THE WHITE HOUSE

WASHINGTON

December 17, 2004

Dear Senator Leahy:

I write in further response to your letters of May 17, 2004, and June 15, 2004, to Counsel to the President Alberto R. Gonzales concerning treatment of detainees in U.S. custody.

My understanding is that you discussed these letters with Judge Gonzales shortly after they were received by him. In addition, I note that some of the documents requested in your letters were released on June 22, 2004, and that some of the issues raised in those letters were addressed in a July 1, 2004, letter to you from the Department of Justice. In a letter to Judge Gonzales dated December 3, 2004, however, you have indicated that you consider your letters to him unanswered and your requests for documents "ignored or rejected." I am therefore happy to provide you with this written response to those letters.

1. In the letter of May 17, 2004, you requested a copy of "the January 2002 memorandum [Judge Gonzales] reportedly sent to the President" that "reportedly stated, among other policy assertions, that, 'this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners.'" This request is repeated in paragraph 6(D) of your June 15, 2004 letter. As you know, longstanding practice followed by Presidents of both parties ordinarily precludes disclosing internal advice given to the President by his senior advisors. A draft of the memorandum to which your letter apparently refers has, however, been obtained by the press and is available at http://www.msnbc.msn.com/id/4999148/site/newsweek/. I trust that you have accordingly had access to that document (copy at Tab 1 of the accompanying binder for your convenience) and that the request contained in your letter of May 17, 2004, has been overtaken by events.

2. Your June 15, 2004 letter also seeks (at paragraph 6(D)) a final version of the memorandum from Judge Gonzales to the President concerning the application of Geneva Conventions to al Qaeda and the Taliban. I must respectfully advise you that we decline to make such a document available in order to protect the interests of this and future Presidents in receiving confidential and candid advice from senior advisors. The Supreme Court has long recognized "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." United States v. Nixon, 418 U.S. 683, 708 (1974).

In our view, these interests are at their zenith with respect to any memorandum prepared for the President by the Counsel to the President concerning issues such as application of the Geneva Convention to terrorists who have attacked our country and seek to do our citizens harm. While we recognize and respect the Senate's interest in exploring Judge Gonzales' views on important legal issues, we respectfully suggest that such exploration can and should take place

without undermining "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking" that would attend public release of a confidential memorandum to the President.

3. Your letter of June 15, 2004, also propounded questions and requested numerous documents concerning the development of policies and practices related to treatment of those in U.S. custody. As your December 3 letter notes, one week after your June 15 letter, the Administration held a briefing and released multiple documents – including some of those specifically requested in your letter (Items C, G, H, and I of paragraph 6 of that letter) – relating to treatment of detainees. For your convenience, I have enclosed the transcript of a June 22, 2004, briefing by Judge Gonzales and others (Tab 2) as well as a set of the documents released concurrent with those briefings (Tab 3).

4. Among the other documents requested in your June 15 letter is a January 26, 2002, memorandum from Secretary of State Colin Powell to Judge Gonzales (Item E of paragraph 6 of your June letter). That memorandum has been obtained by the press and is available at http://msnbc.msn.com/id/4999363/site/newsweek/. Similarly, a February 2, 2002 memorandum from State Department Legal Adviser William H. Taft IV (requested at paragraph 6(F) of your June letter) is found at http://www.nytimes.com/packages/html/politics/20040608_DOC.pdf. For your convenience, I have enclosed copies of both items. (Tabs 4 and 5)

5. Two other documents requested in your June 15 letter (DOJ Office of Legal Counsel ("OLC") opinions dated September 25, 2001, and November 6, 2001, requested as items A and B of paragraph 6 of that letter) did not involve consideration of issues concerning interrogation or treatment of detainees and were not among the documents released in June. As you may be aware, however, OLC routinely reviews legal opinions it has generated to determine when, if ever, such opinions might be appropriate for public dissemination without harm to the deliberative processes of the Executive Branch or to the attorney-client relationship between OLC and Administration officials. As part of this ongoing review, OLC, in consultation with others in the Administration, has determined that one opinion identified in your June 15 letter – the September 25, 2001 opinion regarding "The President's Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them" – may be released under the traditional practice. OLC has posted this opinion on its web site; I have enclosed a courtesy copy of that opinion for your convenience. (Tab 6).

The other OLC opinion requested in your June 15 letter concerned "Legality of the Use of Military Commissions to Try Terrorists." Because the issues addressed in that memorandum are currently the subject of litigation in cases such as *Hamden v. Rumsfeld,* (D.C. Cir. No. 04-5393) (scheduled for argument March 8, 2005), it would in our view be inappropriate at this time to disclose an internal legal analysis of those issues. The Administration's position, however, is fully discussed in publicly-available court filings, including the brief recently filed by the Department of Justice in the *Hamden* case. I have enclosed that brief for your convenience. (Tab 7)

Thank you for your interest in the Administration's legal determinations and policies related to the war on terror. I know Judge Gonzales looks forward to the opportunity to appear before the Committee as it considers his nomination to be Attorney General.

Sincerely,

David G. Leitch
Deputy Counsel to the President

The Honorable Patrick J. Leahy
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cc: The Honorable Orrin G. Hatch