Responses of Alberto R. Gonzales
Nominee to be Attorney General
to the Written Supplemental Questions of Senator Edward M. Kennedy

I. General Request:

Your answers repeatedly state that you do not recall certain key discussions on torture, that you do not know whether relevant documents and other materials exist, that you have not conducted a search for such materials, and that you would refuse to provide them because they involve "classified information," "predecisional" or "internal deliberations," "deliberative material," or "non-public" opinions.

As you certainly know, however, there is no legal bar to providing classified materials or any of the other materials to Congress, and such materials have in fact been provided regularly to Congressional committees in nomination and other proceedings. You yourself were directly involved in providing sensitive executive materials to the Intelligence Committees and the 9/11 Commission, and an incomplete selection of torture-related documents to the public last June. The only exception to the obligation to provide such materials is in the rare case where the President himself determines that his interest in secrecy outweighs the public interest in disclosure of the information or materials to Congress or the public, and he himself invokes executive privilege.

Refusal to provide the requested materials and information is inappropriate and unjustified in the present circumstances. It was clear at the time you were nominated that your involvement in the prisoner detention and interrogation issues would be a major concern of the Senate, and that the Senate would need full information and materials on this subject. Recent reports confirm serious abuses of detainees at several locations, and your role in the development of the legal justifications that many believe facilitated and encouraged these abuses is a central issue in the decision by the Senate on whether you should be confirmed as the nation's chief law enforcement officer.

I therefore request that you reconsider all of your answers at the hearing and in your written submissions and that you provide the materials and information requested.

For example, in your answer to 2(a) of my written questions to you, you do not describe your suggestions or opinions on the Bybee Memorandum, but you indicate that your office may have provided comments or suggested edits. Please identify and provide any materials containing or reflecting those comments or edits, and any materials reflecting your knowledge of them or your role in them.

Please determine whether there are audio recordings, or other transcriptions or records of any kind, relating to any of the meetings, events, discussions or facts in question.

If any of the requested or relevant materials once existed but no longer exist, please describe what happened to them.

Response: Respectfully, I have provided a great deal of information through the answers I provided at the day long hearing on my confirmation and in the nearly 450 written responses I prepared over the Martin Luther King, Jr. holiday weekend to post-hearing questions from more than a dozen different Senators. In all of my responses, I have answered truthfully, based on my recollection.

With respect to the specific points raised in your question, I can reaffirm that, I in fact cannot recall with any specificity many of the discussions in which I participated concerning interrogations of detainees. I can in good faith try to provide you a general description of the process, of the issues with which I was concerned, and of my views concerning the role of Counsel to the President as part of that process. I have, through my responses to all of the Senators, attempted to provide such information to the Committee.

With respect to your requests for documents, I have since the time of my nomination not been involved in responding to requests for documents that may have been created during my tenure as Counsel to the President. Decisions regarding the release of White House or Department of Justice documents to the Committee are being made by other officials at the White House and I have provided all of the documents that I have been authorized to disclose. I do not agree, however, that the only "the only exception to the obligation to provide . . . materials [requested by a Member of Congress] is in the rare case where the President himself determines that his interest in secrecy outweighs the public interest in disclosure of the information or materials to Congress or the public, and he himself invokes executive privilege." Instead, it is generally not the practice of this or prior Administrations to provide all documents requested by a Member of Congress where those documents contain highly deliberative or Presidential communications. By longstanding practice, no claim of executive privilege is necessary to decline to produce such documents in response to such a request. It is on the basis of this practice, and in light of the nature of the documents at issue, that I understand the White House has respectfully declined to provide additional documents in addition to the many documents it has already made public or produced in response to inquiries from Senators.

I respect your interest in learning of my involvement in prisoner detention and interrogation issues, and have attempted to provide as much information as I am able to recall, identify, and provide. With respect, I reject the charge that I participated in "the development of the legal justifications" that "facilitated and encouraged" abuses of detainees.

In response to your specific inquiry, so far as I am aware, there have never been any audio recordings or transcriptions of any meetings in my office concerning these topics or any others.

II. Follow-up Requests on Specific Questions:

Question #1: Discussions of Interrogation Techniques.

Please provide the requested details of the meetings, including dates or timeframes, the persons present, and the recommendations, results, and assignments. In all answers, if your recollections are non-specific or incomplete, state what you do recall.

