individuals did not come from one specific country. They were a fanatic, ideological enemy with international reach. They could be anywhere. And they had the money to finance their terrorist activities.

It was during these early months that the administration explored what its options were and how they should act in confronting this unique enemy, one that fought not in uniforms on battlefields, not for a particular nation but in blue jeans and American civies.

Some are claiming that the President relied on the Bybee memo in formulating his policy with respect to interrogation techniques at Abu Ghraib. Let's take a look at these documents. First, the so-called Bybee memorandum was not written by Judge Gonzales, in spite of the implications by some. It was written by Jay Bybee who, at that time, was the Assistant Attorney General of the Office of Legal Counsel at the Department of Justice, and is now a distinguished judge on the Circuit Court of Appeals for the Ninth Circuit. That is why some people call it the Bybee memo. They could not call it the Gonzales memo. It is not the Gonzales memo, has never been the Gonzales memo.

The memo is dated August 1, 2002. Remember that date. The memo addresses the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. It does not analyze the Geneva Convention. Let me just mention that this is a scholarly piece of analysis. Regardless of whether you agree or disagree with its legal conclusion, there can be little doubt that this 50-page, single-spaced document with 26 footnotes is a thoughtful and thorough analysis.

Let me also say that this memo does not tell the President to use torture in Iraq. Rather it tries to define what torture is from a purely legal perspective.

Let's compare the Bybee memo with the President's actual memorandum on the treatment of detainees. The subject of this memo is the humane treatment of al-Qaida and Taliban detainees. The President's memo was written on February 7, 2002. This is 6 months before the Bybee memorandum. So there is absolutely no way the President could have relied on the August 1, 2002, Bybee memo because it did not exist at the time he issued his definitive February 7 directive, the one that he and others followed.

Let me be clear: I am not saying the Justice Department never considered the Convention Against Torture prior to August 1, 2002. In fact, given the voluminous length of the analysis, it probably took some time to write. But to suggest this Bybee memo, which addresses a different statute, a statute that is nowhere mentioned in the President's memorandum, was indispensable in crafting the President's decision is simply false for the simple reason it did not exist at the time.

What some of my Democratic colleagues are trying to do is hold Judge Gonzales responsible for a memorandum he did not write and that came from the Justice Department which he did not direct.

The Bybee memo asks an important question: What is torture? This is a critical question to ask in the middle of a war on terror in which our enemies have made it clear that they will not observe the Geneva Conventions or any other rule of civilized conduct. Judge Gonzales received the Bybee memo, but some of my friends across the aisle are almost suggesting that he actually wrote it. He did not. He had nothing to do with it. In fact, they criticize him because they believe he did not object to the memo at the time he received it. But the fact is, we do not know what his private legal advice was to the President on the Bybee memo because that advice is privileged advice. And Presidents do not want their counsel divulging privileged advice.

In fact, we should think twice before we ever proceed down the path of attempting to require the White House Counsel to divulge to the Congress in an open hearing precisely what legal advice he gave to the President on an inherently sensitive matter such as those that directly relate to national security.

When all is said and done, Judge Gonzales did not supervise Jay Bybee. He did not supervise Attorney General Ashcroft. It was not his job as White House Counsel to approve of memos written by the Justice Department. And that memo of February 7 said the detainees should be treated humanely. That was the President's position.

I have a lot more I want to say about this, but I notice the distinguished Senator from New York is here and wanted to say a few words before we break for lunch. I will interrupt my remarks. I couldn't interrupt a few minutes earlier. I will come back to this subject.

I hope the Chair will allow the senior Senator from New York to have a few extra minutes. I would be happy to sit in the chair, if needed. But I will relinquish the floor and ask unanimous consent if I can finish my remarks after the luncheon; is that possible?

Mr. SPECTER. Mr. President, we have consent following the lunch. I think the Senator from——

Mr. HATCH. Immediately after the consent order.

Mr. SPECTER. The Senator is entitled to finish.

Mr. HATCH. Especially being interrupted and accommodating colleagues on the other side. I would like to finish.

Mr. SPECTER. There had been a request for Senator MIKULSKI for 10 minutes right after lunch.

Mr. LEAHY. Yes, at 2:15. We don't have to break at 12:30. We could continue on. I was off the floor. What was the request?

Mr. SCHUMER. Will my colleague yield for a minute?

Mr. LEAHY. I don't have the floor.

Mr. SPECTER. Mr. President, will the Senator from Utah be willing to await the completion of the remarks of Senator MIKULSKI for 10 minutes at 2:15 and Senator SCHUMER at 2:15 and then he will resume his remarks?

Mr. HATCH. Following Senator MIKULSKI?

Mr. LEAHY. If the Senator will withhold, how much longer does the Senator from Utah have?

Mr. HATCH. I have a little bit more. It could be as long as a half hour.

Mr. SPECTER. My unanimous consent request is that at 2:15, when we resume, Senator MIKULSKI be recognized for 10 minutes and Senator SCHUMER be recognized for 10 minutes and then Senator HATCH be recognized to conclude his remarks, then Senator CORNYN be recognized, and then Senator KENNEDY be recognized.

The PRESIDING OFFICER. Is there objection?

Mr. LEAHY. Reserving the right to object, it would be Senators SCHUMER, HATCH, CORNYN, and KENNEDY?

Mr. SPECTER. It would be Senators MIKULSKI, SCHUMER, HATCH, CORNYN, and KENNEDY.

Mr. LEAHY. I have no objection.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SPECTER. I thank the Chair.

RECESS

The PRESIDING OFFICER. Under the previous order, the hour of 12:30 p.m. having arrived, the Senate will recess until 2:15 p.m.

There being no objection, the Senate, at 12:30 p.m., recessed until 2:14 p.m. and reassembled when called to order by the Presiding Officer (Mr. VOINOVICH).

EXECUTIVE SESSION

NOMINATION OF ALBERTO R. GONZALES TO BE ATTORNEY GENERAL—CONTINUED

The PRESIDING OFFICER. Under the order of recognition, Senator MIKULSKI is recognized for 10 minutes, Senator SCHUMER for 10 minutes, followed by Senator HATCH, Senator CORNYN, and Senator KENNEDY, with no time limit agreed to for Senator HATCH, Senator CORNYN, and Senator KENNEDY.

The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, the agreement is to have Senator MIKULSKI recognized for 10 minutes and Senator SCHUMER for 10 minutes. There is no time set when Senator HATCH resumes, and then Senator CORNYN is in line, and then Senator KENNEDY is in line. It is my hope we will be able to get a consent agreement for the full debate time early this afternoon when that appears to be appropriate.

Senator MIKULSKI, under the unanimous consent agreement, now has 10 minutes.

The PRESIDING OFFICER. The Senator from Maryland.

Ms. MIKULSKI. Mr. President, I rise to exercise my constitutional responsibility pertaining to the nomination of Mr. Alberto Gonzales to be Attorney General of the United States.

Over the weekend, all of us were heartened to see the enormous turnout of the Iraqi people seeking democracy and participating in the processes of democracy, even risking life and limb to vote in an act of self-determination over the future of Iraq. I was particularly filled with joy when I saw that women were free to participate in a democratic process in Iraq. But as we look to Iraq's move toward a democratic framework, the United States of America must continue to lead the way, but also lead by example—how our own country, through its processes and the people who govern, stand up for the principles that have been the hallmark of the United States of America.

It is because of these principles of truth, justice, dignity, civil rights, human rights, and the enforcement of the rule of law that when it comes to the nomination of Judge Alberto Gonzales to be the Attorney General, I must reluctantly say that I cannot support this nomination.

When you meet Mr. Gonzales, you find him to be a warm, engaging person, a person of civility and courtesy who has an incredibly compelling personal story.

But we are not here to vote for a personal story; we are here to vote for the Attorney General of the United States, whose job is to enforce the law. Sure, we hear what a great background Mr. Gonzales has: the son of migrant workers, the first in his family to go to college and to law school, to work at a prestigious law firm, to go on to the Supreme Court of Texas, and be a Counsel to the President of the United States. But this is a man who, in his very act as Counsel to the President, created a whole new framework that created a permissive atmosphere for the United States of America to engage in torture. That is unacceptable.

Mr. Gonzales attended the U.S. Air Force Academy—wow, what a great accomplishment. If anyone would understand the risk to troops should they fall and be taken prisoners of war, why they should be held under the Geneva Convention which protects the rights of a prisoner, it should be someone who attended the U.S. Air Force Academy, which has a high rate of graduates taken POW.

Certainly the story is inspiring, but we are not voting on a personal story. The Attorney General must be committed to core constitutional values and to the rule of law. He must have a record of independence and good judgment. Mr. Gonzales has not demonstrated that commitment. In his zealous attempt to be the protector of the President, he has adopted legal reasoning at odds with core constitutional values. He has rejected long-established legal principles and compromised our Nation's moral leadership. He failed in the most important job, telling the President no, and speaking truth to power.

After a careful review of his record, I do not believe that Judge Gonzales can fulfill the principles we want at the Department of Justice.

This issue of torture is a very troubling one. Mr. Gonzales's advice to the President on this issue as well as detention and interrogation are very disturbing. Under his watch the administration changed the definition of torture, limiting it to physical pain equivalent in intensity to pain accompanying serious physical injury or even death. His advice provided the pathway to the President to exempt U.S. officials from international law governing torture.

What did that mean? It meant that if the United States of America engaged in torture, he wanted to have legal arguments to show we would not be tried as war criminals. In his 2002 memo to President Bush, he provided a legal analysis that allowed the President to sidestep international principles governing humane treatment. He said that the new form of war ''renders quaint'' the Geneva Conventions. That statement is outrageous. Quaint means outdated or old fashioned. It means it is an Edsel. Quaint is a hoola hoop. It is not a treaty. You don't call the Geneva Convention that. Though it's often not enforced as vigorously as we would want, it is the one tool that has protected our own troops. It sets guidelines for humane treatment of prisoners. If America flaunts these laws—what will happen to our soldiers if they are captured. That is why the military's judge advocate general corps and former Secretary of State Powell urged the President to stand behind the Geneva Conventions.

Since 9/11 we know that America has been fighting a different kind of war. We do know that we have to get information from terrorists who have predatory intents toward our country. We do need to look at new approaches, and maybe even reforming the Geneva Convention. But we should not do it by flouting international law.

The memorandums that Gonzales oversaw allowed a framework and an attitude for torture to take place.

Now where are we? We have troops under court-martial, and what we have is punishment at the bottom and condoning at the top.

We can't have an Attorney General like that. We need to have an Attorney General who seeks the truth, who wants to help protect the United States of America and protect the United States of America for what it stands for. This is one of the reasons I cannot support him.

But let's say 9/11 had never taken place and he had never written that memo and we had never gone to war in Iraq—wouldn't we all love it? I still would have flashing yellow lights about Mr. Gonzales. One of his main jobs is to recommend Federal judicial nominations. The way he has gone about nominations for the appellate court has been troubling. The White House Counsel's Office has pushed some of the most ideological and extreme judicial nominees we have ever seen, nominees with hostility to civil rights, to women's rights, to environmental rights, and to disability rights. This is even more troubling as we face a possible Supreme Court vacancy.

Let me talk as the Senator from Maryland. I know it firsthand. We have a vacancy on the Fourth Circuit Court of Appeals, and its Maryland's seat that is vacant. Who did Gonzales pick? First of all, he wanted a nominee who was not even a member of the Maryland bar. That was pretty sloppy or pretty ideological. Then they picked someone with minimal qualifications. There are over 30,000 lawyers in Maryland and they couldn't find somebody who was a member of the Maryland bar? Why not? They found three for the Federal district court. Instead they wanted to play politics, and the way he wanted to play politics was to take away the Fourth Circuit seat from Maryland and give it to Virginia.

We should not play politics with judicial nominations. Do we want an Attorney General who will play politics with the law, play politics with the court, and just play politics with international conventions designed to protect our troops? I do not want to play that kind of politics. I am going to vote against Alberto Gonzales.

Let me say this: The position of Attorney General is unique in American Government. As leader of the Department of Justice, the AG must have a deep respect for the Constitution. That person has to be strong and willing to do what is right, regardless of politics, of pressure, or what is popular. The Attorney General is America's most important lawyer but also the people's lawyer, to protect the American people and important institutions.

Unfortunately, Mr. Gonzales has spent the last 4 years as a single-minded advocate for Presidential policies, which he himself should have cautioned the President against undertaking. He could have advised the President and shown respect for the law. But that is not his record. If he cannot value America's constitutional principles and give independent advice to the President, I can't vote for him for Attorney General.

When we look at all the others things he has done—he skirted questions about the President's authority on torture; he didn't want to answer questions for the committee. He said he couldn't remember, then he couldn't find this and he couldn't find that—I can't find it in me to vote for him.

There are those who say the President has a right to his nominations. The President does have a right to a nomination, but that doesn't mean he has the right to get his nominee. The Founders of this country, the people

who invented America and wrote the Constitution of the United States, gave the Senate an advice and consent function. That means, to advise the President on best policies and best possible people, before we give our consent to the President.

I cannot be a rubberstamp. I have to vote my conscience and to cast my vote, reluctantly, against Alberto Gonzales.

I yield the floor.

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. Mr. President, this has been one of the most difficult votes on a nominee I have had to make since coming to the Senate, and that is because I like Judge Gonzales. I respect him. I think he is a gentleman, and I think he is genuinely a good man. We have worked well together, especially when it comes to filling the vacancies on New York's Federal bench. He has been straightforward with me, he has been open to compromise, and the bench is filled with good people.

Our interactions have not just been cordial, they have been pleasant. I have enjoyed the give and take in which we have engaged. Therefore, when President Bush nominated Judge Gonzales to be Attorney General, my first reaction was positive. Unlike with judicial nominees which are life appointments from a separate branch of Government, Cabinet officers serve the President, and I generally believe we should show deference to the President's choices. That is why I was inclined to support Judge Gonzales. I believed, and I said publicly, that Judge Gonzales was a much less polarizing figure than Senator Ashcroft had been.

But less polarizing than John Ashcroft is not enough alone to get my vote. Even if you are, as Judge Gonzales is, a good person with top-notch legal qualifications, you still must have the independence necessary to be the Nation's chief law enforcement officer. The Attorney General is unlike any other Cabinet officer. For all those other Cabinet officers, simply carrying out the President's agenda is enough. But to be a good Attorney General, unqualified deference to the President is not enough. Unlike all the other Cabinet positions, where your role is to implement and advance the President's policies as Attorney General, as the Nation's chief law enforcement officer, your job is to enforce the law, all the laws, whether they hurt or help the administration's objectives.

This position requires a greater degree of independence than, for example, the Secretary of State, whose obligation is to advance the President's interests abroad. When the White House asks the Justice Department, Can we do x? Can we wiretap this group of people? The Justice Department is charged with giving an objective answer, not one tailored to achieve the President's goals. That is the chief law enforcement officer of the land—separate from the President's right-hand person. As I have said before, it is hard to be a straight shooter if you are a blind loyalist.

There are two models for an Attorney General: loyalist and independent, and we all know there were Attorneys General over the years who have been close to the President. Robert Kennedy is a great example. He served his own brother. But that said, no one ever doubted, in the confines of the Oval Office, Bobby Kennedy would oppose his brother if he thought he was wrong. Judge Gonzales is more of a loyalist than an independent, but that alone does not disqualify him. It raises concerns, but after extensive review of the record, unfortunately and sadly, and despite my great personal affection for Judge Gonzales, his testimony before the committee turned me around and changed my vote from yes to no. He was so circumspect in his answers, so unwilling to leave even a micron of space between his views and the President's, that I now have real doubts whether he can perform the job of Attorney General.

In short, Judge Gonzales still seems to see himself as Counsel to the President, not as Attorney General, the chief law enforcement officer of the land.

I would like to give a little bit of history. Judge Gonzales came and saw me back in December. We had a good conversation on a range of topics. I respected and appreciated his commitment to recuse himself from the investigation into the felony disclosure of then-covert CIA agent Valerie Plane's identity.

I told him that I understood 9/11 created a brave new world; that the war on terror required reassessment of the rules of law; and I told him that given the enemies we now face, we couldn't afford to be doctrinaire.

I told him I supported the administration when it comes to aggressively reexamining the way we do business and interrogating witnesses.

I agree we have to make sure we are doing everything we can do to protect American families from those who would do us harm to prevent another 9/11, but I also told Judge Gonzales that I was troubled that the administration had undertaken its reworking or reinterpretation of the rules of war behind closed doors rather than engaging the Congress and the American public and the international community in an open and direct fashion.

Time and time again the administration has gotten itself into trouble by trying to go at it alone rather than doing business in the open, particularly in the Justice Department. Whether it was the total information awareness project, the TIPS Program, or torture, they have been burned by their peculiar penchant for complete secrecy.

I encouraged Judge Gonzales to be candid with the committee when discussing these issues. I encouraged him to give us some hope that he would run a different department, a more open department, one more willing to listen to the oral arguments than John Ashcroft.

Unfortunately, even a cursory review of his answers reveal strict adherence to the White House line and barely a drop of independence.

A set of answers very important to me came in response to my questions on the nuclear option—whether to rule from the chair that Senators were not allowed to filibuster judicial nominees.

When we met in private, I asked Judge Gonzales his opinion about the constitutionality of the nuclear option. He said he had not reviewed the applicable constitutional clauses, and that in any event it was a matter reserved for the Senate. I asked him at that private meeting before the hearing.

It wasn't taking him by surprise in any way to look at the Constitution. I told him I would ask the question again at the hearing. I informed him that his answer on this question would weigh heavily on my decision whether to support his confirmation.

At the hearing, when I asked Judge Gonzales about the nuclear option, rather than being candid, he completely avoided the question, ducking, dodging, and weaving.

I asked him three times to give his opinion, and each time he refused. I asked him twice more in writing, and again he refused to answer. In one of those questions, I simply asked him to imagine he was counsel to a U.S. Senator who was seeking his opinion on the constitutionality of the nuclear option, and no interference in serving the President. Again, he refused to answer.

This is a crucial issue for me for two reasons. First, the importance of the nuclear option; and second, the importance of Judge Gonzales's independence as Attorney General.

I believe the nuclear option would be so deeply destructive it would turn the U.S. Senate into a legislative wasteland and turn the Constitution inside out. Madison's ''cooling saucer'' would be shattered into shards.

Judge Gonzales in his refusal to answer such vital questions and even giving opinions so that we might see the way he thinks weighs a lot with me, at least in terms of my vote, not in terms of him as a person.

The matter repeated itself on question after question. On torture and nearly everything else, it seemed as if Judge Gonzales was going out of his way to avoid answering. He demonstrated a lack of straightforwardness and independence on just about every single question he was asked—again, no glimmer of light between how he might see things and how the President might see things.

When you are the chief law enforcement officer of the land, when you are asked to rule on sensitive questions that balance liberty and security, you can't just do what the President wants all the time or you are not serving your country or serving the job. It is different from other Cabinet positions.

I concluded that Judge Gonzales still sees himself as a White House Counsel rather than the nominee to be Attorney General, the chief law enforcement officer of the land.

I have great respect for the judge. The Horatio Alger story that he had makes all of us proud to be Americans. It makes us glad about the future of new communities as they rise in America. It is truly an amazing country when a man can rise from such humble beginnings to be nominated Attorney General.

I am mindful of the fact that if he is confirmed, as I anticipate he will be, Judge Gonzales will be the Nation's first Hispanic Attorney General. It is a tremendous success story that makes this vote even more difficult, although I am also mindful of the fact that the Hispanic Caucus voted against his nomination.

When I called Judge Gonzales last week to tell him how I would be voting, he was understandably disappointed but he was, as always, a gentleman. He assured me we would continue working together to solve our Nation's problems. He assured me he would prove me wrong, and I hope he does.

It was one of the most difficult conversations I have had in a long time. But it is too significant a job and too important a time to have an Attorney General about whom we have such severe doubts.

I have no choice but, with sadness, to vote no.

I yield the floor.

Mr. SPECTER. Mr. President, I received a letter this morning addressed to Senator COLLINS and myself, Senator LEAHY and Senator LIEBERMAN, from Senator KENNEDY and Senator DURBIN concerning the certain second report from the Department of Justice. Immediately on receiving the letter, I contacted the Department of Justice to obtain a copy of the report. This is a report that did not go to Judge Gonzales but went to another client agency by the Department of Justice advising them as to the legal parameters for interrogation techniques, and that the identity of the memoranda that previously had been disclosed to Senator LEAHY, although the memo had not been transmitted. And the matter had been briefed to the chairman of the oversight committee which has jurisdiction over the client committee. I am not very happy about all this circumlocution, but that is the information I have.

Since Senator KENNEDY was scheduled to speak in a few minutes when I got this at 2:20, I am advising my colleagues one of them is a recipient of the letter, Senator LEAHY; another is the writer of the letter, Senator KENNEDY.

I ask unanimous consent these documents be printed in the RECORD.

Mr. LEAHY. Reserving the right to object, and I shall not object, fortunately getting a letter like that is sort of like getting a big package addressed to you—and it is true, it was addressed to me—and you open the package and of course there is nothing in there and it still does not answer the question.

I will not object. I also appreciate the courtesy of the chairman making sure that everyone knew the letter had arrived.

Mr. SPECTER. As I received the letter this morning, I took steps to try to identify the memoranda and obtain it, if possible. These are the results. They ought to be made part of the record.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, February 1, 2005.

