STATEMENT OF OPPOSITION TO THE CONFIRMATION OF ALBERTO GONZALES TO THE OFFICE OF ATTORNEY GENERAL OF THE UNITED STATES

January 4, 2005

At the time the President announced this nomination, People For the American Way raised serious concerns about Alberto Gonzales' fitness for the post of Attorney General of the United States, but reserved judgment pending a complete review of his record. Unfortunately, as more of that record becomes clear, what PFAW's review reveals is a lawyer who too often allows his legal judgment to be driven by his close relationship with the President rather than adherence to the law or the Constitution. The risk that such lack of independence poses for his ability as Attorney General to be the lawyer for all of the people of this country is simply too great to warrant his confirmation. Therefore, People For the American Way must oppose the confirmation of Alberto Gonzales to be the 80th Attorney General of the United States.

Specifically, as White House Counsel, Gonzales has been a central architect of some of the most controversial elements of the Administration's war on terror; he participated in a dramatic weakening of U.S. commitments to the Geneva Conventions and against torture; he has led the Administration's effort to pack the federal appellate courts with right-wing judges and to crusade for unprecedented Executive Branch secrecy; and he has failed to recuse himself from decisions and investigations pertaining to former clients and his former firm. Additionally, as Counsel to then-Texas Governor George W. Bush, and advisor to the Governor on death penalty clemency decisions, he showed a callous disregard for due process and fairness. The Attorney General is not the lawyer for any particular President or Administration, but is the lawyer for all the people of the United States. Throughout his work for President Bush on all these matters, Gonzales's single-minded efforts to advance the goals of his superiors, to the exclusion of legal and constitutional authority to the contrary, demonstrate his inability to serve as the nation's chief lawyer and enforcer of all Americans' rights.

Undermining the Constitution and the Rule of Law

As counsel to the President, Gonzales has been a prime architect of and advocate for policies that would confer on the Executive Branch unparalleled powers not subject to review, question, or check by Congress or the courts. He has supported detention policies that a conservative Supreme Court has concluded defy basic constitutional principles of due process and separation of powers. He has dishonored this nation's commitment to international human rights. And he was the prime mover behind the creation of military commissions that sidestep both U.S. criminal law, the Uniform Code of Military Justice and the laws of war. This record reflects a disturbing willingness on the part of Gonzales to subordinate concerns for basic human rights to the unfettered —and unquestioned — power of the executive.

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Gonzales has played a pivotal role in crafting policies as part of the Administration's war on terror which have grievously undermined America's commitments to cherished civil rights and liberties. This includes the adoption of a dramatic and unparalleled detention policy in the war on terror which, combined with the Administration's claims of unfettered authority in the designation and handling of "enemy combatants," violates fundamental principles enshrined in our Constitution such as the separation of powers and due process of law. Many aspects and principles of these policies were repudiated by the U.S. Supreme Court by wide margins in decisions this summer. As the majority bluntly wrote in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004), "a state of war is not a blank check for the President[.]"

Gonzales was also at the center of the Bush Administration's unprecedented steps to limit and ignore the Geneva Conventions. In a draft January 25, 2002 memo to the President, Gonzales largely dismissed the conventions as "quaint" and "obsolete" in the context of the war on terrorism,[1] and argued that the Geneva Convention does not apply to the conflict in Afghanistan. Both his conclusions and his legal reasoning have been roundly condemned by non-governmental organizations with expertise in human rights and international law such as Human Rights Watch and Amnesty International.[2]

Furthermore, memos from the U.S. State Department reveal that our own government's experts in human rights and international law sharply criticized Gonzales' recommendations and analysis. Specifically, Secretary of State Colin Powell wrote in response to Gonzales' draft memo that his recommendation would "reverse over a century of U.S. policy and practice in supporting the Geneva conventions and undermine the protections of the law of war for our troops."[3] Powell also warned that Gonzales' analysis would "undermine public support among critical allies" and have "a high cost in terms of negative international reaction."[4] In a February memo to Gonzales, the Legal Advisor of the U.S. Department of State, William H. Taft, echoed Secretary Powell's objections stating that "[a]ny small benefit [of Gonzales' recommendations] will be purchased at the expense of the men and women in our armed forces that we send into combat." [5]

Gonzales' dismissal of international law – particularly universal norms of human rights and the laws of war embodied in the Geneva Conventions – appears to be a matter of expedience, demonstrating an all too cavalier willingness to put aside expert legal advice in favor of desired outcomes. Although no final version of Mr. Gonzales' memorandum has been produced, which should itself be the basis of significant Senate inquiry, his advice reportedly provided the basis for the President's decision in February, 2002 to deny Geneva

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[1] Alberto Gonzales Memorandum, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban, Draft January 25, 2002.