Response: Since shortly after September 11, 2001 until the present, the Administration has been involved in conducting the War on Terror by gathering as much information from terrorists as we possibly can within the bounds of law. During that time, I have participated in several meetings at which the possible use of methods of questioning were discussed. These meetings may have included, from time to time, representatives from the National Security Council, the Department of State, the Department of Justice, the Department of Defense, the Central Intelligence Agency, and others. In the meetings I attended, agencies' representatives raised concerns that certain terrorists had information that might save American lives; the participants shared a desire to explore whether there existed methods of questioning these terrorists that might elicit that information; and it was always very clear that we would implement such methods only within the bounds of the law. As Counsel to the President, my constant emphasis and interest was on the last factor – ensuring compliance with the law. It would not have been appropriate for me to comment on issues such as whether a particular individual may have information that would be helpful to the effort to save American lives or defeat terrorists, or whether a certain procedure for questioning that individual would be effective in eliciting that information. Others with more relevant experience, expertise, and information were responsible for making those judgments. Instead, it was my responsibility to ensure that any method they deemed appropriate and effective from an operational point of view was considered lawful by the Department of Justice. To the extent I was involved in recommendations, results, and assignments arising out of such meetings, my activities were directed toward ensuring that those with operational responsibility would act only after receiving the judgment of the Department of Justice that a proposed course of action was lawful.

Question #2: Your Role in the Bybee Memorandum.
Please explain what you meant when you used the expression "forward leaning," especially in any documents which contain that expression. Please make sure that the documents provided, and your refreshed recollections, specify the persons who requested the Bybee Memorandum, and the reason for the request.

Response: As I said in the hearing, I do not recall ever using the term "sort of leaning forward" in terms of stretching what the law is. The expression "forward leaning" generally means, in my view, to think creatively within the bounds of the law. In my judgment, and the President's, we should do everything we can to win the war against terrorists who kill innocent civilians and do not fight according to the laws of war, and this may well require that attorneys asked to give legal advice – like those persons responsible for unique military operations – explore the possibilities that the law permits different solutions than those that have been tried before. That is not to say one stretches or ignores the law to achieve a desired result, but rather that one should think creatively about whether the law might permit new approaches in this unique war. I do not believe that I used the phrase "forward leaning" in any documents concerning the August 1, 2002, memorandum.

Questions #3 - 6: Documents Relating to the Bybee Memo.
In these and other answers, when you use the phrases "no present knowledge of any documents" or "no present knowledge that there are any documents," does that mean that such documents existed or may have existed in the past? If so, please identify and describe them in detail and explain what happened to them. Do the two phrases have different meanings to you? Where you yourself did not search for documents, please detail the steps by others assisting you to locate them.

Response: In my responses to these questions, my use of the phrase "no present knowledge of any documents" or "no present knowledge that there are any documents" was intended to indicate that I presently do not know of responsive documents, regardless of whether they currently exist, and was not intended to indicate that I am aware of responsive documents that no longer exist. The two phrases do not have different meanings in my judgment.

Question #5: Your Change in Position on the Bybee Memorandum.
When, how and through whom did Justice's Office of Legal Counsel "raise questions" about the Bybee Memorandum? Please provide all relevant materials. The statement in the Bybee Memorandum that certain acts were not "torture" was adopted and disseminated in 2002 and remained Administration policy until June 2004. At that time you and the President decided that these actions were in fact torture. Was that decision retroactive? Or was it prospective, so that acts which became torture under the new interpretation continued not to be considered torture if committed *before* June 2004?

Response: Lawyers within the Office of Legal Counsel raised some concerns about the memorandum before it had been leaked to the press in June 2004. My general reaction expressed to staff and others in the Administration prior to the June 2004 press conference was that people would incorrectly assume from the hypothetical discussions contained in the August 1, 2002, memorandum that the President was somehow relying on those discussions as authority under our Constitution to engage in torture despite the statutory prohibition, when that was not, in fact, the case. The Executive Branch has a substantial need for confidentiality not only with respect to non-public final OLC

opinions, but also with respect to predecisional advice or discussions with OLC, in order to protect the deliberative processes of the Executive Branch and the attorney-client relationship between Administration officials and OLC. Just as the longstanding practice has been that non-public OLC opinions are not disclosed outside the Executive Branch, similarly discussions with OLC preceding the preparation of a final opinion are kept confidential. Based on this policy, I have been advised by the White House not to provide further details.