Hon. ARLEN SPECTER,
Chairman, Committee on the Judiciary, U.S. Senate, Dirksen SOB, Washington, DC.

DEAR MR. CHAIRMAN: You have inquired about a memorandum from the Office of Legal Counsel, described in recent press reports as being signed by Jay Bybee, then Assistant Attorney General for the Office of Legal Counsel, and addressed to another agency, signed on or about the same date as the August 1, 2002, memorandum which has been made public, addressing the legality of specific interrogation practices under 18 U.S.C. §§ 2340 and 2340A.

As the Department of Justice made clear in a letter to Senator LEAHY dated July 1, 2004, (enclosed) ''[t]he Department of Justice has given specific advice concerning specific interrogation practices, concluding that they are lawful.'' As the Department also made clear at that time, that advice is classified and the Department will not discuss it further publicly. Thus, the existence of a classified opinion from the Department of Justice on the subject of specific interrogation practices has been publicly acknowledged for more than six months. As the Department noted in the July 1, 2004 letter, that advice has been appropriately provided by the client agency in a classified setting to the relevant oversight committee.

Finally, the Office of Legal Counsel in its recent memorandum of December 30, 2004, stated ''we have reviewed this Office's prior opinions addressing issues involving [interrogation] of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.''

Sincerely,

WILLIAM E. MOSCHELLA,
Assistant Attorney General.

Enclosure.

DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, July 1, 2004.

Hon. PATRICK J. LEAHY,
Ranking Minority Member, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR LEAHY: This responds to your letter, dated June 15, 2004, which enclosed written questions for the record of the Committee's oversight hearing on June 8, 2004, regarding terrorism, with particular reference to the interrogation of detainees.

Questions 1 through 4: Administration documents

In response to the requests for documents contained in your first four questions, enclosed are six Department of Justice documents that have been released publicly. They are: (1) a memorandum from the Office of Legal Counsel (OLC) to the Counsel to the President and the General Counsel of the Department of Defense on the ''Application of Treaties and Laws to al Qaeda and Taliban Detainees,'' dated January 22, 2002; (2) a letter from the Attorney General to the President on the status of Taliban detainees, dated February 1, 2002; (3) a memorandum from OLC to the Counsel to the President on the ''Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949,'' dated February 7, 2002; (4) a memorandum from OLC to the General Counsel of the Department of Defense on the ''Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan,'' dated February 26, 2002; (5) a letter from OLC to the Counsel to the President on the legality, under international law, of interrogation methods to be used during the war on terrorism, dated August 1, 2002; and (6) a memorandum from OLC to the Counsel to the President on ''Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A,'' dated August 1, 2002.

While these are documents that would not usually be disclosed to anyone outside the Executive Branch, the Administration decided to release a number of documents, including these and including many from the Department of Defense, to provide a fuller picture of the issues the Administration had considered and the narrower policies the Administration actually adopted in this important area. While we appreciate your interest in the additional documents set forth in the attachment to your letter, the Executive Brand has substantial confidentiality interests in those documents. OLC opinions consist of confidential legal advice, analysis, conclusions, and recommendations for the consideration of senior Administration decisionmakers. The disclosure of OLC opinions that have not been determined to be appropriate for public dissemination would harm the deliberative processes of the Executive Branch and disrupt the attorney-client relationship between OLC and Administration officials. We are not prepared to identify these documents specifically or reveal which documents may be classified, but we can assure you that no portions of any of these documents have been classified since the Attorney General's testimony on June 8, 2004.

We also can state that included in the memoranda that have been released are all unclassified, final written opinions from the Department of Justice addressing the legality of interrogation techniques used in interrogations conducted by the United States of al Qaeda and Taliban enemy combatants. While the Department has not issued written opinions addressing interrogation practices in Iraq, it has been the consistent understanding within the Executive Branch that the conflict with Iraq is covered by the Geneva Conventions, and the Department has concurred in that understanding.

Lastly, we note that some of the documents requested originated with other agencies such as the Departments of State and Defense. Consistent with established third-agency practice, we suggest that you contact those agencies directly if you wish to obtain copies of their documents.

5. Do you agree with the conclusions articulated in an August 1, 2002, memorandum from Jay Bybee, then AAG for the Office of Legal Counsel, to Alberto Gonzales, Counsel to the President, that: (A) for conduct to rise to the level of ''torture'' it must include conduct that a prudent lay person could reasonably expect would rise to the level of ''death, organ failure, or the permanent impairment of a significant bodily function,'' and (B) section 2340A, of the Federal criminal code ''must be construed as not applying to interrogations undertaken pursuant to [the President's] Commander-in-Chief authority''?

(A) In sections 2340 & 2340A of title 18, Congress defined torture as an act ''specifically intended to inflict severe physical or mental pain or suffering.'' Because Congress chose to define torture as encompassing only those acts that inflict ''severe . . . pain or suffering,'' Department of Justice lawyers who are asked to explain the scope of that prohibition must provide some guidance concerning what Congress meant by the words ''severe pain'' (emphasis added). In an effort to answer that question, the August 1, 2002 memorandum examines other places in the federal code where Congress used the same term—''severe pain.'' In at least six other provisions in the U.S. Code addressing emergency medical conditions, Congress identified ''severe pain'' as a typical symptom that would indicate to a prudent lay person a medical condition that, if not treated immediately, would result in—''(i) placing the health of the individual . . . in serious jeopardy, (ii) serious impairment to body functions, or (iii) serious dysfunction of any bodily organ or part.'' 42 U.S.C. §139w–22(d)(3)(B); see also 8 U.S.C. §1369(d) (same); 42 U.S.C. §1395x(v)(1)(K)(ii); id. §1395dd(e)(1)(A); id. §1396b(v)(3); id. §1396u–2(b)(2)(C). In light of Congress's repeated usage of the term, the memorandum concluded that, in Congress's view, ''severe pain'' was the type of pain that would be associated with such conditions. (The opinion refers to these medical consequences as a guide for what Congress meant by ''severe pain''; it does not state, as your question suggests, that, to constitute torture, conduct must be likely to cause those consequences.)

Although, in other statutory provisions, Congress repeatedly associated ''severe pain'' as a symptom with certain physical or medical consequences, it is open to doubt whether that statutory language actually provides useful guidance concerning, the prohibition in sections 2340 & 2340A. A description of medical consequences—consequences which could be accompanied by a variety of symptoms including varying degrees of pain—does not necessarily impart useful guidance to a lay person concerning the meaning of ''severe pain'' The Office of Legal Counsel is currently reviewing that memorandum with a view to issuing a new opinion to replace it and may well conclude that the meaning Congress intended when it defined torture to require ''severe pain'' is best determined from the other sources addressed in the original memorandum, including standard dictionary definitions. See, e.g., FDIC v. Meyer, 510 U.S. 471, 476 (1994) (''In the absence of [a statutory] definition, we construe a statutory term in accordance with its ordinary or natural meaning.'').

(B) The analysis in the August 1, 2002, memorandum concerning the President's authority under the Commander-in-Chief Clause, U.S. Const. art. II, sect. 2, c1. 1, was unnecessary for any specific advice provided by the Department. The Department has concluded that specific practices it has reviewed are lawful under the terms of sections 2340 & 2340A of title 18 and other applicable law without regard to any such analysis of the Commander-in-Chief Clause. The discussion is thus irrelevant to any policy adopted by the Administration. As a result, that analysis is under review by the Office of Legal Counsel and likely will not be included in a revised memorandum that will replace the August 1, 2002, memorandum. The Department believes that, as a general matter, the better course is not to speculate about difficult constitutional issues that need not be decided. For the same reason, it would be imprudent to speculate here concerning whether some extreme circumstances might exist in which a particular application of sections 2340 & 2340A would constitute an unconstitutional infringement on the President's Commander-in-Chief power. Cf Request of the Senate for an Opinion as to the Powers of the President 'In Emergency or State of War,' 39 Op. A.G. 343, 347–48 (1939).

6. Has President Bush or anyone acting under his authority issued any order, directive, instruction, finding, or other writing regarding the interrogation of individuals held in the custody of the U.S. Government or as an agent of the U.S. Government? If so, please provide copies. If any portion of any document is provided with redactions, please explain the basis for such redactions. The basis for withholding any document should also be explained in detail.

On June 22, 2004, the White House released the instruction issued by the President to the Department of Defense on February 7, 2002, concerning the treatment of al Qaeda and Taliban detainees (it does not, however, expressly address interrogation practices). The Department of Justice is not aware of any writing issued by the President that expressly addresses the issue of interrogations practices. The President has, however, made it clear that the United States does not condone or commit torture. We should also emphasize that the President has not in any way made a determination that doctrines of necessity or self-defense would point conduct that otherwise constitutes torture. The President has never given any order or directive that would immunize from prosecution anyone engaged in conduct that constitutes torture.

We assume that to the extent your question asks about directives issued by others under the President's authority it is limited to interrogations of enemy combatants in the conflict with al Qaeda and the Taliban or interrogations of persons detained in connection with the conflict in Iraq. As you know, numerous law enforcement agencies of the Executive Branch have likely acted under the President's authority as Chief Executive to issue numerous directives concerning interrogations or interviews of subjects in custody in the ordinary course of enforcing the criminal and immigration laws. We assume that such directives are outside the scope of your question.

Numerous individuals acting under the President's authority have undoubtedly issued orders or instructions regarding interrogations of individuals in U.S. custody, both in the conflict with al Qaeda and the Taliban and in the conflict in Iraq. Such documents, however, are not Department of Justice documents. Those documents should be sought from the appropriate departments or agencies that issued them, through the appropriate oversight committees in Congress.

As for the Department of Justice, the General Counsel of the FBI issued a memorandum on May 19, 2004, reiterating existing FBI policy with regard to the interrogation of prisoners, detainees or other persons under United States control. That memorandum reiterated established FBI requirement that FBI personnel ''may not obtain statements during interrogations by the use of force, threats, physical abuse, threats of such abuse, or severe physical conditions.'' It also set forth reporting requirements for known or suspected abuse or mistreatment of detainees. A copy of that memorandum is enclosed. The Department is still following up to determine whether there are any other similar written directives relevant to your question. Please also see the response to Question 8 concerning the Department's legal advice to other agencies.

7. On Friday June 11, 2004, the President was asked the following question at a press conference: ''Mr. President, the Justice Department issued an advisory opinion last year declaring that as Commander-in-Chief you have the authority to order any kind of interrogation techniques that are necessary to pursue the war on terror . . . [D]id you issue any such authorization at any time?'' The President answered: ''No, the authorization I issued . . . was that anything we did would conform to U.S. law and would be consistent with international treaty obligations.'' Please provide a copy of the authorization to which the President was referring. Please also provide a copy of the Presidential directive you had before you and referred to at the hearing.

At the press conference to which you refer, it seems likely that the President was referring to the February 7, 2002, instruction discussed above. At the hearing before the Committee, the Attorney General was also referring to the President's instruction of February 7, 2002. The Attorney General did not have any Presidential directive before him at the hearing, He was merely reading language from the February 7, document that had been incorporated into his notes.

8. Were you ever asked to approve or otherwise agree to a set of rules, procedures, or guidelines authorizing the interrogation of individuals held in the custody of the U.S. Government or an agent of the U.S. Government? If so, please indicate when you were asked to do so, and whether you did, in fact, approve or agree in any way in whole or in part. In addition, please provide a copy of any such rules, procedures or guidelines, or explain your basis for refusing to do so.

The Department of Justice has given specific advice concerning specific interrogation practices, concluding that they are lawful. The institutional interests the Executive Branch has in ensuring that agencies of the Executive Branch can receive confidential legal advice from the Department of Justice require that that specific advice not be publicly disclosed. In addition, that advice is classified. We understand that, to the extent the client department(s) have not already done so, they will arrange to provide the advice to the relevant oversight committees in a classified setting.

As noted above, included among the memoranda that the Department has already released are all unclassified, final written opinions from the Department of Justice addressing the legality of interrogation techniques used in interrogations conducted by the United States of al Qaeda and Taliban enemy combatants. While the Department has not issued written opinions addressing interrogation practices in Iraq, it has been the consistent understanding within the Executive Branch that the conflict in Iraq is covered by the Geneva Conventions, and the Department has concurred in that understanding.

9. What were the criteria the Department used in selecting civilian contractors to assist in the reconstituting of Iraq's prison system? Please describe the vetting process to which they were subjected. To what extent were concerns about their backgrounds known to the officials who recommended them to you and to what extent were you, aware of such concerns when you selected them? Why were such concerns dismissed when such individuals were recommended to you and selected by you? Please explain in detail.

It was and is essential that we do whatever we can to help create a fair and humane criminal justice system in Iraq. To that end, the Department of Justice responded to urgent requests from the Coalition Provisional Authority (''CPA'') and its predecessor for the provision of experts in the areas of prosecution, policing, and corrections. The individuals whom the Department of Justice has sent to Iraq—federal prosecutors, former state and local police officers; and corrections experts—have volunteered to take on

one of the most dangerous missions in that country. They are literally on the front lines: in the courts, in the police stations, and in the prisons.

The experts the Department provided to the CPA—including the corrections experts—have had neither responsibility for, nor control over, individuals detained by the Coalition military forces. The Department's role is strictly limited to the Iraqi criminal justice system. In particular, the corrections experts have operated heretofore under the direction of the CPA's Senior Advisor to the Iraqi Justice Ministry. Thus they have had no involvement in any of the alleged abuses at the military portions of the Abu Ghraib prison that are currently under investigation by Congress and by the United States Military.

Ensuring that these contractors are appropriately screened is a responsibility that we take very seriously. But it is important to note that we are aware of no allegation that any of the corrections contractors committed or countenanced any abuse of prisoners in Iraq. To the contrary, their central role in rebuilding the Iraqi prison system—including creating systems for reporting and correcting abuses by Iraqi prison officials—has been highly praised by the CPA's Senior Advisors to the Iraqi Justice Ministry. Nevertheless, at the Attorney General's request, the Inspector General is undertaking a review of the process used to screen and hire corrections advisors sent to Iraq.

With regard to the process for selecting the initial team of corrections experts, which deployed in May 2003, the Deparment of Justice consulted experts in the Bureau of Prisons (BOP) and the American Correctional Association. The Department contacted one of the individuals recommended by BOP, a former BOP Regional Director, and requested his assistance in further vetting proposed assessment team members. That individual agreed to join the first assessment team, and to help recommend other members. Candidates were required to submit SF 85Ps (Questionnaires for Public Trust Positions) and fingerprint cards. NCIC checks were conducted. No disqualifying information was found.

A second assessment team was deployed starting in September 2003. This team was selected based in part on BOP recommendations and in part on recommendations of members of the first assessment team. To be sure, some of the corrections experts sent to Iraq previously had been named in lawsuits in the United States, in their capacities as the directors of major state corrections systems. Although we do not minimize the significance of such lawsuits, they are commonplace for prison officials. And as far as we are aware, none of the corrections experts sent to Iraq was ever found by a court to have committed or countenanced abuses against prisoners in their custody.

As the need for corrections advisors grew, the Department worked with a government contractor firm to identify qualified candidates willing to serve in Iraq. Since January 2004, more than 80 additional correctional experts have served, or are now serving, in Iraq. These candidates were also required to submit SF85Ps and fingerprint cards. The preliminary results of our internal review indicate that a few caudidates were deployed before the necessary checks had been completed. (We would note, however, that we are aware of no allegations or findings of abuse of prisoners by these candidates in Iraq or elsewhere.) Appropriate remedial action is being taken to address this situation.

It goes without saying that these experts have taken on one of the most dangerous of tasks in Iraq. We are glad to be able to report to you that, so far as we have been able to determine, they have done so in a manner that has brought honor to the United States. We nevertheless recognize that we must engage in constant vigilance to ensure that this remains the case, and intend to do so throughout the duration of our mission in Iraq.

10. Is the Department of Justice currently drafting, or considering drafting, legisation to authorize the President to detain individuals as ''enemy combatants? If the Department is drafting or considering drafting such legislation, will you consult with us before submitting it to Congress?

The Department is not currently drafting or considering drafting such legislation. The Department does not believe that such legislation is necessary at the present time. Although the Department is still evaluating the full import of the Supreme Court's recent decision, the decision in Harmdi v. Rumsfeld, No. 03–6696, slip op. at 9–17 (June 28, 2004), confirms that additional legislation is unnecessary. In Hamdi, the Court held that in the Authorization for Use of Military Force, 115 Stat. 224 (Sept 18, 2001), Congress has ''clearly and unmistakably authorized detention'' of enemy combatants, id. at 12, including American citizens, where an enemy combatant is defined as a person who is ''part of or supporting forces hostile to the United States or coalition partners'' and who ''engaged in an armed conflict against the United States,'' id at 9 (internal quotation marks omitted).

Should circumstances change, the Department would always be willing to work with the Committee to ensure that necessary and appropriate legislation is enacted.

11. During the Judiciary Committee hearing last week, you mentioned the limitation placed on the torture statute (18 U.S.C. §2340–2340A) by 18 U.S.C. §7(9). This section was added to the definition of ''special maritime and territorial jurisdiction'' by section 804 of the USA-PATRIOT Act—originally an Administration proposal. The Administration explained at the time, in its sectional analysis, that the provision would ''extend'' Federal jurisdiction to ensure that crimes committed by or against U.S. nationals abroad on U.S. Government property did not go unpunished. Unmentioned in the Administration's explanation was that this provision creates a jurisdictional gap in our ability to prosecute acts of torture.

(A) Did the Department of Justice know and intend that the proposed amendment would restrict the applicability of the anti-torture statute?

(B) Would the Department support legislation to restore the pre-PATRIOT Act reach of the torture statute, making it applicable to U.S.-owned, U.S.-run, and U.S.-controlled facilities, including aircraft, ships, and other mobile sites, located outside of the United States? If not, why not?

(C) Would the Justice Department support further extension of the torture statute, to make it applicable anywhere outside the geographical borders of United States (i.e., the 50 states, the District of Columbia, and the commonwealths, territories, and possessions of the United States)? If not, why not?

(A) An inquiry with Department personnel who were involved in drafting the amendment to the provision defining the special maritime and territorial jurisdiction of the United States (''SMTJ''); 18 U.S.C. §7; has determined that they were unaware of the potential that the amendment had for affecting the applicability of sections 2340 & 2340A. To the contrary, the provision was intended, as the Department's section-by-section analysis indicated, to ensure jurisdiction over crimes committed by or against U.S. nationals at embassies and consular offices and on military bases and other U.S. facilities overseas. In particular, the amendment was intended to address a conflict among the courts of appeals concerning the extraterritorial application of an existing paragraph in section 7 and to codify the longstanding position of the United States that the SMTJ did extend to overseas bases. Compare United States v. Gatlin, 216 F.3d 207 (2d Cir. 2000) (holding, contrary to position taken by the United States, that section 7(3) does not apply extraterritorially), with United States v. Corey, 232 F.3d 1166 (9th Cir. 2000) (holding that section 7(3) does apply extraterritorially), and United States v. Erdos, 474 F.2d 157 (4th Cir. 1973) (same).

(B) The Department would support legislation making sections 2340 & 2340A applicable to U.S.-owned, U.S.-run, and U.S.-controlled facilities outside the United States. The question, however, assumes that such applicability was clear before the passage of the USA PATRIOT Act. As our answer to part A indicates, that is not enturely accurate. Rather, before the PATRIOT Act, there was a circuit split concerning the scope of the SMTJ and whether or not it applied to overseas military bases. Thus, under the view of the Ninth Circuit, the SMTJ extended to military bases overseas and accordingly sections 2340 & 2340A would not have appled to such bases. See Corey, 232 F.3d at 1172. Under the view of the Second Circuit, on the other hand, the SMTJ did not extend to bases overseas, and sections 2340 & 2340A would have applied to such bases. See Gatlin, 216 F.3d at 223.

The Department will gladly work with Congress to draft appropriate legislation to achieve the objective of applying sections 2340 & 2340A to such bases overseas. Simply returning statutory language to its pre-PATRIOT Act form, however, is likely not the best means for achieving that goal.

(C) The Department would have no objection to such legislation, and would work with the Committee to ensure that it is carefully drafted to achieve its intended effect.

* * *

We hope that this information is helpful. We will supplement this response with additional information relating to other questions for the hearing record as soon as possible. Please do not hesitate to contact this office if you would like additional assistance regarding this or any other matter.

Sincerely,

WILLIAM E. MOSCHELLA
Assistant Attorney General.

Mr. LEAHY. Fortunately, though, the letter and the way it has been described by the chairman is absolutely correct. He has been very straightforward in his description. But it does not say, and the question was asked of Mr. Gonzales and the White House, was he aware—was he, Alberto Gonzales aware—of the second Bybee memo. That does not require a classified answer. It is either a ''yes'' or ''no'' and he still refused to answer yes or no.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, out of deference to my Democratic colleagues this morning, I interrupted my remarks to allow Senator SCHUMER to speak briefly on the nominee. It now has been several hours since I last spoke. Let me briefly recap for those just joining this debate.

Everyone knows I support the nomination of Judge Gonzales to be the next Attorney General of the United States.

Early this morning, I talked about Judge Gonzales's inspirational personal background. I talked about his educational and professional qualifications, and they are many. I talked about all the awards he has won from so many civic organizations. I talked about many of the numerous organizations, individuals, and entities that support his nomination—virtually most strong Hispanic organizations, including the District Attorneys Association and the FBI Agents Association, and others, as well.

