

Responses of Alberto R. Gonzales  
Nominee to be Attorney General of the United States  
to Written Questions of Senator Richard J. Durbin

**TORTURE POLICY**

1. The December 30, 2004 memo from the Department of Justice (“DOJ”) Office of Legal Counsel to the Deputy Attorney General (“12/30/2004 torture memo”) states, “This memorandum does not address the many other sources of law that may apply, depending on the circumstances, to the detention or interrogation of detainees.” It is unclear why you would ask DOJ to define the outer limits of torture when other legal restrictions, e.g., the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (“Torture Convention”) and the Uniform Code of Military Justice, prohibit abuses that do not rise to the level of torture. In your press briefing on June 22, 2004, you said that an August 1, 2002 memo from DOJ’s Office of Legal Counsel to you (“8/1/2002 torture memo”) “was written in response to questions only about the scope of the torture convention and the anti-torture statute.” You said you requested this guidance because “our soldiers need to know the limits of permissible conduct.”
  - a. The torture prohibitions in the Torture Convention and in the anti-torture statute, 18 U.S.C. §§ 2340-2340A, (“anti-torture statute”) are not “the limits of permissible conduct” because U.S. personnel are also prohibited from engaging in abuse that does not rise to the level of torture. Do you agree? If yes, why did you request the 8/1/2002 memo? If your aim was to define the limits of permissible conduct, why did you not ask the Office of Legal Counsel to examine all of the legal restrictions governing the treatment of detainees?

Response: I agree that there may be many other sources of applicable law, depending on the circumstances. It is common for a legal opinion only to address certain questions. In this case, the federal criminal prohibition against torture was one that was not clear, and it appeared appropriate to seek legal advice concerning its meaning.

- b. In your June 22, 2004 press briefing, you said, “every interrogation technique that has been authorized or approved throughout the government is lawful and does not constitute torture.” Is it also true that every authorized interrogation technique that has been authorized or approved throughout the government does not constitute cruel, inhuman or degrading treatment, as this term is defined by the Torture Convention and the Senate reservations thereto?

Response: As I testified, because of the Senate’s reservation to Article 16 of the Convention Against Torture and the jurisdictional and other limitations of Article 16 and of the Fifth, Eighth and Fourteenth Amendments, which have been held not to apply to aliens overseas who are not being punished within the meaning of the Eighth Amendment, Article 16 has a limited reach. However, we also want to be in compliance with the relevant substantive constitutional standard incorporated into Article 16 by virtue of the Senate’s reservation, even where it may not be

legally required. I had been advised that approved interrogation techniques were analyzed under that standard and satisfied it. Since that time, we have determined to undertake a comprehensive legal review of all interrogation practices. Part of that review was completed when the Office of Legal Counsel released its memorandum addressing 18 U.S.C. §§ 2340 & 2340A on December 30, 2004. The analysis of practices under the standards of Article 16 is still under way, but no one has told me that we are not meeting the substantive requirements of Article 16.

- c. At your hearing, I asked you whether U.S. personnel can legally engage in cruel, inhuman, or degrading treatment under any circumstances. You told me that “We are meeting our legal obligations,” but you did not respond directly to the question. Can U.S. personnel legally engage in cruel, inhuman, or degrading treatment under any circumstances?

Response: Please see my response to 1(b), above.

- d. You also told me at the hearing: “As you know, when the Senate ratified the Convention Against Torture, it took a reservation and said that our requirements under Article 16 were equal to our requirements under the Fifth, Eighth and 14th Amendment. As you also know, it has been a long-time position of the executive branch, and a position that’s been recognized and reaffirmed by the Supreme Court of the United States, that aliens interrogated by the U.S. outside the United States enjoy no substantive rights under the Fifth, Eighth and 14th Amendment. So as a legal matter, we are in compliance.” If I understand you correctly, you believe that the Torture Convention’s prohibition on cruel, inhuman, or degrading treatment imposes no affirmative obligations on the U.S. regarding aliens interrogated outside the U.S. Is that your view? Is that the U.S. government’s position? Is this consistent with the June 25, 2003 letter from Department of Defense (DOD) General Counsel William Haynes to Senator Leahy, which states, “‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States. United States policy is to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with this commitment”?

Response: Please see the response to 1(b), above.