I appreciate the opportunity to clarify a misunderstanding. While your question suggests that the memorandum of August 1, 2002, concluded that "certain acts" were not torture and that subsequently a decision was made that "these actions were in fact torture," that is not the case. The memorandum of August 1, 2002, did not address specific actions and conclude that they were or were not torture. Rather, it sought to describe the standard Congress had set in defining torture in 18 U.S.C. § 2340 without addressing specific acts. In addition, in the memorandum released on December 30, 2004, providing OLC's current interpretation of the statute, OLC made clear that OLC had reviewed its "prior opinions addressing issues involving treatment of detainees" and did "not believe that any of their conclusions would be different under the standards set forth" in the December 30th memorandum. Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A*, at 2 n.8 (Dec. 30, 2004). The current interpretation of the statute is the one that the Executive Branch will apply, and it does not have solely prospective effect.

Question #7: <u>Opposition of High-Level JAG Officers.</u>
What did you do when you "learned" that high level officers experienced in military law "disagreed with the legal and policy positions" in your January 2002 document? Who were they? Did you make any changes that reflected the opposition within the military? Provide details and identify and provide all related materials.
When you say the "principals who had equities in the decision" had a chance to present their concerns "directly to the President," does that include the dissenting high-level JAG officers? Did he meet with them or learn of their opposition? Please identify and provide any documents in which the "principals" or their lawyers who disagreed with your document or the President's decision expressed that disagreement at any time, and any other materials reflecting that disagreement.

Response: At all times throughout the process that led to the President's February 7, 2002, determination concerning humane treatment of al Qaeda and Taliban detainees, I attempted to ensure that the views of all parties with an interest in the matter – including those in the military – were fully and faithfully represented both in writing and otherwise. I do not recall, if I ever knew, the names of individual military officers who were concerned about the Geneva determinations. I do not believe that any "dissenting high-level JAG officers" presented their concerns directly to the President; as a matter of good management practice I believe it was for the Chairman of the Joint Chiefs of Staff and the Secretary of Defense to determine which of those concerns within DOD merited the

President's personal attention and to present those views to the President as they in their discretion saw fit.

Question #8: Connecting the Bybee Memorandum to Operations in the Field.
Please describe how, when and by whom the Bybee Memorandum, addressed to you, was disseminated to DOD and other agencies. Since the military was already subject to strict limitations under the Uniform Code of Military Justice, and was already subject to the President's previous mandate to treat prisoners humanely, what was the purpose of giving DOD detailed advice on when severely coercive interrogation techniques become "torture" under the Torture Act?

Response: As you note, the August 1, 2002, memorandum was not addressed to the Department of Defense. I do not recall when the memorandum was disseminated to that Department or other agencies. Therefore, I am unable to answer the second part of the question. In my experience, however, it is not uncommon for agencies to ask to obtain copies of legal opinions on questions of interest to them, even if the opinion might not directly govern their conduct.

(b) How did you become "aware" of what the DOD Working Group was doing with the Bybee memo? What was your role, and the role of your office and assistants, in or with the Working Group? Provide details, and identify and provide relevant documents.

Response: I believe I became aware that the DOD working Group reviewed the Bybee Memorandum because I was advised of that fact by the DOD General Counsel. Neither I nor anyone on my staff had any role in or with the Working Group. So far as I am aware, no employee of the Office of Counsel to the President ever met with the Working Group, provided any input into its consideration of the issues before it, reviewed or commented on any drafts of its report, or otherwise participated in the Working Group process.

Question # 9: Ghost Detainees.
Does your answer to this question mean that the issue was never brought to the attention of or inquired into by your office?

Response: I do not recall when I became aware of issues surrounding ICRC access to certain detainees, but I would have gained such awareness as an attendee at meetings of senior Administration officials. I recall understanding that the Department of Defense was investigating the issue. Based on that understanding, I believed that the Department of Defense would conduct an investigation and the Departments of Defense and State would address any issues regarding the ICRC, as had been customary and as it was appropriate for them to do. It was not within my authority or practical ability as Counsel to the President to conduct such an investigation into the actions of agencies outside the White House or to be a primary point of contact with the ICRC.