[2] *See*, "Attorney General Nominee Undermined Rights", Human Rights Watch, November 10, 2004, http://www.hrw.org/english/docs/2004/11/10/usdom9659.htm. Joint Letter from Human Rights Organizations, December 8, 2004, http://hrw.org/english/docs/2004/12/08/usdom9797.htm.

[3] Colin Powell Memorandum, Draft Decision Memorandum for President on the Applicability of the Geneva Convention to the Conflict in Afghanistan, January 26, 2002.

[4] *Id*

[5] William Taft Memorandum, Comments on Your Paper on the Geneva Convention, February 2, 2002.

Convention rights to Guantanamo Bay detainees as well as for other troubling Administration practices concerning the war on terror.[6] The result has been to undermine the United States' global campaign to expand freedom, democracy, and human rights throughout the world, and to damage our standing with our allies at a critical time in our nation's history.

Finally, Gonzales was also the architect of the President's strategy of creating military commissions to try foreign terror suspects, circumventing both U.S. criminal law and the laws of war. The "trials" before these commissions have been referred to by current U.S. military lawyers as perpetuating a "monarchical regime."[7] Under the tribunal rules, the government can impose punishment, including even the death penalty, without independent judicial review.[8]

As Attorney General, Gonzales would have sweeping power over the lives of every American, both citizens and non-citizens. Yet, his record as counsel to the President unfortunately suggests that he will not exercise the independence of thought and action essential as Attorney General to the protection of all Americans' constitutional rights and liberties.

Justification of Torture

As the top legal advisor to the President, Gonzales is inextricably linked to a series of legal memoranda and policies that in less than two years have threatened to unravel six decades of U.S. leadership on human rights. In August of 2002, Gonzales received a memo, produced at his request[9], from then director of the Office of Legal Counsel, Jay Bybee, which concluded that the President could lawfully order the use of torture and that those following his orders were immune from criminal prosecution. Further, the memo sought to establish an extremely narrow definition of torture limited to: "physical pain…equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[10]

Gonzales later personally and publicly repudiated the use of torture on behalf of the Administration – after the memorandum came to light – and suggested that Mr. Bybee's conclusions did not reflect Administration policy.[11] However, other evidence suggests his words do not reconcile with Administration legal actions. Seven months after the torture memo arrived on Gonzales' desk, it was incorporated *nearly verbatim* into a Defense Department memorandum produced by that Department's Working Group on Detainee Interrogations in the Global War on Terrorism.[12]

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[6] *See* Editorial, *Mr. Gonzales' Record,* Washington Post, Nov. 22, 2004

[7] Brief of the Military Attorneys Assigned to Defense in the Office of Military Commissions as Amicus Curiae in Support of Neither Party, *Odah v. United States*, No. 03-343 (2004).

[8] Human Rights Watch, Briefing Paper on U.S. Military Commissions, August 2004, at 2-3.

[9] Jay Bybee Memorandum, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A, August 1, 2002, 1.

[10] *Id.*

[11] Richard Stevenson, *White House says Prisoner Policy Set Humane Tone*, New York Times, June 23, 2004.

[12] Draft Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, March 6, 2003.