2. At your hearing, you told me, “As Counsel to the President, my job was to ensure all authorized techniques were presented to the DOJ, to the lawyers, to verify that they met all legal obligations, and I have been told that is the case.”
  - a. Please provide a list of all interrogation techniques presented to you, your office, or the DOJ for their review and, for each technique, indicate whether you, your office, or the DOJ determined that it is legally permissible. Please provide copies of all documents related to the review of these interrogation techniques.

Response: As I explained in my testimony before the Committee, with respect to the conflict with al Qaeda and the Taliban, the role of reviewing the legality of methods of questioning terrorists for information that might save American lives that agencies wished to adopt fell to the Department of Justice. While I may have participated in some discussions of particular methods of questioning, my role was to ensure that methods of questioning being proposed were cleared with the lawyers at the Department of Justice, not to approve them myself. A list of the particular methods of questioning reviewed by the Department of Justice, and the results of such reviews, would contain classified information. However, as the Committee is aware, documents relating to the legality of certain methods of questioning, in particular methods of questioning under consideration or adopted by the military for limited use at Guantanamo Bay, were made public on June 22, 2004.

**b. According to media reports, U.S. personnel have used each of the interrogation techniques listed below. For each of these techniques, please indicate (1) whether use of the technique would constitute torture or cruel, inhuman or degrading treatment or violate any other legal prohibition, (2) whether you, your office, or DOJ reviewed the technique, and (3) if you, your office, or DOJ did review the technique, whether it was determined to be legally permissible and the legal basis for that determination. Please provide copies of all documents related to the review of these interrogation techniques.**

- (a) Simulated drowning (including "waterboarding")
- (b) Stress positions (including forcing detainees to assume painful, contorted positions for extended periods of time)
- (c) Prolonged isolation
- (d) Forced grooming
- (e) Inducing stress by use of detainee's fears (e.g., dogs)
- (f) Removal of clothing (forced nudity)
- (g) Hooding
- (h) Sensory deprivation
- (i) Food deprivation (as distinguished from dietary manipulation)
- (j) Sleep deprivation (as distinguished from sleep adjustment)
- (k) Removal of comfort items (including religious items)
- (l) Environmental manipulation (including exposure to extreme temperatures, loud music and strobe lights)
- (m) Physical contact such as a face or stomach slap
- (n) Forcible injection of mood-altering drugs
- (o) Mock executions
- (p) Threatening to send detainees to countries where they would be tortured

Response: Some of these activities, at least under certain factual assumptions, might very well be prohibited, either under the torture statute or under other prohibitions such as, for example, the standards of conduct contained in the Army Field Manual. Some might likewise be permissible in specific circumstances, if appropriately limited, depending on the nature of the precise conduct under consideration. As the Administration has made clear in the past, the

Department of Justice has reviewed specific interrogation practices used in the conflict with al Qaeda and the Taliban and has concluded they are lawful. It would be inappropriate for me to address methods of questioning discussed in the press and to attempt to analyze them under the prohibitions of 18 U.S.C. §§ 2340 & 2340A. As the Office of Legal Counsel's recent memorandum addressing 18 U.S.C. §§ 2340 & 2340A makes clear, Congress defined torture as an act that is "specifically intended to inflict severe physical or mental pain or suffering." Analyzing whether a particular practice meets that test is a highly fact-intensive inquiry. In addition, were the Administration to begin publicly ruling out speculated interrogation practices, by virtue of gradually ruling out some practices in response to repeated questions and not ruling out others, we would provide al Qaeda with a road map concerning the interrogation that captured terrorists can expect to face and would enable al Qaeda to improve its counter-interrogation training to match it.

- 3. At your hearing, I asked you whether the President can invoke his authority as Commander-in-Chief to avoid the restrictions of any statute. You told me, "I do believe it is possible, theoretically possible, for the Congress to pass a law that would be viewed as unconstitutional by a President of the United States." Do you believe that the anti-torture statute or any other statute governing the treatment of detainees is unconstitutional? Can you assure me that, if you are confirmed as Attorney General, you will not in any circumstance advise the President that he is not required to comply with the anti-torture statute or other laws that currently govern the treatment of detainees?**

