Statement of

The Honorable Edward Kennedy

United States Senator
Massachusetts
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STATEMENT OF SENATOR EDWARD M. KENNEDY
ON NOMINATION OF ALBERTO GONZALES
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I continue to believe that Mr. Gonzales should not be on the agenda for this Committee meeting.

He declined to answer or evaded many of the questions we asked him at the hearing. He has failed to provide full and forthright answers to our follow-up written questions.

His pat responses that all of the Administration's policies, regardless of their consequences, were justified because we had captured "some really bad people" demean the strength of our Constitution. An essential part of winning the war on terrorism and protecting the country for the future is protecting the ideals and values that America stands for here at home and around the world. The checks and balances in the Constitution are essential to our democracy and a continuing source of our country's strength. They are not obstacles or inconveniences to be jettisoned in times of crisis.

The Bybee Torture Memorandum was written at Mr. Gonzales's request. The memo itself is directed to him. After its release in August 2002, the memo was official policy on interrogations by the Defense Department and the C.I.A. for two and a half years until it was finally repudiated last month, on the eve of Mr. Gonzales's nomination.

Yet he refuses to tell us anything about how the Bybee Memorandum was written and why he ordered it. We know from press reports that the C.I.A. asked him for advice on how far the agency could go in interrogating detainees. In July 2002, he held meetings with other Administration officials to discuss how to legally justify certain interrogation methods. He refuses to tell us anything about those meetings.

He says he can't remember what specific interrogation methods were discussed.

He can't remember who asked for the Justice Department's legal advice in the first place.

He can't remember whether he made any suggestions to the Department on the drafting of the Bybee Memorandum, although he admits that "it would not be unusual" for his office to have done so.

He doesn't know how the memo was forwarded to the Defense Department and became part of its "Working Group Report" in April 2003, which was used to justify the new interrogation

practices at Guantanamo. Those practices, in turn, "migrated" to military operations in Afghanistan and Iraq.

We have a torture problem. The F.B.I. says so. The Red Cross says so. The Defense Intelligence Agency says so. The Defense Department says it investigated more than 300 cases of detainee torture, sexual assault, and other abuse. Additional allegations of abuse are being reported on a daily basis. Yet Mr. Gonzales can't remember any details of how it happened.

I've repeatedly asked Mr. Gonzales to provide documents on his meetings, evaluations, and decisions on the Bybee Memorandum. These documents would speak volumes about all the issues Mr. Gonzales says he has trouble remembering. Yet he refuses to provide the documents. He won't even search for them. In his responses to my written questions, Mr. Gonzales stated eight times that he has not "conducted a search" for the requested documents. In other words, the documents we want may exist, but he's not going to look for them. It's hard to imagine a more arrogant insult to this Committee's oversight role.

Mr. Gonzales refused to answer other questions and requests on the grounds that they would involve "classified information," "predecisional" or "internal deliberations," or "deliberative material." None of these grounds is sufficient. There is no legal bar to providing classified materials to Congress; they're routinely provided to Congress and discussed in closed meetings. There is no recognized privilege for "predecisional" or "deliberative" materials. The only exception is in the rare case where the President himself determines that his interest in secrecy outweighs the public interest in disclosure, and he himself invokes executive privilege. That hasn't happened here.

It was clear when Mr. Gonzales was nominated that his involvement in the prisoner detention and interrogation issues would be a major concern of the Senate, and that the Senate would need full information and materials on this subject. Serious abuses of detainees occurred in Iraq, Afghanistan, and Guantanamo. Mr. Gonzales's role in developing legal justifications goes to the heart of the issue whether he should be confirmed as the nation's chief law enforcement officer. If we allow this nominee to proceed to a vote without insisting on answers to our questions, we'll be abdicating our advice-and-consent responsibility and weakening our oversight function precisely when it is needed most.

