Gonzales Must Be Questioned About Rumsfeld Death Squads

by Edward Spannaus

New revelations coming out about the "death squads" being created by Defense Secretary Donald Rumsfeld make it imperative that the Senate Judiciary Committee recall Alberto Gonzales for questioning concerning his role in providing the legal justification for these hit-teams. It is indisputable that the legal opinions which Gonzales, as White House Counsel, approved and submitted to the President—contending that the President has virtually unlimited powers in wartime to override laws and treaties, even those prohibiting torture—laid the basis for the use of these "hunter-killer" teams championed by Rumsfeld, and for the practice of "extraordinary rendition" being attributed to the CIA.

Yet these issues were scarcely touched upon, during the Senate Judiciary Committee's Jan. 6 hearing on the nomination of Gonzales to become Attorney General of the United States. The hearing, which had been scheduled to last for two days, was rushed through and completed in just one day—very likely because the White House and Senate Republicans are fearful that some new scandal or set of documents will emerge and blow the whole process up. This was the view of a number of sources consulted by this news service; one, who was directly involved in the hearings, says that there were rumblings that "there is something big out there," which the Republicans are afraid of.

'The Salvador Option'

It was known at the time of the hearing, that some major leaks would be coming out containing revelations on Rumsfeld's plans for expanding the use of the combined military Special Forces and CIA "hunter-killer" teams, which Rumsfeld set into motion in the period immediately following Sept. 11, 2001. The most definitive account of this secret program, and its direct connection to the publicized torture and abuse of prisoners at Abu Ghraib, Iraq, as well as in Afghanistan, and at Guantanamo, has been provided in a series of articles, now in book form, by investigative reporter Seymour Hersh. It is anticipated the Hersh will be publishing an updated account of the death-squad operation, possibly as early as Jan. 15-16.

Meanwhile, *Newsweek* reported on Jan. 9, that the Pentagon, being desperate over the recognition that the United States is losing the war against the "insurgency" in Iraq, is now discussing what is called "The Salvador Option": the creation of kidnapping and assassination teams, modelled on the death squads which were financed and supported by the U.S. in El Salvador in the 1980s, to hunt down leftist rebels and their sympathizers.

"Following that model," *Newsweek* reports, "one Pentagon proposal would send Special Forces teams to advise, support, and possibly train Iraqi squads, most likely handpicked Kurdish Peshmerga fighters and Shi'ite militiamen, to target Sunni insurgents and their sympathizers, even across the border into Syria, according to military insiders familiar with the discussions. It remains unclear, however, whether this would be a policy of assassination or so-called 'snatch' operations, in which the targets are sent to secret facilities for interrogation."

However, one source told *EIR* that this scheme is already in effect, with death squads already having been deployed weeks ago, in the assault on Fallujah. Other well-placed U.S. and Israeli intelligence sources have reported that such U.S. units have been operating for the past year or more, and are, in some cases, working in conjunction with Israeli assassination squads. Israel has a longstanding policy of "preventive assassinations" of Palestinians "militants."

Another aspect of the debate, is over whether the Department of Defense or the CIA should carry out these operations. The DOD is subject to the Uniform Code of Military Justice

(UCMJ), which has gotten more attention in the wake of the torture scandals; the CIA is not subject to the Code, but does technically require a Presidential finding in order to conduct covert operations.

Newsweek describes this as part of Defense Secretary Rumsfeld's long-standing drive to take over the CIA's clandestine and paramilitary operations. "Rumsfeld's Pentagon has aggressively sought to build up its own intelligence-gathering and clandestine capability with an operation run by Defense Undersecretary Stephen Cambone," *Newsweek* reported.

Prior to the publication of the *Newsweek* account, *EIR* was told by an informed source, that, as a result of the post-9/11 restructuring, and pursuant to the exercise of Presidential authority, Rumsfeld had accelerated his drive to take complete control of the intelligence-gathering process as it involves covert and paramilitary operations. The new CIA Director Porter Goss has been "emasculated," and the CIA itself sidelined, somewhat in the same way that the State Department has become less and less important in the Bush-Cheney Administration.

