

The Civil Liberties and Civil Rights Record of Attorney General Nominee Alberto Gonzales

**Prepared by the Washington Legislative Office
of the American Civil Liberties Union**



January 2005

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Prepared by the Washington Legislative Office of the
American Civil Liberties Union, Laura W. Murphy, Director.

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THE AMERICAN CIVIL LIBERTIES UNION is the nation's premier guardian of liberty, working daily in courts, legislatures and communities to defend and preserve the individual rights and freedoms guaranteed by the Constitution and the laws of the United States.

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Table of Contents

- Preamble 1

- I. Introduction 1

- II. Gonzales’s Role in the “Global War on Terror” and the Iraq Conflict 2
 - The Role of the White House Counsel’s Office 3
 - The Military Commissions 4
 - Enemy Combatants 4
 - Specific Avenues of Inquiry 5

- III. The Need for an Independent Attorney General 6

- IV. Civil Liberties Concerns 7
 - The “Global War on Terrorism” and Domestic Law Enforcement 7
 - Hostility to Executive Accountability and Open Government 7
 - The Death Penalty: The Clemency Memos 8
 - Reproductive Rights 9
 - Affirmative Action 10
 - Support for the Federal Marriage Amendment 10
 - Immigration 11
 - The Faith-Based Initiative 11

- V. Conclusion 11

- Appendix I. 12

- Endnotes 13

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Preamble

As a matter of policy, the American Civil Liberties Union emphatically maintains its 84-year history of refusing to endorse or oppose nominations made by the president, other than nominees to the Supreme Court. *By releasing this report, the ACLU is not, in any way, endorsing or opposing Alberto Gonzales for the post of attorney general.* We do, however, urge the Senate to conduct a thorough and rigorous confirmation process, in which Gonzales is asked to account for his actions and policy positions.

While we may not take a position on Gonzales's confirmation, the ACLU does comment publicly on the civil liberties records of key officials whose positions accord them significant influence on the protection and enforcement of civil liberties and civil rights.

I. Introduction

The departure of Attorney General John Ashcroft and nomination of current White House Counsel Alberto Gonzales to that position obligates the ACLU, especially in the post-9/11 era when the office of attorney general is so significant, to examine Gonzales's public record on civil liberties.

In short, the record is not encouraging.

As White House counsel, Gonzales has demonstrated a clear enthusiasm for the Bush administration's broad—and, we believe, unconstitutional—reading of the president's commander-

in-chief authority to detain United States citizens and foreign nationals. His office also undertook the legal thinking behind the White House's decision to support a constitutional amendment endorsing discrimination against persons because of their sexual orientation, and he helped formulate the legal framework for government-sanctioned religious discrimination in the president's "faith-based initiative."

However, Gonzales's public record does not suggest an absolutist position against reproductive freedom, and his support for the president's guest-worker program reflects an openness on immigration issues. While his record on reproductive rights, civil rights and immigration may contain a few bright lights, the Senate will have to explore fully his commitment in these areas and others before it votes to confirm him.

The following ACLU white paper on Gonzales's record covers three broad themes.

First, it connects the dots on Gonzales's role in formulating detention and interrogation policies that helped lead to the horrific abuses at Abu Ghraib and Guantánamo Bay. It is now common knowledge that Gonzales signed a memorandum calling certain protections afforded to detainees by the Geneva Conventions "obsolete" and "quaint."

Given the power and scope of the counsel's office, it is clear that Gonzales had a significant role in the creation of these misguided rules and procedures. And he has certainly been a public cheerleader of the Bush administration's

frequent disregard of traditional legal and constitutional norms. This report reviews the available evidence and suggests certain avenues of investigation for Senators seeking to ascertain Gonzales's legal philosophy on these matters.²

Appendix I of this report lists documents that remain withheld from the public and the Senate, but that have been discussed or described in the press, sought in the ACLU's Freedom of Information Act lawsuit relating to the torture of military prisoners overseas, and, in several instances, requested by various Senators. The ACLU believes the public has a right to see these documents, and that executive privilege must not be used to shield these documents from public scrutiny.

Second, this report examines the possible conflicts of interest in the unique dynamic of a White House counsel moving to the Justice Department. As is often noted, the White House counsel serves as the "president's lawyer," but a more accurate description is the "presidency's lawyer."³ The White House counsel is meant to serve as the protector of the office of the presidency against scandal, against abridgements of presidential authority (even if warranted) and against attacks on the president's political agenda. It is, effectively, defense counsel for the West Wing.

The attorney general, however, is an entirely different creature. Though clearly an executive officer that serves at the pleasure of the president, the attorney general must nevertheless be the government's guardian of the rule of law and the Constitution. This is especially true given the absence of an independent counsel statute, which was one of the main mechanisms by which the executive branch could police itself, and the unique threats posed to constitutional checks and balances by the exigencies of the "war on terrorism."

For instance, the attorney general today must shoulder the burden of appointing special prosecutors to investigate malfeasance at the White House. There is a valid concern that Gonzales's position as White House counsel will color his objectivity in investigating any allegations that civil liberties violations were caused by the criminal conduct of high-level government officials.

Third, although Gonzales's record on traditional civil liberties issues like reproductive freedom, equal opportunity programs and gay and lesbian rights is less detailed, it deserves thorough analysis.

