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Gonzales Helped Set the Course for Detainees;

Justice Nominee's Hearings Likely to Focus on Interrogation Policies

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In March 2002, U.S. elation at the capture of al Qaeda operations chief Abu Zubaida was turning to frustration as he refused to bend to CIA interrogation. But the agency's officers, determined to wring more from Abu Zubaida through threatening interrogations, worried about being charged with violating domestic and international proscriptions on torture.

They asked for a legal review -- the first ever by the government -- of how much pain and suffering a U.S. intelligence officer could inflict on a prisoner without violating a 1994 law that imposes severe penalties, including life imprisonment and execution, on convicted torturers. The Justice Department's Office of Legal Counsel took up the task, and at least twice during the drafting, top administration officials were briefed on the results.

White House counsel Alberto R. Gonzales chaired the meetings on this issue, which included detailed descriptions of interrogation techniques such as "waterboarding," a tactic intended to make detainees feel as if they are drowning. He raised no objections and, without consulting military and State Department experts in the laws of torture and war, approved an August 2002 memo that gave CIA interrogators the legal blessings they sought.

Gonzales, working closely with a small group of conservative legal officials at the White House, the Justice Department and the Defense Department -- and overseeing deliberations that generally excluded potential dissenters -- helped chart other legal paths in the handling and imprisonment of suspected terrorists and the applicability of international conventions to U.S. military and law enforcement activities.

His former colleagues say that throughout this period, Gonzales -- a confidant of George W. Bush's from Texas and the president's nominee to be the next attorney general -- often repeated a phrase used by Defense Secretary Donald H. Rumsfeld to spur tougher anti-terrorism policies: "Are we being forward-leaning enough?"

But one of the mysteries that surround Gonzales is the extent to which these new legal approaches are his own handiwork rather than the work of others, particularly Vice President Cheney's influential legal counsel, David S. Addington.

Gonzales's involvement in the crafting of the torture memo, and his work on two presidential orders on detainee policy that provoked controversy or judicial censure during Bush's first term, is expected to take center stage at Senate Judiciary Committee hearings tomorrow on Gonzales's nomination to become attorney general. The outlines of Gonzales's actions are known, but new details emerged in interviews with colleagues and other officials, some of whom spoke only on the condition of anonymity because they were involved in confidential government policy deliberations.

On at least two of the most controversial policies endorsed by Gonzales, officials familiar with the events say the impetus for action came from Addington -- another reflection of Cheney's outsize influence with the president and the rest of the government. Addington, universally described as outspokenly conservative, interviewed candidates for appointment as Gonzales's deputy, spoke at Gonzales's morning meetings and, in at least one instance, drafted an early version of a legal memorandum circulated to other departments in Gonzales's name, several sources said.

Conceding that such ghostwriting might seem irregular, even though Gonzales was aware of it, one former White House official said it was simply "evidence of the closeness of the relationship" between the two men. But another official familiar with the administration's legal policymaking, who spoke on the condition of anonymity because such deliberations are supposed to be confidential, said that Gonzales often acquiesced in policymaking by others.

This might not be the best quality for an official nominated to be attorney general, the nation's top law enforcement job, the administration official said. He added that he thinks Gonzales learned from mistakes during Bush's first term.

Supporters of Gonzales depict him as a more pragmatic successor to John D. Ashcroft, and a cautious lawyer who carefully weighs competing points of view while pressing for aggressive anti-terrorism efforts. His critics have expressed alarm at what they regard as his record of excluding dissenting points of view in the development of legal policies that fail to hold up under broader scrutiny and give short shrift to human rights.

His nomination has, in short, become another battleground for the debate over whether the administration has acted prudently to forestall another terrorist attack or overreached by legally sanctioning rights abuses.

One thing is clear: Gonzales, 49, enjoys Bush's trust. He has worked directly with the former Texas governor for more than nine years, advising him on sensitive foreign policy and defense matters that rarely -- if ever -- fell within the purview of previous White House counsels.