In short, I talked about why this man is the right person for this difficult job at this challenging time and why we should not stand in the way of his fulfilling this wonderful opportunity—the first Hispanic ever nominated to one of the big four Cabinet level positions. I even went over other major first-time Hispanic nominations to major positions in this country all the way from President Reagan, to the first President Bush, and finally to our current President.

I also talked about how this man—this good, honorable, decent man—is being treated by some like a scapegoat. Some of my colleagues are trying to unfairly blame Judge Gonzales for abuses committed by renegade soldiers at the Abu Ghraib prison. But Judge Gonzales, of course, was not in charge of the soldiers in the field. He was not the person telling soldiers what interrogation techniques they could or could not use. I, like the President, like Judge Gonzales, and like many of the American public, was sickened by the abuses that occurred at Abu Ghraib prison. But these violations are not going unpunished.

I talked about the investigations, prosecutions, and convictions the Defense Department has undertaken with respect to those perpetrators and how despicable those perpetrators are. I know we will see more prosecutions and convictions as time goes on. The Defense Department has been active on this, acted immediately, and has been acting ever since. It may not be published in the front pages of the newspapers and you may not hear about it on the 6 o'clock news, but these people are going to be brought to justice for their wrongdoing. To blame Judge Gonzales for this is making him a scapegoat. That is wrong.

That is not the only thing my colleagues are trying to unfairly blame Judge Gonzales for. They are trying to blame him for the so-called Bybee memo, a memo Judge Gonzales did not write—a memo that was written by an agency, the Department of Justice, that Judge Gonzales did not work in; an agency for which Judge Gonzales was not responsible. And there has been an implication here that he, as White House Counsel, should have reversed everything and told the Justice Department what to do. If he had done that, he would be criticized for that.

The fact of the matter is the Justice Department is the advisory body on these types of legal issues for the executive branch of Government. He may be White House Counsel, but that does not give him the right to change any opinion given by the Justice Department.

I brought out that on February 7, before the Bybee memo was brought forth, on February 7 of the same year, the President did sign a memorandum with regard to the Taliban and al-Qaida that basically said that although these prisoners did not qualify for Geneva Convention protections they should be treated humanely. We do not hear a lot about that memorandum. If we do, his critics will probably distort it.

I would like to spend a few minutes to focus specifically on the Geneva Conventions. There has been a lot of discussion and, frankly, a lot of misinformation. I would like to take a few moments to clarify. Some of the legal principles involved might sound a little complicated, but I will try to explain this as simply as I can.

The Geneva Conventions are an international treaty. One key question facing the United States as we fought back against the terrorists was whether Iraq, the Taliban, and al-Qaida should be treated differently under this treaty.

First, as we all know, treaties are signed by countries. They are not signed by individuals for individuals. Iraq signed the Geneva Conventions. There has never been any question that the Geneva Conventions apply to our conflict in Iraq where Abu Ghraib is located. Afghanistan also signed the Geneva Conventions. Afghanistan, however, has been embroiled in internal violent conflicts for 22 years. There was no legally recognized leader, no legally recognized central government and, for that matter, there were not even basic government services in the country at that time. The Taliban was a vile faction struggling for control of the nation, but it did not have anything like control over the entire country.

There was a question about whether Afghanistan was a failed state as a matter of international law. If it was a failed state, then the treaty, naturally, would not apply to it. Ultimately the President decided regardless of what the law requires, that he was going to apply the Geneva Conventions to the Taliban. That is what it says in the President's February 7, 2002 memorandum.

Going to the third category, al-Qaida is not a country. They are not a faction within a single country. They are a group of individuals from lots of different places who go around the world spreading terror and murdering innocent people. Simply put, they are a gang of terrorists, not a country. Since al-Qaida is not a country, they could not sign the treaty, nor would they, and we all know that. So it makes perfect sense to conclude that the President is not legally required to apply the Geneva Conventions to al-Qaida.

So far, the analysis has been pretty straightforward. You sign the treaty, the treaty applies to you. The next step is a little more complicated. Under the Geneva Conventions, all detainees are not treated alike. In order to receive preferential treatment as a detainee, you must qualify as a POW, a prisoner of war. In order to be considered a prisoner of war, the group must have an organized command structure, uniforms, or insignia, openly carry arms and obey the laws of war. Al-Qaida and the Taliban detainees cannot qualify as POWs.

Neither al-Qaida nor the Taliban have a permanent centralized communications infrastructure—the way you would expect to find such in a typical military organization. The Taliban is a loose array of individuals with shifting loyalties among various Taliban and al-Qaida figures. Defections and bribery are rampant.

Second, the Taliban and al-Qaida members wear no uniform or other insignia that serve as a ''fixed sign recognizable at a distance.'' They dress like civilians in that area of the world.

Third, although the Taliban carry arms openly, so do many in Afghanistan. They do not attempt to distinguish themselves from others carrying weapons.

Lastly, al-Qaida and the Taliban do not follow the laws of war. We are all too familiar with how al-Qaida operates since we saw their despicable handiwork on September 11, 2001. They dress as civilians. They specifically attack civilians after hijacking civilian commercial airlines. They transform civilian aircraft into weapons of destruction to murder thousands of ordinary, innocent human beings.

The Taliban used mosques for ammunition storage and for command and control meetings. They put tanks and artillery in close proximity to hospitals, schools, and residences. The Taliban has massacred hundreds of Afghan civilians, raped women, and pillaged villages. They use villages as human shields to protect stockpiles of weapons and ammunition.

In fact, there is no indication that the Taliban understood or considered themselves bound by or aware of Geneva Conventions. The Taliban made little effort to distinguish between combatants and noncombatants when engaging in hostilities. For example, they killed for racial or religious purposes.

So even if the Geneva Conventions applied to al-Qaida, it would not give them preferential treatment because they are not POWs. In fact, as I understand it, there is no significant difference between the treatment being accorded to the Taliban and al-Qaida, even though the Geneva Conventions only apply to the former, the Taliban.

Now, let me cut to the chase. The President's February 7, 2002, memorandum makes one thing crystal clear: Regardless of where and when the Geneva Conventions apply—regardless of whether the Taliban or al-Qaida are

POWs—the President says unequivocally that detainees are to be treated humanely.

This is a crucial point that has often gotten lost in some of the inflamed rhetoric being employed by the opponents of Judge Gonzales and the President. And let us be clear that a considerable amount of the criticism being lodged against Judge Gonzales is merely an attempt to cause political damage to the President himself.

That the purpose of the February 7 memo is to ensure that all detainees are treated humanely is evident by the fact that this concept is repeated four times in that memorandum.

First, you should know that this is clear from the title of the memo: ''Humane Treatment of al Qaeda and Taliban Detainees.''

The President makes his policy directive explicit in paragraph No. 3 of the memo:

> Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment.

He repeats the command again in the last sentence of paragraph 3:

> As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely.

The President repeats the command a fourth time in paragraph 5:

> I hereby reaffirm the order previously issued by the Secretary of Defense to the United States Armed Forces requiring that the detainees be treated humanely.

One last point on this. In addition to saying again and again that detainees must be treated humanely, the President's February 7, 2002, memorandum also mandates that the U.S. Armed Forces treat detainees in a manner consistent with the principles of Geneva to the extent appropriate and consistent with military necessity.

Now, while lawyers can hem and haw about what this precisely means, given the context of the quotation in the paragraph immediately following the POW analysis, it is logical to conclude that it means that the U.S. military shall accord POW treatment to al-Qaida and Taliban detainees unless military necessity dictates otherwise.

Let me also make one other thing clear. What happened to some detainees at Abu Ghraib was not humane treatment. We all know that. The Army knows that. Our military knows that. I think all of us here can agree with that. It is also clear to me that the abuses that occurred at Abu Ghraib were contrary to the President's February 7, 2002, memorandum to treat them humanely. Those who committed these abhorrent abuses can and should be vigorously prosecuted and punished, and they are. Right off the bat, the investigation took place. And right off the bat, they are bringing people to justice. There is no doubt about that.

I might add, the President is not given any credit for the prosecutions of Abu Ghraib. The desire of some who always want to score political points leads them to blame all wrongdoings on the President, even in a case like this where he had nothing to do with these actions. Judge Gonzales has made it clear that he does not defend the abuses that occurred.

I am sure there are many people out there who are wondering what any of this has to do with the nomination of Judge Gonzales. Well, I have to undertake this legal analysis because some people have unfairly attacked Judge Gonzales for a draft memorandum with his name on it. The memo was dated 2 weeks before the President's order on February 7, 2002, and it suggests that the Geneva Conventions should not apply to the Taliban.

Several allegations against Judge Gonzales have been raised in the media and elsewhere, and I want to set the record straight.

It appears from recent media accounts that this draft was not even written by Judge Gonzales. As is common in many Government offices, drafts are often initially written by lower level individuals and then edited and approved by the intended high-level author.

We also know this was an early draft because other documents from the State Department indicate that Secretary Colin Powell and legal adviser William H. Taft recommended extensive changes to the draft, as they should have. The recommendations include significant changes to the structure of the memorandum, and how the information is presented, as well as correcting statements of fact and specific language.

Although we do not know what Judge Gonzales actually advised the President, and we cannot because it was confidential advice to the President, we do know the President's February 7, 2002 memorandum is consistent with the views espoused by the State Department at the time.

Judge Gonzales has told this committee that this draft:

> does not represent the final advice given to the President.

It seems odd to me that our colleagues cannot accept his statement on that.

He continued:

> Because it does not embody my final views as provided to the President, I have not endorsed, nor do I have any occasion to disavow, the tentative judgments about certain provisions of the Geneva Conventions reflected in that draft.

Now, some will argue Judge Gonzales ought to tell the Senate precisely what advice he gave the President on this very sensitive issue. The fear I have is that if the Senate demands this information in this instance and the White House succumbs to that demand, it will undermine the candor with which future White House Counsels communicate with future Presidents. I think most people would argue it probably would. That is why these types of conversations are privileged, and not available to the Congress of the United States.

And, I might add, even when it is in the interest of the White House, in most instances this information remains privileged because the executive branch reasonably does not wish to set a precedent that will lead to Congress asking for access to every conversation that occurs in the White House.

In this case, we have some salient facts. The President did not see the January 25, 2002, draft prior to making his February 7, 2002, decision to treat all detainees humanely. And, more important, at the end of the day, President Bush issued a policy directive that did not go as far as some of the legal advisers within the administration told them he could go under the law.

Now, the draft says some provisions of the Geneva Conventions are obsolete and quaint, such as providing athletic uniforms, scientific instruments, advances of salary, and commissary privileges. People have quoted this out of context to say that Judge Gonzales thinks all of the Geneva Conventions are obsolete and quaint.

This is simply nonsense. President Bush and Judge Gonzales know how important the Geneva Conventions are to American military personnel. We all do. As Judge Gonzales told the Judiciary Committee on January 6 of this year:

> Honoring our Geneva obligations provides critical protection for our fighting men and women, and advances norms for the community of nations to follow in times of conflict. Contrary to reports, I consider the Geneva Conventions neither obsolete nor quaint.

Yet I have seen all kinds of comments suggesting otherwise. I know Judge Gonzales. I have worked with Judge Gonzales for 4 solid years. I knew him before those 4 years. He is a man of his word. I take him at his word on this important matter. So should my colleagues in the Senate.

Let me review this one last time because it is an important point. Judge Gonzales has told this committee in writing that he does not believe the Geneva Conventions are obsolete and quaint. He said so under oath in his confirmation hearing, and he said so again in writing in response to questions from Senators.

There have also been allegations that Judge Gonzales, because he has worked closely with President Bush for several years, is somehow incapable of having his own opinions and will be unable to give frank legal advice. I recall that similar accusations were made over 40 years ago with respect to the nomination of Robert F. Kennedy to be Attorney General of all things. As many Americans know, Robert Kennedy was President John F. Kennedy's brother and the brother of our distinguished Senator from Massachusetts and had previously served as the President's campaign manager prior to his nomination to the office of Attorney General. While there was a good deal of controversy whether he, too, could be

independent of his brother as Attorney General before he was confirmed, Robert Kennedy went on to become a great Attorney General, one who was and still is much admired by many in this country. I believe Judge Gonzales, too, can and will exercise that same independence.

I listened carefully to Judge Gonzales's responses during the committee's hearing, and I know that he fully understands the differences between the role of White House Counsel and the role of the Attorney General of the United States. As White House Counsel, in Judge Gonzales's own words:

I have been privileged to advise the President and his staff.

As Judge Gonzales further explained:

As Counsel to the President, my primary focus is on providing counsel to the White House and to the White House staff and the President. I do have a client who has an agenda, and part of my role as Counsel is to provide advice that the President can achieve that agenda lawfully. It is a much different situation as Attorney General, and I know that. My first allegiance is going to be the Constitution and to the laws of the United States.

Judge Gonzales understands that as Attorney General, when confirmed, he would have, as he describes it, ''a far broader responsibility to pursue justice for all the people of our great Nation, to see that the laws are enforced in a fair and impartial manner for all Americans.'' This transition is no different than the type many in this body have made over the years. People from this body, attorneys, work for all kinds of clients and every manner of clients. And the well-trained advocate is always aware of who his client is. To suggest that Judge Gonzales is somehow incapable of making this transition is more than insulting. It is despicable to make that suggestion. He is a bright guy with a lot of ability, and a record of which we should all be proud.

As someone who served in private practice, as a judge, in political positions, and as an advisor to the President, his record is testament to his ability to serve his client well no matter who that is. I know Judge Gonzales. I know he will make this transition. I guarantee you he is no ''yes'' man. He has the character, education, and experience to exercise independent judgment in the interest of the American public.

There have also been some allegations that Judge Gonzales's responses to the approximately 500 questions posed to him during the course of this nomination process were somehow incomplete. These allegations have been made notwithstanding the fact that the New York Times characterized Judge Gonzales's answers to the committee as ''one of the administration's most expansive statements of its position on a variety of issues, particularly regarding laws and policy governing CIA interrogations to terror suspects.''

Some Senators have quoted Judge Gonzales's answers out of context. They focus on the few sentences where they say he refused to provide complete information and ignore all the other sentences in response to some 500 written questions to describe at length all of his knowledge on the wide variety of issues raised by Senators.

Judge Gonzales is not someone who is trying to prevent the committee from seeing documents. To the contrary, Judge Gonzales was instrumental in the White House's release of hundreds of pages of documents revealing the administration's policies relating to the treatment of detainees last June. He helped negotiate among Congress, the Department of Defense, the Department of Justice, and the White House to declassify and publicly release documents relating to the humane treatment of al-Qaida and Taliban detainees, the application of the Geneva Conventions, the War Crimes Act, the Convention Against Torture, the Rome statute, as well as the Defense Department documents relating to specific techniques authorized and the report of the DOD working group which assessed the legal policy and operational issues relating to detainee interrogations in the global war on terrorism.

Frankly, there were good arguments for withholding some of this information or at least making it available to Congress in a classified or nonpublic forum so that the general public and our enemies in particular would not be so well informed about our interrogation techniques. But the administration and Judge Gonzales wanted to provide full disclosure to the public and declassified this information so that everyone would know what went on.

Just last week, Judge Gonzales submitted over 250 pages of responses to written questions after his hearing. That was after questions were supposed to be cut off. We used to do that in this body. We would give a fair amount of questions, which never amounted to as many as these. But just last week Judge Gonzales submitted over 250 pages of responses—single-spaced pages, by the way—to written questions after his hearing. I believe that Judge Gonzales attempted to answer the questions and be responsive. Although the deadline for submitting written questions expired on January 13, 2005, four Democratic Senators filed additional questions to Judge Gonzales on January 19, 21, 24, and 25; I understand even maybe up to the present time. Judge Gonzales provided written answers to all of those questions on or before January 25, 2005. Yet that is still not enough.

Some have tried to make a big deal out of the fact that Judge Gonzales did not personally conduct a search in response to overbroad requests for notes, memoranda, e-mail, audio recordings, or documents of any kind. What my friend from Massachusetts Senator KENNEDY fails to tell the American public, however, is that the White House informed the Judiciary Committee 2 months ago that Judge Gonzales recused himself from the decisionmaking process of releasing documents because of his pending nomination. Judge Gonzales repeated his recusal at his confirmation hearing in the first week of January. Obviously, a person in Judge Gonzales's shoes may have a short-term incentive to release documents to the committee when his nomination is pending. However, the White House may have a very different and legitimate view of such release as part of the historical relationship between the Executive Office of the President and the Congress in releasing information on, for example, matters pertaining to legal advice to the President and the White House Counsel and policy recommendations on matters of national security from White House components.

It makes sense that Judge Gonzales would recuse himself during this time period. I believe it was proper for him to do so. Given Judge Gonzales's recusal, it is understandable why he personally did not conduct a search of White House records. But placing the blame solely on Judge Gonzales is just not right.

Senator KENNEDY focuses on eight instances where Judge Gonzales did not conduct a search. What do these responses have in common? First of all, they are all incredibly overbroad. One request seeks production of all notes, memoranda, e-mail, audio recordings, or documents of any kind that reflect the occurrence and substance of all meetings in which specific interrogation techniques were discussed. The request is not limited to specific documents, or documents written by Judge Gonzales, or received by him. This request wants every e-mail by anybody in the Federal Government who participated in a meeting about interrogation techniques during a war. Come on now.

Another request seeks all notes, memoranda, e-mail, and documents that reflect the CIA's request for legal advice on how far it could go in conducting interrogations, or which interrogation methods it could use and any responsive actions by the White House Counsel's Office and the Department of Justice. Now, you have an overbroad request that holds Judge Gonzales responsible not only for things he did not write, but for e-mails written by others in two different agencies that he has no direct supervision over. Let's get real here.

Let me mention some other points about these requests. In response to each one of these, Judge Gonzales, to his credit, never complains that the requests are unfair and overbroad—even though they are. He responds by saying he has no notes, or that he does not know of any audio recordings, or that he is not aware of any responsive documents. Also, for each of these requests he explains that the materials, if they did exist, would fall under a privilege. Then he says he did not conduct a

search. Imagine how futile it would be to look for e-mail or handwritten notes of other people in other agencies about such a broad topic like interrogation techniques that would then be subject to a privilege?

I know what this tactic is. Ask for the kitchen sink in the hopes of trapping the nominee with an unartful answer, so it can be claimed that he is not forthcoming. In other words, this is pure, unmitigated politics.

It is entirely transparent that the anti-Gonzales vote is pure politics and nothing more.

Judge Gonzales is a good man. He has not tried to hide the ball. There may well be legitimate requests for specific documents made by members of the Judiciary Committee at a later date as we learn more about the abuses at Abu Ghraib. There may also be legitimate questions about when and under what circumstances various executive privileges apply. I don't know, there may be. But this is just not one of those occasions. It is as simple as that.

Look, this is not just any nomination. This is a nomination for the Attorney General of the United States of America. This is the first Hispanic ever nominated for that position, or for any of the big four positions in the Cabinet of any President. I am chairman of the Republican Senatorial Hispanic Task Force. We work with Hispanic people all over America who are every bit as devoted to our country as any citizen who has ever been in this country. I personally love Hispanic people. I can truthfully say I love this man as well because he is a good man. I have seen him give good advice. I have seen him work very hard to try to be accurate. I have seen him cooperate with our committee time after time. I have seen him keep his cool in the face of some of the outrageous requests that were made over the time I was chairman of the Senate Judiciary Committee. I have seen him run the White House Counsel's Office, and he has done a terrific job. He is a good administrator, a good lawyer. He has tremendous judicial experience.

This man, regardless of his background, should be confirmed immediately as Attorney General of the United States of America. Frankly, I know my friends in the Hispanic community, and Hispanic people all over America, are watching this debate, and they are sensing something very unfair going on here. Every Democrat who opposed this man on the Judiciary Committee—virtually every one, as far as I can recall—talked about his great and humble background, how he came from nowhere and accomplished all he did, and what a good man he is. But they always have some reason to vote against him.

I suspect there are a lot of politics being played here. We all know Alberto Gonzales has constantly been mentioned by the media and everybody else as someone who might ultimately wind up on the Supreme Court of the United States of America. Actually, if he never winds up there, being Attorney General is not too bad. It is one of the greatest positions in any country anywhere and certainly in our country. And to have this man come from the most humble of circumstances, which typifies the struggle every immigrant family in this country has gone through, and to not give him this opportunity when he is fully qualified for it, I think, would be a travesty. Let me conclude by telling my colleagues and the American public that I know Alberto Gonzales well. He is a good man. He is a fair man. He understands persecution. He understands prejudice. He understands the need to fight back to make it in this life, regardless of all of the obstacles in his way. I believe when he is confirmed, Judge Gonzales will make an excellent Attorney General. He has been fair to everybody on our committee time after time.

The Senate should not stand in his way of becoming the next Attorney General of the United States. I do not believe it will. I do not believe people should be voting against this good man. If people vote against him, we have to stop and think, ''Why are they doing that to a man of his quality?''

When Judge Gonzales accepted the President's nomination for Attorney General, he said the following:

> When I talk to people around the country, I sometimes tell them that within the Hispanic community there is a shared hope for an opportunity to succeed. Just give me a chance to prove myself—that is a common prayer for those in my community.

I ask my colleagues to do exactly that—give Judge Gonzales a chance to prove himself. He will not let you down. I urge my colleagues to vote for Judge Gonzales to be the next Attorney General of the United States, and we will be very wise if we do so.