In sum, the position of attorney general is a crucial one in our political system. The president has the constitutional obligation to ensure that the "laws be faithfully executed," and relies a great deal on the head of the Justice Department to carry out that mandate. Accordingly, attorneys general must wear two hats. One requires them to protect our security through the enforcement of our duly enacted laws. The other, however, requires them to be the frontline defenders of the Constitution and steel our liberties against internal and external threats.

II. Gonzales's Role in the "Global War on Terror" and the Iraq Conflict

Gonzales is well known today as the author of a memorandum in January 2002 urging the president to reject the protections of the Geneva Conventions for detainees captured in the fighting against al Qaeda and the Taliban. This memorandum had an important role in shaping administration policies that weakened legal and customary constraints requiring the humane treatment of prisoners taken during military hostilities.

Particularly because of the nexus between the creation of many of these policies and the abuse

scandal at Abu Ghraib prison in Baghdad, Gonzales's role in these events deserves the closest scrutiny by the Senate Judiciary Committee and, indeed, by the entire chamber.

The Role of the White House Counsel's Office

Shortly after 9/11, lawyers at the Justice, State and Defense Departments and at the Central Intelligence Agency began researching the legal status of the new al Qaeda and Taliban detainees. It appears that the legal foundation for the administration's subsequent denial of any formal legal protections for these detainees was a 48-page memorandum from Justice Department Office of Legal Counsel ("OLC") attorneys John C. Yoo and Robert J. Delahunty. The document was requested by William J. Haynes, the Defense Department's general counsel, in 2002.

The memorandum argued that neither the Geneva Convention pertaining to prisoners of war nor the Geneva Convention setting out the rights of civilians captured in a war zone applied to the detainees. Moreover, the memorandum repudiated any need for an individual determination of POW status—as is required in Article 5 of the Geneva Convention governing the treatment of POWs—and argued that other customary laws of war were likewise inapplicable.⁴

The OLC's reasoning directly contradicted the conclusions of the State Department. Two days after the Yoo/Delahunty memorandum was sent to Defense, William H. Taft IV, the State Department's general counsel, submitted a sharply worded dissent, which remains withheld from the public and Senate, arguing that the Justice Department's legal reasoning was "seriously flawed."⁵

Gonzales's Jan. 25, 2002, memorandum for the president was consistent with the

Yoo/Delahunty memorandum. Calling the OLC findings "definitive," Gonzales informed the president that the White House had the constitutional authority to deny the detainees legal protections, and that he disagreed with the reconsideration requested by the State Department.

When listing the "positive" ramifications of the president's decision, Gonzales wrote: "In my judgment, the new [war on terrorism] 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."⁶ He also boldly asserted that a blanket presidential finding that Geneva should not apply "eliminates" any argument regarding the need for case-by-case status determinations.⁷

The ACLU objects to this line of reasoning. The need for an individual determination by a competent tribunal is absolutely essential to ensure some check against wholly innocent individuals being captured on the battlefield and then detained indefinitely.

Another OLC memorandum, authored by John Yoo and Patrick Philbin, also a deputy assistant attorney general, argues that federal courts would likely find themselves powerless to entertain a habeas corpus petition from a detainee held at Guantánamo Bay.⁸ That legal position has since been clearly repudiated by the Supreme Court.⁹ Gonzales should tell the Senate whether the Yoo/Philbin memorandum represents his own views on the matter and whether the government's attempt to create a legal limbo for detainees ought to be reconsidered in light of recent Supreme Court decisions. As a former administration lawyer told *The Washington Post* in 2004, Guantánamo Bay was attractive because it was "the legal equivalent of outer space."¹⁰

The Senate should aggressively seek to determine:

- The scope of Gonzales's leadership in formulating these policies.
- The link between these policies and the subsequent prisoner abuse at Guantánamo Bay, in Afghanistan and in Iraq.
- Whether the Justice Department and Pentagon were following Gonzales's lead in the legal back-and-forth described above.

The Military Commissions

In the uproar over the administration's military detention policies post-9/11, Gonzales has also been a strong public advocate of the president's plan to try certain al Qaeda and Taliban operatives in military commissions (with procedures far more prosecution-friendly than military courts-martial). Moreover, in defending these military commissions, Gonzales has repeatedly failed to address the pressing concerns of the civil liberties and human rights communities.

"The suggestion these commissions will afford only sham justice like that dispensed in dictatorial nations is an insult to our military justice system," he wrote.¹¹ Gonzales failed to mention, however, that the current system differs markedly in evidentiary standards, insulation from command influence and other key protections against wrongful conviction than traditional courts-martial or even the arcane military commissions of World War II.¹² As conservative columnist William Safire wrote in response to the above comment, "Many attorneys friendly to this White House know that order was egregiously ill drafted. The White House counsel, Alberto Gonzales, defended the order on this Op-Ed page by denying or interpreting away its most offensive provisions."¹³

Gonzales's comments about the legality of the commissions are doubly dubious in light of the November 2004 federal court decision declaring the tribunal system unlawful in the case of Salim Ahmed Hamdan, a suspected al Qaeda member.¹⁴ Judge James Robertson of the United States District Court for the District of Columbia specifically repudiated Gonzales's primary argument: that Taliban and al Qaeda combatants held at Guantánamo were not entitled to an individual determination of their prisoner of war status.¹⁵ At the time this report went to print, Robertson's decision remains on appeal to the Supreme Court.