For example, when the Justice Department formally repudiated the legal reasoning of the August 2002 interrogation memo last week in another document that Gonzales reviewed, it was overturning a policy with consequences that Gonzales heard discussed in intimate detail -- to the point of learning what the physiological reactions of detainees might be to the suffering the CIA wanted to inflict, those involved in the deliberations said.

The White House said Gonzales and Addington, a former Reagan aide and Pentagon counsel, were unavailable to be interviewed for this article. But asked to comment on whether Gonzales acquiesced too easily on legal policies pushed by others, spokesman Brian Besanceney responded that Gonzales had "served with distinction and with the highest professional standards as a lawyer" in private practice, state government and the White House, and he "will continue to do so as attorney general."

A Success Story

Bush has told people that he was attracted by Gonzales's rags-to-riches life story. A Texas native and the son of Mexican immigrants, Gonzales served for two years in the Air Force before graduating from Rice University and Harvard Law School. He met Bush during his 1994 gubernatorial campaign, while Gonzales was a partner at the politically connected Houston law firm Vinson & Elkins.

Upon election, Bush appointed him as his personal counsel, later as Texas secretary of state and eventually as a justice on the Texas Supreme Court. Within weeks of the 2000 presidential election, Bush tapped Gonzales to be his White House counsel, and Gonzales set about creating what officials there proudly described as one of the most ideologically aligned counsel's offices in years.

Bringing only one associate to Washington from Texas, Gonzales forged his staff instead from a tightknit group of Washington-based former clerks to Supreme Court or appellate judges, all of whom had worked on at least one of three touchstones of the conservative movement: the

Whitewater and Monica S. Lewinsky inquiries of former president Bill Clinton, the Bush-Cheney election campaign, and the Florida vote-counting dispute.

"It was an office of like-minded" lawyers and "strong personalities," said Bradford A. Berenson, a criminal defense lawyer appointed as one of eight associate counsels in Gonzales's office. "There was not a shrinking violet in the bunch."

"Federalist Society regulars" is the way another former associate counsel, H. Christopher Bartolomucci, described the Gonzales staff and its ideological allies elsewhere in the government, such as Deputy Assistant Attorney General John Yoo and Defense Department General Counsel William J. Haynes II. All were adherents to the theory that the Constitution gives the president considerably more authority than the Congress and the judiciary.

One of the clearest examples of this ambition was Gonzales's long-running and ultimately futile battle with the independent commission that investigated the Sept. 11, 2001, terrorist attacks. Gonzales's office, acting as the liaison between the White House and the 10-member bipartisan panel, repeatedly resisted commission demands for access to presidential documents and officials such as national security adviser Condoleezza Rice, prompting angry and public disputes.

Gonzales is "a good lawyer and a nice guy, and maybe he was a decent judge for a year, but he didn't bring a lot of political judgment or strategic judgment to their dealings with the commission," a senior commission official said. "He hurt the White House politically by antagonizing the commissioners . . . and all of it for no good reason. In the end, the stuff all came out."

Each morning, Gonzales convened round tables at which his staff -- as well as Addington -- related their legal conundrums. Gonzales was "not a domineering personality . . . and he gave us a chance to speak our minds," said Helgi C. Walker, a former clerk for Clarence Thomas who was an associate counsel from 2001 to 2003.

"There was often a lively debate, but at the end it was not clear where Gonzales was," another former colleague said. A second former colleague recalls that in interagency meetings, Gonzales sat in the back and was "unassuming, pleasant and quiet." So discreet was Gonzales about his opinions that one official who worked closely with him for a year said "he never made an impression on me."

But Berenson says Gonzales was hardly pushed around by officials who thought they had a monopoly on wisdom. "I didn't have the sense that he was whipping his horses or that they were dragging him along behind them," he said, adding that Gonzales was "neither the tool of an aggressive staff nor the quarterback of a reluctant team."

Current and former White House officials interviewed for this article listed only a few episodes in which Gonzales forcefully pressed a position at odds with ideological conservatives. None was in the terrorism field.