The accumulation of power in the Pentagon, as regards intelligence-gathering and assessment, is "staggering," this source said, and he added that Rumsfeld is now preparing an aggressive expansion of covert operations, with authorization from the White House. This will include something like the 1970s Phoenix assassination program in Vietnam, which Rumsfeld now calls "eradication."

The only Senators who questioned Gonzales about any of this, were Richard Durbin (D-Ill.) and Edward Kennedy (D-Mass.), who were subject to the time constraints and cutoff of questioning imposed by committee chairman Arlen Specter.

Kennedy questioned Gonzales about a Justice Department memo prepared for Gonzales, which authorized the CIA to transport prisoners out of Iraq to other countries for the purpose of "facilitating interrogation." Even though the Fourth Geneva Convention prohibits the forcible transfer of persons from occupied territories, and defines this as a "grave breach" of the Convention and therefore a war crime, the Justice Department argument, approved by Gonzales, was that this prohibition does not apply to "foreign terrorists" in Iraq. (This is an absolute mischaracterization of the Fourth Geneva Convention, which applies to *everyone* within an occupied territory or country.)

When Kennedy asked Gonzales about the DOJ memo, and also about the question of "ghost detainees" (prisoners held incommunicado and "off the books," hidden from the International Red Cross), he claimed not to remember the circumstances of the CIA requesting the legal guidance, and asserted that "I don't have any knowledge about what the CIA or DOD is doing."

Blaming the CIA

There is a bit of Rumsfeld subterfuge also going on, in attributing these operations to the CIA. It is believed by many

President Bush with Alberto Gonzales, who is now the nominee for Attorney General. The legal opinions which Gonzales, as White House counsel, submitted to the President, contended that the President has virtually unlimited powers in wartime to override laws and treaties, even those prohibiting torture.

sources, that the "rendition" operations are conducted under DOD auspices, just the same way that the special task forces formerly known as Task Forces 20 and 121 (now 6-26) included CIA operatives, but were run by the Pentagon. Specifically, this is run out of the office of the Deputy Secretary of Defense for Intelligence, Stephen Cambone, and his deputy, Gen. William "Jerry" Boykin.

An interesting confirmation of this came in a Jan. 8 *Chicago Tribune* story, one of a number of such stories reporting on efforts to trace the Gulfstream executive jet that has been used to transport suspected al-Qaeda operatives to third countries such as Egypt and Syria, where they have been tortured. All previous accounts of the "mystery jet" described it as owned and operated by the CIA, under a set of untraceable cover names and corporate shells. However, the *Tribune* cites a retired CIA officer saying that the jet is operated by the Joint Special Operations Command. JSOC is based at Ft. Bragg in North Carolina, and is the coordinating agency for all military special operations forces and operations.

Gonzales: The Facilitator

Of a piece with Gonzales's approval of death squads and torture, is his earlier conduct when he was counsel to then-Gov. George W. Bush in Texas, in facilitating executions of death-row inmates. In both cases, Gonzales readily provided the twisted legal rationalizations for his boss's indifference

to death and suffering.

It has now been shown, that when Gonzales told the Senate Judiciary Committee that the reason that his "death penalty memos" to Governor Bush were so truncated, was that he usually had "numerous discussions" and "a rolling series of discussions" with Bush about each execution, Gonzales "almost certainly crossed the line from half-truth to untruth." writes Alan Berlow in the online *Salon* magazine.

This is demonstrated in the Jan. 14 edition of *Salon,* by Alan Berlow, the author of the noted 2003 *Atlantic Monthly* analysis of the Gonzales memos, which memos resulted in the execution of all 57 death-row inmates who were the subjects of his memos. Berlow had shown that the Gonzales memos were generally only a summary of the prosecution's arguments, and repeatedly failed to mention the most important claims on the defendant's behalf, including plausible claims of innocence.

"Because the written summaries were so thoroughly unprofessional," Berlow wrote in *Salon,* "Gonzales no doubt felt he had to downplay their significance in his Senate testimony"—which he did by claiming that the memos were preceded by extensive discussions with Bush. But, says Berlow, Bush's appointment logs only show one meeting per execution, which was almost always on the day of the execution. Gonzales also testified that if Bush "expressed questions or concerns . . . the governor would direct me to go back and find out and be absolutely sure." Yet there is no record of any follow-up memos or report in any of the 57 cases.