Enemy Combatants

Finally, it remains unclear who, precisely, championed the idea of detaining both citizen and noncitizen "enemy combatants" out of reach of criminal due process or international law. Many commentators believe, however, that given his influence on matters of national security, Gonzales must have played a key role. Indeed, "[i]t was his office that conceived of the term 'enemy combatant' as a way to indefinitely detain American citizens accused of terrorism..."¹⁶

And, in defending the decision to detain Jose Padilla and Yasser Esam Hamdi, both United States citizens, as enemy combatants, administration officials stressed that the detentions had been reviewed and approved at the highest levels of the administration. Gonzales should be held accountable for taking the extreme position that the executive branch should be able to unilaterally remove Americans from the reach of judicial review and subject them to indefinite, incommunicado military detention. Indeed, in the government's brief to the Supreme Court in the Jose Padilla case, counsel notes that the final step in the enemy combatant approval process is review by the White House counsel's office.¹⁷

Specific Avenues of Inquiry

Gonzales should be prepared to address the role he played in each of the matters listed below, and we urge him to facilitate the release of the documents mentioned here and listed in the appendix.

We hope the president and Gonzales would agree that the gravity of what apparently occurred in the name of national security presents a public interest of sufficient magnitude to defeat any claim of executive privilege. In particular, we strongly urge Gonzales to support the release of any documentation mentioned in the draft Congressional subpoenas proposed by Senators Dianne Feinstein (D-CA) and Patrick Leahy (D-VT) or in the ACLU's litigation.¹⁸

- Sometime in late fall 2001, the Justice Department prepared a memorandum for the CIA defining "torture" for the purposes of international law. Apparently, it found that the international terrorism convention, to which the United States is a party, *permits* a broad range of questionable tactics, including sleep deprivation and coercion through phobias. Reading the language of the convention narrowly, the memorandum said that only actions causing "severe physical or mental pain" were proscribed.¹⁹ This memorandum is being withheld from the public and the Senate.
- In late November 2004, the press disclosed a secret Red Cross memorandum that accuses the Pentagon of using psychologically coercive techniques "tantamount to torture," and co-opting medical personnel in the base into helping gauge the mental and physical states of detainees during interrogation, a severe breach of medical ethics.²⁰ Gonzales needs to address the connection between the interrogation techniques alleged in this Red Cross report and the back-and-forth, described above, between him, the Pentagon's general counsel and the Office of Legal Counsel at the Justice Department. These allegations are in accord with descriptions of physical and mental coercion in documents obtained by the ACLU pursuant to its ongoing Freedom of Information Act lawsuit, which is seeking government documents on the abuse of detainees overseas.
- In response to the assault on the Geneva Conventions by the political members of the defense community, career military lawyers were forced to anonymously consult with Scott Horton, a human rights lawyer with the New York City Bar Association. Though they could only talk in vague terms about classified information, they told Horton that Pentagon officials were deliberately trying to create "an atmosphere of legal ambiguity." The primary movers of this effort included, reportedly, Undersecretary of Defense for Policy Douglas Feith and General Counsel Haynes²¹ (who has been nominated by President Bush to the 4th Circuit Court of Appeals).
- According to various sources, including the Taguba Report,²² the military has been complicit in turning certain detainees in Iraq over to the CIA so that their existence can be kept secret from the International Red Cross, in contravention of international law. Defense Secretary Rumsfeld himself admitted approving, at the request of then-Director of Central Intelligence George Tenet, the sequestration of one of these "ghost detainees." It appears not to be an isolated incident.²³

- Finally, we know that President Bush himself signed a directive authorizing the creation of a web of secret CIA detention facilities overseas.²⁴ It has also been reported that the Department of Justice officially prepared a memorandum discussing the types of interrogation techniques that the CIA can use against high-level al Qaeda detainees, which are presumably even more aggressive than those used in Iraq, Afghanistan and Cuba.²⁵ Sources in another article said that Gonzales, Haynes and David Addington, Vice President Cheney’s counsel, discussed various techniques, and found acceptable the controversial gambit known as “water-boarding,” in which detainees are made to believe they are in imminent danger of drowning.²⁶

See Appendix I for a listing of pertinent material that the government refuses to disclose to the public and the Senate.

III. The Need for an Independent Attorney General

Under current law, the primary mechanism for investigating high-level wrongdoing by the president, senior officials of the executive branch or members of Congress is through the special counsel provisions in the Code of Federal Regulations.²⁷ The special counsel is to be appointed when a particular investigation would pose a “conflict of interest” or when it is in the “public interest,” and can be invoked by the acting attorney general if the attorney general has recused himself or herself.²⁸

Though the jurisdiction, scope and practical power of the special counsel resemble that of the independent counsel, the attorney general retains more control. For instance, the attorney general has the last word on selection,²⁹ ambit

of investigation³⁰ and the expansion of the special counsel’s jurisdiction into civil or administrative matters,³¹ and has great discretion in discipline³² and removal.³³ The attorney general also exercises a limited veto on investigative steps that he or she deems unwarranted.³⁴

That said, the conflict of interest rules governing a special counsel are actually more stringent than those applicable to the now-defunct independent counsel.³⁵ However, because the special counsel reports directly to the attorney general, who would decide whether a particular conflict violates Justice Department regulations, there remain openings for impropriety if the attorney general is partial to a particular outcome of the investigation.

