



# The Association of the Bar of the City of New York

Office of the President

**PRESIDENT**

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December 22, 2004

The Honorable Alberto Gonzales  
Counsel to the President  
The White House  
1600 Pennsylvania Avenue, NW  
Washington, DC, 20500

Dear Judge Gonzales:

I am writing on behalf of the Association of the Bar of the City of New York. The Association is an independent non-governmental organization with a membership of more than 22,000 lawyers, judges, law professors and government officials, principally from New York City but also from throughout the United States and from 50 other countries. Founded in 1870, the Association has a long history of engagement in issues of legal policy of concern to the profession and has been a continuous advocate of the Rule of Law at home and around the world. The Association has been a long-standing advocate of international humanitarian law. Indeed, one century ago officers of the Association represented the United States at the Hague conferences which produced an important forerunner to the Geneva Conventions. Today we remain committed to the preservation of this legacy.

Let me begin by congratulating you on your nomination as Attorney General of the United States. In contrast to our policy regarding the judiciary, the Association has no historical practice of taking positions on nominations to the Executive Branch or the Department of Justice. Nonetheless, as one of the nation's largest voluntary bar organizations, we have been following your nomination process with interest, with special attention to maintaining our government's highest traditions in promoting the Rule of Law both domestically and internationally. Toward these ends, we hope that we will be able to assist you in your capacity as the nation's chief law enforcement officer. Where appropriate, we also hope to share our views, as we have traditionally done, with regard to important legal matters of the day.

Accordingly, the Association desires to take the opportunity of your appointment to raise with you several issues concerning legal positions in connection with the United States' response to the attacks of September 11. As a lawyers' organization based in New York City, no one is more sensitive than we are to the dangers posed by terrorist attacks on our soil. At the same time, we believe that our government's responses to these and related threats must accord with applicable law. For this reason the Association has published numerous major reports assessing measures taken in the war on terror in light of legal safeguards protecting civil liberties and international human rights. By contrast, numerous memoranda from within the Bush

administration that have appeared in the press over the past year take a contrary position. We believe that these memoranda include some rather unorthodox views concerning the applicability of the Geneva Conventions and other important international conventions, as well as the domestic legislation intended to enforce them. In consequence, we invite you to make clear your own position on the matters that these memoranda raise. We do so with the conviction that your views as Attorney General will reflect established U.S. positions on civil liberties and international law, rather than the extreme positions that the memoranda in many instances take.

1. Presidential Authority to Ignore Statutes and Conventions.

First, various memoranda drafted in the White House Counsel's Office, the Department of Justice, and the Department of Defense suggest that the Anti-Torture Act, the War Crimes Act, and various international treaties that the United States has ratified, including the Geneva Conventions and the Convention Against Torture, would be unconstitutional if applied to limit the President's authority in treating detainees and in undertaking military operations more generally. This novel view runs counter to well-settled interpretations based on constitutional history, structure, and text, not least of which are grants of authority to Congress under Article I, sec. 8, cls. 10-11 of the United States Constitution. This view also ignores the framework established by the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer* and *Dames & Moore v. Regan*. We at the Association respectfully urge that you endorse the bedrock principle that the President is subject to the constitutional checks and balances of the other branches, including with regard to military and foreign affairs. In particular, we hope that you will commit enforcing Federal statutes and applying U.S. treaty obligations on the treatment of detainees, regardless of any contrary thinking in the Executive Branch.

2. Authority for Extreme Interrogation Techniques<sup>1</sup>

We understand that on your request the Office of Legal Counsel prepared a memorandum discussing the standards for interrogation of detainees under U.S. law as well as the Convention Against Torture, the Statute of the International Criminal Court, and other international obligations. This request resulted in an August 1, 2002 memorandum drafted by William Bybee and John Yoo. Press accounts have reported that this memo was solicited in connection with a White House request to use harsh, new interrogation practices on a particular detainee. No subsequent action by the White House appears as of record. We would appreciate your views as to whether it is legally appropriate to authorize the Secretary of Defense, the Director of the CIA, or any other Executive official to undertake any of the extreme interrogation methods that the analysis offered by Judge Bybee and Professor Yoo deemed acceptable.