Gonzales's testimony, Berlow concludes, is "just not believable."

Documentation

Admiral Hutson Opposes Gonzales Nomination

Following is the testimony of Adm. John D. Hutson (ret.), opposing the nominiation of Alberto Gonzales for Attorney General of the United States, presented to the Senate Judiciary Committee on Jan. 6, 2005. Admiral Hutson is currently the dean and president of the Franklin Pierce Law Center in Concord, New Hampshire. He served as a judge advocate in the United States Navy from 1972-2000, and was the Judge Advocate General of the Navy from 1997-2000.

The first section below is the opening of Admiral Hutson's oral testimony to the hearing, which was restricted to ten minutes. The second part, following the asterisks, is taken from his full written testimony as submitted to the Committee.

As Americans, we have been given many gifts by our Creator and our forebears. We hold these gifts in trust for our progeny and for mankind generally. One of these gifts is great military strength. This military prowess is enhanced by our legacy of strong advocacy for human rights for all human beings by virtue of their humanity alone, and by our long history of unwavering support and adherence to the rule of law.

These gifts come with a string attached. Like all gifts, there's a responsibility to husband them. We must not squander them. Rather, we must nurture them, refine them and pass them on in even better condition than they were given to us. Generations of Americans have understood this responsibility and have accepted it.

In the wake of World War II, Truman, Eisenhower, Marshall, Senator [Carl] Vinson, and others fulfilled their part of that sacred trust. They had seen the horror of war, a horror that few of us have seen, but have only read about. They responded with programs like the Marshall Plan, and with international commitments like the Geneva Conventions. I believe that the Geneva Conventions are part of our legacy, not unlike the Bill of Rights, the Fourteenth Amendment, and *Brown v. Board of Education.* They demonstrate the goodness of the United States. They also demonstrate our strength and our military might. Even in the midst of that most awful of human endeavors—war—we should treat our enemies humanely, even when we have captured them. To do so is a sign of strength, not weakness. To not do so is a sign of desperation.

I come here to speak in opposition to the confirmation of Judge Gonzales, because he appears not to understand that. He finds the Geneva Conventions to be an impediment, a hindrance to our present efforts, quaint and obsolete in important respects. His analysis and understanding of the Geneva Conventions, which I discuss in detail in my written statement, is shallow, short-sighted, and dangerous. It's wrong legally, morally, diplomatically, and practically. It endangers our troops in this war and future wars, and it makes our nation less safe.

My 28 years in the Navy tells me that his analysis of the Geneva Conventions and their applicability to the war in Afghanistan and the war on terror is particularly disturbing, because it indicates an utter disregard for the rule of law and human rights. Those are the reasons American fighting men and women shed their blood, and why we send them into battle. But if we win this battle and lose our soul in the process, we will have lost the war, and their sacrifices will have been for naught.

The Geneva Conventions have protected American troops from harm for many years. Our forces are more forward-deployed than any other nations', in terms of numbers of deployments, locations to which they're deployed, and the number of forces deployed. This has been the case since World War II, and will continue to be true. That's because—because of that, there is no country for which adherence to the rule of law and to the Geneva Conventions is more impor-

tant than it is to the United States. It's our troops that benefit. Original U.S. proponents of the conventions saw them as a way to protect U.S. troops from the enemy, not the enemy from U.S. troops. It's good for our military if we—it's not good for our military if we now throw them over the side just because some people believe they're inconvenient to the present effort. This is only the present war. It's not the last war, it's not even the next-to-last war.

* * *

. . . [War's] only value is to provide the time and space necessary for real solutions to take place—diplomatic, economic, political, and social. War is not a solution in itself and cannot be used to justify national misbehavior or loss of national integrity.

In disagreements or arguments between individuals, it is important that they not act in a manner that so poisons their relationship that it cannot recover. The same is true with nations. It's easy to act with integrity in peacetime when things are going smoothly. The true test of national integrity is in wartime. We must wage war in such a way that we are able ultimately to resume peace.

