

Society of American Law Teachers

Past Presidents

Norman Dorsen
(NYU)
Howard Lesnick
(Pennsylvania)
David L. Chambers
(Michigan)
George J. Alexander
(Santa Clara)
Wendy M. Williams
(Georgetown)
Rhonda D. Rivera
(Ohio State)
Emma Coleman Jordan
(Georgetown)
Charles R. Lawrence III
(Georgetown)
Howard A. Glickstein
(Touro)
Sylvia A. Law
(NYU)
Patricia A. Cain
(Iowa)
Jean C. Love
(Iowa)
Linda S. Greene
(Wisconsin)
Phoebe A. Haddon
(Temple)
Stephanie M. Wildman
(Santa Clara)
Carol Chomsky
(Minnesota)
Margaret E. Montoya
(New Mexico)
Paula C. Johnson
(Syracuse)
Michael Rooke-Ley
(Seattle, visiting)

Past Vice-Presidents

Anthony G. Amsterdam
(NYU)
Derrick A. Bell, Jr.
(NYU)
Gary Bellow
(Harvard)
Ralph S. Brown, Jr.
(Yale)
Thomas Emerson
(Yale)

Board of Governors

Alicia Alvarez
(DePaul)
Fran Ansley
(Tennessee)
Margalynne Armstrong
(Santa Clara)
Elvia Arriola
(Northern Illinois)
Margaret Martin Barry
(Catholic)
Steven W. Bender
(Oregon)
David A. Brennan
(Mercer)
Nancy Cook
(Roger Williams)
Frank Rudy Cooper
(Villanova)
Robert D. Dinerstein
(American)
Jane Dolkart
(Southern Methodist)
Nancy Ehrenreich
(Denver)
Kent Greenfield
(Boston College)
Tanya Hernandez
(Rutgers - Newark)
Emily Houh
(Cincinnati)
Joan Howarth
(UNLV)
Chris Iijima
(Hawaii)
Eric S. Janus
(William Mitchell)
Eileen Kaufman
(Touro)
Tayyab Mahmud
(Cleveland-Marshall)
Joan Mahoney
(Wayne State)
Martha Mahoney
(Miami)
Nancy Ota
(Albany)
Deborah Waire Post
(Touro)
Bill Quigley
(Loyola)
Florence Wagman Roisman
(Indianapolis)
Natsu Taylor Saito
(Georgia State)
Robert Seibel
(CUNY)
Aviam Soifer
(Hawaii)
Kellye Y. Testy
(Seattle)

Equalizer Editor

Raleigh Hannah Levine
(William Mitchell)

Historian

Joyce Saltalamachia
(New York, on leave)

Membership Records

David Chavkin
(American)

Secretary

Emily Houh
(Cincinnati)

Treasurer

Norman Stein
(Alabama)

Webmaster

Richard H. Chused
(Georgetown)

Professor José Robert (Beto) Juárez, Jr.
St. Mary's University School of Law
One Camino Santa Maria
San Antonio, TX 78288
210-431-2145
bjuares@stmarytx.edu

Professor Holly Maguigan
New York University School of Law
245 Sullivan Street, Room 522
New York, NY 10012-1301
212-998-6433
holly.maguigan@nyu.edu

Co-Presidents

January 20, 2005

The Honorable Arlen Specter
Chair
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

RE: The Society of American Law Teachers'
Opposition to the Nomination of Alberto Gonzales
to be Attorney General of the United States

Dear Senators Specter and Leahy:

The Society of American Law Teachers (SALT) opposes – and urges all members of the committee to vote against -- the nomination of Alberto Gonzales to be the Attorney General of the United States. SALT is the largest organization of law professors in the United States, representing more than 900 professors at more than 160 law schools.

This is the first time that SALT ever has taken a position with respect to a nominee for a position in the Executive Branch. We take this stand because, as law teachers, we have a special obligation to maintain the rule of law, and confirming Mr. Gonzales as Attorney General would work grievous damage to that principle.

The Attorney General is the chief law enforcement officer of the nation. Mr. Gonzales has proven himself unfit for this job by dereliction of his individual responsibility as an attorney in advising the President with respect to the treatment of prisoners held by the United States.