The Bybee Memorandum was no law review article or newspaper op-ed. As Mr. Gonzales himself has said, it was the definitive legal opinion by the Justice Department on the rules on torture for the entire Executive Branch of the Government. As far as we know, until the Department released its revised version of the memorandum last month, the Bybee Memorandum was the only official Justice Department opinion on the definition of torture, on the legal defenses for those who commit torture, and on the power of the President to override laws and treaties on torture. There may have been other memos on torture, but the White House refuses to give them to us.

Harold Koh - a leading scholar of international law and Dean of the Yale Law School, who served in both the Reagan and Clinton Administrations - calls the memo "the most clearly legally erroneous opinion" he has ever read. I hope every member of the Committee will take the time to review Harold Koh's testimony.

"If the counsel for the President had received such an opinion," Koh said at our hearing, "you would have expected him to do at least one of two things: First, reject it on the spot and send it back or, second, send it to other parts of the government and have them give a second opinion, particularly the State Department, which I believe, following the policies in the U.S. Report on the Convention Against Torture, would have said that the opinion is flatly wrong.

"Instead, . . . that opinion was allowed to become executive branch policy, was incorporated into the DOD working group report, and remained as executive branch policy for some two and a half years, during which time I believe that a permissive environment was inevitably created."

In his response to our questions, Mr. Gonzales said that he has "no specific recollection of [his] reaction to the conclusions, reasoning, or appropriateness as a matter of policy of any of the particular sections of the memorandum at the time [he] received it two-and-a-half years ago."

He did say, however, that he believed at the time that it was "a good-faith effort" to interpret the Anti-Torture Statute. At the hearing, he told Senator Leahy: "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."

Let's review those conclusions. The Bybee Memorandum made three basic points.

First, it said that torture means only acts that inflict the kind of pain experienced with death or organ failure. To commit torture, it said, a government official must have the "precise objective" of inflicting severe pain. If causing such harm was not his precise objective - even if he knew "that severe pain would result from his actions" - he should be acquitted.

Second, the memo said that the President has the inherent constitutional power as Commander-in-Chief to override the prohibitions against torture enacted by Congress.

Third, it said that government officials can avoid prosecution for their acts of torture by invoking the defenses of "necessity" or "self-defense" - even though the Convention Against Torture, which Congress ratified in 1994, states very clearly that "no exceptional circumstances whatsoever" may be invoked as a justification for torture.

None of these points qualify as a reasonable or "good-faith" legal argument. The Bybee Memorandum defined torture so narrowly that Saddam Hussein's henchmen could have claimed immunity from prosecution for many of their crimes. Beating you, suffocating you, ripping out your fingernails, burning you with hot irons, suspending you from hooks, putting lighted cigarettes in your ear -it's not clear how many of these barbaric methods would have been prohibited under the Bybee Memorandum, since none of them necessarily involved near-death or organ failure, the specific conditions specified in the memo as constituting torture.

Mr. Gonzales refused to tell us whether the extreme conduct mentioned in the F.B.I. e-mails is illegal - such as burning detainees with lighted cigarettes, exposing them to extreme temperatures, giving forcible enemas and holding them in prolonged stress positions in their own urine and feces. He explained his refusal as follows: "[W]ere the Administration to begin ruling out speculated interrogation practices in public, by virtue of gradually ruling out some practices

in response to repeated questions and not ruling out others, we would fairly rapidly provide al Qaeda with a road map concerning the interrogation that captured terrorists can expect to face."

That's arrogant nonsense. Our laws, our treaties, and our military field manuals all provide specific and clear guidance on where to draw the line on torture. Mr. Gonzales's failure to condemn these acts of torture only weakens America's standing in the world and sets back our efforts against terrorism.

To reach their narrow definition of torture, the authors of the Bybee Memorandum relied on totally unrelated federal statutes that define emergency medical conditions for purposes of providing health benefits. As the revision last December of the Bybee Memorandum admits, the statutes relied on "do not define severe pain even in that very different context . . . and they do not state that death, organ failure, or impairment of bodily function cause 'severe pain.'" Clearly, the original reasoning was repudiated. Clearly, the memo's definition of torture was far too narrow. If it applied in other countries, U.S. soldiers and citizens traveling abroad would be at far greater risk.