At the very least, Gonzales must take concrete steps to erect a firewall around his office to prevent even the appearance of impropriety. The need for such a check is made all the more apparent by the remote, but not inconceivable, possibility that he himself, or his colleagues in the White House, played a direct role in authorizing highly coercive interrogation techniques discussed above in section II. Were such a revelation to come out, Gonzales would be in the hugely awkward position of having to authorize a criminal investigation against himself or his close political allies.

Such a hypothetical is even more disturbing given the myriad ways in which the attorney general could manipulate his discretion over the special counsel’s office to subtly obstruct the pursuit of justice.

Additionally, although such a scenario may seem far-fetched today, note that three of Bush’s six predecessors have required the appointment of independent investigators in response to major presidential scandals. Given the fact that Halliburton, Enron and the Valerie Plame affair are all still open investigations,

and that the latter two were expanded shortly before the 2004 election, it remains a very open question whether President Bush (and Attorney General Gonzales) are going to face a scandal akin to Whitewater or Iran-Contra before the second term ends.

Finally, the ACLU is particularly concerned that the promotion of the White House counsel to attorney general will impair the Department of Justice's ability to conduct full and fair investigations of possible criminal civil rights or civil liberties violations.

IV. Civil Liberties Concerns

Gonzales's civil liberties record is incomplete, but troubling nonetheless. His time on the Texas Supreme Court contains some clues as to how he would approach civil liberties concerns as attorney general, and reports of his involvement in civil rights and civil liberties issues as White House counsel provide further details. The following discussion pieces together as comprehensive a picture as possible of Gonzales's constitutional philosophy.

The "Global War on Terrorism" and Domestic Law Enforcement

Attorney General John Ashcroft is often targeted as the main public cheerleader for the broad expansions of domestic government surveillance and investigative power authorized in the wake of 9/11. Although he certainly deserves the criticism he receives, there have been reports that Gonzales actually makes the final legal decisions as to what the administration will approve.

Media reports have indicated that this was particularly true during the Congressional negotiations over the USA Patriot Act, the 2001 counterterrorism bill that has become a rallying cry for the public backlash against the

Bush administration's abridgments of certain civil liberties:

Ashcroft has had to adjust to the fact that there are few decisions of importance made in the Justice Department without the explicit approval of the White House and its counsel's office... As a former senator, he began negotiating with his old colleagues as to what concessions might be made to pass what became the USA Patriot Act... But when the White House was informed of his discussions, he was stunned to be told that he was not authorized to make such offers.

Even though the legislation centered on the law enforcement world he headed, Ashcroft was told that Alberto R. Gonzales, the White House counsel, and his deputy, Timothy Flanigan, would make any major decisions.³⁶

Given Gonzales's apparent proximity to the drafting of the Patriot Act, we fear he may not be receptive to the calls on both the left and the right for certain refinements in the law. Indeed, former solicitor general Theodore Olson explicitly mentioned that Gonzales would follow Ashcroft as a "staunch" defender of the Patriot Act.³⁷

See www.aclu.org/patriot for more information on the Patriot Act.

Hostility to Executive Accountability and Open Government

Arguably, the greatest legacy of the current administration will be its unprecedented

adherence to a strict presumption of secrecy in its official dealings. Gonzales should face tough questioning about whether he truly believes, as his advice to the president suggests, that the president has a duty, for the sake of national security or to expand the scope of the executive's authority, to insulate the office from its traditional level of accountability.

As the title of Nixon White House counsel John Dean's new book suggests, the "secret" Bush administration has been "Worse than Watergate" in keeping sunlight out of the West Wing.³⁸

For instance, on Nov. 1, 2001, the White House issued an executive order, drafted by Gonzales, exempting more than 68,000 pages of Reagan administration records from release. Reportedly, the records involved the private communications of President Reagan, Vice President George H.W. Bush and top aides (some of whom serve currently in the George W. Bush White House). Gonzales proposed a series of delays on releasing the Reagan records to allow President Bush to invoke a "constitutionally based privilege or take other appropriate action."³⁹

Though little noticed at the time, the Gonzales presidential papers order is actually a sweeping change to open government laws. The current regime allows records to be kept secret indefinitely, and significantly reduces the checks placed on executive authority. Prior to the order, presidential papers were presumed disclosable after 12 years, which historians (and the ACLU) argue was enough time to protect executive privilege and reduce any chilling effect on the candor required in effective executive consultations.

Gonzales rejected these arguments, saying "the pursuit of history" should not "deprive a president of candid advice while making crucial

decisions."⁴⁰ Also of note is Gonzales's lead role in the aggressive assertion of executive privilege surrounding public calls for release of documents pertaining to Vice President Cheney's energy policy task force.⁴¹

The Death Penalty: The Clemency Memos

During his tenure as governor of Texas, George W. Bush permitted 150 executions, a record unsurpassed in recent history.⁴² He granted clemency in only one case. Gonzales, his then-legal counsel, prepared 57 briefs on these cases, usually presented to the governor on the morning of the planned execution. The classified documents outlined the facts of the case, and presented a summary of the arguments for clemency.⁴³ Though Governor Bush frequently claimed to agonize deeply over permitting an execution to go forward, a review of the memorandums by Alan Berlow at *Atlantic Monthly* suggested that the reviews were only cursory.⁴⁴