3. Clarification of the "Torture Memoranda"

Third, we at the Association would likewise be reassured were you to make clear that your own position as Attorney General will reject the analysis and conclusions that the Bybee/Yoo memorandum and the highly derivative Department of Defense Working Group Report of April 4, 2003 put forward. Among other things, these documents argue that in order to count as "torture" within the meaning of 28 USC § 2340 (the "U.S. Anti-Torture Statute"), physical pain must be "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." This position is unprecedented and is contrary to the plain language of the U.S. Anti-Torture Statute as well as the Torture Victim Protection Act. It is also contrary to the language and purpose of the Convention Against Torture, consequent interpretations by international and foreign courts, and the

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<sup>1</sup> By "extreme interrogation techniques" we mean techniques beyond the scope authorized in Department of the army Field Manual 34-52 (1992), which is widely accepted as a legally correct statement of the rules governing interrogation.

understanding accorded it by monitoring bodies, chief among them the International Committee of the Red Cross.

#### 4. Extraordinary Renditions

Fourth, the Association asks that you address one, serious concerns on the topic of so-called “extraordinary renditions.” This term refers to numerous, well-documented instances of U.S. involvement in extrajudicial transfers of terrorist suspects to countries where there is a serious risk that detainees will be subjected to torture or cruel, inhuman, or degrading treatment. Reported examples of U.S. involvement in this practice include the transfer of a Canadian citizen, Maher Arar, from the United States to Syria, and of Australian Citizen Mamdouh Habib from Pakistan to Egypt and then to Guantanamo. The practice of extraordinary rendition is a clear and unequivocal violation of international law, and is contrary to U.S. law and policy. We urge you make clear that, as Attorney General, you will condemn this practice and enforce all domestic and international measures that prohibit it.

#### 5. Application of the Geneva Conventions in the Global War on Terror

Fifth, our members would be appreciative if you would clarify your position on the Geneva Conventions in light of your draft memorandum dated January 25, 2002 and since made public. We understand this document to have often been quoted out of context in an inflammatory fashion. That document nonetheless does advise the President that he could determine that the main provisions of the Geneva Conventions do not apply with respect to members of al Qaeda and the Taliban on the grounds that Afghanistan was a “failed state” and that the Taliban do not qualify as regular forces, and in addition, that the President could suspend their operation. The memorandum further argues that to the extent that the main body of the Geneva Conventions do not apply, minimum protections of Common Article 3 are inapplicable to the Afghan conflict. Especially when read in conjunction with a memorandum drafted by John Yoo and Robert Delahunty dated January 9, 2002, this position is apparently based on the mistaken understanding that Common Article 3 applies only to nationals involved in a conventional civil war not involving more than one nation. This position cannot be squared with the Conventions’ history or consistent interpretation by bodies such as the ICRC, as well as the International Criminal Tribunals for the former Yugoslavia and Rwanda. We invite you to share with the public your actual views on these positions, and more generally your position about the applicability of the Geneva Conventions.

#### 6. Military Commissions

Sixth, we seek to know what your position as Attorney General will be with regard to military commissions. Unlike courts martial, military commissions of the type authorized by the Presidential Military Order of November 13, 2001 and elaborated by the Department of Defense Military Commission Order No. 1 of 2002, lack fundamental due process guarantees. Moreover, as recently determined by the United States District Court for the District of Columbia in *Hamdan v. Rumsfeld*, the current military commissions lack such bedrock due process safeguards as the right to confront witnesses. Conversely, the Association has high confidence in the existing United States courts martial, which we believe comply with United States and international law standards applicable to such proceedings. As Attorney General, would you be at least prepared to reconsider the omission of key due process safeguards lacking in the military commissions as currently constituted?

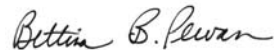
#### 7. Public Release of Documents Relevant to Legal Policy Formulation

Finally, we at the Association believe that transparency promotes informed public assessment and decision making. Accordingly, we urge that you provide as complete an

account as possible of both the Administration's legal position and supporting analysis with reference to the issues that are outlined above. Such an account would include a more complete disclosure of documents both prior and subsequent to the memoranda referred to in this letter, as well as similar memoranda that have also been made public. A complete and relevant disclosure would also include any and all documents seeking and granting authorization for the practices that this letter discusses. Such disclosure, we believe, is far preferable to the piecemeal press leaks that we have seen in the past year.

In his opinion in *Hamdi v. Rumsfeld*, Justice Scalia declared, "Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis -- that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it." We at the Association agree. We would add, moreover, that this conclusion extends to our nation's commitment to international law. We are hopeful that, if confirmed as Attorney General of the United States, you will maintain these fundamental American traditions as well. We are likewise hopeful that in your current capacity as the President's nominee to that post you will do so by publicly addressing the matters I have raised in this letter.

Sincerely,

A handwritten signature in cursive script that reads "Bettina B. Plevan".

Bettina B. Plevan