Response: The President has consistently stated that the United States will not use torture in any circumstances, so it is simply implausible that I would ever be called upon to address whether the President's constitutional authority as Commander-in-Chief would permit him to, in effect, nullify the torture statute for national security reasons. Further, the President has repeatedly affirmed the Administration's commitment, in dealing with terrorists in our custody, to act in accordance with all laws and international treaties. It is theoretically possible, of course, as I explained in my testimony to the Committee, that Congress could pass a law that the President might regard as unconstitutional; presidents of both parties have held that view. I would also remind you that Congress itself recognized in the Resolution Authorizing the Use of Force in September 2001, that the President has the constitutional authority to deter and prevent acts of terrorism against the United States. For a president to consider whether or not to ignore a particular law as unconstitutional, however, would pose a question of extraordinary gravity and difficulty. I would approach such a question with a great deal of care.

- 4. There have been numerous media reports indicating that the Central Intelligence Agency (CIA) has used highly coercive interrogation techniques such as "waterboarding." According to some reports, your office or DOJ reviewed and approved the use of these techniques. Please provide unclassified responses to the following questions to the greatest extent possible, with a classified annex if necessary. What are the legal standards for CIA interrogations? What role did you, your office, and DOJ play in developing and approving these standards? Have you, your office, or DOJ approved any CIA interrogation techniques or issued any interrogation guidelines to the CIA? If yes, please provide any documents related to this.**

Response: As I explained in my testimony to the Committee, the Department of Justice has reviewed specific interrogation practices used in the conflict with al Qaeda and the Taliban and has concluded they are lawful. Although I do recall participating in certain discussions about the legality of particular methods of questioning, in each case it was for the Department to decide whether a particular methods of questioning could lawfully be employed. Information about the standards for interrogation by the CIA would be classified, as would be information about any particular methods of questioning approved for use by the CIA.

5. At an Appropriations Committee's Defense Subcommittee hearing on May 12, 2004, I asked Secretary of Defense Donald Rumsfeld about interrogation techniques that had been approved for use in Iraq. These techniques were reflected in a document, "Interrogation Rules of Engagement," that was created by the U.S. Army and posted in the Abu Ghraib prison. DOD provided this document to Congress, a copy of which is attached to these questions for your reference. The document specifically mentions stress positions, presence of military working dogs, sensory deprivation, isolation for longer than 30 days, and environmental manipulation. The document also states, "The Geneva Conventions apply within CJTF-7," and Secretary Rumsfeld told me that these techniques had been "checked by the lawyers" and "deemed to be consistent with the Geneva Convention." However, these techniques seem to violate the Fourth Geneva Convention, which, according to the Administration, is applicable in Iraq. In particular, Article 27 states, "Protected persons ... shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity," and Article 31 states, "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them." Do you believe that using these interrogation techniques would violate the Geneva Conventions?

Response: I am not aware whether the Department of Justice has analyzed whether particular interrogation techniques intended for use in Iraq would comply with the requirements of the Fourth Geneva Convention, and that is not an issue with which I am familiar. I would expect the Department of Defense to address that issue.

6. As you know, Secretary Rumsfeld established a Working Group to advise him on interrogation policies for Guantanamo Bay. According to some media reports, you and/or your office were involved in the establishment and deliberations of the Working Group. The Working Group produced a report on April 4, 2003 ("DOD Working Group Report"), recommending that the Secretary of Defense approve the use of numerous coercive interrogation techniques. In response to the Working Group's recommendation, Secretary Rumsfeld issued revised rules for interrogations at Guantanamo Bay. These allowed for the use of coercive interrogation tactics, including prolonged isolation, sleep adjustment, dietary manipulation, and environmental manipulation. As you also know, the 8/1/2002 torture memo was recently rescinded and replaced by the 12/30/2004 torture memo. However, the DOD Working Group Report, which is based in part on the 8/1/2002 torture memo and which formed the legal basis for the use of coercive interrogation techniques, has not been revised. Moreover,

Secretary Rumsfeld has not revisited his approval of coercive interrogation techniques for use at Guantanamo Bay, which was based upon the DOD Working Group Report's recommendations. Please describe the role of you and your office in the Working Group's establishment and deliberations. Will the DOD Working Group Report be revised in light of the fact that the 8/1/2002 torture memo was withdrawn? Will the Defense Secretary revisit his approval of coercive interrogation techniques for use at Guantanamo Bay?