The summaries of arguments in favor of clemency were far less prominent in the memorandums than the details of the crime, and frequently omitted mention of crucial mitigating factors like contradictory testimony at trial, inadequate legal counsel and even possibly exculpatory evidence.⁴⁵ In addition, Governor Bush often publicly insulated himself from criticism by arguing that his clemency powers were relatively limited. He also claimed he could not affirmatively recommend clemency without a finding by the Board of Pardons and Paroles (BPP), which was — at the time of his election to the presidency — entirely composed of his appointees. Presumably, had he any doubts about an impending execution, he could have asked the BPP to review the case.⁴⁶

Indeed, as reported by Berlow, Governor Bush did approach the BPP in the case of Henry Lee Lucas, and the board recommended (by a vote of 17 to 1) to commute Lucas' sentence to life

without parole. Reportedly, Governor Bush recommended commutation because the jurors “did not know” certain facts when they sentenced Lucas to death.⁴⁷ Indeed, Lucas had confessed to a series of murders that he could not have committed, as he was out of the state when they occurred. As Berlow notes, the same standard could have been used to grant clemency in several other cases that came across the governor’s desk. Clearly, Gonzales should have mentioned similar contradictory evidence in a number of the clemency memos, but did not.

For instance, the memorandum for David Wayne Stoker failed to mention that a key witness had recanted his testimony against Stoker, saying that he only testified against him because the prosecutor threatened to bring a perjury charge if he did not stick to his story.⁴⁸ The star witness against Stoker, Carey Todd, testified at trial that he had received nothing for implicating Stoker, failing to mention that a neighboring county dropped criminal charges against him on the day of his testimony and that he was paid \$1,000 from Crime Stoppers for implicating Stoker.⁴⁹

Also, Stoker’s lead defense counsel later gave up his law license in the face of disciplinary sanctions⁵⁰ and the psychiatrist who triggered Stoker’s possible death penalty by declaring the defendant a certain recidivist never even examined him.⁵¹ But, the Gonzales memorandum contains only this passage: “One court opinion states that the evidence is solely circumstantial. Nonetheless, experts did determine that the .22 Ruger admitted into evidence, seen in Stoker’s possession by his own brother within the weeks following the murder, was actually the murder weapon.”⁵²

To date, the White House continues to summarily dismiss the Berlow story. It issued the following statement when the story broke: “We

dismiss the story as totally off-base. It paints a completely inaccurate picture of a responsibility that then-Governor Bush took very seriously. As governor, the president approached each and every case in a deliberate and thoughtful manner and received very sound and thorough counsel. Judge Gonzales is highly regarded and well-respected for his experience, integrity and legal expertise by those who know him.”⁵³

We urge the Senate to conduct an independent examination of the clemency memos.

Reproductive Rights

As Texas Supreme Court justice, Gonzales ruled six times in cases interpreting that state’s parental notification law. In each, Gonzales voted with the majority or the plurality – voting to permit a judicial bypass once, deny once and remand to the trial court four times – and on each occasion emphasized that he was deciding the matter based upon strict statutory construction, rather than out of any personal belief in the propriety of abortion.

As one opinion he joined stated, “We are not called upon to decide the constitutionality or wisdom of abortion. Arguments for or against abortion do not advance the issue of statutory construction presented by this case.”⁵⁴

The famous charge leveled against Gonzales by some on the right – that he criticized fellow justice Patricia Owens for her anti-abortion views – seems somewhat misplaced. In that case, Gonzales dismissed a charge that the majority opinion erred and that “the general rule of notification should be very rare and require a high standard of proof,” emphasizing that he could find “nothing in the statute to directly show that the Legislature intended such a narrow construction.”⁵⁵ He went on to note that while “the ramifications of such a law and the results of the Court’s decision here may

be personally troubling to me as a parent, it is my obligation as a judge to impartially apply the laws of this state without imposing my moral view on the decisions of the Legislature.”⁵⁶

That said, Gonzales has made several statements possibly hinting at his personal stance on abortion rights. “All I’ll say about it is, how I feel personally may differ with how I feel about it legally.... It’s the law of the land,” he said in 2001.⁵⁷ Given these ambiguities, Gonzales should also be asked if he played any role in the issuance of an executive memorandum on the first day of Bush’s presidency restoring the ban on funding by the U.S. Agency for International Development for international groups that advocate or provide counsel on abortion.

Affirmative Action

Gonzales’s record on equal opportunity programs could be seen as both promising and troubling. Though he was intricately involved in drafting the administration’s briefs in the two University of Michigan admissions cases decided by the Supreme Court in 2003, Gonzales apparently sought to weaken the language.⁵⁸ After Gonzales started “carving up” Solicitor General Theodore Olson’s language, Olson had “pangs of conscience in accepting it.”⁵⁹ The result was a brief opposing the admissions policy, saying it looked too much like quotas, but supporting race-conscious diversity measures.

We urge Gonzales to clarify his personal position on the use of race-conscious equal opportunity programs to increase diversity, remedy ongoing discrimination or end the continued ramifications of past discrimination.

The Bush Administration’s Support for the Federal Marriage Amendment

Gonzales’s personal stance on discrimination based on sexual orientation is unclear.