I yield the floor.

The PRESIDING OFFICER (Mr. CRAPO). Under the previous order, the Senator from Texas is recognized.

Mr. CORNYN. Mr. President, I find it ironic that we are debating the nomination of this fine nominee for Attorney General and hearing some vehement criticism of not just him but of this administration and its policies in Iraq and combating the war on terror, and when on Sunday we saw free Iraqis conduct their first democratic election in many years, with the kind of turnout that, frankly, brings a little embarrassment to those of us in America because they had such a tremendous outpouring of emotion and support for the opportunity to rise up against their oppressors, thanks to coalition forces and the sacrifices made by the American people and our allies, and be able to do what we do here on a regular basis, and that is let the will of the American people be known through the process of electing our representatives. But here we are, and shortly on the heels of the debate on the nomination of Condoleezza Rice as Secretary of State. Of course, what we are told by those on the other side of the aisle is the outcome of this debate is not in doubt. Even the opponents of Judge Gonzales, just as the opponents of Condoleezza Rice, even as they stand here and claim these are great American success stories, which they are, and claim to personally like and respect these nominees, at the same time we see them excoriated and abused by partisan politics which, unfortunately, I hoped would cease or at least be mitigated somewhat by the results of the election on November 2.

We saw on November 2 not only the President's reelection by substantial margins, but we also saw an increase in our side of the aisle in the Senate and larger numbers in the House. One reason I believe that happened was because of this debate on the wisdom of our policies of this Government, particularly over the last 4 years. We held a popular referendum on November 2 and, frankly, the politics of obstruction and anger were repudiated.

What the American people want and expect is that we will get the business of the American people done in this body and that we will not degenerate into partisan fingerpointing or namecalling, nor obstruction of the kind we have seen occur time and time again against this President's nominees, particularly the judges who have been nominated by this President to circuit courts.

We know that while our friends on the other side of the aisle did have an opportunity for self-examination and reappraisal on November 2, apparently they have been unable or unwilling to change their habits and their destructive approach to this process. Unfortunately, it causes good men and women, such as Al Gonzales and Condoleezza Rice, to have to go through a process that, frankly, does not dishonor them but I think fails to bring honor to this institution and to those who oppose their nominations.

There is no question that we have an obligation in the Senate to seriously conduct our advice and consent function, and certainly no one is suggesting that any Senator should not vote their conscience. That is not what we are talking about. What we are talking about is when we cross the line that should not be crossed between doing our duty, sent here as we were by the people of our various States, and engaging in partisan politics on the floor, particularly on nominations, it is unfortunate.

I want to speak now not about this caricature that has been created by those who oppose this nomination, not the person I really see described by his opponents that I do not recognize, but I want to talk about the real Al Gonzales.

I am pleased Judge Alberto Gonzales happens to be a friend. He is a talented lawyer and a distinguished public servant and a good man. He also happens to be a good Texan and an inspiring American success story. I am proud to call him my friend.

I have known Alberto Gonzales for a number of years, unlike most of the people who are in this body, and that just is because I worked with him and alongside him and had a chance to observe him day in and day out, as he first functioned as the President's then-general counsel when he was Governor of the State of Texas, when he then served in the office of secretary of state for the State of Texas, and then was appointed and then elected to serve on the Texas Supreme Court, which he did for a couple of years before the President of the United States asked him to leave his home behind and come to Washington to work with him in the challenges of the Oval Office, to serve as his legal adviser and White House Counsel.

Little did this President know and little did Alberto Gonzales know that September 11 would forever change the course not only of American history but their lives in such a dramatic and profound way.

The context I think the opponents of this nomination fail to take into account is how much America and our way of life was threatened by those who had no regard for human life, who had no regard for the law of war, but rather than attack our military in a battlefield chose to attack innocent civilians, resulting in the massive loss of human life in Washington, Pennsylvania, and in New York and resulting in almost a trillion dollars' worth of economic loss to the American economy.

Not only is this an extraordinary nominee and a good man, but I suggest to my colleagues that this President and his advisers, including his legal adviser, Alberto Gonzales, were met with challenges they never could have imagined they would have to undertake. It is important to have that context as we judge the work he did.

As I say, I have known Alberto Gonzales for many years, and I can tell you the media is absolutely right when they call him the man from Humble. For those who are not from Texas, that refers to Humble, TX, where he was raised, but also the fact that he is a modest, self-effacing man. He is the son of migrant workers. His childhood home, where his mother still lives today, was built by his father and his uncle.

As a child, he earned a little bit of money selling soft drinks at Rice University stadium and there, as he looked over the football games being played in that stadium, he dreamed of one day possibly going to school at Rice University.

Alberto Gonzales was the first person in his family to attend college. Because of the love and support of his family, his hard work and determination, he graduated from Rice University. In other words, his dream came true. Then he went on to graduate from Harvard Law School, two of the most prestigious institutions in this country.

Was it because he was born with a silver spoon in his mouth or was a child of privilege or knew powerful people? I suggest the answer to that is absolutely not. The reason Alberto Gonzales was successful in achieving his educational dreams is because of the love and support of his family and because of the hard work that in America ought to be rewarded and not discouraged.

Indeed, this is a man who not only, after he went to college, went on to work in one of the most prestigious law firms in the United States of America, but was one of its first minority partners. Yes, it was this young lawyer, after about 10 years of practice, who was first identified by an aspiring Governor of the State of Texas, George W. Bush.

It cannot be lost in this debate, as it goes on today, tomorrow, and Thursday, that Judge Alberto Gonzales is truly an inspiration to all of us who still believe in the American dream.

His nomination to be the 80th Attorney General of the United States of America, the chief law enforcement officer of this great country and our first Hispanic Attorney General, that story should by all accounts have a happy ending. But unfortunately that is not the way Washington works. Once again, we will see that this confirmation process is unnecessarily partisan, even cruel to those who have selflessly dedicated themselves to serving the American people. Only in Washington would a good man such as Alberto Gonzales, the personification of the American dream, someone who has pulled himself up by his bootstraps by dint of hard work and determination and the love and support of his family—only in Washington would we see that a man such as this would get raked over the coals for doing his job.

This must be a little disorienting to Judge Gonzales and his family, because, frankly, he comes from that part of America that believes America should always be a place where honesty, determination, and diligence are rewarded.

I want to talk a little bit about some of the specifics of the accusations made against Judge Gonzales, because I don't think we can take for granted that this is particularly well understood. They have to do with arcane matters, albeit important matters such as the Geneva Convention and the law of war, with the limits on interrogation techniques that can be humanely employed by the United States as a matter of policy, but first, I wish to point out that not only does a majority of the Senate stand ready to vote and confirm this particularly well-qualified and distinguished nominee, there are a number of groups around the country which support his nomination. I heard—and this happens to be a pet peeve of mine—that someone said the Hispanic Caucus in the U.S. House of Representatives opposes Alberto Gonzales's nomination.

What that person did not say is that the Hispanic Caucus in the House of Representatives is composed only of Democrats. Indeed, there are Hispanics, both in the House and in the Senate, who support Judge Gonzales's nomination, as well as groups from all around the country that believe this nomination should not hit a glass ceiling but, rather, be an example for all Hispanics who look for reward for their hard work and labor in American society and which see this as an opportunity to elevate one of their own as a role model to young boys and girls as they go to school and work hard and try to achieve their American dream. The National Council of La Raza, the Hispanic Alliance for Progress Institute, the Texas Association of Mexican American Chamber of Commerce, the New America Alliance, the American-Latino Business Initiative, the National Association of Latino Elected and Appointed Officials, the Congressional Hispanic Conference, the League of United Latin American Citizens, the Hispanic National Bar Association, the Latino Coalition, the National Association of Latino Leaders, the United States Hispanic Chamber of Commerce, the Hispanic Association of Colleges and Universities, MANA, a National Latino Association, the National Association of Hispanic Publishers, the Hispanic Roundtable, and the National Association of Hispanic Firefighters endorse Alberto Gonzales's nomination to serve as this Nation's 80th Attorney General.

I don't want those listening by reference to a solely Democratic caucus in the House of Representatives, by hearing they do not support his nomination to be under the misapprehension that Latinos in this country do not overwhelmingly support this nominee, because they do.

I would point out finally, with regard to the Hispanic Caucus in the House, the solely Democratic-member caucus, they didn't support Miguel Estrada's nomination to the District of Columbia Court of Appeals, either. Frankly, it is beginning to be an unseemly trend.

Let me talk a minute about the Geneva Convention because this is, as many legal matters are, somewhat confusing. Frankly, we get down so far into the weeds on this that people's eyes glaze over and roll back into their heads and they quit receiving any additional information. But the bottom line is this: Judge Gonzales advised the President that all detainees in the war on terror—whether they be al-Qaida fighters, whether they be Taliban, whether they be the Iraqi military when we went into Iraq; all—as a matter of policy of this Government, be treated humanely. In other words, Alberto Gonzales, this President, this Government, and all of its officials have said we oppose torture in any form as a means to get intelligence from detainees, whether they be classified as unlawful combatants or are covered by the Geneva Convention.

Indeed, that is what Alberto Gonzales said in a memo he wrote to the President dated February 7, 2002, and which

the President adopted. It is the policy of this Government to treat detainees—no matter how they be classified—humanely, and that we condemn the use of torture as a matter of national policy.

You would never know it by some of the statements, some of the misstatements and some of the disinformation that has been spread about this nominee. Unfortunately, it has been harmful to our effort in the war on terror. This should come as fairly straightforward information, but let me just emphasize it. I asked this question repeatedly during the course of the hearings we had with Judge Gonzales. I said: Does anybody here take the position that America should not use all lawful means to obtain actionable intelligence that would save American lives? Does anyone take the position that we should not use all lawful means to obtain actionable intelligence that would save human lives?

Thankfully, notwithstanding some of the rhetoric we have heard and maybe some of the confusion we have heard propagated during this debate, everyone said: No, we agree with that. You should use all lawful means to get actionable intelligence to save American lives.

What I was thinking back to was a hearing we had before the Senate Armed Services Committee on May 14, 2004. I asked that question of two of our Nation's most distinguished military leaders, MG Geoffrey Miller, who was in charge of the detention facilities there at Guantanamo, where many of the al-Qaida fighters are kept who have been the subject of news reports and some discussion and litigation. I also asked GEN John Abizaid, who is the commander of the U.S. central command, including Iraq. I will just read what General Abizaid said:

I will start with a question.

I said: ''In your opinion, General Miller, is the military intelligence you have been able to gain from those who have recruited, financed and carried out terrorist activities against the United States or our military, has that intelligence as a consequence that you gained saved American lives?''

General Miller said: ''Senator, absolutely.''

So I asked General Abizaid, who was also there on the same panel, I said: ''Would you confirm for us, General Abizaid, that it is also true within the Central Command''—which includes Iraq, Afghanistan, and I think it covers 26 countries. I may be off one or two.

But General Abizaid, the commander of U.S. Central Command, said: ''Senator, I agree that is true. And I'd also like to add that some of these people we are dealing with are some of the most despicable characters you could ever imagine. They spend every waking moment trying to figure out how to deliver a weapon of mass destruction into the middle of our country, and we should not kid ourselves about what they are capable of doing to us and we have to deal with them.''

I said: ''General Abizaid, if we needed any other reminder than that of the death of Nicholas Berg, I believe that reminds us again in a graphic fashion.''

You will recall that it was Nicholas Berg who was captured by terrorists, who then was beheaded on camera, and that film was shown to the entire world.

Our enemy does not play by the rules. They are not constrained by the law of war or the Geneva Convention. They believe it is perfectly acceptable to kill innocent civilians by suicide bombing attacks, as we have seen. And they believe it is perfectly acceptable to behead unarmed hostages as a means to carry out their reign of terror.

On the matter of the Geneva Convention, it is clear that it is important for us to get actionable intelligence using humane and legally acceptable means. Any suggestion that Judge Gonzales believes inhumane or illegal means are acceptable is simply not supported by any facts.

Frankly, on the matter of the applicability of the Geneva Convention, Judge Gonzales is right. You don't have to take my word for it.

First, I heard the Senator from Utah, Senator HATCH, former chairman of the Judiciary Committee, point out that al-Qaida never signed the Geneva Convention. But people may say, Well, that is a technical matter but it is part of it.

I will tell you that the Red Cross's own guidelines, which I hold here in my hand, have four requirements, four conditions of lawful combat, none of which al-Qaida meets.

Here again I ask: Does anyone in this body or anywhere across the country seriously argue that al-Qaida complies with the law of war? Judge Gonzales is not binding himself in his legal conclusion about the applicability of the Geneva Convention. Even though you say it might not meet the letter of the rules set out in this book I held up, the International Committee of the Red Cross Guidelines on the Geneva Convention, I would suggest this is important. Three Federal courts have concluded that Judge Gonzales's legal advice was correct. It has also been endorsed by numerous legal scholars and international legal experts across the political spectrum, as well as the 9/11 Commission, as well as a report given by the Schlesinger Commission, which was one of the commissions appointed to review the detention operations both at Guantanamo Bay and Abu Ghraib.

Finally, in addition to those decisions by the Federal court, the 9/11 Commission, and the Schlesinger report, I would say a brief filed in a recent Supreme Court case by former Carter administration officials, former State Department legal advisers, judge advocates general, military commanders, and liberal international law scholars, has agreed with Judge Gonzales's conclusion about the applicability of the Geneva Convention to al-Qaida.

As a matter of fact, these legal scholars said the President's conclusions that members of al-Qaida and the Taliban are unlawful combatants is clearly correct.

I would say to those who have been loose with the law and facts with regard to the Geneva Convention, they need to doublecheck their information, because time and time and time again Judge Gonzales's legal advice to the President has been shown to be correct.

But I must say again, this is not the same as saying we are going to treat these detainees in an inhumane fashion or that we are going to engage in torture. We are not. But some have inflated those two, saying if the Geneva Convention doesn't apply, what you are saying is there are no rules and anything goes, which is absolutely false. That is not what I am saying. That is not what Judge Gonzales said, that is not what the President says, and that is not the policy of the U.S. Government.

One last thing on the Geneva Convention. My father's generation, which was part of the ''greatest generation'' that fought in World War II—there are a lot of television shows and movies that depict how POWs are maintained. One of them I remember watching when I was a kid was called ''Hogan's Heroes.'' You know what the Geneva Convention is designed to do—to protect American soldiers by providing reciprocal treatment by nations that we are at war with so our soldiers, sailors, marines, and airmen will be kept in a humane and appropriate fashion. But, of course, that presupposes the Geneva Convention applies, and that your enemy respects the law of war and shows some sort of self-restraint, something al-Qaida and the Taliban have not shown at all.

But does anybody believe that we ought not to be able to entice detainees to respond by offering creature comforts or other preferential treatment?

For example, when I went to Guantanamo and observed detention of al-Qaida terrorists there, it was explained to me by General Miller that they would sometimes use a little better food, maybe a change of the diet, perhaps allow people to cook on a grill outside and sort of encourage them to cooperate by more appetizing food, or maybe even move them from an individual cell into a community cell block where they could associate with one other and have a little greater freedom of movement. Those were some of the techniques being used there which would not be available if the Geneva Convention applied.

Surely those who oppose this nomination cannot believe that al-Qaida terrorists deserve to be treated better than an American citizen accused of a crime, which is in essence what they are saying.

I know I have dwelled upon this subject for a while, but let me conclude on

this because, frankly, you hear the same old, tired, worn-out arguments being brought up time and time again without regard to the facts as I have explained them or the law as I have explained it.

There was a time actually when President Reagan was in office where there was a proposed amendment to the Geneva Convention, known as Protocol I of 1977, that would have actually extended the Geneva Convention to terrorists. President Reagan said: ''We must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.'' We did not adopt that amendment but, indeed, we rejected it.

Notably at the time, even the New York Times and the Washington Post agreed. The Times called the President's position ''sound'' while the Post said it was right and even accused opponents of that of hijacking the Geneva Convention.

But, my, how far we have come to this hyperpoliticized environment where the facts and the law seem to take a backseat, and continuation of some of the political campaign tactics that we saw before November 2 have now carried over after the election not directed only at the President but now directed at his nominees.

All this support from multiple Federal courts, the 9/11 Commission, the Schlesinger report, liberal international legal scholars, Carter administration officials, even the New York Times and the Washington Post, and yet Judge Gonzales is being criticized by opponents of his nomination for taking the exact same position with regard to the applicability of the Geneva Convention.

All I can say is, it is only in Washington.

Let me touch on one other legal issue that gets down into the weeds. Judge Gonzales has been criticized for trying to understand what Congress meant when it passed the law prohibiting the use of torture, the so-called torture statute. The memo he is being criticized for he did not write, and the language defining what was torture and what was not torture that he is being criticized for, he did not write that statute either. Congress wrote that statute.

If Judge Gonzales, the officials at the Department of Defense, if the U.S. Government, including this administration, had so little regard for the law and basic human norms like humane treatment of detainees, why in the world would they go through all of this trouble to try to figure out what exactly did Congress intend and what are the limits? The reason is not to find a limit so you can find a way around the statute, it is to find how do you comply with the law because Government officials know if you violate the law, you, too, are accountable in a court of law.

Frankly, today—maybe it is a sign of the times—even military commanders, the Secretary of Defense, and other high Government officials do not make a move without consulting their lawyer because of their concern, No. 1, about complying with the law; and, No. 2, the consequences of failing to comply with the law.

It is simply unfair to attack Judge Gonzales again for a memo he did not write and a statute that defines torture that he did not write either, that Congress did. So I suggest some of the opponents of this outstanding nominee, if they do not like what the torture statute says, if they do not like the effort to try to understand and explain it, maybe they ought to look in the mirror and maybe we ought to go back to work and be more clear about what we mean when we say torture is illegal and what the limits are of that.

Again, everyone agrees—or at least I have not heard anyone object yet—to the goal of using all lawful means to obtain actionable intelligence to save American lives. And how can you determine what those lawful means are unless you examine the treaties and the statutes and other laws that deal with what the permissible limits of interrogation techniques are and use that as a bright line to determine what is legal, permissible, what is humane and what is not.

Let me mention, some have again tried to confuse the issue by taking the criminal conduct of a few at Abu Ghraib prison and suggesting that somehow this reflects the policy of this administration and of the U.S. Government.

Not only is that suggestion an insult to all law-abiding Americans, and particularly those men and women in uniform who are serving honorably and who made the celebrations following the election in Iraq on Sunday possible, but to try to paint with such a broad brush and to say this is a matter of policy or practice and nobody cares what the law is and, you know what, we are going to take a few bad actors and people who cross the line between legality and illegality and we will basically suggest everybody is in the same big pot. That pot is people who have committed criminal acts against detainees and prisoners at Abu Ghraib.

It is safe to say that everyone agrees Abu Ghraib was a shameful episode in our Nation's history. Yet again some want to actually exploit that tragedy, that shameful episode by a few, for political points. Abu Ghraib is a serious matter. It should be treated seriously. Indeed, it has been.

The Senate Armed Services Committee has held hearing after hearing after hearing to try to get to the bottom of what happened. The U.S. Department of Defense has conducted at least eight different investigations to try to figure out what went wrong and how to make sure it does not happen again, but to also hold those who cross the line into criminal conduct accountable. Indeed, we have seen that happen.

Abu Ghraib should be treated seriously and not politically. Even the Schlesinger report—and I know there have been suggestions that somehow the acts of a few miscreants at Abu Ghraib reflect broad, widespread disregard for basic human rights of these detainees, or maybe somehow reflects the use of permissible interrogation techniques approved by the Department of Justice—here again the Schlesinger report, composed of a bipartisan commission to investigate what happened at Abu Ghraib, concluded:

> No approved procedures called for or allowed the kinds of abuses that, in fact, occurred. There is no evidence of a policy of abuse promulgated by senior officials or military authorities.

If there is no evidence of a policy of abuse promulgated by senior officials or military authorities, and if there is no evidence whatever that Judge Gonzales was in any way responsible for this, why are we talking about Abu Ghraib during Judge Gonzales's confirmation? Again, I suggest this is not about Alberto Gonzales and his fitness to serve. This, unfortunately, has crossed the line into partisan politics, a place we should not go.

I am proud of my friend, Judge Alberto Gonzales. He is a source of great inspiration and pride to his family, his friends, and to the great State of Texas from where we both come. Time and time again, Judge Gonzales has done his duty in the war on terrorism. It disheartens me to see him held up to ridicule, distortions, and outright lies for being the patriot that he is.

I also will speak, because I know others will address this—I have not been able to listen to all of the debate, but I have quite a bit of it. I know this matter came up in the committee and it is important to set the record straight. Judge Gonzales appeared before the committee and answered question after question by the members of the Senate Judiciary Committee. Of course, that was broadcast on C–SPAN for people all across the world to see. My own impression was that Judge Gonzales did his very best to answer the questions that were asked of him.

Some members of the committee purported to be dissatisfied with the opportunity they were given to ask questions, and they had additional questions to ask. I hold in my hand more than 400 questions—and these are on single-spaced pages—more than 400 questions asked of Judge Gonzales after the hearing, and they generated 440 responses encompassing 221 single-spaced pages. After the New York Times argued that Judge Gonzales was very forthcoming in his responses to the committee, there was another request made, and at that time an additional 54 written responses were provided on 27 single-spaced pages. There were requests for copies of documents, some of which I have in my hand. I do not claim these are all of them, but I do believe it is a representative sample of what Judge Gonzales was actually provided. I will get to who provided it in a minute.