Beyond simply requesting the torture memo, press reports suggest that Gonzales personally convened and led discussions by Administration lawyers about how to legally justify severe interrogation techniques proposed by the Central Intelligence Agency (CIA). These discussions laid the groundwork for the August memo.[13] Techniques reportedly approved for use by the CIA are so severe that they are used (without causing permanent injury) to train American Special Operations soldiers to resist torture by enemy captors. This includes a method know as "water boarding" where the prisoner is held under water long enough to be convinced he is drowning.[14]

During a May 13, 2004 flight to Iraq, Secretary of Defense Rumsfeld defended methods authorized for Department of Defense interrogators — which reportedly include sleep deprivation, prolonged nakedness, withholding food, painful stress positions, hooding for days at a time, threatening prisoners with dogs, and exposure to harsh extremes of heat and cold[15] -- by referencing the legal advice he received on the matter: "[T]here are always going to be differences of views as to whether something [is or is not torture]... And what we know is that *the lawyers* cleared what was issued down through the system."[16] Gonzales later provided his personal imprimatur on the approval process and all techniques authorized as being "carefully vetted [and] lawful."[17]

In the months since allegations of abuse and torture of Iraqi prisoners at Abu Ghraib have surfaced, the scandal has widened into reports of inhumane treatment at the detention facility at Guantanamo Bay, Cuba and at facilities in Afghanistan. In addition, reports now reveal secret prisoners, including presumptive prisoners of war in Iraq, held by the CIA and, in some cases, rendition of such prisoners to third countries (who routinely engage in torture) for imprisonment and interrogation. In recent days, the Justice Department itself has effectively repudiated the August memorandum as incorrect in a number of respects, raising serious questions as to its issuance by DOJ and tacit sanctioning by Gonzales.[18] Whether by act or omission, Gonzales' tenure has marked America's loss of the moral high ground in the arena of human rights.

Irresponsible Death Penalty Review

As counsel to the governor of Texas, Judge Gonzales had the responsibility of presenting to Mr. Bush clemency applications from death penalty inmates who faced impending execution after having exhausted their state and federal appeals. In his 57 death penalty memos submitted to Governor Bush — who has the singular distinction of being the only governor in American history to have overseen the execution of over 150 people — Judge Gonzales repeatedly failed to fully present the most mitigating circumstances during

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[13] Michael Isikoff, Daniel Klaidman and Michael Hirsh, *Torture's Path*, Newsweek, December 27, 2004.
[14] James Risen, David Johnston and Neil A. Lewis, *Harsh CIA Methods Cited in Top Al Qaeda Interrogations,* NEW YORK TIMES, May 13, 2004.
[15] John Barry, Michael Hirsh and Michael Isikoff, *The Roots of Torture*, NEWSWEEK, May 24, 2004
[16] DOD transcript, May 13, 2004 (emphasis added).
[17] Richard Stevenson, *White House Says Prisoner Policy Set Humane Tone*, New York Times, June 23, 2004.
[18] *See* Memorandum for James B. Comey, Deputy Attorney General, re: Legal Standards Applicable Under 18 U.S.C. 2340-2340A, December 30, 2004 (available at www.usdoj.gov/olc/dagmemo.pdf)

the clemency review process, thereby ignoring issues at the very heart of clemency. Clemency is a vehicle of mercy and as such, applications for clemency contain a defendant's most compelling case for mercy. But Gonzales often made only passing mention of claims of ineffective assistance of counsel, child abuse or mental illness, and focused heavily on the gruesome nature of the crimes, a past criminal record and the denial of relief by the courts.

For example, in the case of Terry Washington (executed May 6, 1997), Gonzales mentioned the defendant's mental illness and background of abuse only by saying there was "conflicting information" concerning his "childhood", and that Washington "may" have suffered abuse as a child,[19] when in fact the trial court specifically found that Washington was "mildly retarded and suffered from organic brain damage" and was physically abused as a child.[20] In addition, when summarizing Washington's plea for mercy, Gonzales omitted entirely the claim of ineffective assistance of counsel due to the lawyer's failure to seek or develop evidence concerning Washington's mental condition during the penalty phase of the trial. This failure is particularly egregious in light of the U.S. Supreme Court decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), holding that Texas' capital sentencing scheme was unconstitutional as applied because the jury was unable to express its reasoned moral response to evidence of abusive childhood and mental retardation in determining whether death was the appropriate punishment. As the U.S. Supreme Court found in *Penry*, such mitigating evidence can establish that mental retardation and organic brain damage renders a defendant unable to learn from experience, which would argue against the death penalty.

