2003. *See* DOD Memo for the Commander, US Southern Command: Counter-Resistance Techniques in the War on Terrorism (April 16, 2003). Authorized techniques include dietary and environmental extremes, sleep deprivation, and prolonged isolation. The International Committee of the Red Cross informed the U.S. Government, including White House lawyers, that the interrogation techniques employed at Guantanamo Bay constitute "an intentional system of cruel, unusual and degrading treatment and a form of torture." As has been widely documented, interrogation tactics employed at Guantanamo then "migrated" to Afghanistan and Iraq, where military authorities relied upon the Working Group Report to craft their interrogation policies.

The Bybee memo reads largely like a roadmap to circumventing laws against torture. Indeed, in a number of instances the memo pointedly ignores significant case law that does not support its permissive view on torture and expansive presidential power. It appears that no one involved in these

deliberations, including Gonzales, had any misgivings about this legal opinion for nearly two years until it was publicly disclosed. The Bybee memo includes the following conclusions:

- "[F]or an act to constitute torture as defined in Section 2340 [the statutory prohibition against torture], it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious 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."

- "[E]ven 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 defendant 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."

- "[U]nder the current circumstances, necessity or self-defense may justify interrogation methods that might violate Sections 2340A."

A number of legal scholars have criticized the analysis in the Bybee memo as "reckless," "weak," and "embarrassing." In response to the widespread criticism of the Bybee memo, the Department of Justice issued a new memo on December 30, 2004, stating that it superseded the Bybee memo in its entirety, in which the analysis directly addressing the definition of torture was ameliorated. The memo did not, however, address the OLC's earlier conclusions that necessity or self-defense might justify torture.

At the hearing, Mr. Gonzales had an opportunity to explain what his view on the Bybee memo's analysis had been prior to its revision and also to explain his role in producing and disseminating the memo. Gonzales either did not remember his role and earlier opinion or did not disagree with any of the memo's specific features.

- Senator Leahy asked Mr. Gonzales whether he agreed with the Bybee memo's conclusion 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." Gonzales answered: "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." In his written responses, Mr. Gonzales still could not recall his prior views on the Bybee memo and refused to disclose any documents related to that memo.

- Mr. Gonzales otherwise declined to provide further information about his role or the role of the CIA in approving or disseminating the Bybee memo's conclusions. He could not recall whether he had requested the Bybee memo analyzing the torture statute and interrogation standards although the memo is addressed to Gonzales and begins: "You have asked for our views regarding the standards of conduct under [the torture statute] . . . in the context of the conduct of interrogations outside of the United States." He also could not recall whether the CIA had asked him for a legal analysis of interrogation methods. Gonzales would not answer questions about how the CIA obtained the Bybee memo. Gonzales could not recall whether the White House Counsel Office "had anything to do with the work

of the [DoD] working group." Gonzales stated he could not recall whether he reviewed military lawyers' analysis that the techniques espoused in the Bybee memo would put U.S. troops at risk for court-martial. Gonzales acknowledged however that "it is possible you could engage in conduct that would satisfy that [torture] statute according to the [Bybee] memo, but be inconsistent with other obligations that would remain binding upon members in our military."

- In response to questioning by Senator Sessions, Mr. Gonzales said of the Bybee memo, "the opinion represents the position of the Department of Justice, and as such, it's the position that I supported at the time." He stated that he "didn't have a disagreement with the conclusions then reached by the department" in the Bybee memo but could not recall "whether or not [he] was in agreement with all of the analysis." Gonzales defended the Bybee memo, explaining that the authors of the memo "did the very best they could interpreting, in my judgment, a difficult statute." To which Senator Graham, a reserve Air Force Judge Advocate for over 20 years, replied: "Well, that's where [we] disagree. I think they did a lousy job." When asked by Senator Leahy whether he agreed with that conclusion today, Gonzales answered that he did not, stating: "That does not represent the position of the executive branch."