Walker said she is aware of criticism that Gonzales "should have been saying 'I believe this or that' " about some of the provocative issues presented to him. "He did not see his job as being about him" but about advocating Bush's interests, she explained. "The judge is not consumed with his own importance, unlike some others in Washington."

Detainee Policy

Unlike many of his predecessors since the Reagan era, Gonzales lacked much experience in federal law and national security matters. So when the Pentagon worried about how to handle expected al Qaeda detainees in the days after the Sept. 11 attacks and the Oct. 7 U.S. attack on

Afghanistan, Gonzales organized an interagency group to take up the matter under the State Department's war crimes adviser, Pierre-Richard Prosper.

Former attorney general William P. Barr suggested to Gonzales's staff early on that those captured on the battlefield go before military tribunals instead of civil courts. But Ashcroft and Michael Chertoff, his deputy for the criminal division, both adamantly opposed the plan, along with military lawyers at the Pentagon. The result was that the process moved slowly.

Addington was the first to suggest that the issue be taken away from the Prosper group and that a presidential order be drafted authorizing the tribunals that he, Gonzales and Timothy E. Flanigan, then a principal deputy to Gonzales, supported. It was intended for circulation among a much smaller group of like-minded officials. Berenson, Flanigan and Addington helped write the draft, and on Nov. 6, 2001, Gonzales's office secured an opinion from the Justice Department's Office of Legal Counsel that the contemplated military tribunals would be legal.

That office, historically the government's principal internal domestic law adviser, was also staffed by advocates of expansive executive powers; it had told the White House in a classified memo five weeks earlier that the president's authority to wage preemptive war against suspected terrorists was virtually unlimited, partly because proving criminal responsibility for terrorist acts was so difficult.

After a final discussion with Cheney, Bush signed the order authorizing military tribunals on Nov. 13, 2001, while standing up, as he was on his way out of the White House to his Texas ranch for a meeting with Russian President Vladimir Putin. It provided for the military trial of anyone suspected of belonging to al Qaeda or conspiring to conduct or assist acts of terrorism; conviction would come from a two-thirds vote of the tribunal members, who would adjudicate fact and law and decide what evidence was admissible. Decisions could not be appealed.

Cut out in the final decision making were military lawyers, the State Department and Chertoff, as well as Rice, her deputy, Stephen J. Hadley, and Rice's legal adviser, John Bellinger. "I don't think Gonzales felt he was acting precipitously, but he realized people would be surprised," Flanigan said. It amounted to a decision that the president could act without "the entire staff's blessing. As it turned out, they [National Security Council officials] just weren't involved in the process."

Berenson, who left the White House for private practice in 2003, said "there were such strong shared assumptions at the time [that]we had a powerful sense of mission." He attributes the haste to worry about another terrorist attack.

But David Bowker, then a State Department lawyer excluded from the process and now in private practice, called the order premature and politically unwise. "The right thing to do would have been an open process inside the government," he said.

The tribunals were halted by U.S. District Judge James Robertson, who ruled on Nov. 24, 2004, that detainees' rights are guaranteed by the Geneva Conventions -- which the administration had argued were irrelevant.

Rebellion at State

Four weeks after Bush's executive order, a similarly limited deliberation provoked more determined rebellion at the State Department and among military lawyers and officers. The issue was whether al Qaeda and Taliban fighters captured on the battlefield in Afghanistan should be accorded the Geneva Conventions' human rights protections.

Gonzales, after reviewing a legal brief from the Justice Department's Office of Legal Counsel, advised Bush verbally on Jan. 18, 2002, that he had authority to exempt the detainees from such

protections. Bush agreed, reversing a decades-old policy aimed in part at ensuring equal treatment for U.S. military detainees around the world. Rumsfeld issued an order the next day to commanders that detainees would receive such protections only "to the extent appropriate and consistent with military necessity."

Secretary of State Colin L. Powell -- whose legal adviser, William H. Taft IV, had vigorously tried to block the decision -- then met twice with Bush to convince him that the decision would be a public relations debacle and would undermine U.S. military prohibitions on detainee abuse. Gen. Richard B. Myers, chairman of the Joint Chiefs of Staff, backed Powell, as did the leaders of the U.S. Central Command who were pursuing the war.

