

Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
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At the Senate Judiciary Committee on the Nomination of Alberto Gonzales to be Attorney General of the United States
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Mr. Chairman, the decision on whether to vote to confirm Alberto Gonzales to be the next Attorney General of the United States has been difficult. As all of my colleagues on this Committee know, I believe that Presidents are entitled to a great deal of deference in their cabinet nominations. I have voted in favor of a number of this President's nominees, including the current Attorney General, with whom I had serious disagreements on matters of policy and general ideology. My votes may not have always pleased my political supporters, or my party's leadership. But in carrying out my part in the constitutional scheme, as one who is asked to advise on and consent to a President's nominations, I am guided by my conscience, and by the history and practices of the United States Senate. Rejecting a cabinet nominee is a very rare event. The decision to do so must never be taken lightly.

Mr. Chairman, I have reached the conclusion, after a great deal of thought and careful consideration, that I cannot support Judge Gonzales's nomination. Let me take a few minutes to explain my decision.

The Attorney General of the United States is the nation's chief law enforcement officer. The holder of that office must have an abiding respect for the rule of law. A formative experience for me, and for many of my generation, was the Watergate scandal, and particularly the Saturday Night Massacre on October 20, 1973. On that night, Attorney General Elliot Richardson and his deputy William French Smith both resigned from office rather than carry out President Nixon's order to fire special prosecutor Archibald Cox. Those acts of courage remain for me a shining example of the role that the Attorney General plays in our government. They give me the unshakeable conviction that his or her ultimate allegiance must be to the rule of law, not to the President.

As Judge Gonzales himself said as he stood next to the President on the day he was nominated: "The American people expect and deserve a Department of Justice guided by the rule of law." I am pained to say, Mr. Chairman, that Mr. Gonzales' performance as White House Counsel and, particularly, his appearance before this Committee and his responses to our questions, have given me grave doubts about whether he meets that test. Judge Gonzales too often has seen the law as an obstacle to be dodged or cleared away in furtherance of the President's policies.

Judge Gonzales has held the position of White House Counsel since the beginning of this Administration and through a very difficult and challenging period in our history. The response of the Administration to the September 11th attacks and the launch of the war on terrorism have brought some very difficult legal issues to his desk. Some of these issues touch on the very core of our national identity. What kind of nation are we going to be during times of war? How will we treat those we capture on the battlefield? How will we live up to our international treaty obligations as we wage this war?

Time after time, Judge Gonzales has been a key participant in developing secret legal theories to justify policies that, as they have become public, have tarnished our nation's international reputation and made it harder, not easier, for us to prevail in this struggle. He requested and then disseminated the infamous Office of Legal Counsel ("OLC") memo that for almost two years, until it was revealed and discredited, made it the position of the government of the United States of America that the International Convention Against Torture, and statutes implementing that treaty, prohibit only causing physical pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." Under that standard, the images from Abu Ghraib that revolted the entire world would not be considered torture, nor, according to some, would the shocking interrogation technique called "waterboarding."

Judge Gonzales advised the President that he could declare the entire legal regime of the Geneva Conventions inapplicable to the conflict in Afghanistan. Secretary of State Powell rightly pointed out the danger of this course, but Judge Gonzales persisted. This theory could actually have given greater legal protection to terrorists, by taking away a key part of the legal regime under which war crimes can be prosecuted. The idea that the Geneva Conventions protect terrorists who commit war crimes, which Judge Gonzales repeated in his hearing, is a dramatic misunderstanding of the law, and it was very troubling to hear it from the person who would coordinate our legal strategy in the war on terrorism.

Judge Gonzales was also an architect of the Administration's position on the legal status of those it called "enemy combatants," a position that was soundly rejected by the Supreme Court of the United States last year.

In all of these areas, Judge Gonzales served as the President's lawyer, and facilitated the President's policies. I believe that he failed the President and the nation badly. But these past mistakes need not have been conclusive in my assessment of his suitability for the office of Attorney General. For example, I also have serious concerns about the role that the national security adviser, Dr. Condoleezza Rice, played in crafting and implementing the Administration's badly flawed foreign policy. But I do not think that taking part in a policy I strongly oppose is sufficient grounds for me to oppose a cabinet nomination. As I have indicated, the President - any President - is entitled to be advised by those who share his beliefs and confidence.

Had Judge Gonzales in his testimony before this Committee recognized the serious problems with the judgments he made on these issues and given convincing assurances that he understands that his new role will require a different approach and a new allegiance to the rule of law, I might have been convinced to defer to the President once again. Attorney General Ashcroft, for example, was unequivocal in expressing his commitment, under oath, to enforcing laws with which he disagreed as a Senator.

But Judge Gonzales's appearance before the Committee was deeply disappointing. When given the opportunity under oath to show that he would be adequately committed to the rule of law as our nation's chief law enforcement officer, he failed to do so. He indicated that the infamous OLC torture memo is no longer operative, but that he does not disagree with the conclusions expressed in it. He reiterated erroneous interpretations of the effect that applying the Geneva Conventions to the war on Afghanistan would have on the treatment of members of Al Qaeda captured in combat. Most disturbingly, he refused time after time to repudiate the most far-reaching and significant conclusion of the OLC memo - that the President has the authority as Commander-in-Chief to immunize those acting at his direction from the application of U.S. law.

This failure goes directly to the question of his commitment to the rule of law. Under our system of government, the Attorney General of the United States may be called upon to investigate and even prosecute the President. We cannot have a person heading the United States Department of Justice who believes that the President is above the law. I and other members of the Committee questioned Judge Gonzales closely about this issue. He hid behind an aversion to hypothetical questions, he conjured up his own hypothetical scenarios of unconstitutional statutes, but he simply refused to say, without equivocation, that the President is not

above the law.

On the torture issue in particular, Judge Gonzales repeatedly told us that he opposes torture and that the President has never authorized torture. Thus, he indicated, the question of whether the President acting as Commander in Chief can authorize torture has never and will never come up. I certainly hope that we can rely on those assurances, but the Founders of this nation designed a system where even the President is bound by our laws—precisely so that we wouldn't have to rely on trust alone that the President will act in accordance with them. I think this Committee, and the American people, deserved to hear whether the next Attorney General agrees that the President has the power to disobey laws as fundamental to our national character as the prohibition on torture. Judge Gonzales refused to address this question unequivocally, and that left me deeply troubled.

Mr. Chairman, Judge Gonzales has a compelling personal story, and many fine qualities as a lawyer. If he is confirmed by the Senate, there are many issues on which I hope we can work together for the good of the country. But I cannot support his nomination. Not because he is too conservative, or because I disagree with a specific policy position he has taken, but because I am not convinced that he possesses the abiding respect for the rule of law that our country needs in these difficult times in its Attorney General. I will vote No. Thank you Mr. Chairman.