I think all fairminded people would conclude not only did Judge Gonzales attempt, to the best of his ability, to answer questions asked him of the committee when we were in open session, but at least on two occasions answered other questions. On one occasion he gave 440 answers in a 227-page, single-spaced response, again provided additional written responses in 27 additional pages, and he also provided more than 200 documents to go along with his answers.

So I think any fairminded person would have to conclude Judge Gonzales has tried his best to be responsive. I do think it is important to point out, as I believe Senator HATCH did earlier, that actually Judge Gonzales recused himself from providing these responses or answering the questions. In other words, he felt it was improper for him to have a personal hand in crafting the responses to the document requests or necessarily questions directed to the White House or to some other party.

So many of the responses, particularly to document requests, came from the White House Counsel's Office provided by, I believe it was Mr. Leitch, that Judge Gonzales had actually no hand in. But that was in an effort on his part to try to be fair and even-handed and to basically take himself out of any controversy and leave it up to the committee, those requesting the documents, and the White House. I believe that was appropriate.

So time and time again, we have seen that the real Al Gonzales is not the caricature that has been painted by his opponents during this confirmation process. Time and time again, we have seen that not only do the American people view Alberto Gonzales as a personification of the American dream, he is a source of pride and admiration for Hispanic organizations and Hispanics all across this great land of ours, as he well should be.

Notwithstanding what we have heard from opponents of this nomination, and of this administration, Judge Alberto Gonzales has condemned the use of torture on detainees, prisoners of war, anyone in American custody. Indeed, he has insisted, as a matter of American policy and law, on humane treatment. But he also believes, as the true patriot he is, that it is important we not lose the overall context of where this is happening and how this is happening.

Alberto Gonzales believes, as I believe everyone—at least no one objected here on this side of the ocean—who supports freedom and democracy for the Iraqi people believes, it is important we continue to use all lawful means to obtain actionable intelligence to save American lives and to help ensure our success against the insurgents who still plague Iraq.

I believe that on fair analysis by those who would listen to the facts and the arguments on both sides of this particular debate, there is only one reasonable, nonpolitical conclusion, and that is, this nominee should be confirmed, and should be confirmed overwhelmingly by the Senate.

After we saw the opposition to Condoleezza Rice's nomination, I was gratified to see that at least she received the vote of 85 Members of the Senate in a bipartisan fashion. But I was troubled when, even though several members of the Senate Judiciary Committee said they would likely be voting in favor of Alberto Gonzales's nomination, they have now changed their tune. We saw a strict party-line vote in the Senate Judiciary Committee: all Republicans supporting his nomination, all Democrats opposing it.

So, unfortunately, I was left with the conclusion that we have seen now again a continuation of the bitter politics of this confirmation process which not only I think fails to bring honor to this institution but which I think does a real disservice to the honorable men and women who agree to serve in important positions such as Secretary of State and Attorney General.

But I also say it does not bode well for the hoped-for beginning of a new Congress on the President's judicial nominees. We know the President intends to send up 10 nominees who were previously filibustered by the other side. I would have thought that after the election they would have reconsidered that course. But here again, I think we have seen an unfortunate continuation of the tactics and the bad habits that perhaps our opponents in this debate have lapsed into. And perhaps they know no other way to proceed, other than through obstruction and through mischaracterization of this nominee's fine record. We should confirm Alberto Gonzales as the 80th Attorney General of the United States, and do so overwhelmingly.

Thank you, Mr. President.

The PRESIDING OFFICER (Mr. MARTINEZ). Under the previous order, the Chair now recognizes the Senator from Massachusetts.

Mr. KENNEDY. I thank the Chair. I talked to the floor manager and indicated I was going to ask unanimous consent that the Senator from Florida, Mr. NELSON, be recognized and permitted to speak for 15 minutes after I yield the floor.

Mr. SPECTER. Mr. President, is there a 15-minute time limit on how long Senator NELSON will speak?

Mr. KENNEDY. That was the time he requested, and that is the time I ask unanimous consent for.

Mr. SPECTER. Sounds good.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. KENNEDY. I thank the Chair.

Mr. President, as others have said, this is an extremely important nomination. I think all of us in this body take our responsibilities seriously. Those of us who have expressed some concern and reservation, even opposition, to this nominee are filled with admiration about his own personal story. I have said at other times, I wish I could vote for the story, not the individual, because the story, as has been pointed out, is the story of the American dream.

But there are decisions that were made when this nominee had important responsibilities that I think are in conflict with American values. The primary issue I am concerned about and that I find should be of concern to the American people is his attitude when he was the President's Counsel on the development of a policy of torture, which has been recognized by the Federal Bureau of Investigation, by the Central Intelligence Agency, by the Defense Intelligence Agency, by the Red Cross.

There is no question that he was at the epicenter in terms of the development of that policy. I think that is what is at issue; at least it is for me. And I think it is important that our colleagues have an opportunity to listen to the record.

I listened to my friend and colleague from Texas speak on his behalf, and I certainly respect his presentation. But I think the facts speak otherwise on a number of important points.

Earlier the chairman of the committee, Senator SPECTER, said in reference to the correspondence from the Department of Justice that he was not satisfied with the Justice response to Senator DURBIN's and my request for the memos relating to a New York Times story, again related to torture. And I am certainly not, either.

What the Justice Department said was that they brief the Intelligence Committee on these memos and the materials then are classified. That does not help the rest of us. We still need to know whether the Times story was accurate. We are all cleared, obviously, as Members of the Senate to classified information. We need the information to decide on the Gonzales nomination, and we should have it before the vote.

In the final paragraph of the note from the Justice Department, it says:

> Finally, the Office of Legal Counsel in its recent memorandum of December 30 stated we have received this office's prior opinions addressing issues involving interrogation of detainees and do not believe that any of their conclusions would be different under the standards set forth in the memorandum.

So the Justice Department piles secrecy upon secrecy.

Then in a letter received today, they refused to provide the second Bybee memo.

Justice says basically what the administration has said: Don't worry, it is taken care of. You in the Senate don't have to worry very much about it.

I find that troublesome.

Mr. SPECTER. Will the Senator from Massachusetts yield?

Mr. KENNEDY. I am glad to yield briefly.

Mr. SPECTER. I think the Senator misunderstood me. I did not say that I was dissatisfied with what the Department of Justice had submitted. What I

did was to ask them to respond to the letter which I received this morning from you and Senator DURBIN, and they responded with a letter which I have put in the RECORD where they have said that the second memo was not a memo that went to Judge Gonzales, but it was a memo that went from the Department of Justice to another client who had inquired as to what were the parameters of appropriate questioning. And the Department of Justice said that it had classified information and they would not release it and that it had been identified in previous correspondence with Senator LEAHY and that it had been the subject of a briefing of a chairman of a relevant committee on the customer client.

I think all of this may boil down to a request by the CIA—I am speculating now; I want that clear for the record because that is not what the letter said—in that there was later a briefing to the chairman of the Intelligence Committee. So the matter did not go to Judge Gonzales, and that is a reason for not making the disclosure because he did not actually receive it. But I thank the Senator from Massachusetts for letting me comment. But I had not said that I was dissatisfied with what the Department of Justice had done.

Mr. KENNEDY. Mr. President, this is all about the issue of torture. We are talking about torture and the role that Mr. Gonzales played in the development of the dramatic change in American policy that overrode statutes that had been passed in the Senate and treaties which the Senate had signed. It is about torture. He is the legal counsel for the President. I will get back into the history of his role in this. But to dismiss a relevant document that is about torture, that is related to the subject matter of Mr. Gonzales, and think that we don't have an opportunity or right to review that, I find troublesome. I don't know what the administration is attempting to hide. I will come back to that later in my presentation about the failing of the responsiveness of Mr. Gonzales on these issues. It seems to me that any fair reading of this memoranda, of the questions that Senator DURBIN and I asked, and reading of the Department of Justice memorandum would find them completely unresponsive. If that is not what the chairman of the committee says, I say it. I will move on.

This is one of the most important votes the Senate will take this year. The issues raised by Mr. Gonzales's nomination go to the heart of what America stands for in the world and the fundamental values that define us as a nation: our commitment to individual dignity, our respect for the rule of law, and our reputation around the world as a beacon for human rights, not as a violator of human rights.

President Bush said it well in his inaugural address last month:

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.

The world is watching to see if our actions match our rhetoric.

How can the Senate possibly approve the nomination of Mr. Gonzales as Attorney General of the United States, the official who symbolizes our respect for the rule of law, when Mr. Gonzales is the official in the Bush administration who, as the White House Counsel, advised the President that torture was an acceptable method of interrogation in Afghanistan, Guantanamo, and Iraq? Torture is contrary to all that we stand for as Americans. It violates our basic values. It is alien to our military's longstanding rules and tradition. We send our men and women in the armed services into battle to stop torture in other countries, not to participate in it themselves.

These values did not change or become less relevant after 9/11. Americans did not resolve to set aside our values or the Constitution after those vicious attacks. We didn't decide as a nation to stoop to the level of the terrorists. To the contrary, Americans have been united in their belief that an essential part of winning the war on terrorism and protecting the country for the future is safeguarding the ideals and the values that America stands for at home and around the world.

Americans agree that torture is and should remain beyond the pale. A recent pole in USA Today showed that Americans strongly disapprove of the interrogation tactics that have been used in Iraq, Afghanistan, and Guantanamo, including the use of painful stress positions, sexual humiliation, threatening prisoners with dogs, threatening to ship them to countries known to practice torture. The American public has held fast to our most basic fundamental values. How could our Government have gone so wrong?

Mr. Gonzales is at the center of a torture policy that has run roughshod over the values that Americans hold so dear. On issue after issue in developing this policy he has endorsed expediency over the rule of law. He adopted an absurdly narrow definition of torture in order to permit extreme interrogation practices. He advocated an unjustifiably expansive view of Presidential power, purporting to put the executive branch above the law. He ignored plain language of the Geneva Conventions in an attempt to immunize those who may commit war crimes. He continues to push a discredited interpretation of our treaty obligations to permit the CIA to commit cruel, inhuman, and degrading acts outside of the United States. He refuses to be candid about his interpretations, policies, and intentions.

The administration's policy on torture was established in August of 2002 in a Justice Department document called the Bybee or, more accurately, the Bybee-Gonzales memorandum. The memorandum was written at Mr. Gonzales's request. It reads: ''Memorandum for Alberto R. Gonzales, Counsel to the President.''

The first two sentences read:

You have asked for our Office's views regarding the standards of conduct under the Convention Against Torture and the Anti-Torture Statute passed by Congress in 1994. As we understand it, this question has arisen in the context of the conduct of interrogations outside the United States.

After its release in August 2002, the memoranda became the official policy on interrogations by the Defense Department and the CIA for 2½ years, until it was repudiated just last month at the last minute on the eve of Mr. Gonzales's nomination.

Yet, Mr. Gonzales refused to tell us anything about how the Bybee-Gonzales 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.

I have here the questions I had submitted, which were filed on January 18:

Did you participate in meetings where specific interrogation techniques were discussed?

I will include the full answers, but included in the answer is this:

For me to provide details about the methods of questioning terrorists mentioned in meetings that I attended would entail discussing classified information, and I am not at liberty to do so.

Could you tell the positions taken by the individuals present at the meetings when these topics were discussed?

Any meeting of the type you described, any records reflecting the information you specify would involve predecisional deliberations, and I am not at liberty to disclose.

What are predecisional deliberations? Is that executive privilege? If so, why don't they say it? If not, he has a requirement, and the committee should not have passed them out unless he was going to answer the questions.

Then it goes on:

Identify any notes or memoranda reflecting the CIA's request, any responsive actions by your office and the Department of Justice.

Any meeting of that type would involve predecisional deliberations and I am not at liberty to disclose.

Well, in preparation for your hearing, or since the hearing, did you review documents relating to the Bybee memorandum and its history?

I have conducted no search to the extent the documents requested may exist; moreover, they would involve deliberative material and I am not at liberty to disclose.

I listened to my colleagues on the other side talk about all of the questions asked, and I have 4 pages, 5 books, 16 documents. These are the answers. This is all part of the record. ''I am not at liberty to disclose,'' he says.

It goes on:

Identify notes or correspondence reflecting advice or assessments, recommendations and your views on these issues.

Answer:

I have not conducted a search.

The issue was torture.

I have not conducted a search. Any records reflecting the information you specify would involve deliberative material, and I am not at liberty to disclose.

There it is, Mr. President. I will not take the time to go on. I will include those questions in the RECORD. They conducted a word search about torture, another word. It didn't kick out and they said: We conducted a complete search, and this is the best we can do for his answers. It is an insult to not just the Senate of the United States but the American people on the issue of torture.

We are talking about basically the single issue that is involved in the remarks I am making, about his role in the development of torture. Talk about values in this country, this is torture.

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-Gonzales 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, to use the obscure word resorted to by the administration, somehow ''migrated'' to U.S. military operations in Afghanistan and Iraq, as if no human hand had been involved in the dissemination.

Torture became a pervasive practice. The FBI says so. The Red Cross says so. The Defense Intelligence Agency says so. The Defense Department says it has investigated more than 300 cases of detainee torture, sexual assault, and other abuse. Additional allegations of abuse—many of them too sickening to be described in open session on the floor of the Senate—are reported almost daily. Yet, Mr. Gonzales can't remember the details of how any of it happened.

The Judiciary Committee has 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 our 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 the constitutional role of the Senate in considering nominations.

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 prohibition against providing classified material to Congress. It's 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 decides 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 policy on prisoner detention and interrogation 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 their legal justification goes to the heart of the issue whether he should be confirmed as the Nation's chief law enforcement officer.

If we vote to confirm this nominee 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-Gonzales memorandum was not a law review article or newspaper op-ed article. 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.

We learned this past weekend from a New York Times article that the Justice Department's Criminal Division—then headed by Assistant Attorney General Michael Chertoff, now the nominee to head the Department of Homeland Security—was advising the CIA on the legality of specific interrogation techniques, using the Bybee-Gonzales memo as its legal guideline.

Further, the Times reported that there is a second Bybee memo which goes into even more detail than the first about which methods of coercion can be used. We have repeatedly asked for information about the original Bybee-Gonzales memo and how it was used. The nominee and the White House have stonewalled us. We have repeatedly asked for other documents to be produced that would be relevant to understanding the first Bybee-Gonzales memo. The nominee and the White House have stonewalled us.

Yesterday, Senator DURBIN and I wrote a letter to the ranking members of the Judiciary and Government Accountability Committees outlining the pressing need for all relevant documents before we proceed to fully consider the nomination. Senator DURBIN and I wrote:

It is clear that the Senate should have the documents before it votes on these two nominations, since such materials go to the heart of the qualifications of the nominees to serve in the sensitive and important positions which they have been nominated for.

As far as we know, until the Department released its revised version of the memorandum last month, the Bybee memorandum was the official and definitive 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.

Given the recent New York Times article, it may be that in addition to the second Bybee memo, which we do not have, there are other memos on torture that the White House refuses to disclose.

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 Bybee memorandum the most clearly legally erroneous opinion he has ever read. As he told the Judiciary Committee:

If the counsel for the President receives such an opinion, 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 the executive branch policy, was incorporated into the DOD working group report, and remained as executive branch policy for some 2½ years, during which time I believe that a permissive environment was inevitably created.

That is what Harold Koh said at the hearing. I hope every Member of the Senate will take the time to read his testimony.

In his response to our questions about the Bybee memorandum, Mr. Gonzales said 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 2½ years ago.''

He did say, however, that he believed at the time it was ''a good-faith effort'' to interpret the antitorture 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. They are summarized on the memo's final page. 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. That is what the memo said: The pain ''must be of an intensity akin to that which accompanies serious physical injury, such as death or organ failure.''

Second, the memo said that the President has the inherent constitutional power as Commander in Chief to

override the prohibitions against torture enacted by the Congress. Application of the antitorture statute ''to interrogations undertaken pursuant to the President's Commander in Chief powers may be unconstitutional,'' the memo said.

Third, the memo said that even if a Government official were to commit torture under the extremely narrow definition set forth, abusers could still invoke the defenses of ''necessity'' or ''self-defense.'' As the memo states, ''necessity or self-defense could provide justification that would eliminate any criminal liability.'' The memo made this outlandish claim 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.

Fourth, the memo states that even if the person inflicting pain knew that severe pain would result from his actions, he would not be guilty of a crime even if he acted without good faith if causing harm was not his primary objective. This analysis defines ''intent'' in a way that defines away any instances of torture. This is one of the serious errors in the Bybee-Gonzales memo that was contradicted in the new OLC memo of December 30, 2004, which replaced the original memo.

None of these points qualify as a reasonable or ''good faith'' legal argument. The Bybee memorandum defined torture so narrowly that Saddam Hussein's lieutenants 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—none of these categories are specifically prohibited under the Bybee memorandum since none involve near death or organ failure, the specific conditions required by the memo to constitute torture.

As Chairman SPECTER himself said today, the original Bybee-Gonzales memo was ''erroneous in its legal conclusions,'' and its definition of torture ''was not realistic or adequate.''

Nevertheless, Mr. Gonzales allowed it to stand for over 2 years and allowed it to be disseminated to other agencies, such as DOD, where major portions were absorbed verbatim into official policy. And now we know from the Times that it was used in the Justice Department to approve specific extreme methods for the CIA.

Mr. Gonzales also refused to tell us whether the extreme conduct at Guantanamo described in the FBI e-mails is illegal.

This conduct included burning detainees with lighted cigarettes, exposing them to extreme temperatures, giving forcible enemas, holding them in prolonged stress positions in their urine or feces. He explained his refusal to respond by saying to us:

> [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-Qaida with a roadmap concerning the interrogation that captured terrorists can expect to face.

That is arrant nonsense. Our laws and treaties, 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.

How can we confirm as the chief law enforcement officer a nominee who is afraid to stand up for the rule of law?

To reach this 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. The revision last December of the Bybee memoranda refuted this analysis stating that 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 memo's original definition of torture is wrong. If it is applied in other countries, U.S. soldiers and citizens traveling abroad would clearly be at risk.

The Bybee memorandum provisions on executive power are also wholly inconsistent with the separations of power 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 antitorture 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'' for 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 on this issue by committee members. To this day, we still do not know whether the President believes he has the power as Commander in Chief to authorize torture. There is no such thing as a Commander in Chief override.

It is 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's 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 in any nominee for Attorney General.

Mr. Gonzales has also demonstrated a flagrant disregard for the rule of law in his effort to facilitate the CIA 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 at the CIA's direction, as many as 100 detainees at Abu Ghraib had been hidden from the Red Cross and that the CIA 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 have learned that Mr. Gonzales was a major architect of this policy. On March 19, 2004, the Justice Department provided him with a draft memorandum—the so-called ''Goldsmith Memorandum''—to allow the CIA to ship certain persons out of Iraq. Once again, the memo's first page reads, ''Memorandum for Alberto R. Gonzales, Counsel to the President.'' A separate cover page confirms that the opinion was requested by him. It is hard to imagine a clearer smoking gun.

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. Scott Silliman, an expert in military law at Duke University, observed that the Goldsmith memorandum:

> Seeks to create a legal regime justifying conduct that the international community

clearly considers in violation of international law and the Convention.

Although the memo was labeled ''draft,'' it was put into action. In October 2004, the Washington Post reported that one intelligence official familiar with the operation said the CIA 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 preposterous. Yet it appears to have provided a legal justification for the CIA to commit war crimes. As with the Bybee Memorandum, Mr. Gonzales has categorically refused to answer the Senate'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 does not know whether the CIA 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 the Senate 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 CIA 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, CIA 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 narrow definition. President Bush also exempted the CIA from his directive in February 2002 to treat all detainees ''humanely.'' This shameful change in policy obviously endangers the safety of American soldiers who are captured abroad.

Finally, the New York Times reported that Mr. Gonzales excluded important 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 Adviser 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 3 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.

Torture has never before been a Republican versus Democrat issue. Instead, it has always been an issue of broad consensus and ideals, reflecting the fundamental values of the Nation. President Reagan signed the Convention Against Torture in 1988.

President George H.W. Bush and President Clinton supported its ratification in 1994. The Senate Foreign Relations Committee, led by Senator Helms and Senator Pell, voted 10–0 to report the Convention favorably to the full Senate.

I hope that this tradition of bipartisanship and consensus will continue today. I hope that all Members of the Senate will cast their vote in a way that upholds our fundamental values.

A ''no'' vote is the right vote if we care about maintaining America's standing in the world and fighting the war on terrorism. 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 and Goldsmith Memorandums have raised basic questions about the genuineness of our commitment to the rule of law.

It is the right vote for our troops. The administration's shameful disregard for our laws and treaties on torture has lowered the bar for the protection of our own soldiers.

It has violated the military's longstanding ''golden rule'': Treat captured combatants in the manner we expect our own soldiers to be treated. What can Mr. Gonzales possibly say to a country that justifies its torture of a U.S. soldier by citing Mr. Gonzales's own record of support for it?

The PRESIDING OFFICER. Under the previous order, the Senator from Florida is now recognized for 15 minutes.

SOCIAL SECURITY

Mr. NELSON of Florida. Mr. President, I have just returned from a weekend in three different parts of my State and of the State of the Presiding Officer. I was conferring with many of our constituents regarding what is anticipated to be the President's proposal that he will give in his speech tomorrow night regarding Social Security. Of course, this is of enormous importance to us, not only in America but especially in Florida because of the high percentage of our population who are senior citizens. In fact, it is 3 million Floridians, retirees, survivors, and people with disabilities who depend on monthly Social Security benefits.