The Geneva Conventions envision an end to the hostilities and to the destruction of war. They envision a return to peace. They provide a framework for the conduct of the war that will enable the peace to be sustained and flourish. We must not be deterred just because our enemy in a war on terror doesn't comply with the Conventions. Our unilateral compliance will aid in the peace process. Moreover, it should have been understood that violations of the Conventions, or ignoring them, doesn't help bring an end to the war. To the contrary, as we have seen, this only adds ferocity to the fighting and lengthens the war by hardening the resolve of the enemy. Our flagrant disregard for the Conventions only serves as a recruiting poster for this enemy and for our enemies for generations to come.

For over half a century and many conflicts, the Geneva Conventions have served us well as the accepted rules of conduct in wartime, the Rule of Law with which civilized nations comply. They comply because they are nations of integrity. They also comply out of pure self-interest. Nations always act in what they believe to be their self-interest. They may miscalculate what their self-interest is, but they always act in what they believe it to be. It is in our self-interest is to comply with the Geneva Conventions under any circumstances. To do otherwise risks waging such an unlimited war that we are no longer perceived to be a nation that values the Rule of Law or supports human rights. Other nations learn from our actions more than our words. Moreover, if we move away from the Geneva Conventions and toward unlimited warfare, our own troops are imperiled in this war and future wars by our enemies, who will follow suit.

If the United States complies with the rules of conduct as laid out by the Geneva Conventions, we can endeavor to force others, including our enemies, to comply as well.

The converse is also true. If we fail to live up to the aspirations of the Geneva Conventions, we will have served as the wrong kind of role model. We will have stepped down from the pulpit from which we can preach adherence to the Rule of Law in war.

In the wake of World War II, the U.S. leadership advocated the adoption and reaffirmation of the Conventions because they served the ultimate interest of the United States. Eisenhower, Truman, Marshall, Senator Vinson and others envisioned another step in the historical journey toward the quintessential oxymoron, civilized warfare. They supported the warfighting concepts contained in the Geneva Conventions because those rules would protect U.S. troops in the field. Their concern was to safeguard our troops from mistreatment by the enemy, not to protect the enemy from mistreatment by U.S. forces. Judge Gonzales's memorandum completely eviscerated the original vision of the Geneva Conventions.

Where GPW (Geneva Convention Relative to the Protection of Prisoners of War) talks about scrip, athletic uniforms, commissaries and the like, American proponents were thinking of the treatment we could demand for U.S. prisoners of war, not how we should avoid providing those amenities to enemy prisoners we held. Far from being quaint, these stand as bulwarks protecting U.S. troops who are captured.

Our disregard for the Conventions will likely deter potential future allies from joining us. If we comply with the Geneva Conventions only when it's convenient, who will fight alongside us? The answer is only other nations which also don't want to be hamstrung by so-called quaint and obsolete rules. We will become an outlaw nation that wages unlimited warfare, and only like-minded renegade nations will fight with us. In the past we have always insisted on compliance. We are a special nation in the history of the world and should be shouting from the rooftops that we will always insist that all our allies enforce those rules that serve to protect us all and demonstrate and preserve our humanity. Rather, we are leading the way in the other direction. That displays either a gross disregard or an abject lack of understanding for the implications of our actions.

Since World War II and looking into the foreseeable future, United States armed forces are more forward-deployed both in terms of numbers of deployments and numbers of troops than all other nations combined. What this means in practical terms is that adherence to the Geneva Conventions is more important to us than to any other nation. We should be the nation demanding adherence under any and all circumstances because we will benefit the most.

Instead, what we see in the January 2002 memo from Judge Gonzales and the other legal memoranda which were prepared during that time period from the Department of Justice and Department of Defense, is a short-sighted, narrow-

Secretary of Defense Donald Rumsfeld visits Abu Ghraib prison in Iraq in the Summer of 2004, after the scandal broke over the torture being conducted at the prison. "For good or evil," writes Admiral Hutson, "what starts at the top of the chain of command drops like a rock down the chain of command."

minded, and overly legalistic analysis. It's too clever by half, and frankly, just plain wrong. Wrong legally, morally, practically, and diplomatically.