The seriousness of our concerns cannot be overstated. Mr. Gonzales both flouted legal requirements and did so with respect to a subject that implicates our fundamental morality: how we as a nation treat those whom we hold prisoner. To our dismay, Mr. Gonzales was unwilling either to concede that he had erred in legal positions that he advanced as the President's Counsel or to acknowledge that prisoner mistreatment is both unlawful and inherently wrong, even when the Senate Judiciary Committee gave him ample opportunity to do so.

Raleigh Hannah Levine
(William Mitchell)

Joyce Saltalamachia
(New York, on leave)

David Chavkin
(American)

Emily Houh
(Cincinnati)

Norman Stein
(Alabama)

Richard H. Chused
(Georgetown)

At the heart of our concern is the necessity that this nation follow the law and be humane in its treatment of those whom it imprisons. The descriptions and images of our abuse of prisoners at Guantánamo Bay and in Iraq surely offend all who are aware of the role of torture in human conflict. Some people argue that the United States is in a position different from that of other governments because we have been attacked by terrorists. But that reasoning has been cited by every regime that has engaged in torture, from the Russians in Chechnya, to the French in Algeria, to the Germans confronting resistance in occupied nations. Torture is abhorrent to civilized society and to U.S. and international law; there can be no justification for its use. Confirmation of this nominee will be read by the world as legitimizing the abuse of prisoners in Guantánamo Bay, Afghanistan, Abu Ghraib, and elsewhere.

We must emphasize that the prohibition against torture is well established under customary international law. In 1948, in response to Nazi atrocities, the General Assembly of the United Nations added the prohibition against torture to the landmark Universal Declaration of Human Rights. Article 5 states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." This ban on torture and other ill-treatment has subsequently been incorporated into the extensive network of international and regional human rights treaties, including Article 7 of the International Covenant on Civil and Political Rights (ICCPR), ratified by 153 countries, including the United States in 1992, and the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention against Torture), ratified by 136 countries, including the United States in 1994.

Lawyers are bound by rules of ethics in our actions as counselors. The Texas Disciplinary Rules of Professional Conduct, which licensed attorneys violate at peril of disciplinary sanctions, begin with this standard:

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

When Mr. Gonzales counseled his client, President George W. Bush, in a January 2002 memorandum, that the international law regarding treatment of prisoners of war and other detainees was "obsolete" and "quaint," he strayed from that standard.

The Texas rule not only states a general proposition, but also contains a more specific prohibition against attorney wrongdoing. Rule 1.02(c) of the Texas Attorney Conduct Code provides:

A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal

Not only should the lawyer not assist a client in breaking the law, but she or he "shall make reasonable efforts under the circumstances to persuade the client to take corrective action." Did Mr. Gonzales counsel his client about the legal, moral, political, and diplomatic dangers of ignoring the international rules of war? He did not. Instead, he advised his client that the Geneva Conventions did not apply to Afghanistan war prisoners, and he did so in order to avoid potential prosecution of his client for war crimes. In his now-infamous January 25, 2002 memorandum, Mr. Gonzales, bypassing the armed forces' counsel and disregarding the advice of the Secretary of State's Legal Adviser, agreed with his client that the Taliban and Al Qaeda were outside the scope of the Geneva Conventions. His reasoning was that if the Geneva Conventions did not apply, there would be a substantially reduced threat

to his client of "domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441)," a 1996 law carrying the death penalty. Otherwise, Mr. Gonzales advised his client, the prohibition of such crimes as "outrages against personal dignity" would apply, presumably to those carrying out administration policy, whether or not the individual detained qualified as a prisoner of war. He also advised his client that a determination that the Geneva Conventions did not apply to the Taliban "would mean that Section 2441 [authorizing domestic criminal prosecution under the War Crimes Act] would not apply to actions taken with respect to the Taliban." (Gonzales January 25, 2002 Memorandum for the President, p.2.) The January 25 memorandum explicitly counsels the client on how to avoid prosecution for war crimes. Indeed, Mr. Gonzales reassured his client that a presidential determination that the Geneva Conventions did not apply "would provide a solid defense to any future prosecution."