Similarly, Gonzales' memo on the clemency petition by Benjamin Herbert Boyle, contained only one sentence concerning mitigating circumstances, stating that "[Boyle's father] physically abused Boyle and the rest of the family."[21] In fact, Boyle claimed in his federal habeas corpus case that his attorney rendered ineffective assistance at the punishment phase of his trial because of his failure to present significant mitigating evidence of his mental illness and violent family background that would have been relevant to the jury's determination of the death penalty.[22] Gonzales' failure to fully present the defendant's claim for mercy likewise prevented any kind of moral response from playing a part in Boyle's clemency petition. Boyle was executed on April 21, 1997.

Gonzales' memo on David Wayne Stoker failed to mention any mitigating circumstances in his recitation of the extremely complex case.[23] Instead, Gonzales wrote only 18 sentences and failed to mention: (1) the recanting by a witness who testified at trial that Stoker had confessed; (2) evidence that a witness received reward money and other incentives for testimony against Stoker; (3) evidence that testimony of a psychiatrist who never examined the defendant and who had been expelled from the American Psychiatric Association for unethical conduct before Stoker's trial was unreliable; and (4) testimony that

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[19] Alan Berlow, "The Texas Clemency Memos," Atlantic Monthly, July/August, 2003 (hereinafter "Berlow Article"); Gonzales Memo on Scheduled Execution of Terry Washington on Tuesday, May 6, 1997 at 2.
[20] *Washington v. Johnson*, 90 F.3d 945, 952 (5th Cir. 1996).
[21] Gonzales Memo on Scheduled Execution of Benjamin Herbert Boyle on Monday, April 21, 1997
[22] *Boyle v. Johnson*, 93 F.3d 180, 187-8 (5th Cir. 1996).
[23] Berlow Article

an autopsy was performed by a doctor who was found to have falsified evidence in at least 30 cases.

In his memo on Earnest Orville Baldree, after a long accounting of the defendant's past offenses, Gonzales mentions that Baldree's clemency petition claimed misconduct by police and prosecutors, but points out that these claims were denied by state and federal courts.[24] In fact, Baldree's claims of police misconduct were supported by affidavits of three individuals — two who testified at trial and one who submitted a written statement to the police — recanting their trial testimony and prior written statements and stating that the police used coercion of physical threats and threats of additional charges unless they testified that Baldree had admitted to committing the crime.[25] These affidavits were omitted altogether from Gonzales' memo to the governor who then denied the clemency petition.

A review of Gonzales' death penalty memos makes clear that he repeatedly omitted the most important aspect of a clemency petition, mitigating circumstances, which have been defined as "any aspect of a defendant's character or record and any of the circumstances of the offense" that may serve as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 604, (1978). *See also Eddings v. Oklahoma*, 455 U.S. 104, 110, (1982).

Ideologically Driven Vetting of Nominations and Promotion of Executive Branch Secrecy

Gonzales has been the point person in the President's ongoing effort to fill the federal judiciary with far-right judges. Gonzales, along with a team of ultra-conservative attorneys – many of whom are members of the far-right Federalist Society – has applied a strict ideological litmus test in screening prospective nominees for the federal bench. As a result of his efforts, the nomination process has too often been marked by combative partisanship, forcing confrontations in the Senate over the radical agendas and qualifications of several of the nominees. There can be no question that this negative tone has been set, in part, by Gonzales himself, who stated after the Senate rejected the deeply controversial nomination of Charles Pickering, that: "We are going to continue to nominate the same kind of people."[26]

We have already endured nearly four years of divisive and partisan leadership at the Department of Justice under Attorney General Ashcroft. Gonzales' eagerness to engage in bare-knuckled partisanship, and unwillingness to approach the nominations process with a spirit of consensus, suggests that his tenure would simply be more of the same.

While Gonzales' record on judicial nominees reveals a record of close attention to partisan qualifications, his record in vetting the nomination of Bernard Kerik raises other serious concerns. It is hard to imagine how Gonzales could have in good conscience passed

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[24] Gonzales Memo on Scheduled Execution of Earnest Orville Baldree on Thursday, April 29, 1997.
[25] *See Baldree v. Johnson*, 99 F.3d 659 (5th Cir. 1996).
[26] Amy Goldstein, *White House Pushing Harder to Confirm Judges; Senate Committee's Rejection of Pickering Turned into GOP Campaign Theme*, Washington Post, 4/15/02, p. A6. For more information on the troubling record of the Administration on judicial nominations, see PFAW's website at www.pfaw.org/go/independent_judiciary.

along a nomination, for the top domestic security post in the country, with such significant problems in the nominee's background as possible ties to organized crime and problematic ethical lapses in his professional career.[27] It again demonstrates Gonzales' troubling pattern of laying aside basic due diligence to give the White House the answer it wants to hear. This represents an inexcusable breakdown in process and judgment that we cannot afford at the Department of Justice.