The task of summarizing the competing points of view in a draft letter to the president was seized initially by Addington. A memo he wrote and signed with Gonzales's name -- and knowledge -- was circulated to various departments, several sources said. A version of this draft, dated Jan. 25, 2002, was subsequently leaked. It included the eye-catching assertion that a "new paradigm" of a war on terrorism "renders obsolete Geneva's strict limitations on questioning of enemy prisoners."

In early February 2002, Gonzales reviewed the issue once more with Bush, who reaffirmed his initial decision regarding his legal authority but chose not to invoke it immediately for Taliban members. Flanigan said that Gonzales still disagreed with Powell but "viewed his role as trying to help the president accommodate the views of State."

Thirty months later, a Defense Department panel chaired by James R. Schlesinger concluded that the president's resulting Feb. 7 executive order played a key role in the Central Command's creation of interrogation policies for the Abu Ghraib prison in Iraq.

A former senior military lawyer, who was involved in the deliberations but spoke on the condition of anonymity, complained that Gonzales's counsel's office had ignored the language and history of the conventions, treating the question "as if they wanted to look at the rules to see how to justify what they wanted to do."

"It was not an open and honest discussion," the lawyer said.

For Gonzales's aides, however, the experience only reinforced a concern that the State Department and the military legal community should not be trusted with information about such policymaking. State "saw its mission as representing the interests of the rest of the world to the president, instead of the president's interests to the world," one aide said.

The Debate Over Torture

This schism created additional problems when Gonzales approved in August 2002 -- after limited consultation -- an Office of Legal Counsel memo suggesting various stratagems that officials could use to defend themselves against criminal prosecution for torture.

Drafted at the request of the CIA, which sought legal blessing for aggressive interrogation methods for Abu Zubaida and other al Qaeda detainees, the memo contended that only physically punishing acts "of an extreme nature" would be prosecutable. It also said that those committing torture with express presidential authority or without the intent to commit harm were probably immune from prosecution.

The memo was signed by Jay S. Bybee, then an assistant attorney general and now a federal appellate judge, but written with significant input from Yoo, whom Gonzales had tried to hire at the White House and later endorsed to head Justice's legal counsel office. During the drafting of the memo, Yoo briefed Gonzales several times on its contents. He also briefed Ashcroft,

Bellinger, Addington, Haynes and the CIA's acting general counsel, John A. Rizzo, several officials said.

At least one of the meetings during this period included a detailed description of the interrogation methods the CIA wanted to use, such as open-handed slapping, the threat of live burial and "waterboarding" -- a procedure that involves strapping a detainee to a board, raising the feet above the head, wrapping the face and nose in a wet towel, and dripping water onto the head. Tested repeatedly on U.S. military personnel as part of interrogation resistance training, the technique proved to produce an unbearable sensation of drowning.

State Department officials and military lawyers were intentionally excluded from these deliberations, officials said. Gonzales and his staff had no reservations about the legal draft or the proposed interrogation methods and did not suggest major changes during the editing of Yoo's memo, two officials involved in the deliberations said.

The memo defined torture in extreme terms, said the president had inherent powers to allow it and gave the CIA permission to do what it wished. Seven months later, its conclusions were cited approvingly in a Defense Department memo that spelled out the Pentagon's policy for "exceptional interrogations" of detainees at Guantanamo Bay, Cuba.

When the text was leaked to the public last summer, it attracted scorn from military lawyers and human rights experts worldwide. Nigel Rodley, a British lawyer who served as the special U.N. rapporteur on torture and inhumane treatment from 1993 to 2001, remarked that its underlying doctrine "sounds like the discredited legal theories used by Latin American countries" to justify repression.

After two weeks of damaging publicity, Gonzales distanced himself, Bush and other senior officials from its language, calling the conclusions "unnecessary, over-broad discussions" of abstract legal theories ignored by policymakers. Another six months passed before the Office of Legal Counsel, under new direction, repudiated its reasoning publicly, one week before Gonzales's confirmation hearing.