

# Right to torture: An escalating issue that may torment the U.S. The Alberto Gonzales confirmation hearings

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President Bush's nomination of White House counsel Alberto R. Gonzales to succeed John Ashcroft as attorney general will almost certainly intensify the focus on the use of torture in U.S. policy in the war on terror and the war against Iraq.

But whether the confirmation hearings on Gonzales will generate anything more than superficial probing by the Senate and circumspect dancing around the ethical questions by the nation's public intellectuals remains an open question.

Gonzales's confirmation hearing is likely to spark a renewed debate because he is the author of a controversial memorandum to Bush labeling some provisions of the Geneva Convention on the treatment of prisoners of war "obsolete" and others "quaint." In his view, the September 11 attacks and Bush's declaration of "a new kind of war—the "war on terrorism"—created "a new paradigm" requiring that the government be given carte blanche to pursue the nation's enemies.

Almost certain to deepen the controversy is the report at the end of November that the International Committee of the Red Cross has told the U.S. government that interrogation techniques used on the more than 500 detainees at the Guantánamo prison in Cuba are "tantamount to torture."

Additionally, the more aggressive U.S. military operations in Iraq last month have generated a new surge in detainees, nearly doubling the number previously held to some 8,300.

The 2002 Gonzales memo sought to resolve for Bush a dispute between the State Department, which said determination of Geneva Convention status for Taliban and

al-Qaeda prisoners should be made on a case-by-case basis, and Ashcroft's Department of Justice, which argued that no such protections existed.

Gonzales came down on Justice's side. On February 7, 2002, Bush, in what scholar and journalist Mark Danner has called the "original sin" of the administration's approval of torture, decided to withhold Geneva Convention protection from al-Qaeda and Taliban prisoners. "It made legally possible," Danner writes in "Torture and Truth" (*New York Review of Books*), "the adoption of the various 'enhanced interrogation techniques' that have been used at CIA secret prisons and at the U.S. military's prison at Guantánamo Bay."

According to Danner, decisions made by Bush and the administration in the wake of 9/11—the decision to imprison indefinitely those seized in Afghanistan and elsewhere, the decision to designate those prisoners as "unlawful combatants" and to withhold from them the protections of the Geneva Convention, and the decision to use "high pressure" interrogation methods—were "officially to transform the United States from a nation that did not torture to one that did."

The Geneva Convention against torture of prisoners, which went into force in 1987 and has been ratified by some 130 countries, does not allow the kind of distinction that Gonzales made in his memo to Bush and that the administration invoked to defend torturing terrorist suspects at Guantánamo.

In fact, a key article in the convention, as Sanford Levinson of the University of Texas Law School has pointed out, says that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture." Presumably that would include a "war on terror."

But as the "war on terror" evolved into the war on the sovereign nation of Iraq, there has been little or no public discussion of the ethical or moral implications of the decisions taken at the highest reaches of the administration.

Instead, the administration has either declared that—as in the case of the Gonzales memo—international law is "obsolete" or "quaint" and therefore does not apply to it or, in the case of the Abu Ghraib prisoner abuse scandal, where even the administration acknowledges international law does apply, that "a few bad apples" were responsible for the abuse. Neither argument is either factually persuasive or morally compelling.

Although most people instinctively reject any effort to morally defend or justify torture as offensive, that does not mean that a reluctant and ethically nuanced case for the rare use of torture cannot be attempted.

Indeed, the eminent ethicist Michael Walzer, in a now-classic essay, "Political Action: The Problem of Dirty Hands," reprinted in the very useful *Torture: A Collection* (Oxford University Press), edited by Sanford Levinson, builds just such a case. Walzer argues for the necessity of having political leaders who in extreme circumstances are willing to "dirty their hands" by engaging in actions that go beyond the moral rules.

But, as Levinson notes, the "saving grace" for Walzer, if that is an appropriate phrase, is his insistence on the leader's willingness to accept responsibility and feeling suitably guilty about what most people would wish were an "absolute" prohibition.

There is no indication among top Bush administration officials, including the president himself, that there are either feelings of guilt or a willingness to assume responsibility for the acts.

It seems likely, therefore, that even with the new revelations of mistreatment of detainees at Guantánamo, the ethics and politics of U.S. involvement in torture will remain off the agenda of public discussion of America's moral values. -*David Anderson, senior editor, Religion News Service*