However, in discussing the administration’s consideration of the Federal Marriage Amendment (“FMA”), Bush announced in August 2003 that he had assigned “lawyers” to examine the different legislative approaches to banning same-sex marriage.⁶⁰ Although President Bush did not identify Gonzales as one of the assigned lawyers, the Senate Judiciary Committee ought to explore Gonzales’s role on the issue.

On Feb. 24, 2004, Bush called for a constitutional amendment in “defense” of marriage. Though he and his spokesman, Scott McClellan, did not endorse a particular formulation, McClellan did mention the amendments introduced by Rep. Marilyn Musgrave (R-CO) and Sen. Wayne Allard (R-CO) in their respective chambers. Gonzales, who may have been responsible for the legal vetting of the different amendatory approaches, should make clear his position on the Musgrave-Allard amendments, which would bar all marriage rights for same-sex couples, and would likely ban civil unions as well.

Notably, the Musgrave-Allard amendment, as originally introduced, would have defined marriage as exclusively between a man and a woman, and would have stipulated that “[n]either this [United States] constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.”⁶¹

Though the federal marriage amendment was defeated soundly in both chambers of Congress, the administration’s opposition to equal marriage rights, as well as its efforts to weaken existing protections, for gay and lesbian Americans remain strong.

We urge Gonzales to clarify his views.

Immigration

During his tenure as Texas secretary of state, Gonzales made a series of encouraging statements on immigration (usually coupled with appeals against economic protectionism).⁶² As White House counsel, he has been a key backer of the president's guest-worker plan. While the Senate should aggressively explore his views on discriminatory border control programs like the National Security Entry-Exit Registration System ("NSEERS"), Gonzales should also be applauded for resisting the hard-line anti-immigration sentiment in certain sectors of Washington.

As secretary of state, Gonzales wrote an editorial for *The San Antonio Express-News* blasting an INS pilot program – similar, interestingly, to the current national entry-exit screening program known as US Visit – that would track cross-border movements in Eagle Pass, Texas.

Pointing to the tens of thousands of pedestrians crossing between Mexico and the United States every month, Gonzales wrote, "I find it hard to believe that this new Departure Management System will be able to successfully track undocumented immigrants without burdening U.S. citizens and legitimate visitors."⁶³ He even went so far as to call the burdensome identity requirements "Big Brotherish."⁶⁴

We hope that Gonzales's relatively moderate perspective on immigration will lead him to an immigration policy that respects the civil liberties of immigrants.

The Bush Administration's Faith-Based Initiative

More than 60 years ago, on June 25, 1941, President Franklin D. Roosevelt signed the first executive order (No. 8802) prohibiting federal defense contractors from discriminating based

on race, religion, color or national origin. The order represented both the first concrete victory of the modern civil rights movement and the beginning of a now long-standing policy prohibiting organizations and contractors that discriminate against others from receiving federal tax dollars.

On Dec. 12, 2002, however, President Bush signed Executive Order 13279, which expressly rolled back many of the anti-discrimination regulations and policies that had grown out of the Roosevelt order.⁶⁵ The ostensible goal was to enforce the "equal protection" of religious organizations in federal contracting. The practical effect, however, is that it provides religious groups with the right to discriminate against current and potential employees based on religion.⁶⁶

The Bush order comes after a decade of litigation by special interest groups claiming a right to fire people based on religious doctrine.⁶⁷ The implications of the Bush order, however, go beyond just these cases. The order implicitly rejects the reasoning of the Supreme Court's holding in *Bob Jones University v. United States*, 461 U.S. 574 (1983), which removed the university's tax-exempt status because of overt racial discrimination justified by religious precepts.

The Senate should question Gonzales on the 2002 executive order, which was promulgated on his watch.

V. Conclusion

Given the extensive powers seized by the executive branch in the aftermath of 9/11, and the eminent role the attorney general plays in that branch, the Senate should do all in its power to analyze the qualifications and positions of nominees to the post in order to ensure that the proper person is placed in that job. Gonzales

appears to be a committed friend to the administration, and he has amassed an extensive record as an attorney and jurist.

Gonzales's personal stance on core civil liberties matters will play a critical role in his efforts to balance the need for effective law enforcement

and national security with the need for individual freedoms and privacy. Unfortunately, his personal feelings on these matters are largely a subject for speculation, though the evidence that does exist is not heartening.

We respectfully urge the Senate to dig deeper.

Appendix I: Documents that should be released publicly

Select list of undisclosed documents referenced in news articles, government memoranda and reports:

1. Memo from DOJ to CIA providing guidance on permissible interrogation techniques and specifically authorizing "water-boarding" (Aug. 2001)
2. Presidential Order authorizing CIA to set up series of secret detention facilities (late 2001)
3. Memorandum from William Howard Taft IV, Department of State, responding to the January 9, 2002 Yoo/Delahunt memo on the applicability of the Geneva Conventions to Taliban and al Qaeda detainees (Jan. 11, 2002)
4. Memorandum from James C. Ho, Attorney-Advisor, OLC, to John Yoo, Deputy Assistant Attorney General, OLC, re: interpretation of Geneva Conventions' Common Article 3 (Feb. 1, 2002)
5. EC summarizing FBI's concerns about DOD's interrogation methods (May 30, 2003)
6. Cable from CIA agency station in Baghdad to CIA HQ expressing concern about certain interrogation techniques used by DOD (July, 2003)
7. Memo from Lt. Gen. Sanchez permitting high-pressure interrogation techniques at AGP (Sept., 2003)
8. Documents relating to CIA's request that DOD hold certain detainees without registering them on prison rolls (Oct.-Nov., 2003)
9. Memo from Lt. Gen. Sanchez to MI personnel at AGP re: Interrogation rules of engagement (Oct. 9, 2003)
10. Memo from DOJ re liability of interrogators under CAT and Anti-Torture Act when prisoner not in U.S. custody (date unknown)

Endnotes

¹ Memorandum from White House Counsel Alberto Gonzales to President George W. Bush (Jan. 25, 2002), available at <http://msnbc.msn.com/id/4999148/site/newsweek> (agreeing with Justice Department determination that Geneva Conventions protections do not apply to persons held in the conflict against al Qaeda and the Taliban.)