Response: The Department of Defense Working Group was established by the Department of Defense. Although I was occasionally and informally advised of the status of the Working Group's progress, neither I nor, to my knowledge, anyone in my office played a role in its deliberations. The status of the Working Group Report and the Defense Secretary's policy regarding interrogation techniques are matters for decision by the Department of Defense.

7. One reason that the DOD Working Group Report should be revised is that it, like the 8/1/2002 torture memo, redefines torture. For example, the anti-torture statute defines torture to include "prolonged mental harm caused by or resulting from ... the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality." The 8/1/2002 torture memo and the DOD Working Group Report adopt a new, restrictive definition of this standard. These documents argue that the statute only prohibits the use of mind-altering drugs that "penetrate to the core of an individual's ability to perceive the world around him, substantially interfering with his cognitive abilities, or fundamentally alter his personality." They give the example of "pushing someone to the brink of suicide (which could be evidenced by acts of self-mutilation)" as "a sufficient disruption of the personality to constitute a 'profound disruption.'" This seems to go far beyond the legislative language.

a. When you received the 8/1/2002 torture memo, you had the chance to review this definition. Did you then and do you now believe that this definition is legally correct?

Response: The President has repeatedly made clear that it is the policy of the United States that torture will not be authorized or tolerated under any circumstances. I support the President's long-standing policy in this regard. The August 1, 2002, memorandum has been withdrawn and replaced by the Department of Justice. By statute and regulation, the Department of Justice is the entity within the Executive Branch that provides legal advice for the entire branch. I accepted the August 1, 2002, memorandum as a good-faith effort to interpret the anti-torture statute and to explore other matters potentially relevant to its application. I support the Department's decision to withdraw and replace the memorandum and agree with the analysis contained in the replacement memorandum.

b. The anti-torture statute also defines torture as "an act ... specifically intend to inflict severe physical or mental pain or suffering." The 8/1/2002 torture memo and the DOD Working Group Report argue, however, that "Even if the defendant knows that severe pain will result from his actions, if causing such

harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith. Instead a person is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control." The 12/30/2004 torture memo rejects this approach, stating, "We do not believe it is useful to try to define the precise meaning of 'specific intent' in section 2340 [the anti-torture statute]." Did you then and do you now believe that the 8/1/2002 torture memo's definition of specific intent is legally correct?

Response: The President has repeatedly made clear that it is the policy of the United States that torture will not be authorized or tolerated under any circumstances. I support the President's long-standing policy in this regard. The August 1, 2002, memorandum has been withdrawn and replaced by the Department of Justice. By statute and regulation, the Department of Justice is the entity within the Executive Branch that provides legal advice for the entire branch. I accepted the August 1, 2002, memorandum as a good-faith effort to interpret the anti-torture statute and to explore other matters potentially relevant to its application. I support the Department's decision to withdraw and replace the memorandum and agree with the analysis contained in the replacement memorandum.

- c. In your press briefing on June 22, 2004, you said, "The definition of torture that the administration uses is the definition that Congress has given us in the torture statute and the reservation of the torture convention." Similarly, in testimony to the Senate Judiciary Committee on June 8, 2004, Attorney General Ashcroft testified, "it is not the job of the Justice Department or this administration to define torture. Torture has been defined by the Congress." The 8/1/2002 torture memo and the DOD Working Group Report seem to contradict your statement of June 22, 2004. Do you stand by this statement?

Response: I believe the August 1, 2002, memorandum was an effort by the Department of Justice to interpret what Congress meant when it defined torture.

8. Last June, in response to the prison abuse scandal, the Senate unanimously adopted a bipartisan, anti-torture amendment, which I had offered with Senators Specter, McCain, Feinstein, Leahy, Kennedy, and Levin. My amendment affirms the U.S.' long-standing obligation not to engage in torture or cruel, inhuman or degrading treatment, and requires the Secretary of Defense to issue policies to ensure compliance with this standard and to report to Congress on violations of the standard. This standard is embodied in the U.S. Constitution and in numerous international agreements which the U.S. has ratified. Yet, the Bush Administration opposed my amendment. The Durbin amendment was enacted into law after some revisions in the conference committee (Sections 1091-1093 of Public Law 108-375, Defense Authorization bill for FY2005). Last fall, the bipartisan 9/11 Commission unanimously recommended that the U.S. develop policies to ensure that all detainees are treated humanely. In response, I worked with Senators McCain and Lieberman on an amendment to the intelligence reform legislation that would have extended the requirements of my Defense Authorization amendment to the intelligence community. This bipartisan amendment