- Senator Durbin asked Gonzales more than once whether U.S. personnel can legally engage in torture under any circumstance. Gonzales was unable to provide a definitive answer, stating "I don't believe so, but I'd want to get back to you on that and make sure 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 asked Mr. Gonzales whether it was legally permissible for U.S. personnel to engage in "cruel, inhuman or degrading treatment," stripping the prohibition on torture of much meaning as applied to non-citizens detained outside of the United States. Gonzales noted that the United States made a reservation to Article 16 of CAT, defining "cruel, inhuman or degrading treatment" as conduct prohibited by the Fifth, Eighth, and/or Fourteenth Amendments. Based on this reservation, Gonzales explained that the United States was "as a legal matter . . . in compliance" with the prohibition because "aliens interrogated by the U.S. outside the United States enjoy no substantive rights under the Fifth, Eighth and Fourteenth Amendments." In a written response to Senator Feinstein for further clarification on this issue, Gonzales stated "that under Article 16 there is no legal obligation under the CAT on cruel, inhuman or degrading treatment with respect to aliens overseas." That analysis flies in the face of the treaty's ratification history and would remove serious human rights violations from legal prohibition.

Despite the prodding of Senators from both sides of the aisle, Mr. Gonzales would not opine whether the now infamous conduct at Abu Ghraib was criminal, explaining he did not want to prejudge and jeopardize any prosecutions. Senator Specter responded that such a pronouncement would not have an impact on prosecutions for those abuses and torture.

THE GENEVA CONVENTIONS

Mr. Gonzales advised the President in a memo dated January 25, 2002, that the Geneva Conventions were inapplicable to captured members of Al Qaeda, and that members of the Taliban could be denied prisoner-of-war status under the Third Convention. Gonzales' legal advice reversed longstanding U.S. policy and practice supporting application of the 1949 Conventions (and their predecessors);

undermined the Conventions' protections for our own soldiers (a point made by Secretary of State Powell and his top legal officer at the time); implied that the United States may "need[]" to commit war crimes in its counterterrorism efforts, and so should avoid application of the Geneva Conventions to its actions because "grave breaches" of the Conventions would subject perpetrators to prosecution under U.S. law (Section 2441 of the War Crimes Act of 1996); dismissed the risk that a determination of non-applicability of the Conventions to Afghanistan "could undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat"; and opened the door to broader departures from the Geneva Conventions by arguing that Convention parties that become "failed states" (the memo argues that Afghanistan under the Taliban is a "failed state") are neither obligated nor protected by the Conventions during war. This view misstates and undermines the structure of humanitarian law protections, which are triggered by the application of either treaty or customary law to the territory of conflict, not on the basis of whether groups have signed or ratified Conventions that can only be signed and ratified by states.

Mr. Gonzales' conclusion that the two Geneva Conventions did not apply to Al Qaeda detainees, and that captured Taliban also did not merit POW status under the Third Geneva Convention, has had direct, practical consequences for U.S. detention policies and practices. The January 25 memo laid the foundation for subsequent Administration policy as expressed in President Bush's February 7, 2002 memo, that the Conventions did not apply to those detainees – and that therefore the Conventions' restrictions on cruel treatment did not afford such persons any legal protections.

At the hearing Mr.Gonzales refused to alter his stance that the Geneva Conventions did not apply to the conflict with Al Qaeda, repeatedly arguing that to apply the Conventions would mean that the protections of POW status must follow. That view is incorrect. Under the Geneva Conventions, an individual must receive a hearing to determine his status, after which he may be detained and, depending on his status, interrogated. Although the Conventions mandate humane treatment of detainees, these provisions do not need to impede efforts to interrogate detainees, a point Secretary of State Powell emphasized and which was never adequately refuted by Gonzales.

Mr. Gonzales repeatedly gave the impression that he believed that those not deemed prisoners of war are beyond the protections of the Geneva Conventions. That view is also incorrect. As the International Committee of the Red Cross has pointed out, Article 4 of the Fourth Geneva Convention provides protected status to those "who find themselves . . . in the hands of a party to the conflict," unless they do not meet nationality criteria or are covered by the other Geneva Conventions. Such detainees "have a label in the law of war conventions" – "civilian," or "protected person" under the Fourth Convention – even if they are suspected security threats or "unlawful combatants." Those individuals who fail to meet the nationality criteria are covered by Article 75 of Additional Protocol I to the Geneva Conventions, which is part of customary international law.