² In particular, this report lists a series of documents pertaining to post-9/11 military detentions that remain withheld, but would shed initial light on the abuses of power that led, among other things, to the now infamous activities at Abu Ghraib prison in Baghdad. The ACLU calls on the president to affirmatively release these documents on matters of such public import.

³ MARYANNE BORRELLI ET AL., THE WHITE HOUSE 2001 PROJECT, REPORT NO. 29: THE WHITE HOUSE COUNSEL'S OFFICE ii (1985), <http://www.whitehouse2001.org/files/counsel/Counsel-OD.PDF>.

⁴ Memorandum from John C. Yoo, Deputy Assistant Attorney General, and Roger Delahunty, Special Counsel, Office of Legal Counsel, Department of Justice, to William J. Haynes, General Counsel, Department of Defense, on the "Application of Treaties and Laws to al Qaeda and Taliban Detainees" (Jan. 2, 2002), available at: <http://www.msnbc.msn.com/id/5025040/site/newsweek>; see also, Memorandum from Jay S. Bybee, assistant attorney general, Office of Legal Counsel, to White House counsel Alberto Gonzales and Defense Department General Counsel William J. Haynes on "Application of Treaties and Laws to al Qaeda and Taliban Detainees" (Jan. 22, 2002), available at: <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>.

⁵ John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26.

⁶ Gonzales, *supra* note 1, at 2.

⁷ *Id.*; see also the Convention Relative to the Treatment of Prisoners of War, Oct. 21, 1950, 6 U.S.T. 3517, Art. V ("Geneva Convention III") (stipulating that belligerent detainees "shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.")

⁸ Memorandum from John C. Yoo and Patrick Philbin, Deputy Assistant Attorneys General, Justice Department Office of Legal Counsel, to William J. Haynes, Defense

Department general counsel, Re: Possible Habeas Jurisdiction Over Aliens Held In Guantánamo Bay, Cuba (Dec. 28, 2001).

⁹ *Rasul v. Bush*, 542 U.S. ___, 124 S.Ct. 2686, 2698 (2004).

¹⁰ Barry, *supra* note 5, at 30.

¹¹ Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27.

¹² See TIMOTHY EDGAR, CONDUCT UNBECOMING: PITFALLS IN THE PRESIDENT'S MILITARY COMMISSIONS, *passim* (2004), available at: <http://www.aclu.org/Files/OpenFile.cfm?id=15179>.

¹³ William Safire, *Voices of Negativism*, N.Y. TIMES, Dec. 6, 2001, at A35.

¹⁴ *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), petition for cert. filed, 73 U.S.L.W. 3338 (U.S. Nov. 22, 2004) (No. 04-702).

¹⁵ *Id.* at 3.

¹⁶ Elizabeth Bumiller, *The Office Where Law Meets War*, N.Y. TIMES, Sept. 23, 2002, at A22.

¹⁷ Brief for the Petitioner at 7, *Rumsfeld v. Padilla*, 542 U.S. ___, 124 S.Ct. 2711 (2004) (No. 03-1027).

¹⁸ See Helen Dewar, *GOP Senators Block Subpoena on Memos But Prod White House*, WASH. POST, June 18, 2004, at A23; ACLU Torture FOIA Landing Page, at: <http://www.aclu.org/International/International.cfm?ID=13962&c=36>.

¹⁹ Barry, *supra* note 5, at 30.

²⁰ Neil A. Lewis, *Red Cross Finds Detainee Abuse at Guantánamo*, N.Y. TIMES, Nov. 30, 2004, at A1.

²¹ Barry, *supra* note 5, at 32.

²² AR 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE, INVESTIGATING OFFICER MG ANTONIO M. TAGUBA, DEPUTY COMMANDING GENERAL SUPPORT COALITION FORCES LAND COMPONENT COMMAND § 2.33 (2004) ("The Taguba Report"), available at: <http://www.aclu.org/torturefoia/relea-sed/TR3.pdf>.

²³ Eric Schmitt and Thom Shanker, *Rumsfeld Issued an Order to Hide Detainee in Iraq*, N.Y. TIMES, June 17, 2004, at A1.

²⁴ Barry, *supra* note 5, at 31. See also Dana Priest and Barton Gellman, *U.S. Decries Abuse But Defends Interrogations; 'Stress and Duress' Tactics Used On Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1.

²⁵ Toni Locy and John Diamond, *Memo Lists Acceptable 'Aggressive' Interrogation Methods*, USA TODAY, June 28, 2004, at A5.