Social Security provides a guaranteed benefit, and it helps retirees live independently and with dignity. It is also the sole source of income for one-fifth of our Nation's seniors.

In this day and age when you read daily in the newspaper about employer pensions becoming scarce, Social Security provides a lifeline to retirees such as Lucille Solana, a 57-year-old retiree from Davie in Broward County. She worked for United Airlines for nearly 36 years and retired when the company's bankruptcy cut her pay and her office in Miami was closed. She had done what she was supposed to do. She followed the rule of savings: one-third personal savings, one-third corporate pension, and one-third Social Security for her retirement. But it hasn't all gone according to plan. United Airlines is going to terminate her pension, and her personal savings have suffered with the market. About all she has left is her Social Security.

I think we have a moral obligation to help people such as Lucille and our society's elderly citizens.

Social Security also helps us provide financial security to spouses and dependent children if a worker becomes disabled or dies.

Listen to this: 38 percent of all Social Security benefit dollars are paid to disabled Americans. That is 18 million individuals, their spouses, dependent children, and survivors. Without disability benefits, over half of the families with disabled workers would have incomes below the poverty line.

I hasten to add that when we are talking about the spouses and dependent children and survivors, what does the Good Book tell us is one of the highest necessities? It has been told to us in both the Old Testament and the New Testament in Isaiah and James. The widows and the orphans are at the top of our list to be taken care of.

Most families in America know what an important program Social Security is to all Americans. We don't have to convince anyone.

But you also ought to hear the story by Gene and Lynda Christie of Beverly Hills, FL, two of our constituents who are concerned about the President's Social Security plan. They read about his projected plan in the papers. What they read and how it would be calculated, their senior benefits would be cut by $500 a month. They simply can't afford that kind of reduction. I will bet

that some of you would have a difficult time accepting such a cut.

I believe changes to Social Security cannot include cuts to benefits. But that is what privatization would do. That is what the President is expected to propose on Wednesday night as a central part of his plan.

I will oppose diverting money from the Social Security trust fund, but I believe we should do something to keep Social Security solvent just as we have done successfully in the past.

Two decades ago, when I was in the House of Representatives, Social Security faced a real crisis. It truly was on the brink of insolvency. You know what happened. Instead of this approach, ''it is my way or the highway,'' Tip O'Neill and Ronald Reagan got together and they formed a bipartisan commission. On that commission, leadership was given to Senator Bob Dole, to Congressman former Senator Claude Pepper. And the work of that bipartisan commission saved the system and built up the trust fund for the retirement of the baby boomers.

When you put this into context, over the next three-quarters of a century, 75 years into the future, when you compare now with the projected insolvency, lo and behold, we find that the recent tax cuts that have been enacted will cost three times as much as the shortfall that Social Security is projected to face.

According to the Social Security Trustees Report last year, Medicare expenditures are now projected to surpass Social Security spending in 2024. With Medicare expenditures over the next 75 years being far in excess of the shortfall in Social Security, the Medicare deficit will be three times as much as the shortfall in Social Security. Based on these numbers, it is clear that a more real crisis lies in the exploding health care costs.

Privatization will not fix Social Security. In fact, it will actually worsen the country's overall fiscal health. When money is taken out of Social Security to pay for private investment accounts, you won't have enough to pay for current beneficiaries.

Some have suggested that the Government should borrow $2 trillion to plug this hole.

I just came from the Budget Committee. When we are facing upwards of $430 billion and more in deficits in this particular year, and you take another $2 trillion over the next 10 years and add it to it, that would swell the Federal debt and increase our dependence on foreign creditors such as the banks in Japan and China.

Rather than cut the benefits or borrow trillions of dollars, I believe we should pursue other ways to help Americans supplement Social Security and save for their retirement.

Social Security was intended to be a social safety net. Social Security was not intended and never was meant to be an investment program. By linking benefits to the volatile stock prices, privatization shifts the risk to seniors and it weakens Social Security's guaranteed safety net.

Look at the wake of cases recently of corporate wrongdoing. We all know too well the dangers of relying on the stock market for retirement. Just listen to Michael Pesho of Sanford, FL, who wrote to me this December. He says:

Dear Senator, I am a 56-year-old who had to work since the age of 14. I lost both my parents when I was 16, and I have had to provide for myself all these years. I am also a victim of the WorldCom fiasco.

I was laid off at WorldCom and lost my entire retirement portfolio when it was converted into worthless WorldCom stock. I'm tired and would very much like to retire in 9 or 10 years but in order for me to do that Social Security will have to be in place for me to have any kind of retirement foundation to work off of.

He says:

I implore you to ensure Social Security benefits will be there when I need them.

Michael doesn't want his Social Security entrusted to the same market that devastated his retirement savings. It is too risky.

I intend to fight for people who worked hard and played by the rules. I will fight against cuts to Social Security benefits. I will fight against any plan that relies on massive borrowing and increases in debt. I take the fiscally conservative position and I will fight to protect this program that provides a safe and reliable source of retirement income for millions of Americans. I intend to work with the President, not to cut, but to strengthen Social Security. I agree with him that we have a moral obligation to fix it for future generations.

Currently, I am working with other Members of the Senate to put together a moderate and more sensible plan that strengthens Social Security and expands opportunities for all Americans to save for their retirement. This plan would give workers additional tax breaks to save for retirement on their own with a personal account over and above Social Security.

Now is the time to reach out and to bring the various factions together. Now is the time to be conciliators and in the spirit of Ronald Reagan and ''Tip'' O'Neill who saved the Social Security system in a bipartisan fashion back in the early 1980s. We need to bring the factions together. We need to build mutual consent on how to protect Social Security for the retirees of today and future generations. I am very hopeful this can be achieved.

I yield the floor.

The PRESIDING OFFICER (Mr. ALEXANDER). The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I ask unanimous consent that the time until 8:15 this evening be equally divided for debate between the chairman and ranking member or their designees; provided further that the Senate then resume consideration of the nomination at 9:30 a.m. tomorrow, with the time until 4:30 again being equally divided as previously mentioned; provided that the further hour be under the control of the majority and that every 60 minutes alternate. Further, I ask that from 2:30 to 4:30 be under the control of the minority, with 4 o'clock to 4:30 under the control of the majority. I further ask consent that when the Senate convenes on Thursday morning, immediately following the time for the two leaders, there be a period of morning business for 2 hours, with the first hour under the control of the Democratic leader or his designee and the second hour under the control of the majority leader or his designee. I further ask consent that following the morning business time, the Senate resume consideration of the Gonzales nomination and there be an additional 8 hours of debate equally divided again between the chairman and ranking member or designees. Finally, I ask consent that following the use or yielding back of time the Senate proceed with a vote on the confirmation of the nomination with no intervening action or debate, and that following the vote the President be immediately notified of the Senate's action.

Mr. DURBIN. Reserving the right to object, if I could suggest to the chairman, Senator SPECTER, I think he misspoke on one line. I believe in the consent which we are considering it says that ''further, I ask that from 2:30 to 4 o'clock be under the control of the minority and 4 to 4:30 under the control of the majority.'' If that is the way his version reads, I would like to amend his statement.

Mr. SPECTER. 2:30 to 4 under the control of the minority and 4 to 4:30 under the control of the majority? That is acceptable.

Mr. DURBIN. I have no objection.

Mr. DAYTON. Reserving the right to object.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. DAYTON. I ask the chairman, does he intend, then, to proceed now, and is it the understanding that this side will have the next speaker, and I will follow that individual?

Mr. SPECTER. Mr. President, it is my intention to speak next in rebuttal.

Mr. DURBIN. If I might ask through the Chair, I advise my colleague from Minnesota I will make a unanimous consent request about the lineup for Democratic speakers. He will be the first on our side.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DURBIN. Mr. President, I ask unanimous consent the order of speakers on the Democratic side for today be as follows: Senator DAYTON of Minnesota, Senator STABENOW of Michigan, and Senator JOHNSON of South Dakota.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SPECTER. Mr. President, reserving the right to object, and I do not intend to object, I believe implicit in what the Senator from Illinois said is

that there be an alternating of speakers, and I will present a list of Republican speakers to integrate with what Senator DURBIN has stated.

Mr. DURBIN. Mr. President, both implicit and explicit.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SPECTER. Mr. President, today we have heard quite a ring of castigation against Judge Gonzales, virtually all of it misdirected, virtually all of it factually incorrect. We have heard the Senator from Massachusetts castigate the Bybee memorandum in torrid prose, claiming the Bybee memorandum was exactly wrong. He asserted that the Bybee memorandum did not have a sensible interpretation, or a legal interpretation of torture. He further claimed that the Bybee memorandum vastly overstated executive authority, and that it said the President had as much authority on the question of detainees as he did on battlefield control. These claims are palpably erroneous.

The Senator from Massachusetts then cited the Goldsmith memo, and said it certainly was a smoking gun. But Judge Gonzales did not hold that gun, did not have anything to do with that gun. The Senator from Massachusetts said Judge Gonzales was sent a copy of that memorandum. During the course of Judge Gonzales's questioning by the Senator from Massachusetts, the Senator from Massachusetts never once, to my recollection, ever viewed the transcript, or said anything about the Goldsmith memorandum.

So what we have is the castigation of Judge Gonzales for matters which were totally beyond his control. Judge Gonzales was the lawyer for the President as White House Counsel. As such, he sat in on a series of meetings. Those meetings were convened to find out what was the law on how detainees could be appropriately questioned to avoid any implication of the torture statute. When there is a determination of what the law is, that is up to the Department of Justice. And that is what Judge Gonzales testified to. And while there appears to be instances in which the Bybee memorandum was off-base, Judge Gonzales was not involved with the drafting of that memorandum.

Then when the question comes up as to what questions the detainees were going to be asked, that is a matter for the experts. As Judge Gonzales responded to questions from the Senator from Massachusetts at the hearing, it is up to the CIA and up to the Department of Defense. It is not up to the Counsel for the President.

When the Senator from Massachusetts castigates Judge Gonzales for not being able to remember what happened years ago, or what conversations may have taken place, he is being unfairly critical. The Department of Justice was responsible to provide the memo. Whether it was for the CIA or the Department of Defense is something that was not recollected, but who can recollect everything that happened several years ago?

When the Senator from Massachusetts castigates Judge Gonzales for not conducting a search and for not knowing certain information, he is mistaken. A search was conducted.

When the Senator from Massachusetts raised that issue in the executive session, I then asked the White House to conduct a search. That search was conducted, and immediately a memorandum was circulated disclosing what that search was.

When the Senator from Massachusetts, last night—I got it this morning—asked for some more information from the White House, I again forwarded the request and got a reply today. It was not a reply that the Senator from Massachusetts liked, but there has been nothing about this entire proceeding that the Senator from Massachusetts has agreed with. And that is his prerogative. He does not have to agree with it. He does not have to vote for Judge Gonzales. And he can express his views on oversight responsibilities. But there are others of us on this committee who have been here a while who understand our oversight responsibility and who have made a very strong effort to provide the information which the Senator from Massachusetts has asked for.

Judge Gonzales was available to more than a dozen Members of the Senate, available to all members of the Judiciary Committee—not that all asked to see him—and provided more than 250 pages of voluminous answers. So extensive were the answers that they were complimented, in effect, by the New York Times, saying it was the most comprehensive statement made as to what was the policy of the U.S. Government on these very important subjects.

But aside from the rhetoric, what are the facts? What does the testimony show? What do the documents show?

Senator FEINSTEIN says she still does not understand what Judge Gonzales thinks about torture. Well, what Judge Gonzales thinks about torture he has said on quite a number of occasions.

Let me remind all Senators who have to vote on this matter what Judge Gonzales said about torture.

No. 1:

[T]he President has said we're not going to engage in torture.

No. 2:

The President gave a directive to the military that despite the fact that Geneva may not apply with respect to the conflict and the war on terrorism, it is that everyone should be treated humanely.

No. 3, this is in the record, according to his testimony:

[T]he position of the President on torture is very, very clear, and there is a clear record of this. He does not believe in torture, condone torture, has never ordered torture, and anyone engaged in conduct that constitutes torture is going to be held accountable.

No. 4:

All I know is that the President has said we are not going to [have] torture under any circumstances. . . . the United States has never had a policy of torture.

No. 5, further testimony:

Our policy is we do not engage in torture.

No. 6:

It is not the policy of the administration to tolerate torture or inhumane conduct toward any person that the United States is detaining.

No. 7, more testimony:

The President is not going to order torture.

No. 8:

[T]his President is not going to order torture. We don't condone it.

No. 9:

Now, let me emphasize, and I can't emphasize this strongly enough, there are certain basic values that this country stands for and this President certainly believes in, and those values are reflected in the directives that he has issued regarding the treatment of al Qaeda detainees, and those who do not meet those standards are going to be held accountable.

This is all testimony or responses in the Record:

In addition, there are of course other legal restrictions. For example, the convention against torture, that would be applicable, Army regulations that would be applicable. All those exist to conscript the type of conduct that our military can engage in with respect to detainees. And so we want to of course meet basic standards of conduct with respect to treatment of al Qaeda[.]

No. 10, again, testimony:

[A]s I have said repeatedly today, this administration does not engage in torture and will not condone torture. And so what we are really discussing is a hypothetical situation. . . .

No. 11:

[O]ther than the directive by the President that we're not going to engage in torture and that we're going to abide by our legal obligations, I'm not aware of any other directive by the President.

No. 12: Judge Gonzales also reiterated his own opposition to torture in numerous responses to written questions submitted by Judiciary Committee Senators following the hearing.

No. 13:

The President has repeatedly stated that his Administration does not authorize or condone torture under any circumstances by U.S. personnel. I, of course, fully support the President's policy. . . .

No. 14:

I do denounce torture, and if confirmed as Attorney General, I will prosecute those who engage in torture.

No. 15:

The President has made clear that the United States remains committed to adhering to its obligations under the Geneva Conventions and the Convention Against Torture and has unequivocally condemned torture. I have repeatedly emphasized the President's statement of these commitments on behalf of the United States, and will continue to do so if confirmed as Attorney General.

As chairman of the committee, I had the first round of questions, and the first question I asked Judge Gonzales

was: What is your position on torture? And his words were to the effect: I condemn torture. Now, I do not know how much more explicit a witness, a nominee, can be than Judge Gonzales has been, but if someone does not understand Judge Gonzales's position after this kind of an emphatic, definitive statement, it is plain and clear for the record.

The contention has been made that Judge Gonzales agrees with a Bybee memorandum's conclusion that severe pain, for purposes of the torture statute, must be equivalent in intensity to the pain accompanying organ failure, impairment of bodily function, or even death. This has been a source of contention throughout the hearings in the executive session and on the Senate floor. Judge Gonzales responded to the ranking member, who said:

Do you agree today that for an act to violate the torture statute it must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function or even death?

Judge Gonzales answered:

I do not. That does not represent the position of the Executive Branch.

So Judge Gonzales categorically repudiated the Bybee memorandum in that respect.

There has been a source of argument about what the Bybee memorandum meant and what Judge Gonzales's position was about it. Judge Gonzales was deferential to the determinations by the Department of Justice. There is a complicated issue here as to whether the White House is going to be overly determinative in what the Department of Justice's position should be, and the White House has been very cautious. This is traditional—not just with this White House but with prior White Houses—not to tell the Department of Justice what to say or not to appear to tell the Department of Justice what to say because that would be politicization of a Department of Justice by the White House. The White House's role, as we have emphasized it, is not to tell the Department of Justice what to do, and the Department of Justice and the Attorney General's role is to represent all of the American people and not just the President.

There was discussion between the White House and the Department of Justice, as well as other agencies, about what the torture statute meant. Judge Gonzales testified to that and said, in effect, that it would be natural to have those kinds of discussions. Judge Gonzales said:

It was very, very difficult. 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. Ultimately, it is the responsibility of the Department to tell us what the law means, Senator.

In the very next question, however, we clarified his views on the narrow definition of torture in the Bybee memo. The ranking member asked:

Do you agree today that for an act to violate the torture statute it must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death?

And as noted previously, Judge Gonzales said he did not. Later, in another response to the ranking member, Judge Gonzales agreed that it would be horrific conduct—I think you would agree to this, and Judge Gonzales did, to what Senator LEAHY asked—that cutting off someone's finger would be considered torture.

Judge Gonzales also explained his agreement with the conclusion of the Justice Department based on respect for the Department's independence. This is what Judge Gonzales had to say on that facet of the issue:

Senator, what you're asking the counsel to do is to interject himself and direct the Department of Justice, who is supposed to be free of any kind of political influence, in reaching a legal interpretation of a law passed by Congress. I certainly give my views. There was of course conversation and a give and take discussion about what does the law mean, but ultimately, ultimately by statute the Department of Justice is charged by Congress to provide legal advice on behalf of the President.

Well, it is apparent from the totality of the context of what Judge Gonzales had to say that aside from giving deference to the role of the Department of Justice in interpreting the law, the Bybee memo was not accepted by Judge Gonzales.

When it came to the critical question of the assertion in the Bybee memorandum that the President had as much authority on the questioning of detainees as the President had on battlefield decisions, Judge Gonzales said he disagreed with that. When the question came up about the scope of the President's authority to immunize people who would violate Federal law, of course, any suggestion in the Bybee memo or otherwise would be contrary to a basic understanding of the law of the United States, where nobody is above the law.

At his confirmation hearing, Judge Gonzales specifically rejected the portion of the August 1, 2002, Bybee memorandum, which asserted that the President, as Commander in Chief, possessed the constitutional authority in certain circumstances to disregard the Federal criminal prohibition against torture. He stated that the memo has been ''withdrawn.''

It has been rejected, including that section regarding the Commander in Chief's authority to ignore the criminal statutes. So it has been rejected by the Executive Branch. I, categorically, reject it . . . [T]his administration does not engage in torture and will not condone torture.

A question was raised about a reservation to the Convention Against Torture under article 16, which provided that aliens interrogated by U.S. personnel outside of the United States did not enjoy the substantive rights of the 5th, 8th and 14th amendments, a technical reservation for international law purposes.

Judge Gonzales responded that this is a legislative issue that may perhaps require additional consideration. Nevertheless, regardless of the debate about the strict requirements of article 16, Judge Gonzales testified that the administration had sought to be in compliance as a substantive matter under the 5th and 18th amendments. He also testified that to the best of his knowledge, the U.S. has met its obligations under the 5th, 8th, and 14th amendments.

A major question was raised about Judge Gonzales's independence. He was emphatic, saying that:

If confirmed, I will no longer represent only the White House. I will represent the United States of America and its people. I understand the difference between the two roles. In the former, I have been privileged to advise the President and the staff. In the latter, I would have a far broader responsibility to pursue justice for all the people of our great nation, to see that the laws are enforced in a fair and impartial manner for all Americans.

Both Senator LEAHY and I, in our opening statements, emphasized this issue, and this was a matter which Judge Gonzales had thought about and had included in his opening statement and was prepared to affirm the very fundamental difference in his duty as Attorney General to the American people, contrasted with his responsibilities as White House Counsel to the President.

We have seen a rather dramatic turnabout in the course of the hearings on Judge Gonzales, the issue of the esteem in which he had been held and what Senators had to say about him and what they have said about him since in executive session.

Senator KOHL had this to say about Judge Gonzales:

We have had an opportunity to work together on several different issues over the years, and I have come to respect you. And I believe if you are confirmed, you will do a good job as Attorney General of the United States.

Senator DURBIN said:

I respect him and his life story very much.

Senator LEAHY said:

When this nomination was first announced, I was hopeful. I noted at the time that I like and respect Judge Gonzales.

Senator SCHUMER said:

I like Judge Gonzales. I respect him. I think he is a gentleman and I think he is a genuinely good man. We have worked very well together, especially when it comes to filling the vacancies on New York's Federal bench. He has been straightforward with me and he has been open to compromise. Our interactions haven't just been cordial; they have been pleasant. I have enjoyed the give-and-take we have engaged in.

Senator SCHUMER later said:

I was inclined to support Judge Gonzales. I believed, and I stated publicly early on, that Judge Gonzales was a much less polarizing figure than Senator Ashcroft had been. . . . Even if you are, as Judge Gonzales is, a good man, a good person with top-notch legal qualifications, you must still have the independence necessary to be the Nation's chief law enforcement officer.

He continues:

I still have great respect for Judge Gonzales. He has the kind of Horatio Alger story that makes us all proud to be Americans. It is an amazing country when a man can rise from such humble beginnings to be nominated for Attorney General.

So the question arises, as we are engaging in floor debate on the nomination of Judge Gonzales to be Attorney General of the United States, what happened here? We know of the atrocities of Abu Ghraib, and although there have been some efforts in some of the speeches to identify Judge Gonzales with Abu Ghraib, they are not substantial. There have been some criticisms regarding Guantanamo. Those matters are under investigation. But Judge Gonzales is not the interrogator; he is not the questioner; he is not the person who made up the questions; he is not the person who has defined the torture statute. He has been one individual in a series of meetings, where his role has been defined as being the representative of the President.

But the role of the Department of Justice is clearly delineated. They are to interpret what the statutes mean. The experts in the CIA and in the Department of Defense have their own responsibilities.