The Bybee Memorandum's provisions on Executive Power are also wholly inconsistent with the separation of powers in the Constitution. Article II, Section 3 directs the President to "take Care that the Laws be faithfully executed." Yet the Bybee Memorandum states that the federal Anti-Torture Statute would be unconstitutional if it "interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants."

At a press conference in June 2004, Mr. Gonzales refused to say whether this statement remains "good law" in the Bush Administration. He would say only that the President "has not exercised his Commander-in-Chief override; he has not determined that torture is, in fact, necessary to protect the national security of this country."

Mr. Gonzales evaded questions asked on this issue by Committee members. To this day, we still do not know whether the President believes he has the option to authorize torture.

Let's be clear: there is no such thing as a "Commander-in-Chief override." It's certainly not in my copy of the Constitution. It appears to be something that Mr. Gonzales and his colleagues have invented.

Congress has repeatedly passed laws and ratified treaties prohibiting torture and mistreatment of detainees, and the President does not have the power to violate them. When a nominee claims that such an override exists, or suggests that those who commit torture might be able to invoke the defense of "necessity" or "self-defense" notwithstanding Congress' categorical prohibition against such a defense, it sends a message that "anything goes" to our troops and intelligence officers in the field. To allow such extreme claims to become official U.S. policy for two whole years was reckless and, in my view, disqualifying.

Mr. Gonzales has demonstrated a similar disregard for the rule of law in his effort to facilitate the C.I.A. practice of "ghost detainees." The Administration has always claimed to be in full compliance with the Geneva Conventions in Iraq. Yet in the spring of 2004, we learned from General Taguba that between six and eight of the prisoners at Abu Ghraib Prison had not been

registered as required by Army regulations and were being moved around the prison to avoid detection by the International Committee for the Red Cross. General Taguba described this practice as "deceptive, contrary to Army doctrine and in violation of international law."

In September, Army investigators told the Armed Services Committee that as many as 100 detainees at Abu Ghraib had been hidden from the Red Cross at the C.I.A.'s direction - and that the C.I.A. had refused requests to cooperate with the military investigation. This disclosure drew outrage from both Democrats and Republicans. Senator McCain said, "The situation with the CIA ghost soldiers is beginning to look like a bad movie . . . This needs to be cleared up rather badly."

Since then, we've learned that Mr. Gonzales has been a major architect of this policy. On March 19, 2004, at his request, the Justice Department provided him with a draft memorandum - the so-called "Goldsmith Memorandum" - to allow the C.I.A. to ship certain persons out of Iraq. Article 49 of the Fourth Geneva Convention specifically states: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive." Violations of Article 49 constitute "grave breaches" of the Convention and therefore qualify as "war crimes" under federal law.

In spite of the clear, unequivocal language of this provision, the Justice Department ruled that Article 49 does not in fact prohibit, for the purpose of "facilitating interrogation," the temporary removal from Iraq of "protected persons" who have not been accused of a crime.

In October 2004, the Washington Post reported that one intelligence official familiar with the operation said the C.I.A. used the memo "as legal support for secretly transporting as many as a dozen detainees out of Iraq in the last six months. The agency has concealed the detainees from the International Committee of the Red Cross and other authorities, the official said."

The legal analysis in the Goldsmith Memorandum is an embarrassment. Yet it appears to have been the legal justification for the C.I.A. to commit war crimes. As with the Bybee Memorandum, Mr. Gonzales has categorically refused to answer the Committee's questions about his involvement.

He refuses to provide or even conduct a search for documents relating to his request for the Goldsmith Memorandum.

He refuses to say anything about his discussions with the author of the memo.

He says he doesn't know whether the C.I.A. acted on the memo, as the Washington Post reported.