was also adopted unanimously by the Senate, but because the Bush Administration opposed it, the language was stripped during conference, and thus never became law. Why did the Administration oppose these anti-torture amendments? Did you or your office review and comment on the amendments? If so, what were you or your office's recommendations? According to an October 18, 2004 letter from National Security Advisor Condoleezza Rice and Office of Management and Budget Director Joshua Bolten, the Administration opposed the intelligence reform amendment because it "provide[d] legal protections to foreign prisoners to which they are not now entitled under applicable law and policy." What are these legal protections to foreign prisoners to which they are not now entitled under applicable law and policy? Why does the Administration oppose these legal protections?

Response: The Administration stated in its October 18, 2004 letter to conferees on the intelligence reform legislation that it opposed a provision in the draft legislation that would have provided legal protections to foreign prisoners to which they are not now entitled. 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 in this area.

9. The State Department's "Country Reports on Human Rights Practices," which are submitted to Congress every year, have characterized the following interrogation techniques as "Torture and Other Cruel, Inhuman and Degrading Treatment: "beatings," "threats to detainees or their family members," "sleep deprivation," "depriv[ation] of food and water," "suspension for long periods in contorted positions," "prolonged isolation," "forced prolonged standing," "tying of the hands and feet for extended periods of time," "public humiliation," "sexual humiliation," and "female detainees ... being forced to strip in front of male security officers." Do you agree that these techniques constitute torture or cruel, inhuman or degrading treatment?

Response: Certain of those techniques could constitute torture as defined by Congress in the federal criminal prohibition, or "cruel, inhuman or degrading" treatment as defined by the Senate in its reservation to the CAT, depending on the circumstances of how they were employed.

10. The Army Field Manual on Intelligence Interrogation (FM 34-52) states that "acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or an aid to interrogation" are "illegal." It defines "infliction of pain through ... bondage (other than legitimate use of restraints to prevent escape)," "forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time," "food deprivation," and "any form of beating," as "physical torture" and defines "abnormal sleep deprivation" as "mental torture" and prohibits the use of these tactics under any circumstances. Do you agree that "acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or an aid to interrogation" are "illegal"? Do you agree that "infliction of pain through ... bondage (other than legitimate use of restraints to prevent escape)," "forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time," "food deprivation," and "any form of beating," are "physical torture"? Do you agree that "abnormal sleep deprivation" is



**“mental torture”? Are U.S. personnel prohibited from using these techniques under any circumstances?**

Response: Please see the response to Question 2(b), above.

- 11. FM 34-52 also provides very specific guidance about interrogation techniques that may approach the line between lawful and unlawful actions. Before using a questionable interrogation technique, an interrogator is directed to ask whether “If your contemplated actions were perpetrated by the enemy against U.S. [prisoners of war], you would believe such actions violate international or U.S. law. . . . If you answer yes. . . do not engage in the contemplated action.” This is the Army’s version of “the golden rule.” It is an important reminder that the prohibition on torture and other cruel treatment protects American soldiers as much as it does the enemy. Do you agree that this standard should govern U.S. personnel? Does it?**

Response: My understanding of the Army Field Manual is that it is designed to provide guidance for the military in complying with the requirements of the Third Geneva Convention, applicable to the treatment of prisoners of war, where that Convention applies. I have no reason to question the guidance developed by the military in the Army Field Manual.