Question #10: The Goldsmith Memo on "Relocating" Prisoners.
You did not answer (b), (c) or (e).

(b) Was it your intent to justify the practice of maintaining ghost detainees?

Response: No. It would never be appropriate to request a legal opinion with the intent to "justify" a practice or procedure. Articles 136 and 137 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War ("GC") require the United States promptly to notify the Red Cross, through the National Detention Reporting Center, "of any measure taken by it concerning any protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence, or who are interned." The policy of the United States is to comply with its obligations under the Geneva Conventions. As I indicated in my earlier response, the draft memorandum was prepared to assist U.S. personnel to abide by all applicable legal requirements.

(c) Why would it ever be necessary to hide a detainee from the International Red Cross?

Response: Article 143 of the GC provides that Red Cross visits to protected persons "may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure." Similarly, Article 5 of the GC provides that "[w]here in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention." These provisions may authorize some restrictions on Red Cross access to protected persons in certain exceptional cases. Conduct in accordance with these provisions does not constitute "hiding" detainees.

(e) Was this and is this the intent of our policy?

Response: No. The policy of the United States is to comply with all of our legal obligations under the GC.

If the purpose of the draft memo was "to assist US. personnel [to] abide by all applicable legal requirements," and the draft was never finalized or signed, what guidance did you provide to the CIA to fill that need? Please provide the detailed basis and any documents you relied on for your conclusion that the Administration has complied with all of its "legal obligations to notify the ICRC."

Response: I have been advised that although the memorandum was not finalized, CIA and DOD continued to consult with DOJ to make certain that any actions taken were consistent with all of our legal obligations, including any obligations to notify the ICRC.

(h) The Goldsmith memo indicates that the purpose of the proposed "relocation" of detainees out of Iraq was "to facilitate interrogation." In what way would the relocation materially "facilitate" interrogation? In what sense were facilities in Iraq inadequate to interrogate detainees in the manner permitted by law?

Response: I believe the memorandum to which you refer was a draft that was never finalized. With respect to your particular question, I do not know how those on the ground in Iraq believed that relocation might facilitate interrogation. Nor do I know whether anyone reached the conclusion that facilities in Iraq were inadequate to interrogate detainees in the manner promoted by law or, if anyone did so, what the basis for the conclusion was.

Question #11: "Extraordinary Renditions."
Do you believe that the Convention Against Torture prohibits any agency of the United States from turning over an individual in U.S. custody, but not within the territorial boundaries of the U.S., to a nation where he would be in danger of being tortured? Do you consider the U.S. Naval Base at Guantanamo to be United States territory for the purpose of the Convention Against Torture? Do you consider Iraq to be United States territory for the purposes of the Convention Against Torture? Has anyone in the Executive Branch authorized or facilitated the transfer of any person in U.S. custody outside the territorial boundaries of the United States to a nation where the person would be in danger of being tortured? If so, please identify each such person and the legal authority relied upon, and identify and provide all documents reflecting the transfer.

Response: The policy of the United States is not to transfer individuals to countries where we believe they likely will be tortured, whether those individuals are being transferred from inside or outside the United States. I am not aware of anyone in the Executive Branch authorizing any transfer of a detainee in violation of that policy. The precise legal question you ask about the legal application of the "refouler" provisions of Article 3 of the Convention Against Torture ("CAT") or other legal prohibitions is a complex one involving questions of extraterritorial effect, the Senate's declaration that Article 3 is not self-executing, case law such as the Supreme Court's decision in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), and the interplay of statutes such as the prohibition against torture at 18 U.S.C. §§ 2340-2340A, the conspiracy statute and other laws, and I have not personally studied it. However, United States policy is clear—the U.S. will not transfer a detainee to another country if it is likely that he will be tortured. Similarly, the question of whether Guantanamo is United States "territory" for purposes of the CAT is a complex legal issue. "Territory" is not a defined term in the Convention. Notwithstanding the complexity of the legal question, however, United States policy is clear – the President has directed that the United States is not to engage in torture anywhere in the world and is not to transfer detainees from anywhere in the world to other countries where they likely will be tortured.