²⁶ Michael Hirsh et al., *A Tortured Debate: Amid Feuding and Turf Battles, Lawyers in the White House Discussed Specific Terror-Interrogation Techniques Like 'Water-Boarding' and 'Mock Burials'*, NEWSWEEK, June 21, 2004.

²⁷ See General Powers of Special Counsel, 28 C.F.R. § 600.1-600.10 (2004).

²⁸ *Id.* at § 600.1.

²⁹ *Id.* at § 600.3(b) (requiring the attorney general to “consult” with the assistant attorney general for administration).

³⁰ *Id.* at § 600.4.

³¹ *Id.* at § 600.4(c).

³² *Id.* at § 600.7(c).

³³ *Id.* at § 600.7(d).

³⁴ *Id.* at § 600.7(b).

³⁵ Compare 28 C.F.R. § 600.7 (imposing Department of Justice ethics rules on special counsel) with 28 U.S.C. § 594(i) (2003) (establishing different conflict rules for independent counsel).

³⁶ Neil A. Lewis, *Ashcroft's Terrorism Policies Dismay Some Conservatives*, N.Y. TIMES, Feb. 24, 2002, at A1.

³⁷ Theodore B. Olson, *An Excellent Choice; Senate Should Confirm Alberto Gonzales*, WASH. TIMES, Nov. 15, 2004, at A21.

³⁸ JOHN W. DEAN, *WORSE THAN WATERGATE: THE SECRET PRESIDENCY OF GEORGE W. BUSH* (2004).

³⁹ George Lardner Jr., *Bush Clamping Down on Presidential Papers*, WASH. POST, Nov. 1, 2001, at A33.

⁴⁰ Adam Clymer, *Government Openness At Issue as Bush Holds Onto Records*, N.Y. TIMES, Jan. 2, 2003, at A1.

⁴¹ See Robert Novak, *The Arrogance of Power; Bush White House is Carrying on with Same Pretensions of Executive Privilege Clinton Hid Behind*, CHIC. SUN TIMES, Jan. 21, 2002, at 23.

⁴² Alan Berlow, *The Texas Clemency Memos*, ATL. MONTHLY, July/Aug. 2003, at 91.

⁴³ They are available online at: http://www.demaction.org/dia/organizations/ncadp/content.jsp?content_KEY=157.

⁴⁴ Berlow, *supra* note 42, at 93.

⁴⁵ *Id.* at 92.

⁴⁶ *Id.* at 93.

⁴⁷ *Id.*

⁴⁸ *Id.* at 94.

⁴⁹ Steve Mills et al., *GW Bush Has Executed 131 Inmates – Many With Seriously Flawed Trials*, CHIC. TRIB., June 11, 2000, at 1.

⁵⁰ *Id.*

⁵¹ Berlow, *supra* note 42, at 94. Indeed, the psychiatrist was actually Dr. James Grigson, nicknamed “Dr. Death,” who was expelled from the American Psychiatric Association subsequent to the Stoker case because his expert testimony was found to be repeatedly unethical.

⁵² See, e.g., Memorandum from Alberto R. Gonzales to Governor George W. Bush Re Schedule Execution of David Wayne Stoker # 892 on Monday, June 16, 1997, at 6:00 pm (June 16, 1997) (*at*: <http://ncadp.org/files/StokerD.pdf>).

⁵³ *Morning Edition* (National Public Radio broadcast, June 27, 2003).

⁵⁴ *In re Jane Doe*, 19 S.W.3d 249 (Tex. 2000).

⁵⁵ *In re Jane Doe*, 19 S.W.3d 346, 365 (Tex. 2000).

⁵⁶ *Id.* at 366.

⁵⁷ Chitra Ragavan, *Bush's Legal Eagle, Rising with the Son*, U.S. NEWS AND WORLD REPORT, Mar. 12, 2001, at 31.

⁵⁸ Robert Novak, [*White House Counsel Alberto Gonzales...*], CHIC. SUN TIMES, Jan. 23, 2003, at 31.

⁵⁹ *Id.*

⁶⁰ Doug Ireland, *Republicans Relaunch the Anti-Gay Culture Wars*, THE NATION, Oct. 20, 2003, at 18.

⁶¹ H.J. Res. 56, 108th Cong. (2003); S.J. Res. 26, 108th Cong. (2003).

⁶² Alberto Gonzales, *Mexico-Europe Trade is No Threat to Texas*, DALL. MORN. NEWS, Jan. 18, 1998, at 6J.

⁶³ Alberto Gonzales, *Comment: INS Pilot Program Unfair to Eagle Pass Residents*, SAN ANT. EXP. NEWS, Mar. 2, 1998, at 9A.

⁶⁴ *Id.*

⁶⁵ Exec. Order No. 13,279, 67 Fed. Reg. 77,139 (Dec. 16, 2002).

⁶⁶ *Id.* at § 4.

⁶⁷ See, e.g., *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410 (6th Cir. 1996) (permitting a religious school to dismiss an unmarried pregnant teacher for having premarital sex); *Little v. Wuerl*, 929 F.2d 944, 951 (3rd Cir. 1991) (permitting a religiously affiliated school to fire a teacher who failed to have her marriage annulled properly); *Hall v. Baptist Memorial Health Care Corp.*, 215 F.3d 618, 625 (6th Cir. 2000) (upholding a religious school's dismissal of a school counselor after she achieved a leadership position in a church that accepted gay and lesbian members).