The memo is incorrect in its conclusion that that Geneva Convention regarding POWs does not apply to the conflict in Afghanistan against the Taliban and their partners, al Qaeda. Afghanistan is a party to the Convention. The United States fought the Taliban as the de facto government of Afghanistan, in control of 90% of the country, and its armed forces as the "regular armed forces" of a party to the Convention. Those facts entitled Taliban and al Qaeda combatants from Afghanistan to a determination on a case-by-case basis of their status as prisoners of war. Moreover, any detainee not entitled to POW status is nevertheless entitled to basic humanitarian protections guaranteed by the Geneva Conventions and customary international law. This is the position taken by the State Department, but rejected by Judge Gonzales.

Judge Gonzales begins his rationale for this erroneous position by stating that the "war against terror is a new kind of war." That may be. But the war in Afghanistan was not new in any fundamental way. The Geneva Conventions could be applied to that war without any great difficulty, just as we applied them in Iraq and every war we have fought since World War II. They are all new kinds of wars at the time you fight them, with new enemies, new weapon systems, and new tactics and strategies.

The Conventions are designed to apply in all armed conflict and the immediate aftermath of armed conflict. They are designed to apply to combatants—persons taking direct part in hostilities and regular members of the armed forces. There simply is no case for concluding that the Geneva Conventions were obsolete regarding the war in Afghanistan. They formed the proper applicable law and concluding they did not was simply incorrect.

Although it may still be our self-interest, it is difficult to apply the Geneva Conventions to a terrorist when he is not taking part in an armed conflict because the Conventions were not intended to apply to those settings. Criminal law is designed to apply to violent, unlawful acts outside the situation of intense inter-group armed hostilities, i.e., war. Fundamentally, Judge Gonzales's problems with the Geneva Conventions stem from his attempt to apply the wrong law to the problem of terrorism.

As he should have anticipated, but apparently didn't, his error was compounded as the war on terror expanded to Iraq and included American citizens as enemy combatants. Once he reduced his legal analysis to simply that the Geneva Conventions don't apply to terrorists without explaining what law, if any, does apply, he created a downward spiral of unruliness from which we have not yet pulled out.

His memo is slightly over three pages long. Almost one full page is devoted to listing and rationalizing his two positive reasons for concluding the Conventions do not apply: preserving flexibility and "substantially reduce(ing) the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441)."

On less than one half page, 21 lines, Judge Gonzales lists seven reasons why they should apply or the impact of non-application (an action which he describes to the President as ". . .reconsideration and reversal of your decision. . . .") These are:

- since 1949 the United States has never denied their applicability;
- unless they apply, U.S. could not invoke the GPW if enemy forces threatened or in fact mistreated our forces;
- War Crimes Act could not be used against the enemy if they don't apply;
- it would invoke "widespread condemnation among our allies and in some domestic quarters" for us to turn away from the Conventions;
- encourage other countries to look for technical "loopholes" in future conflicts;
- other countries would be less inclined to turn over terrorists or provide legal assistance to us;

And finally, and notable for its understatement,

• "A determination that GPW does not apply to al Qaeda and the Taliban could undermine U.S. military culture, which emphasizes maintaining the highest standards of conduct in combat, and could introduce an element of uncertainty in the status of adversaries."

The paragraph of the memo which discusses the interplay between the Section 2441 of the War Crimes Act and the Geneva Conventions is particularly striking. To his credit, Judge Gonzalez is remarkably frank and candid. Without apparent embarrassment, he asserts as one of the chief reasons to not invoke the Conventions the argument that such action "reduces the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441)." He essentially opines that the Conventions create problems because "grave breaches" of the Conventions would constitute war crimes under the domestic legislation which, unlike the Conventions themselves, is enforceable in U.S. courts. He says, ". . .it would be difficult to predict with confidence what action might be deemed to constitute violations of the relevant provisions of the GPW." He references as examples of this problem the difficulty he sees in defining such phrases from the Conventions as "outrages upon personal dignity" and "inhuman treatment." Later in that paragraph he offers, ". . .it is difficult to predict the needs and circumstances that could arise in the course of the war on terrorism."