- 12. As you know, Article 3 of the Torture Convention requires, “1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.” At your hearing, you told me, “Under my understanding of the law. . . we have an obligation not to render someone to a country that we believe is going to torture them.” According to media reports, the United States has rendered individuals to countries, including Egypt, Saudi Arabia, and Syria, which are known to engage in torture. In some cases, the U.S. reportedly sought assurances from these governments that the rendered individuals would not be tortured. Nevertheless, these individuals allege that they were subsequently tortured. Has the government complied with Article 3 of the Torture Convention from September 11, 2001, to the present? Is it legally permissible in any circumstances to render someone to a country known to engage in torture? If yes, in what circumstances is it legally permissible? Is it legally permissible to render someone to a country that is known to engage in torture if the U.S. receives assurances from that country that they will not torture a rendered individual? If yes, why do you believe that promises from a country known to engage in torture are a reliable basis for asserting that the U.S. is in compliance with its obligations under Article 3 of the Torture Convention? If confirmed as Attorney General, will you ensure that we do not accept assurances from a country known to engage in torture that they will not engage in torture as grounds for rendering someone to that country?**

Response: The government has complied with its obligations under Article 3 of the Convention Against Torture. The Senate, in giving its advice and consent to the CAT, included an understanding to Article 3 stating, "That the United States understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in Article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.'" In carrying out U.S. obligations under Article 3, as subject to the Senate understanding, it is permissible in appropriate circumstances to rely on assurances from a country that it will not engage in torture, and such assurances can provide a basis for concluding that a person is not likely to be tortured if returned to another country.

### TEXAS CLEMENCY

1. **As General Counsel to then-Governor Bush, you supervised 59 executions on behalf of the Governor. As you explained in a speech to the Texarkana Bar Association on February 17, 1999, you "reviewed every file for every case and recommended to the Governor whether clemency was appropriate."**
  - a. **I understand that of the 59 cases you supervised, you did not recommend clemency – or even a 30-day stay of execution – in any case. I also understand the Governor of Texas has limited clemency powers and that the Texas Board of Pardons and Paroles has a large role in this process. However, doesn't the Governor have the authority to order the Board to investigate a case or to hold a hearing if he or she has doubts about guilt or due process? And doesn't the Governor also have the authority to instruct the Board to reconsider negative recommendations on clemency? Did you recommend that Governor Bush pursue any of these courses of action in any of the 59 cases you supervised?**

Response: The President believes the death penalty deters crime and saves lives. At the same time, he believes that all appropriate steps should be taken to ensure that only the guilty are punished. As Governor, he took clemency petitions very seriously, particularly focusing on the question whether the petitioner had a credible claim of wrongful conviction. As General Counsel to the Governor, I made sure that each petition was reviewed carefully by my staff and me and that all information the Governor should appropriately consider in order to make his determination was provided to him. The process I used in reviewing clemency petitions and advising the Governor was modeled on the process used by my predecessor, the General Counsel to Governor Ann Richards. In a letter to me dated January 4, 2005, Governor Richards' former counsel stated, "Capital cases and clemency are among the most important and profound matters that I dealt with during my tenure, and I am confident that you discharged this duty with the utmost professionalism during your tenure in the Governor's office." The members of the Board were confirmed by the Texas Senate. The Governor expected the Board to exercise its own independent good judgment in reviewing these petitions, free from political pressure or influence. Finally, as I understand it, this is the process the Board has used for many years during several administrations, including Governor Richards' administration.

- b. **From 1973 to 1998, the Board of Pardons and Paroles itself never investigated a case or held a hearing on a clemency appeal – or even conducted a meeting on**

any of the 70-plus cases it had considered. Furthermore, according to testimony in a 1998 civil lawsuit, some Board members do not even review case files or read correspondence they are required to read before casting their votes on clemency petitions. Most of all, U.S. District Judge Sam Sparks, who presided over that lawsuit found that "There is nothing, absolutely nothing that the Board of Pardons and Paroles does where any member of the public, including the governor, can find out why they did this. I find that appalling." Based on the Board's record and the lack of an explanation for denying clemency, how were you able to rely on its determination on clemency petitions in every case you supervised, without ever asking the Board to conduct a hearing or investigation?

Response: As noted above, as General Counsel to the Governor, I made sure that each petition was reviewed carefully by my staff and me and that all information the Governor should appropriately consider in order to make his determination was provided to him. The process I used in reviewing clemency petitions and advising the Governor was modeled on the process used by my predecessor, the General Counsel to Governor Ann Richards. In a letter to me dated January 4, 2005, Governor Richards' former counsel stated, "Capital cases and clemency are among the most important and profound matters that I dealt with during my tenure, and I am confident that you discharged this duty with the utmost professionalism during your tenure in the Governor's office." The members of the Board were confirmed by the Texas Senate. The Governor expected the Board to exercise its own independent good judgment in reviewing these petitions, free from political pressure or influence. Finally, as I understand it, this is the process the Board has used for many years during several administrations, including Governor Richards' administration.