A second Texas rule requires that "In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice." (Rule II (2.01) of the Texas Disciplinary Rules of Professional Conduct.) The drafters of that Rule caution that "A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront . . . [A] lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client." Further, the comment advises that purely technical legal advice can be inadequate, and that "[a]lthough a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."

In his January 25, 2002 Memorandum, Mr. Gonzales rationalized and laid the basis for prisoner mistreatment by U.S. forces with his interpretation that the protections of the Geneva Conventions do not apply to this new, unconventional type of war. His failure to provide independent counsel to his client with regard to the use of torture was an abrogation of his professional obligations.

Six months later, Mr. Gonzales requested that the Office of Legal Counsel (OLC) of the Department of Justice formulate a policy on detainee interrogations in the so-called War on Terror. In response, then-Assistant Attorney General (now Judge) Jay S. Bybee of the OLC sent to Mr. Gonzales an August 1, 2002 Memorandum on "Standards of Conduct for Interrogation," which narrowed the definition of torture from that set forth in Article 1 of the Convention Against Torture. Mr. Bybee's memorandum limited torture to the infliction of "physical pain . . . equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death." The memorandum said that such pain "must be inflicted with specific intent," and indicated that the President may authorize torture in certain instances. In contrast, torture under both the Convention Against Torture and the U.S. Anti-Torture Statute encompasses all forms of severe pain and suffering, and does not require the specific intent to cause such suffering. Moreover, Article 3 of the Convention Against Torture clarifies that "no exceptional circumstances whatsoever, whether a state of war or a threat of war" justify torture.

Subsequent to public outcry in 2004 over the torture of Iraqi detainees by U.S. military and intelligence personnel in Abu Ghraib, the Bush administration has been under increasing scrutiny for its interrogation practices in Guantánamo Bay, Iraq, and elsewhere. Finally, on December 30, 2004, the Department of Justice published a revised policy on interrogations of detainees, which retracted two aspects of the earlier memorandum, and qualified a third. Torture, according to the DOJ, no longer is limited to the most extreme forms of physical abuse, and the specific intent to cause such abuse is not required. With regard to presidential authority to authorize torture, the new policy states only that President Bush has no apparent intention to experience such authority at the present time.

The consequences of Mr. Gonzales's unprofessional and unethical representation are monumental, with results that may well haunt our children. Mr. Gonzales's advice to his client and the advice of the Justice Department set the imprimatur of purported legality upon policies and procedures that supported the now well-documented torture and abuse of detainees.

While Mr. Gonzales repudiated "torture" in his hearing before the Senate Judiciary Committee, this statement unfortunately comes in the context of the legal machinations to define the brutal physical and psychological mistreatment of prisoners as something other than torture. As noted above, the Justice Department felt compelled to revise its legal opinion in a new opinion issued in December 2004. Further, a reading of the hearing transcript suggests that a deliberate but unstated distinction was drawn by Mr. Gonzales between "torture" and other coercive and inhumane acts that he might not define as torture, but that nonetheless would violate the Geneva Convention and other controlling authorities.

There is a related issue that should be of concern to members of the Senate and the American public. One of the distinctive qualities of our Republic is the constitutional requirement that Presidents are bound by a nation's laws. Our laws include restrictions on how prisoners are treated. In his testimony, and in his role as the President's advisor, Mr. Gonzales refused to state that the President is not permitted to waive the law when he believes that he is doing so in his role as Commander-in-Chief. In other words, a prospective Attorney General believes that the President may put himself above the laws of the United States.

We are teachers of law, responsible for the ethical and professional training of future lawyers. The role of lawyers in our society often is an uneasy one. Lawyers sometimes are seen as enabling borderline practices, as being silver-tongued apologists for wrong behavior. The ethical standards demonstrated by those military attorneys who voiced their concerns about torture demonstrate the highest standards of our profession. We urge the Senate to reject the nomination of Alberto Gonzales and await a nominee who honors the rule of law.

Yours very truly,

Professor José Robert (Beto) Juárez, Jr.
Professor Holly Maguigan
Co-Presidents