His meaning is clear. We don't want to implicate the War Crimes Act via "grave breaches" of the Geneva Conventions because we can't predict whether we may need to engage in what may be defined as outrages on personal dignity and inhuman treatment during the war on terror. This is a stunning observation. It certainly undermines good order and discipline within the military. More importantly, if we can't define those terms, how can we expect the enemy to do so? How can we ever demand that they not engage in such conduct, having now said the prohibitions are incapable of definition?

Although he doesn't advocate the reasons with any strength or conviction, Judge Gonzales at least was able to identify the damage that following his advice would cause. Unfortunately, he fails utterly to comprehend the degree or consequences of that damage. Nor does he seem to appreciate the consequences of even advancing his ultimate conclusion: "I believe that the arguments for reconsideration and reversal are unpersuasive."

Law is not practiced in a vacuum. It's practiced in real life. The issues are real, affecting real people. They aren't purely academic or just curious intellectual exercises.

A careful, honest reading reveals that the legal analysis of the January 2002 memo is very result-oriented. It appears to start with the conclusion that we don't want the Geneva Conventions to apply in the present situation, and then it reverse-engineers the analysis to reach that conclusion. That approach may be appropriate for a criminal defense counsel who starts with the proposition that the client is not guilty and figures out how to best present that case, but it is not the kind of legal thoughtfulness one would expect from the legal counsel to the Commander-in-Chief.

It is also very oriented to the immediate situation. It considers only the events at that moment in time and space. It fails to adequately consider the practical implications of characterizing the relevant provisions of the Geneva Conventions as "obsolete" and "quaint." Once those words are written down they ring a bell that cannot be unrung. If the Geneva Conventions were obsolete and quaint in 2002, they are obsolete and quaint for all time. Those two words will come back to haunt us forever, or until the Conventions are "modernized." The problem is that it's a bit like going to war with the Army you have, not the Army you would like to have. These are the rules that we went to war with. We must make them work. We must live, or die, with them.

The Bush Administration should officially and unequivocally repudiate Judge Gonzales's erroneous position on the applicability of the Geneva Conventions. It is not the case that the Conventions are obsolete in regulating armed conflict. Perhaps they can be improved and updated to deal with the new face of asymmetrical warfare, and the Administration should work for that, but in the meantime they are the binding law and they serve us well. If new international law is needed for the struggle against terrorism, then that law should be developed, too, but do not throw out the Geneva Conventions because his poor legal analysis couldn't make them fit.

When I have spoken out publicly on these matters over the course of the last two years, often someone in the back of the room, or a caller on a radio talk show, pipes up with the argument that "they are all terrorists and look at what they have done to us." I find that argument to be singularly unpersuasive and unbecoming of the United States. Judge Gonzales, however, echoes the argument when he says in the memo, "Finally, I note that our adversaries in several recent conflicts have not been deterred by GPW in their mistreatment of captured U.S. personnel, and terrorists will not follow GPW rules in any event." That statement is both true and reprehensible coming from the President's legal counsel. For that to be urged as a justification for not applying the Rule of Law in the war on terror is beneath the dignity and civility of the United States. Although more articulately stated than I generally hear it, it is the same argument I have come to expect from someone in the back of the room or an anonymous caller on talk radio.

The United States has supported the Geneva Conventions and urged other nations to do so for over half a century. Now, suddenly, they are characterized by the President's counsel as quaint and obsolete. He argues they may impede our freedom to commit what might otherwise be violations of our own War Crimes Act; we don't want this outdated international law to inhibit our ability to outrage human dignity and engage in inhuman treatment.

Judge Gonzales also bears responsibility, along with oth-

ers, for the other memoranda written to inform those in government and the military about the definitions of torture, defenses, and authority of the President acting as Commander-in-Chief. The Bybee and Yoo memoranda are chilling. They read as though they were written in another country, one that does not honor the Rule of Law or advocate on behalf of human rights. They contain an air of desperation: This is the worst war ever and justifies almost anything in order to win. The concept is that as long as you are a smart enough lawyer, you can find an argument to justify anything. Torture is limited to "inflict(ing)pain that is difficult to endure . . . equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death." (Bybee Memo)

Even if you surpass that lofty standard, your defenses include "necessity" and "self-defense" (meaning defense of the nation, not personal self-defense). Basically, anything that inhibits the President's discretion is unconstitutional and anything that carries it out is permitted.