- c. Under what circumstances would you have recommended that the Governor grant clemency or a 30-day stay to a death row inmate? In particular, I would like you to explain a comment from a speech you made on October 19, 1999, to the Southwestern Insurance Information Service. You said the following: "I believe that some crimes are so horrific to warrant the death penalty and I believe also that those of us in state government have an obligation to carry out the death sentence rendered by the citizens of Texas." If you had an "obligation" to carry out these death sentences, did any death row inmate truly have an opportunity for an objective, non-political review of his or her clemency petition?

Response: The President believes the death penalty deters crime and saves lives. At the same time, he believes that all appropriate steps should be taken to ensure that only the guilty are punished. As Governor, he took clemency petitions very seriously, particularly focusing on the question whether the petitioner had a credible claim of wrongful conviction. In support of his policy, I focused in particular on this issue when reviewing clemency petitions and advising the Governor. Clemency is an act of grace by the sovereign, to be exercised by the Governor in his discretion as he chooses. A governor theoretically could grant some type of clemency in every case or decide never to grant clemency. Governor Bush respected the role of juries, judges and courts in the criminal justice system. He was willing to defer to them in making decisions about the guilt or innocence of an accused and was unwilling to second-guess those decisions unless

there was legitimate doubt about the guilt or innocence of a person. In response to your question, I believe every death row inmate truly had an opportunity for an objective, non-political review of his or her clemency petition. Governor Bush's approach to clemency was overwhelmingly embraced and supported by the voters of Texas in 1998.

2. According to press reports, typically, on the day of a scheduled execution, you would provide Governor Bush with a briefing memo containing a summary of the facts of the case; background information and personal history of the petitioner, including previous criminal history; a summary of proceedings; and a brief review of applicable law and legal claims. This memo, usually three to seven pages in length, would accompany a 30-minute briefing in person. During your hearing, you testified that these memos reflected a "summary of discussions" between your office and the Governor. However, even as a summary, these memos often omitted key information. Please respond to questions about the following four specific cases:

- a. David Wayne Stoker was convicted of murdering a convenience store clerk while committing a robbery in 1986. On June 16, 1997, you provided Governor Bush with a three-page briefing memo on Mr. Stoker's scheduled execution. The summary of the facts is quite detailed, including such specifics as the name of the assistant manager who discovered the victim's body and the time of the victim's death. However, the memo omits the following facts: (i) A key state witness – who a federal appellate judge concluded was just as likely the murderer – received a financial reward for implicating Stoker and also had felony drug and weapons charges dropped the day he testified against Stoker. This witness, along with two police witnesses, lied in court about what the witness received in exchange for his testimony. While your memo notes that this individual was a "police informant who purchased drugs from Stoker," it does not include any of these details. (ii) Another fact not included in your memo is that an additional state witness recanted his original testimony, explaining that he had been pressured by the prosecution to perjure himself. (iii) Your memo also does not inform the Governor that since Stoker's trial, the state's expert medical witness had pled guilty to seven felonies involving falsified evidence in capital murder trials and the state's expert psychiatric witness had never even examined Stoker and had since been expelled from the American Psychiatric Association for providing unethical testimony in murder cases.

(1) Why did you exclude all of these facts from your briefing memo?

Response: The memorandum to which your question refers represented the end of the process through which the Governor was provided information by my office regarding a petition and was only a summary of that information. As General Counsel to the Governor, I made sure that each petition was reviewed carefully by my staff and me and that all information the Governor should appropriately consider in order to make his determination was provided to him. I do not know if the "facts" to which you refer are from the trial proceedings or are from the clemency petition. If the information is from the clemency petition, I have no way of confirming that the facts are true, and thus I cannot respond to your question. If the information is from the trial, that would lead

me to believe that the issues were considered in a court, probably by a jury, and reviewed on appeal at several levels. In either event, as I said in my hearing, information such as the type you described, whether substantial or not, likely was communicated to the Governor in a variety of other means.