So what is happening here? Is it the constant Washington search for political advantage that goes around this town every day? During the course of our discussion on Judge Gonzales, we heard a speech about Social Security. It surprised me a little, in the middle of the proceedings. We have questions on political advantage on so many subjects that I am not going to digress. But there is no doubt that the air is very heavy with politics in this town.

We had the nomination proceedings as to Secretary of State Condoleezza Rice. She was challenged in a way that was highly unusual in the Senate of the United States—challenged as to her integrity. Not was she wrong about weapons of mass destruction, but did she falsify, was her testimony deliberately false and misleading. Dr. Rice had more negative votes than any nominee for Secretary of State since John Jay in 1824. That says something about the atmosphere in Washington and the constant Washington search for political advantage.

Senator SCHUMER has raised a contention repeatedly in the course of the proceedings on Judge Gonzales about the so-called nuclear option. He asked Judge Gonzales for his opinion as to whether the so-called nuclear option is constitutional. That is quite a cloud hanging over the Senator—potentially hanging over the Senate—as to whether the rules of the Senate require only 51 votes on the confirmation of a Federal judge as opposed to the requirement of cloture of 60 votes. Senator SCHUMER has raised that issue. I don't think he is looking for a commitment there as a condition to his vote, so why question Judge Gonzales about that collateral matter that has no bearing on his fitness for the post to which he has been nominated?

So there is some sense on my part that we have found a wedge issue. It is certainly true that Judge Gonzales has not been the most artful of witnesses. To say he has a generalized agreement with the Bybee memorandum was not the most artful of answers, after it had been universally condemned and withdrawn by the Department of Justice. But he made that reference as a theoretical matter as to how the White House respects the Department of Justice's role in interpreting the law so that if the Department of Justice came down with an interpretation, Judge Gonzales was not going to say it was wrong to appear to be having undue influence, or to be politicizing the process. But that wasn't the most artful of answers.

When asked hypothetical questions about was there any circumstance where the President of the United States might not follow a statute, again, it wasn't the most artful of answers. There is no doubt that Abu Ghraib and Guantanamo and the horrors of torture are overwhelming to the American psyche.

Back in 1991, I introduced legislation to protect victims of torture, to have rights of actions in Federal courts. I spoke out about the torture issue before it became a matter for legislation for the Congress generally. The legislation I introduced in 1991 was adopted, so that people who are subjected to torture in foreign countries can sue in U.S. courts. So the issue of torture has always been on the mind of this Senator. It is on the minds of the American people.

But Judge Gonzales is not responsible for what went on in Abu Ghraib or Guantanamo. Judge Gonzales is not responsible for actions by the CIA, or the Department of Defense, or for legal opinions by the Department of Justice.

If you look at his record and his qualifications as a lawyer, his academic qualifications as a Harvard Law graduate, his qualifications for practicing law with a big firm, his qualifications for being a supreme court justice in Texas, his qualifications for being White House Counsel for 4 years, where Judge Gonzales has had contact with many Senators—I dare say in that capacity, my colleagues in the Senate would share my views that he was always courteous, always relevant, always on top of the issues in discussing judicial nominees, where most of us have had some role to confirm a judge in his or her State. I think the comments would be uniform, as the ones I quoted, about how pleasant it was and how effective it was and how professional it was to deal with Judge Gonzales.

So if the winds of Abu Ghraib and Guantanamo had not blown across this hearing, I think we would have had perhaps a unanimous vote in favor of Judge Gonzales. In this highly charged political atmosphere, one has to wonder whether he is not, himself, a torture victim. He is clearly a victim of Washington politics.

Judge Gonzales is still highly likely to be confirmed. He was voted out of committee on a party-line vote. It had been my hope and expectation at an earlier stage that it would have been a strong bipartisan vote. It is still my hope and expectation he will be confirmed with some bipartisanship, but it will not be the kind of strong vote that would have given him a much stronger position as Attorney General absent the Bybee memo, Abu Ghraib, and Guantanamo. But on the basis of his academic, professional, and public service record, there was much, and still is much, on which to recommend him to be the Attorney General of the United States.

Mr. President, I have taken some more time. I made a very short opening statement to begin debate today and have listened to the arguments made by Senators from the other side of the aisle and find factually that they are off the mark; that in terms of what Judge Gonzales has had to say out of his own mouth have come very forceful denunciations of torture, very forceful denunciations of the Bybee memorandum, and a strong statement as to why he ought to be the next Attorney General of the United States.

Mr. President, I ask unanimous consent that the following list be next in order of Republican speakers: Senator COBURN, Senator SESSIONS, Senator BROWNBACK. Before the Chair rules, I will add that we will continue to alternate between Republican and Democratic speakers.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. SPECTER. I wanted to put this on the record so the people who are next up would know it, and would be in a position to come to the Chamber in a timely fashion.

The PRESIDING OFFICER. The Senator from Minnesota.

Mr. DAYTON. Mr. President, I highly respect the distinguished chairman of the Senate Judiciary Committee. He has been noted with his own stellar examples of bipartisanship, working with colleagues on both sides of the aisle. But I must say I have to respond to his remarks about those of us who oppose Judge Gonzales as being engaged in nothing other than political partisanship. I suggest that term could be applied to those who support these nominees because they are of the same political party as the President as much as they could be applied to those of us who are on the other side of the aisle.

If the Founders of this country did not intend for the Senate to exercise an independent judgment about the nominees to these high offices, such as Attorney General and Secretary of State, they would not have provided for a separate Senate confirmation of the President's nominees.

These individuals are not employees of the President, even though they are

nominated by him and serve as members of his Cabinet and serve at his pleasure, as are his employees in the White House, who are not subject to Senate confirmation. These men and women become public officials who represent the United States of America within our country, before the Supreme Court, as Secretary of State in the seats of government around the world. They have to meet an American standard, and it is that standard that each of us has the independent responsibility to apply according to our own best judgments, but one the Constitution clearly intends we should apply independent of the President's judgment and independent, one would hope, of our own respective political parties.

I think ultimately, in the light of this debate, it is for the American people to decide whether this nominee, or any of the President's nominees, meet the standards for those who will represent this Nation in the highest public offices in the land.

I rise today to oppose the nomination of Judge Gonzales to be our Nation's next Attorney General, and I cite, as have other colleagues, the key role that he played in what is certainly one of the darkest disclosures about this administration: Its secret decisions to disregard the principles of the Geneva Convention for the humane treatment of prisoners of war who Judge Gonzales and others conveniently renamed ''enemy combatants.''

This role and its consequences were described in graphic detail in a recent Sunday New York Times review of a couple of books, including the International Commission of the Red Cross's documents regarding the abuse of prisoners in Iraq by American service men and women. I would like to quote to some extent from the New York Times report because it expresses both the severe consequences of the decisions that were made in which Judge Gonzales, unfortunately, played a key role as White House Counsel.

The reviewer cites part of the memorandum that the President approved that was written by Judge Gonzales in that role which states:

As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

The article reporter goes on to say:

Notice the qualifications. The president wants to stay not within the letter of the law, but within its broad principles, and in the last resort, ''military necessity'' can overrule all of it. According to his legal counsel at the time, Alberto R. Gonzales, the President's warmaking powers gave him ultimate constitutional authority to ignore any relevant laws in the conduct of the conflict. Sticking to the Geneva Convention was the exclusive prerogative of one man, George W. Bush; and he could, if he wished, make exceptions. As Assistant Attorney General Jay S. Bybee argues in another memo, ''Any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional. (Section 2340A refers to the United States law that incorporates the international Convention Against Torture.)

Bybee asserted that the president was within his legal rights to permit his military surrogates to inflict ''cruel, inhuman or degrading'' treatment on prisoners without violating strictures against torture. For an act of abuse to be considered torture, the abuser must be inflicting pain ''of such a high level intensity that the pain is difficult for the subject to endure.'' If the abuser is doing this to get information and not merely for sadistic enjoyment, then ''even if the defendant knows that severe pain will result from his actions,'' he's not guilty of torture. Threatening to kill a prisoner is not torture; ''the threat must indicate that the death is 'imminent.' '' Beating prisoners is not torture either. Bybee argues that a case of kicking an inmate in the stomach with military boots while the prisoner is in a kneeling position does not by itself rise to the level of torture.

Bybee even suggests that full-fledged torture of inmates might be legal because it could be construed as ''self-defense,'' on the grounds that ''the threat of an impending terrorist attack threatens the lives of hundreds if not thousands of American citizens.'' By that reasoning, torture could be justified almost anywhere on the battlefield of the war on terror. Only the president's discretion forbade it. These guidelines were formally repudiated by the administration the week before Gonzales's appearance before the Senate Judiciary Committee for confirmation as attorney general.

In this context, Secretary Rumsfeld's decision to take the gloves off in Guantanamo for six weeks makes more sense. The use of dogs to intimidate prisoners and the use of nudity for humiliation were now allowed. Although abuse was specifically employed in only two cases before Rumsfeld rescinded the order, practical precedents had been set; and the broader mixed message sent from the White House clearly reached commanders in the field. Lt. Gen. Ricardo S. Sanchez, in charge of the Iraq counterinsurgency, also sent out several conflicting memos with regard to the treatment of prisoners—memos that only added to the confusion as to what was permitted and what wasn't. When the general in charge of Guantanamo was sent to Abu Ghraib to help intelligence gathering, the ''migration'' of techniques (the term used in the Pentagon's Schlesinger Report) from those reserved for extreme cases in the leadership of Al Qaeda to thousands of Iraqi civilians, most of whom, according to the intelligence sources, were innocent of any crime at all, was complete. Again, there is no evidence of anyone at a high level directly mandating torture or abuse, except in the two cases at Gitmo. But there is growing evidence recently uncovered by the ACLU . . . that authorities in the FBI and elsewhere were aware of abuses and did little to prevent or stop them.

Then there were the vast loopholes placed in the White House torture memos, the precedents at Guantanamo, the winks and nods from Washington, and the pressure of an Iraqi insurgency that few knew how to restrain. It was a combustible mix.

The article continues:

What's notable about the incidents of torture and abuse is first, their common features, and second, their geographical reach. No one has any reason to believe any longer that these incidents were restricted to one prison near Baghdad. They were everywhere from Guantanamo Bay to Afghanistan, Baghdad, Basra, Ramadi and Tikrit and, for all we know, in any number of hidden jails affecting ''ghost detainees'' kept from the purview of the Red Cross.

I will might add that is in direct contradiction to what we have been told, those of us like myself who sit on the Senate Armed Services Committee, who have been told repeatedly by this administration's representatives, and by military leaders, that these abuses were restricted to one prison, Abu Ghraib, in Iraq. I commend Senator WARNER, the chairman of the Armed Services Committee, who has done his utmost, by holding these hearings and pressing the military and pressing the administration, to bring the full scope of what occurred there to public light through those hearings. To have sat through all those, as I have, and now hear that contradicted directly by the facts as they become known is greatly distressing and confirms my own unfortunately necessary judgment that this administration has not been candid with this Congress or with the American people about the conduct of the war in Iraq in this and other very important respects.

Going back to the New York Times article, they, meaning the abuses of prisoners in Iraq:

were committed by the Marines, the Army, the Military Police, Navy Seals, reservists, Special Forces and on and on. The use of hooding was ubiquitous; the same goes for forced nudity, sexual humiliation and brutal beatings; there are examples of rape and electric shocks. Many of the abuses seem specifically tailored to humiliate Arabs and Muslims, where horror at being exposed in public is a deep cultural artifact.

An e-mail message recovered by Danner from a captain in military intelligence in August 2003. . . . In the message, he asked for advice from other intelligence officers on which illegal techniques work best: a ''wish list'' for interrogators. Then he wrote: ''The gloves are coming off gentlemen regarding these detainees, Col. Boltz has made it clear that we want these individuals broken.''

The article continues:

How do you break these people? According to the I.C.R.C., one prisoner ''alleged that he had been hooded and cuffed with flexicuffs, threatened to be tortured and killed, urinated on, kicked in the head, lower back and groin, force-fed a baseball which was tied into the mouth using a scarf and deprived of sleep for four consecutive days. Interrogators would allegedly take turns ill-treating him. When he said he would complain to the I.C.R.C. he was allegedly beaten more. An I.C.R.C. medical examination revealed hematoma in the lower back, blood in urine, sensory loss in the right hand due to tight handcuffing with flexicuffs, and a broken rib.''

That is only one of several incidents of that kind of horrible abuse this article contains. It continues:

And the damage done was intensified by President Bush's refusal to discipline those who helped make this happen. A president who truly recognized the moral and strategic calamity of this failure would have fired everyone responsible. But the vice president's response to criticism of the defense secretary in the wake of Abu Ghraib was to say, ''Get off his back.'' In fact, those with real

responsibility for the disaster were rewarded. Rumsfeld was kept on for the second term, while the man who warned against ignoring the Geneva Conventions, Colin Powell, was seemingly nudged out. The man who wrote a legal opinion maximizing the kind of brutal treatment that the United States could legally defend, Jay S. Bybee, was subsequently rewarded with a nomination to a federal Court of Appeals. General Sanchez and Gen. John P. Abizaid remain in their posts. Alberto R. Gonzales, who wrote memos that validated the decision to grant Geneva status to inmates solely at the president's discretion, is now nominated to the highest law enforcement job in the country: attorney general. The man who paved the way for the torture of prisoners is to be entrusted with safeguarding the civil rights of Americans. It is astonishing he has been nominated, and even more astonishing that he will almost certainly be confirmed.

I conclude my citation of that article. The abuses it describes are terrible, however limited in number they may be. Obviously almost all of our American service men and women serving so heroically in Iraq, Afghanistan, and around the world were not involved in those abuses. In fact, they paid the price for them. They become the targets of relatives and friends of those abuse victims who swear revenge. Our troops are placed at greater risk if, God forbid, they are captured, because we cannot demand that their captors practice standards of humane treatment which we do not practice ourselves.

But there is something that runs even deeper here and that is even more dangerous to our democracy. It is Judge Gonzales's advice that ''the President's warmaking powers gave him ultimate constitutional authority to ignore any relevant law in the conduct of the conflict.''

This is, I suspect, only the tip of the iceberg. Early in the administration's campaign, in the fall of 2002, to stampede Congress and scare the American people into the Iraq war, the White House stated their legal view that the President didn't actually need congressional authorization to invade Iraq. Members of this body on the other side of the aisle were instrumental in persuading him nevertheless to seek that authority.

Secretary Rumsfeld's legal advisers have reportedly reinterpreted existing law to permit him to set up his own CIA-type operations without informing Congress. They reinterpreted another law, purportedly to authorize military counterterrorist commando units to operate within the United States. Who knows how many other laws this administration's legal advisers have reinterpreted or decided that the President or others can ignore entirely, reinterpret or ignore without informing Congress, without informing the American people?

The Attorney General of the United States is entrusted to uphold the laws of this Nation and to apply them consistently and fairly to every American citizen, whether he agrees with them, whether they are convenient, whether the President or anyone else tells him otherwise. He cannot reinterpret them or ignore them or instruct the President or anyone else that they can reinterpret or ignore them. Change them? Yes, through the public process prescribed by the Constitution, by our Constitution: by an act of Congress signed into law by the President himself, reviewed if necessary by the judiciary. No exclusions and no exceptions, not for this President or any President; not for this administration or any administration, whether Republican, Democrat, or anything else. There are no special circumstances. There is no election mandate for secretly ignoring or reinterpreting laws of this Nation, or acting contrary to the rule of those laws or in violation of the Constitution of the United States.

Unfortunately, there is tragic precedent in this country's proud history for the demise of administrations who deviated from the rule of law, who considered themselves above the law or beyond the law or justified in reinterpreting or ignoring the law. Their hubris did great damage to themselves and they did great damage to our country.

They occurred more often than not during second terms, even after receiving that most special of electoral mandates: reelection. What a profound affirmation of the public trust, the most sacred political trust we have in this country: reelection of the President of the United States of America.

For the next 4 years, this President is our President. He is my President. I pray that he succeeds. Where he succeeds, our country succeeds. If he fulfills that sacred trust inferred upon him by the American people, the faith of all Americans in their Government is fulfilled.

We can have policy disagreements here in the Senate, in the House of Representatives, and with the administration. This is what a great Democratic leader, Senator Tom Daschle, called the ''noise of democracy.'' They were intended by this country's Founders, who designed our system of government to allow them, to address them, and resolve them, publicly, lawfully, and constitutionally. When those principles are followed publicly, lawfully and constitutionally, our Nation is strengthened. When they are not, our Nation is almost always weakened, regardless of what those leaders intended at the time.

I respectfully urge this administration to stop reinterpreting and ignoring existing laws and to stop ignoring and misleading Congress and the American people and to nominate an Attorney General who will not advise it, not hide it, and not condone it. That Attorney General I will gladly vote to confirm; this nominee, I will not.

I yield the floor.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. COBURN. Mr. President, I am struck as a newly-elected Senator from the State of Oklahoma. I must say I am extremely disappointed that my first opportunity to speak on the floor of this body is on the basis to refute the claims that are being made against a gentleman that I believe has already served our country miraculously and has been an example in this country of what can happen from very humble beginnings if somebody applies hard work, great effort, and perseverance.

I am also struck by the claims that are made which don't have anything to do with history.

I was sitting here asking myself this question: Were President Kennedy, President Johnson, and President Nixon responsible for My Lai, Vietnam? Was it their policies that caused that to happen? The atrocities that occurred during the Korean conflict, was that the fault of President Truman? The atrocities that occurred during World War II, was that the fault of President Roosevelt? No.

And to make the reach and to make the claim that Alberto Gonzales, in his role as adviser to the President, as a legal counsel, to do what is expected of him in that position and to do that in a way that gives the President of the United States the advice, the knowledge, and the legal opinion of the Justice Department—not his opinion but the legal opinion of the Justice Department—that he somehow has disqualified himself from the position of Attorney General.

I come to the floor today to make a statement in support of Alberto Gonzales's nomination to be the Attorney General of the United States. I believe an injustice is being carried out against him, both personally and professionally. Instead of looking at his qualifications, many have used him as a lightning rod for their complaints about the administration's handling of the war on terror. Specifically, many blame him for the administration's policies on the treatment of detainees and for its inquiries about the definition of torture. I am reminded that the President stated in 2002 that we would offer humane treatment to all prisoners. I am also reminded of how important it was for him to have a definition of what that was according to the Geneva Convention, but also according to our own law.

What have the President and Judge Gonzales done to deserve the criticism they received? We saw Monday the results of Sunday's elections in Iraq.

The allegations against him are based on two sets of advice that were given to the administration by the Attorney General and Department of Justice.

First, the President made a decision based on the legal advice that he received from the Attorney General and the Department of Justice that certain detainees should not receive prisoner-of-war status while they were held in U.S. custody.

Second, Judge Gonzales asked the Department of Justice Office of Legal Counsel under its statutory authority

to render legal opinions to determine the precise meaning of the U.S. anti-torture statute. The Department of Justice responded to this request August 1, 2002, and December 30, 2004.

I must say that torture is not a pleasant subject for us to discuss, but one might ask why the President and his top lawyer needed a clarification on an issue as unsettling as torture. I believe it is good to repeat the words of Senator CORNYN in his discussion. Why would we not use every legal means which are appropriate to protect this country? Finding out the definition of appropriateness is well within the purview of what Alberto Gonzales did.

It is remarkable how quickly we forget. Just 3 years, 4 months, and 21 days ago, this Nation came under attack. We all watched helplessly as more than 3,000 of our fellow Americans were murdered, and nearly an equal number were severely injured in an assault that we had never seen before in this country.

As the horrors of September 11, 2001, unfolded before our eyes, we quickly realized that we were not under the attack of another country, we were not assaulted by a nation that respects and obeys the laws of war and international order. We were ripped from a world paradigm that we understood, one where states follow rules while fighting each other, and thrust into a new world where a nonstate enemy infiltrates society and targets our citizens. Our enemy does not acknowledge that while at war soldiers must wear uniforms, carry their weapons openly, obey a chain of command, and treat captives—especially civilian captives—humanely. What they do is cut their heads off. They don't hide the fact.

The nightmare that began on September 11 has not ended. We watch daily as our enemy attacks our soldiers who are risking their lives and limbs to better the lives of the citizens of Iraq and Afghanistan and drive out terrorist cells. Gone are days when our soldiers were able to face the enemy on the battlefields, eye-to-eye. Today, enemy combatants launch surprise attacks by hiding among civilians and behind the bodies of the wounded. Gone are the days when combatants understood how important it was to protect civilians from harm. Enemy combatants today brutally and repeatedly behead innocent civilians.

As our leaders first faced the aftermath of September 11, a dark reality set in: Our enemy would not play by the rules that civilized people and nations have developed over the course of history. Our leaders needed to understand exactly what our laws required and what we needed to do to survive in this new world we faced. They needed to make strong policy decisions based on our country's domestic laws and international obligations.

First, our leaders needed to understand who we were fighting. Under customary international law, civilians are not allowed to engage in combat. Because soldiers are not supposed to target civilians in battle, it is essential that civilians are distinguishable from combatants. If civilians wish to be protected from harm, they must look different than combatants; therefore, every person who wishes to engage in combat and if captured receive the protections accorded to prisoners of war by the Third Geneva Convention, they must fulfill four conditions: that of being commanded by a person responsible for his subordinates; that of having a fixed distinctive sign recognizable at a distance; that of carrying arms openly; and that of conducting their operations in accordance with the laws and customs of war. We saw none of that.