As White House counsel, consistent with his efforts to promote virtually unlimited Executive Branch prerogative on nominations and other issues, Gonzales has also championed virtually unprecedented efforts at promoting Executive Branch secrecy. For example, in late 2001, Gonzales helped prepare and strongly defended a Presidential executive order giving the President what a *Chicago Tribune* article called "unprecedented power" to keep presidential papers secret. [28] Gonzales also led the effort to withhold Justice Department memos written by a controversial judicial nominee, even while acknowledging that other internal DOJ memos had been produced during prior confirmation proceedings.[29]

Failure to Address Conflicts of Interest

Gonzales appears to have made little effort to mitigate potential conflicts of interest that have arisen during his time at the White House. Prior to his service in the Texas Governor's office, Gonzales was a partner at the law firm of Vinson and Elkins, LLP. While there, he represented Enron in corporate transactional matters as late as 1994. Enron was one of Vinson and Elkins' largest clients – perhaps the largest – during the time leading up to Enron's collapse.[30] Gonzales retained his close ties to both firms during this period. In 2000, when Gonzales stood for election to the Supreme Court of Texas, Enron and his former law firm were among his largest contributors, together reportedly making more than $35,000 in campaign contributions.[31]

Despite these close ties, after the dramatic financial improprieties at Enron came to light in 2001, Gonzales played a central role in the While House in responding to Enron-related investigations being conducted by both the Department of Justice and the Senate Committee on Governmental Affairs. Press reports at the time indicated that his responsibilities included identifying individuals with information of potential interest to the Department of Justice and the Senate Committee.[32] Further, he gathered documents related to contacts between White House staff and Enron and played a key role in deciding which documents to make available to investigators.[33]

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[27] Mike Allen and Peter Baker, *On Kerik Nomination White House Missed Red Flags*, Washington Post, December 15, 2004, A4.
[28] Bob Kemper, *Presidential Records Put Under Gag Order*, Chicago Tribune, November 2, 2001.
[29] Helen Dewar, *Deadlock Over Estrada Deepens*, Washington Post, Feb. 13, 2003.
[30] Elisabeth Frater, *Counsel's Past Raises Recusal Questions*, The National Journal, February 16, 2002.
[31] Bob Port, *New Bush tie to Enron White House lawyer got 35G while in Tex*, New York Daily News, February 10, 2002.
[32] Richard A. Oppel Jr., *White House Acknowledges More Contacts With Enron*, New York Times, May 23, 2002.
[33] Id.; Letter to Senator Joseph I. Lieberman to Alberto R. Gonzales (May 17, 2002)

As White House Counsel, Gonzales is the chief legal advisor to the Executive Office of the President and has a duty to represent the interests of that office. Significantly, at least one other Administration official, Attorney General Ashcroft, who himself had merely received campaign contributions from Enron, recused himself from matters related to Enron. Yet Gonzales, with far deeper connections combined with equally strong public responsibilities, did not. His failure to recuse himself, despite the potential for – or at a minimum the strong appearance of – a conflict of interest, given a prior attorney-client relationship with Enron and close relationship with Vinson and Elkins, call his judgment sharply into question.

Conclusion

In conclusion, the danger signs revealed by Alberto Gonzales' record are all too clear: the erosion of the U.S. commitment to human rights and the universally accepted laws of war; erosion of the rights and liberties of Americans; a broken and divisive nominations process; an inadequate clemency process; broad assertions of executive prerogative and secrecy; and the embrace of conflicts of interest. Woven throughout is Gonzales' repeated refusal to reconcile his obviously deep desire to be an advocate for this President and his role as a public servant and attorney who is held to higher standards of temperament and judgment. As Attorney General, the bar would be that much higher. In light of his conduct in his current and prior positions as legal counsel to President Bush, there is simply nothing in the record to suggest that he will change in his next role when the stakes are even higher. We, therefore, must oppose the confirmation of Alberto Gonzales to be Attorney General of the United States.