- (2) These facts raise genuine issues regarding Mr. Stoker's guilt. Why not at least recommend that Governor Bush order the Board of Pardons and Paroles to conduct an investigation?**

Response: The President believes the death penalty deters crime and saves lives. At the same time, he believes that all appropriate steps should be taken to ensure that only the guilty are punished. As Governor, he took clemency petitions very seriously, particularly focusing on the question whether the petitioner had a credible claim of wrongful conviction. In support of his policy, I focused in particular on this issue when reviewing clemency petitions and advising the Governor. See my answers to questions 1c and 2a(1), above.

- (3) Mr. Stoker's counsel for his clemency appeal told an *Atlantic Monthly* reporter that your office called a week to ten days before the execution, advising him that there would be no reprieve. Was it typical for your office to make such notifications before the Governor had received your memo and briefing?**

Response: My approach was to make as transparent as I could to defense counsel the process by which the Governor assessed each clemency petition. In many cases, the Governor and I had discussed a particular clemency petition several times before he was provided with the final summary memorandum. I doubt seriously that I would have called 10 days before the execution. The Governor would as a matter of practice wait for a recommendation from the Board of Pardons and Parole, which routinely would not make a recommendation until just before the execution date. Additionally, the Governor would normally not make a decision on clemency as long as an appeal was pending in the courts. Finally, I would not notify defense counsel of the Governor's decision before having had an opportunity to fully brief the Governor.

- b. In 1986, Irineo Montoya was convicted of capital murder. Your briefing memo on June 18, 1997, notes the following: "Montoya is a Mexican national and requests for clemency on his behalf have been received from the Governor of Tamaulipas, members of the Tamaulipas legislature, and local officials." Therefore, it is puzzling why your memo omitted the most important issue: whether the Vienna Convention on Consular Relations had been violated and whether this should be considered in the decision to grant or deny clemency to Mr. Montoya. In 1969, the United States ratified the Vienna Convention, which in part requires law enforcement officials to inform foreign nationals that they have the right to contact their consuls when they have been arrested or detained. In this case, Montoya was not notified of this right, which was especially significant because he did not speak English – another fact omitted from your memo. In fact, the Dallas Morning News on June 19, 1997, reported that,**

according to Montoya, he believed the confession he signed was an immigration document, and according to press reports, he was convicted "almost exclusively upon the strength of this confession."

**(1) Why did your memo not even mention the Vienna Convention or the possible violation of it?**

Response: The President believes the death penalty deters crime and saves lives. At the same time, he believes that all appropriate steps should be taken to ensure that only the guilty are punished. As Governor, he took clemency petitions very seriously, particularly focusing on the question whether the petitioner had a credible claim of wrongful conviction. The memorandum referred to in your question represented the end of the process through which the Governor was provided information by my office regarding a petition and was only a summary of that information. As General Counsel to the Governor, I made sure that each petition was reviewed carefully by my staff and me and that all information the Governor should appropriately consider in order to make his determination was provided to him. The process I used in reviewing clemency petitions and advising the Governor was modeled on the process used by my predecessor, the General Counsel to Governor Ann Richards. In a letter to me dated January 4, 2005, Governor Richards' former counsel stated, "Capital cases and clemency are among the most important and profound matters that I dealt with during my tenure, and I am confident that you discharged this duty with the utmost professionalism during your tenure in the Governor's office."

In the particular case you reference, I provided to the Department of State all the factual information it requested regarding the matter. I believed that it was for the Department of State, with its specialized expertise, to make determinations regarding the Vienna Convention as it applied to the facts of this particular case. In a letter dated June 18, 1997, to the State Department's Acting Legal Adviser providing him with the requested information, I also noted that Governor Bush had been advised that "it appears that [the petitioner] did not receive consular notice prior to his confession. The Governor has instructed me to assure you that these matters will be considered in his decision regarding clemency." The Acting Legal Adviser sent a letter to Governor Bush in response expressing appreciation for "your cooperation in this case." I regret that some are more concerned with what the memo said than what the Governor actually knew about a case. In this case, the Governor was advised in numerous conversations of the possible violation of the Vienna Convention.

**(2) Five days before Montoya's scheduled execution, the State Department contacted your office to inform you that it had received a formal diplomatic note from the Government of Mexico concerning Montoya's scheduled execution and alleging a violation of the Vienna Convention in this case. Why didn't your memo mention the State Department contact or the diplomatic note?**

Response: Please see my response to 2b(1), above.