He even says that he has never had the "occasion to come to definitive views" about the analysis in the memo.

Far from helping to clear the air, Mr. Gonzales has clouded it further. To let his nomination proceed would make a mockery of the notion of Congressional oversight and accountability.

There are many other issues in Mr. Gonzales's record that should give members of this Committee pause.

As predicted by Secretary Powell and senior military lawyers, Mr. Gonzales's memorandum of January 2002 on the applicability of the Geneva Conventions to the war in Afghanistan brought a strong negative reaction from even our closest allies and lowered the bar for the protection of our own troops. According to the Schlesinger Report, in September 2003 military commanders in Iraq cited this memo as legal justification for the use of extreme interrogation techniques at Abu Ghraib prison. The worst abuses there occurred from September to December 2003.

In his answers to the Committee, Mr. Gonzales made clear that the Administration does not consider the C.I.A. to be bound by the prohibition on cruel, inhuman and degrading treatment in Article 16 of the Convention Against Torture. This shift in legal policy was apparently made in a separate Justice Department memorandum which has also not been provided to Congress.

Today, therefore, C.I.A. agents are authorized to treat detainees in a cruel, inhuman, and degrading manner - even if it violates constitutional rules in the U.S. - so long as they do not commit "torture" under the Department's definition. President Bush also exempted the C.I.A. from his directive in February 2002 to treat all detainees "humanely." This shameful change in legal policy endangers the safety of American soldiers who are captured abroad.

Finally, the New York Times reported that Mr. Gonzales excluded critical Administration personnel from deliberations on the Administration's plan to establish military tribunals at Guantanamo, a plan that was widely criticized as unjust, unworkable, and unconstitutional. Secretary of State Powell, National Security Advisor Rice, and the head of the Justice Department's Criminal Division, Michael Chertoff, saw the President's Military Order only after it was published in November 2001. Most of the Pentagon's top military lawyers were also kept in the dark. More than three years after the Order's publication, not a single detainee at Guantanamo has been successfully prosecuted. To the contrary, as predicted by officials who have expertise in the field, the military tribunal process there is falling apart.

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All of us continue to be impressed by the story of Mr. Gonzales's life. Growing up in a small house with no hot water or telephone, raised by parents who were migrant farm workers, he obtained degrees from two of the nation's finest universities. He became a justice on the Texas Supreme Court, and has served as one of the President's closest advisers over the past four years. I agree with President Bush when he said that in many ways Mr. Gonzales embodies the American Dream.

The American Dream, however, involves more than the ability of the poor and dispossessed to gain power and prestige. As Dr. Martin Luther King Jr. preached in 1965, the American Dream also challenges us "to respect the dignity and the worth of all human personality." President Bush similarly observed in his Inaugural Address just last week, "From the day of our Founding, we have proclaimed that every man and woman on this earth has rights, and dignity, and matchless value, because they bear the image of the Maker of Heaven and earth."

It's that aspect of the American Dream that's before us today - the commitment of the United States to individual dignity, human rights, and the rule of law - our respect around the world as a beacon for human rights, not as a violator of human rights.

The torture and other abuses of prisoners in Iraq, Afghanistan, and Guantanamo have done immense damage to America's standing in the world.

The extreme and irresponsible claims in the Bybee Memorandum have raised questions about our commitment to the rule of law, and have exposed our own soldiers to greater risk, and the Defense Department's adoption of this memo as official policy has undermined our military's rules, traditions, and commitment to justice.

The Goldsmith Memorandum has recklessly approved a practice that violates Army regulations and the plain language of the Geneva Conventions.

The continuing effort to pin the blame for the torture scandal on a "few bad apples" among our soldiers while ignoring or even rewarding Mr. Gonzales and others responsible for the policy has sent the wrong message to our nation and the world.

I cannot support a nominee who has done so much to harm America's basic interests and fundamental values. I urge my colleagues to reject his nomination.