No mention is made of U.S. military regulations. All services have their own regulations relating to these issues. The U.S. Army Field Manual 34-52 is representative. It states:

"U.S. policy expressly prohibits acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation. Such illegal acts are not authorized and will not be condoned by the U.S. Army. Acts in violation of these prohibitions are criminal acts punishable under the U.C.M.J. If there is doubt as to the legality of a proposed form of interrogation not specifically authorized in this manual, the advice of the command judge advocate should be sought before using the method in question."

Although Judge Gonzales would surely consider it quaint and obsolete, this is long-standing U.S. military doctrine.

Significantly, these opinions and legal arguments weren't written in some law review article or in an op-ed piece to stimulate national debate. They were written to inform the President as Commander-in-Chief. Unfortunately, we saw the result of that kind of situational, shortsighted legal analysis.

This advice given to the President by Judge Gonzales was not offered with an eye to protecting American troops, as it may seem to be upon a superficial consideration. In both the short term and the long term, it doesn't protect our armed forces, it imperils them. It enables them to engage in the sort of reprehensible conduct we have seen, and it will enable our enemy to also engage in such conduct with impunity.

There are two great spines that run down the back of military discipline. They are accountability and the chain of command. These profound concepts are separate, but related. The concept of accountability means that you may delegate authority, but you can never delegate responsibility. Responsibility always remains with the person in charge.

Who was responsible for the series of memoranda that were drafted during that time which defined torture so narrowly and defenses so broadly, which argued that the President as Commander-in-Chief enjoys virtually unlimited power? Who failed to stand up and say this is not only bad law; it also fosters bad morals and therefore bad diplomacy, and it leaves our troops at risk? Taking this course will make the United States a less good, less secure, nation.

Who thought this was the single most important, awful war, past or future, and that that justified throwing out all the rules that good people had defended over the years, all for the sake of ill-advised expediency?

The chain of command enables the military to operate effectively and efficiently. For good or evil, what starts at the top of the chain of command drops like a rock down the chain of command. Soldiers, sailors, Marines, and airmen execute the orders of those at the top of the chain and adopt their attitude. Consequently, those at the top have a legal and moral responsibility to protect their subordinates. We don't want the subordinates to feel compelled to second guess the legality, morality, or wisdom of what is decided above them in the chain of command.

If the message that is transmitted is that the Geneva Conventions don't apply to the war on terror, then that is the message that will be executed. The law and over 200 years of U.S. military tradition say that those at the top are responsible for the consequences. Again, law isn't practiced in a vacuum. It's practiced in real life. This isn't just a quaint academic exercise. It affects human beings and the world order.

The United States is now without a peer competitor. This places an awesome responsibility on us because there is no nation or coalition of nations that can forestall our national will. By and large, we can do what we want in the world if we rely solely on military might. Therefore, it is incumbent upon us to also rely on our integrity as a nation in making decisions about the role we will play. It doesn't make us small or weak to voluntarily inhibit our free will; indeed, it is an indication of great strength and discipline. For generations we have justifiably served as a role model for other nations. We have been a paragon of human rights and the world's leading advocate for the Rule of Law. We must not step back from that role now. We must also preserve our self-respect. If we don't respect ourselves, we can't expect others to respect us. Fear alone isn't enough to be a world leader.

The strongest nation on Earth can ill afford an Attorney General who engages in sloppy, shortsighted legal analysis or who doesn't object when others do.

The war on terror is crucial to our survival. And survive we will. But there will be other wars to fight in the future just as there have always been in the past. We cannot lose our soul in this fight. If we do, even if we win the military battles, the victories will be Pyrrhic, and we will have lost the war. The Attorney General (designate) has led us down that path. Instead, we need an Attorney General who recognizes that when there is a conflict between law and policy, law prevails.