Question #15: The February 2002 Presidential Directive on Humane Treatment.
(a)You say that the directive was limited to the Armed Forces because other agencies are governed by "several other laws." But the Armed Forces are also bound by other restrictions that guarantee humane treatment. Thus your answer is not persuasive. Please re-answer. Did the President intend to exclude the C.I.A., other civilian agencies and contractors from the requirement to treat detainees humanely? If not, how is that requirement enforced. Did you advise him on this issue?

Response: It is my understanding that the President has not issued a directive on the treatment of detainees other than the February 7, 2002, directive "reaffirm[ing] the order previously issued by the Secretary of Defense to the United States Armed Forces." The President, however, expects all agencies to comply with their respective legal obligations. The President said – for example on March 31, 2003 – that he expects detainees to be treated humanely. As you know, the term "humanely" has no precise legal definition. As a policy matter, I would define humane treatment as a basic level of decent treatment that includes such things as food, shelter, clothing, and medical care. I understand that the United States is providing this level of treatment for all detainees. I have been told that we are also meeting the substantive standards of Article 16 of the CAT regarding cruel, inhuman, or degrading treatment. As I have also explained in my responses to 1(A), (B), and (C), the CIA and other non-military personnel are fully bound by the prohibition on torture in the CAT and by the criminal prohibition on torture contained in 18 U.S.C. §§ 2340-2340A. In addition, depending on the circumstances, they are bound by other criminal statutes that may provide penalties for conduct constituting torture.

(c) Please answer these questions and provide the publicly cited OLC opinions.

Response: I have been advised by the White House that I must respectfully decline to provide a copy of the opinions or to answer the questions posed about them.

(d) Is your statement that the President does not condone torture "by US personnel" intended to mean that he would allow non-U.S. personnel to torture prisoners captured by the U.S.?

Response: No. The United States does not condone and would not permit torture by non-U.S. personnel of prisoners captured by the United States.

Question #20: Support for a Comprehensive Investigation.
You did not answer any part of this question. Unless you believe you have a conflict of interest in answering these questions, please answer each part.

i. Do you support a comprehensive investigation, beyond the past and current internal Defense Department inquiries, into all of the allegations of abuse?

Response: As I noted in my original response, there have been eight completed investigations, and there are three ongoing investigations. There have been numerous

trials, courts martial, and administrative proceedings. These investigations and proceedings should be allowed to continue. I have no reason not to believe that once completed, these proceedings will result in a complete and comprehensive investigation and adjudication of detainee operations. Once they are completed, the appropriate individual, whether that is the Secretary of Defense, the Attorney General, or some other individual, should make a decision as to whether an additional investigation is necessary.

ii. Describe the form of investigation that you would recommend, including, but not limited to, the agency that should conduct the investigation, whether the results should be publicly available, the powers of the investigators, and the timing of such an investigation.

Response: I would not be in a posture to recommend any such investigation until the current investigations and proceedings were complete. As indicated above, the completion of such proceedings and investigations may likely result in a complete and comprehensive investigation and adjudication of detainee operations. It is in my judgment premature to discuss an additional investigation.

iii. Given the possibility of criminal proceedings in which you might be a witness, would you follow Attorney General Ashcroft's example and allow the Deputy Attorney General to appoint a special prosecutor?

Response: As I said in my earlier responses, if confirmed, I would take extremely seriously my obligation to recuse myself from any matter whenever appropriate and would consult with other lawyers at the Department of Justice if any such questions were to arise. As I indicated above, the ongoing investigations and proceedings should be allowed to continue. Once completed, the appropriate individual, whether that is the Secretary of Defense, the Attorney General, or some other individual, should make a decision as to whether additional investigation is necessary.

iv. If Congress decides to create a 9/11-type commission to make a comprehensive investigation into the reports of abuse, will you urge the President to sign such legislation?

Response: As I indicated above, the ongoing investigations and proceedings should be allowed to continue. I could not commit to making a recommendation either way until all such investigations and proceedings are completed.

Question #21: <u>Your Role in Attorney General Ashcroft's Committee Appearance.</u> Did you tell the Attorney General that he could refuse to provide documents to the Committee without invoking any privilege? Did the President approve that decision?

Response: I recall that I participated in discussions regarding what documents should be disclosed and which should remain confidential to protect the deliberative process,

national security or other vital interests. I don't recall any discussion of whether any privilege should be invoked. It is my understanding that there has been a longstanding tradition of protecting the confidentiality of the deliberative process, a tradition that Congress has recognized.