Mr.Gonzales refused to concede that his advice to deny the protections of the Geneva Conventions to Al Qaeda and the Taliban had any influence on detainee treatment in Iraq. Yet, as Senator Biden pointed out, the Pentagon-appointed Schlesinger Committee found that very determination was used by the commander of occupation forces in Iraq, Lt. Gen Ricardo S. Sanchez, to authorize interrogation techniques beyond established military practice and that the confusion over the varying interrogation policies led to some of the abuses in Iraq.

In addressing the creation of due process standards at Guantanamo, Gonzales stated: "I'm not sure it'll meet international scrutiny." But in the same exchange with Senator Graham on the processes in place at Guantanamo, Mr. Gonzales admitted "that part of winning the war on terror is winning the hearts and minds of certain communities. And to 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." Mr.Gonzales' disregard for international law is hard to reconcile with his apparent understanding that the United States appears to the world in an unfavorable light.

Although the Administration maintained that the Geneva Conventions applied in Iraq, Gonzales requested in 2004 that the Justice Department prepare a memo concerning the prohibition on transfers of "protected persons from occupied territory" as applied to Iraq. The March 19, 2004 memo (the "Goldsmith memo") stated that the United States would be acting consistently with Article 49 of the Fourth Geneva Convention were it to remove one set of "protected persons" – illegal aliens – from Iraq pursuant to local immigration law, and that in addition it could relocate both illegal aliens and other "protected persons" from Iraq to another country to "facilitate interrogation" – as long as (1) that was for a "brief but not indefinite period," and (2) adjudicative proceedings had not been brought against such individuals.

The Goldsmith memo to Gonzales sheds light on his involvement in the "ghost detainee" program of secret detentions, described by Army Maj. Gen. Antonio Taguba in his report as "deceptive, contrary to Army doctrine and in violation of international law." In a written follow-up answer, Mr.Gonzales refused to declare that practice a violation of the Geneva Conventions. He also stated that he thought the Goldsmith memo "presented a reasonable and scholarly interpretation of the terms of the Geneva Convention." Gonzales denied any knowledge of why or what the CIA asked for in seeking an opinion on the permissibility of removing persons protected by the Geneva Conventions from Iraq.

Mr. Gonzales' role in this process belied in part his assertions that the Geneva Conventions applied to Iraq. Moreover, the memo did of course have real ramifications in Iraq. And its impact continues to be felt. Two days after the hearing, *The New York Times* reported that the United States had determined that the Geneva Conventions did not apply to at least 325 foreign fighters in Iraq.

PRESIDENTIAL POWER

The Bybee memo requested by Gonzales stated: "Even if an interrogation method arguably were to violate [the torture statute], the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign." At the hearing Senators asked Mr. Gonzales on a number of occasions his view on this extreme legal position, which would fly in the face of settled separation of powers jurisprudence. In response:

- Mr. Gonzales stated that the President could invoke his authority as Commander-in-Chief to conclude that a law was unconstitutional and refuse to comply with it.

- When pressed in greater detail as to whether or not the President had the authority to order interrogations that violate criminal laws prohibiting torture, Mr. Gonzales continually responded that such questions were hypothetical because the President does not condone torture.

- He did not acknowledge the distinction that Senator Feingold made "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."

- When asked by Senator Leahy if he believed that other world leaders could legally authorize the torture of U.S. citizens for reasons of national security, Gonzales replied, "I don't know what laws other world leaders would be bound by. . . I'm not in a position to answer that question." In his written response, Gonzales amended his answer, acknowledging the prohibition on torture in the Convention Against Torture and in other countries' domestic laws. He also stated that the Geneva Conventions would protect American soldiers.

- Mr. Gonzales refused to provide a copy of, or reveal the legal conclusions of a March 13, 2002 OLC memo on the President's authority to transfer captive terrorists to the control and custody of foreign nations.

CONCLUSION

Human Rights First is a human rights organization committed to protecting the rule of law. As such, we are compelled to take what is, for us, the unusual step of opposing a presidential nominee. This is the second time in 27 years that Human Rights First has done this; the other instance was in 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. And so, we urge the Senate to reject Mr. Gonzales' nomination.