If someone engaged in combat does not follow these rules, he or she is an illegal combatant. Illegal combatants have long been recognized by state practice in the law of war field. In Ex parte Quirin, the U.S. Supreme Court held that ''by universal agreement and practice the law draws a distinction between the Armed Forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants.''

Furthermore, the state practice of the United States does not evidence any understanding of a customary international law norm extending the Geneva Convention and prisoner-of-war treatment to combatants who commit terrorist acts. Instead, international law regards such individuals as illegal combatants who cannot claim the protection of the laws of war that extend to legal combatants.

Only lawful combatants, members of fighting units who comply, again, with the four conditions—being commanded by a person responsible for subordinates; having a fixed distinctive sign, recognizable at a distance; carrying arms openly; and conducting their operations in accordance with the laws and customs of war—are license to engage in military hostilities. Only those who comply with these four conditions are entitled to the protections afforded to captured prisoners of war under the laws and usages of war.

In fact, the denial of protected status under the laws of war has been recognized as an effective method of encouraging combatants to comply.

As we hear those opine about what has gone on, I ask the American people to think about it. Who are these people who are killing our soldiers? Who are these people who are blowing people up? Who are they? They meet none of the criterion for a legal combatant.

How has the President applied these principles to the War on Terror? In the February 7, 2002, Order on the Humane Treatment of al-Qaida and Taliban Detainees, President Bush stated unequivocally that all detainees are to be treated humanely, ''including those who are not legally entitled to such treatment.'' Therefore, even though many of the fighters our soldiers encounter are not entitled to prisoner-of-war treatment, they are still being treated humanely.

Furthermore, the President has unequivocally stated the Third Geneva Convention applies to detainees captured in Iraq. Even those Iraqi prisoners who do not meet the four requirements to receive POW status are subject to an appearance before a Third Geneva Convention Article 5 tribunal to determine their status. Prior to that, they must receive POW protection until their status is determined.

Second, while the President agrees with the Department of Justice that he has the authority under the Constitution to suspend Geneva, as between the United States and Afghanistan, he has declined to do so and has stated that the provisions of Geneva apply to our present conflict with the Taliban. However, common Article 3 of Geneva, and article 4, POW status, do not apply to the Taliban because they are unlawful combatants.

Finally, none of the provisions of Geneva apply to the conflict with al-Qaida in Afghanistan or elsewhere. Al-Qaida detainees are not prisoners of war but are unlawful combatants.

Next, the administration officials acknowledge that there could be circumstances where detainees hold information that could literally be a matter of life or death for thousands or even millions of American citizens. Judge Gonzales needed to understand what we are allowed to do under the laws of our Nation to save the lives of our people. Therefore, Judge Gonzales sought the legal expertise of the Department of Justice—not his opinion, but the Department of Justice's opinion—to understand the definition and meaning of torture in the United States anti-torture statute.

This request by Judge Gonzales did not in any way indicate the desire of the administration to use torture. It is a far reach to claim it. As a matter of fact, it is absolutely untrue to claim it. In fact, the official position of the administration is that neither torture nor inhumane treatment are to be used against anyone by the United States regardless of whether they have prisoner-of-war status or not. Because the administration's position is so strong, it was critical that the President and his advisers fully understand what constitutes torture so that no lines would be crossed.

What does all this mean? Members of the Taliban and al-Qaida detainees do not receive the luxuries afforded prisoners of war because they are unlawful combatants. Iraqi fighters, even if they are terrorists, and most are, receive prisoner-of-war status until they receive a hearing before an article 5 tribunal to determine their status. None of these detainees are to be tortured or otherwise treated inconsistently with U.S. constitutional principles.

It would have been irresponsible for Judge Gonzales to have not sought to understand the legal rights of enemy combatants and the law. He had a duty

to the President and to the United States to understand these concepts and pass those on to the President in his private executive position as legal counsel to the President.

We all went to sleep in a different world on September 11, 2001, very different than the one we lived in the night before. Our leaders needed to understand our domestic and international obligations well to respond to the new needs of our country. Alberto Gonzales should not be faulted for doing his duty for his client, the President of the United States. He is well qualified to serve as a U.S. Attorney General, and he should be confirmed.

I also conclude by saying the following: In late November, I came to Washington to go through a process of orientation as a new Senator in this body. The message I heard from the other side of the aisle is, We want cooperation. We want bipartisanship. We do not want to politicize. The opposite of that is happening at this very moment in this body. Here is a good man who has demonstrated tremendous ability through his life. Everyone says he is well qualified. Everyone knows he will make a great Attorney General. The fact is, politics is getting in the way of his confirmation.

I urge my fellow Members in this body to support and confirm him as the next Attorney General of the United States.

I yield the floor.

The PRESIDING OFFICER. Under the previous order, the Senator from Michigan is recognized.

Ms. STABENOW. Mr. President, I rise today to oppose the nomination of Judge Alberto Gonzales to be the Attorney General of the United States. The Attorney General is the chief law enforcement officer for our country with tremendous legal powers. He or she is responsible for enforcing our laws and for making important decisions on how they will be interpreted. The Attorney General can decide what person will be charged with a crime or detained. This is a job that requires sound legal judgment and impartiality because the Attorney General's duty is to uphold the Constitution and the rule of law.

But this job is not just about our laws; it is also about the ideals of our country. It is about what we stand for. It is about our freedom and liberty and justice as embodied in our Constitution. It is about representing these fundamental types of democracy, not just to Americans but to the world.

During the inauguration, we heard the wonderful words from President Bush about the cause of freedom. I was pleased to hear him talk about our history as a country that has led the world in the cause of freedom. These are the ideals that our children learn about every day. We should be proud of our history. But our words must match our deeds.

I am deeply concerned not only about Mr. Gonzales's judgment, but that his confirmation would send the wrong message to the world about the value we place on our basic constitutional rights. Judge Gonzales has played a prominent role in shaping this administration's policy on detention and torture. Some of these policies have not only damaged our country's reputation and moral leadership, but they have also placed our troops in greater danger. Judge Gonzales holds legal positions that violate treaties the United States has ratified and supported, and he helped to provide the justification for the treatment of prisoners that led to the abuses at Abu Ghraib.

He also advocated and advised the President on legal positions that circumvented the Geneva Conventions. In following Judge Gonzales's advice to circumvent the Geneva Conventions, this administration clearly set the stage for the abuses at Abu Ghraib, the torture scandal, and this opinion ignored decades of U.S. support for humane treatment of prisoners. Such a reckless disregard for human rights laws not only violates international law but, again, it puts our own troops at additional peril.

The Convention Against Torture, which was ratified by the United States in 1994, prohibited torture and cruel, inhumane or degrading treatment. The Senate defined such treatment as abuse that would violate the 5th, the 8th, or 14th amendment to our Constitution. This standard was formally accepted by the Bush administration.

During Judge Gonzales's testimony it became clear that under his watch the administration twisted this straightforward standard to make it possible for the CIA to subject detainees to practices such as simulated drowning and mock execution. The standard he approved defined torture as inflicting pain equivalent to ''serious physical injury, such as organ failure, impairment of bodily function or even death.''

In his testimony he told the committee that these constitutional amendments do not apply to foreigners held abroad; therefore, in his view, the torture treaty does not bind intelligence interrogators operating on foreign soil.

Such a distortion is unacceptable and, again, is dangerous to our troops who are serving us on foreign soil.

How can someone who has sought to find the loopholes in the law be entrusted to be the chief law enforcement officer of our land?

These attempts to circumvent the very laws he will be called upon to enforce not only show a reckless disregard for the law, put our troops in further danger, but they have damaged our position in the world. Since World War II, the United States has been a moral authority in the world, an effective leader on the world stage. Such damage not only tarnishes our reputation in the world, but it negatively affects our very ability to enlist our allies in the critical war on terror. How can we hope to reclaim the moral leadership we once had with this person as our chief law enforcement officer? What signal does this send to the world?

For more than 10 years, Judge Gonzales has served as President Bush's legal counsel, but now he must represent a higher authority, the Constitution of the United States of America, and he must do so with integrity and independence from his former long-term client.

The Attorney General of the United States cannot be a spokesperson for the President. The Attorney General is the highest ranking law enforcement officer in the land. The Attorney General has responsibilities for enforcing, interpreting, and creating the laws that govern our democratic way of life in the United States. It is, therefore, imperative that the person who holds this position be someone who has the confidence of the American people. Our laws must come first. He or she must look not for the political rationale or the loophole but, rather, always seek the appropriate legal path, as guided by the U.S. Constitution. This is the people's attorney.

I was disturbed that during the confirmation hearings Judge Gonzales restated his belief that the Commander in Chief can override—can override—the laws of our country and immunize others to perform what would otherwise be unlawful acts. This is wrong. No one person can stand above the laws that govern our Nation. The rule of law applies to every one of us, including the President of the United States.

I had hoped that during his testimony before the Senate Judiciary Committee, Judge Gonzales would have used the opportunity to address these questions and concerns, and that he would have also used it as an opportunity to demonstrate an understanding that the Attorney General does not represent the President but, rather, the American people, the laws of our Nation, and the Constitution of the United States.

I am troubled by the many questions that remain by his refusal to state categorically that the President may not authorize the use of torture in violation of U.S. law and the Geneva Conventions.

On Sunday, Iraqis took an important step toward democracy by holding their first free elections in decades. We applaud and celebrate with them. Let's not take a step backwards now in America by confirming a nominee who does not represent the fundamental rights that the word ''democracy'' represents.

Mr. President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BROWNBACK. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BROWNBACK. Mr. President, I rise in support of Judge Gonzales, President Bush's nominee to serve as our Nation's 80th Attorney General. I want to address a few points that have been brought up today and discuss those a little bit. We will be able to vote on this nominee this week. I think he is going to make an outstanding Attorney General. He has been an outstanding lawyer in various capacities throughout his professional career already. He is going to continue to show that. I want to articulate why that is going to be the case.

His background is well known. I serve on the Judiciary Committee. We had lengthy hearings with Judge Gonzales. We had multiple rounds. Everybody on the committee got to ask and have answered every question they asked. This is a nominee who has been through the question-and-answer process on a lengthy basis. It is time we move forward. The President needs an Attorney General. This is the office that heads so many of our functions that are very important in the war on terrorism, and we need to move forward with this.

It is well known to people who have been watching this debate. As the son of migrant workers from a family of seven children, the first to go to college, he is the epitome of the American dream. He has a law degree from Harvard. He could have done anything, yet he chose a path of public service. And he is an extraordinarily good public servant—humble, wise, has a tremendous ability to persevere through difficulty.

Through his work as chief counsel to the President, Judge Gonzales has become seasoned in national security issues and legal challenges that are essential to the job of Attorney General. He is unquestionably qualified for the position, and I have no doubt he will be confirmed by the Senate this week and should be confirmed and should be given our strong support.

I am deeply saddened by many distortions and unjustified criticisms of Judge Gonzales's nomination that he has had to go through and to face. Even if you disagree with the administration in the war on terror, Judge Gonzales should have been treated during the nomination process with a level of dignity and respect by this body in going through the discussion. One can say: I believe that this is a good nominee, that this is a good person, and they should look at those criteria and those qualifications and not say: I am voting against him because I have a disagreement with the administration on a policy issue.

Undoubtedly, there are disagreements on policy issues. Undoubtedly, there are a number of people who disagree with Judge Gonzales on how he would view policy issues. But that is not the issue in the confirmation process. The issue is, is this person qualified to hold this job? Will he do a good job? The President, in winning the election, does need to have his people in key positions to be able to carry out policies that he put forward, that the American public has passed on in the election process.

In the past few weeks, there are some who have done all they can to associate Judge Gonzales with the word ''torture'' and the disturbing pictures from Abu Ghraib because he offered a legal memorandum stating that the Geneva Conventions do not apply to members of al-Qaida. These kinds of accusations are factually inaccurate and only serve to bring down the reputation and morale of our Armed Forces who are serving honorably and nobly in defense of this Nation. As we saw over this past weekend, there was an incredible vote by the Iraqi people that was so heartening to myself and to all of America because this is something we have fought for, that our young men and women have died for, to give them freedom. Now they have it, and they are expressing it.

Clearly, there are going to be problems ahead and difficulties, and it is not going to be anything close to a perfect democracy. Ours isn't yet, although we continue to aspire and are moving closer and closer toward that end. They are going to have difficulties. Yet they have made a step that would not have happened had our young men and women not put their lives on the line and the President made bold decisions that this body authorized to go to war to remove Saddam Hussein from power. Judge Gonzales has been part of the Bush team and the White House. He has done a good job there, and he will do an excellent job as Attorney General.

I wanted to take a few minutes to set the record straight on some key issues. Some have questioned Judge Gonzales's independence from the President. Judge Gonzales understands that his role as Attorney General of the United States will be very different from his role as counsel to the President. He has made that quite clear in his confirmation hearing. He stated:

> I do very much understand that there is a difference in the position of Counsel to the President and [that of] Attorney General of the United States. . . . As counsel to the President, my primary focus is on providing counsel to the White House and to White House staff and the President. I do have a client who has an agenda, and part of my role as counsel is to provide advice that the President can achieve that agenda lawfully. It is a much different situation as Attorney General, and I know that. My first allegiance is going to be to the Constitution and to the laws of the United States.

Upon confirmation, Judge Gonzales will be ready and able to take on the independent responsibilities of the Attorney General. His service as a Texas Supreme Court justice proved his ability to be independent from then-Governor and now-President Bush. At his confirmation hearing, he indicated he would be very sensitive to any perception that law enforcement was being politicized by the White House and would seek to avoid such perceptions by ''talk[ing] to the career staff . . . to make them understand that [he's] coming to th[e] department with a clear understanding of the distinct roles between the two jobs.

Remember, this is a gentleman who earlier in his professional career served on the Texas Supreme Court, a Supreme Court of one of the States of United States. He understands a different position. He has been in an independent position. He understands these different roles and the places they serve in Government. And he understands how they work and he will abide by them.

Also at his hearing he emphasized the ''very restrictive contacts policy between the [Justice] Department and the White House, limiting who from the White House can contact the Department of Justice,'' saying that ''what we don't want to have is people from various divisions within the White House calling the Department about an ongoing investigation.''

He offered his commitment to ensure that the contacts policy is as strong as it should be. He also offered his commitment to abide by that policy. Judge Gonzales has stated his commitment to respecting and fostering the professionalism of the career employees of the Department of Justice. In response to written followup questions from the Senator from Massachusetts, Judge Gonzales said he would ''do everything in [his] power to reassure the career professionals at the Department and the American people that [he] would not politicize the Department.''

There is a direct statement from Judge Gonzales of how he would operate.

Judge Gonzales emphatically endorsed the proposition that ''all government lawyers should always provide an accurate and honest appraisal of the law, even if that will constrain the administration's pursuit of desired policies.''

Again, that is another direct quote from Judge Gonzales in response to a question by a Member of the Senate.

Judge Gonzales also suggested in his response to the Senator from Massachusetts that his close personal relationship with the President would make it easier for him to be honest and forthright with the President. So he has a personal relationship that he can build on as well, but he understands the professional relationship. He is a lawyer, and he understands the role in which he would be serving.

I would like to make it clear that on the issue of the Geneva Conventions, despite what you are hearing today, the United States is committed to complying with the governing law and treaty obligations in the war on terrorism.

There have been some criticisms of Judge Gonzales regarding the Geneva Conventions. Some have claimed that

Judge Gonzales finds the Geneva Conventions to be an impediment, a hindrance to our present efforts, quaint and obsolete in important respects. Others are claiming that the administration had refused to apply the Geneva Conventions to the conflict in Afghanistan:

Afghanistan was the first time in which we said that it did not apply to a conflict.

Senators have accused the administration of taking its obligations under the Geneva Conventions lightly.

The administration has fully and faithfully adhered to its obligations under the Geneva Conventions. Judge Gonzales's critics meld together two different issues: First, whether the Geneva Conventions apply to a particular armed conflict and, second, whether particular individuals in that conflict are entitled to a particular protected status under one of the Geneva Conventions. The mere fact that the Geneva Conventions apply to a conflict between two nations does not mean that all persons involved in that conflict qualify for a particular status, such as prisoner-of-war status, under the terms of the conventions.

The administration and Judge Gonzales have been very clear in separating the two issues. But as demonstrated in the claims made above, Judge Gonzales's critics have sought to confuse the issue by mixing the two questions.

The administration did not determine that the Geneva Conventions did not apply in enemy conflict in Afghanistan. Rather the President determined that the Geneva Conventions do, indeed, apply to the conflict in Afghanistan, but that neither al-Qaida terrorists nor Taliban fighters qualify for prisoner-of-war protections under the Geneva Conventions.

This obvious distinction is grounded in the very text of the Geneva Conventions. This has been ignored by Judge Gonzales's critics. The judge explained the distinction quite clearly in his testimony before the Judiciary Committee. He stated this:

There was a decision by the President that Geneva would apply with respect to our conflict with the Taliban. However—and I believe there is little disagreement about this as a legal matter—because of the way the Taliban fought against the United States, they forfeited their right to enjoy prisoner-of-war legal protections.

Judge Gonzales has repeatedly affirmed his respect for the Geneva Conventions. He has worked to ensure that we protect Americans from the threat of terrorism, while treating al-Qaida and Taliban detainees humanely and, to the extent appropriate and consistent with military necessities, in keeping with the principles of the Geneva Conventions.

Judge Gonzales has also stated further at the hearing:

I consider the Geneva conventions neither obsolete nor quaint.

In closing, we have an outstanding nominee in judge Gonzales. His personal background is one of incredible accomplishments. His ability and his legal mind are excellent. His commitment to public service is tremendous. The faith that people have in him is there and is what we need in a person who is Attorney General of the United States. We need to have a person there that people look up to and say this is a person who will uphold the law, who is an upright individual, and will do all he can to make this a better place. Judge Gonzales will do all of those things and he will do it in a tremendous fashion.

I don't think this is a particularly helpful or good debate, where we question a person's ability to stand independent, or to do these other things, when that person stated clearly he would and his past track record has shown that he will.

For those reasons, I hope we can move expeditiously through this debate. Let people question his ability if they choose, but let's have the vote and get Judge Gonzales approved to serving this country in this important time and in this very important job.

Mr. KOHL. Mr. President, in many ways, Judge Gonzales's life story is the American dream—rising from humble beginnings to being nominated to be our Attorney General. Yet, Judge Gonzales must be evaluated on more than his life story; indeed, the decisions he has made in his public capacity must be closely scrutinized. We are, after all, being asked to confirm him as the Nation's chief law enforcement officer.

We begin with a standard of granting deference to the President to surround himself with the people he chooses for his Cabinet. But that deference is not absolute. The Attorney General is not the President's lawyer, but the people's lawyer. As I listened to the nominee's answers at his confirmation hearing, read his responses to our additional questions, and examined the facts, I found that my deference was challenged. Indeed, we are being asked to confirm the administration's chief architect of its legal policies in the war on terror—policies with questionable legal support that have proven harmful to the conduct of the war and injured our reputation abroad.

We must expect more from our Attorney General. The war on terrorism has proven more clearly now than ever before that the Justice Department's mission is too central to our democracy to be entrusted to someone who leaves us with such doubt. As the President's chief legal officer in the White House, Judge Gonzales's advice sadly fell short time and again. For these reasons, I must vote no.

A closer examination of the administration's legal policies demonstrates why we have reached this conclusion. Over the strong objections of Secretary of State Powell, career military lawyers, and others with great expertise, Judge Gonzales advised the President to deny prisoners the protections of the Geneva Conventions. Others warned Judge Gonzales that this advice could undermine military culture, generate confusion about how to treat detainees, and ultimately lead to abuse. We now know that their worst fears were warranted.

His role in shaping the policy on torture was similarly regrettable. The ''torture memo'' that was drafted at Judge Gonzales's request stood as administration policy for 2 years. The Defense Department used the memo's disturbing conclusions to justify abusive interrogation techniques.

These policies have consequences. To defeat terrorism, the 9/11 Commission concluded that we must win the war of ideas in the Muslim world. The importance of this recommendation cannot be emphasized enough. Undermining our fundamental commitment to due process, failing to honor our international agreements, and flouting our laws prohibiting torture and war crimes harms that effort.

Judge Gonzales's performance at the hearing did little to alleviate our concerns. We heard him condemn torture, generally, but refuse to discuss what he thought constituted torture. We heard him commit to honor our international agreements but waffle when asked when they apply. We heard him denounce the abuses that were committed in Iraq but refuse to discuss whether they might be illegal. We heard him commit to hold anyone involved responsible for their actions but repeat predetermined conclusions about what happened and who was to blame.

When asked by members of the Judiciary Committee about his views on these policies and his roll in shaping them, Judge Gonzales either could not remember or was nonresponsive. When asked about whether he thought torture was ever productive, after more than 2 years of participating in discussions on the subject, he told the Committee, ''I have no way of forming an opinion on that.'' He admits to attending meetings where specific methods of torture were discussed but told the committee that he cannot recall anything that was said. His evasiveness was not an encouraging preview or his ability to be candid with the American people about the basis of the decisions he will be responsible for making as our Attorney General.

This has not been an easy decision to reach. We hope that if Judge Gonzales is confirmed, he will prove us wrong. For now, however, our doubts are too great to support his nomination.

MORNING BUSINESS

Mr. BROWNBACK. Mr. President, I ask unanimous consent that there now be a period for the transaction of morning business, with Senators permitted to speak for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.