The Civil Liberties and Civil Rights Record of Attorney General Nominee Alberto Gonzales

Prepared by the Washington Legislative Office
of the American Civil Liberties Union

AMERICAN CIVIL LIBERTIES UNION

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The Civil Liberties and

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Preamble

As a matter of policy, the American Civil Liberties Union emphatically maintains its 84-year history of refusing to endorse or oppose nominations made by the president, other than nominees to the Supreme Court. [illegible]. We do, however, urge the Senate to conduct a thorough and rigorous confirmation process, in which Gonzales is asked to account for his actions and policy positions.

While we may not take a position on Gonzales's confirmation, the ACLU does comment publicly on the civil liberties records of key officials whose positions accord them significant influence on the protection and enforcement of civil liberties and civil rights.

I. Introduction

The departure of Attorney General John Ashcroft and nomination of current White House Counsel Alberto Gonzales to that position obligates the ACLU, especially in the post-9/11 era when the office of attorney general is so significant, to examine Gonzales's public record on civil liberties.

In short, the record is not encouraging.

As White House counsel, Gonzales has demonstrated a clear enthusiasm for the Bush administration's broad— and, we believe, unconstitutional— reading of the president's commander-in-chief authority to detain United States citizens and foreign nationals. His office also undertook the legal thinking behind the White House's decision to support a constitutional amendment endorsing discrimination against persons because of their sexual orientation, and he helped formulate the legal framework for government-sanctioned religious discrimination in the president's "faith-based initiative."

However, Gonzales's public record does not suggest an absolutist position against reproductive freedom, and his support for the president's guest-worker program reflects an openness on immigration issues. While his record on reproductive rights, civil rights and immigration may contain a few bright lights, the Senate will have to explore fully his commitment in these areas and others before it votes to confirm him.

The following ACLU white paper on Gonzales's record covers three broad themes.

First, it connects the dots on Gonzales's role in formulating detention and interrogation policies that helped lead to the horrific abuses at Abu Ghraib and Guantánamo Bay. It is now common knowledge that Gonzales signed a memorandum calling certain protections afforded to detainees by the Geneva Conventions "obsolete" and "quaint."[1]

Given the power and scope of the counsel's office, it is clear that Gonzales had a significant role in the creation of these misguided rules and procedures. And he has certainly been a public cheerleader of the Bush administration's

frequent disregard of traditional legal and constitutional norms. This report reviews the available evidence and suggests certain avenues of investigation for Senators seeking

scandal at Abu Ghraib prison in Baghdad, Gonzales's role in these events deserves the closest scrutiny by the Senate Judiciary Committee and, indeed, by the entire chamber.

The Role of the White House Counsel's Office

Shortly after 9/11, lawyers at the Justice, State and Defense Departments and at the Central Intelligence Agency began researching the legal status of the new al Qaeda and Taliban detainees. It appears that the legal foundation for the administration's subsequent denial of any formal legal protections for these detainees was a 48-page memorandum from Justice Department Office of Legal Counsel ("OLC") attorneys John C. Yoo and Robert J. Delahunty. The document was requested by William J. Haynes, the Defense Department's general counsel, in 2002.

The memorandum argued that neither the Geneva Convention pertaining to prisoners of war nor the Geneva Convention setting out the rights of civilians captured in a war zone applied to the detainees. Moreover, the memorandum repudiated any need for an individual determination of POW status—as is required in Article 5 of the Geneva Convention governing the treatment of POWs—and argued that other customary laws of war were likewise inapplicable.[4]

The OLC's reasoning directly contradicted the conclusions of the State Department. Two days after the Yoo/Delahunty memorandum was sent to Defense, William H. Taft IV, the State Department's general counsel, submitted a sharply worded dissent, which remains withheld from the public and Senate, arguing that the Justice Department's legal reasoning was "seriously flawed."[5]

Gonzales's Jan. 25, 2002, memorandum for the president was consistent with the Yoo/Delahunty memorandum. Calling the OLC findings "definitive," Gonzales informed the president that the White House had the constitutional authority to deny the detainees legal protections, and that he disagreed with the reconsideration requested by the State Department.

When listing the "positive" ramifications of the president's decision, Gonzales wrote: "In my judgment, the new [war on terrorism] paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e., advances of monthly pay), athletic uniforms, and scientific instruments."[6] He also boldly asserted that a blanket presidential finding that Geneva should not apply "eliminates" any argument regarding the need for case-by-case status determinations.[7]

The ACLU objects to this line of reasoning. The need for an individual determination by a .i05 9 word7A999hol(ACinnoc-2aY)T20.705 3ividualy a

The Senate should aggressively seek to determine:

- The scope of Gonzales's leadership in formulating these policies.
- The link between these policies and the subsequent prisoner abuse at Guantánamo Bay, in Afghanistan and in Iraq.
- Whether the Justice Department and Pentagon were following Gonzales's lead in the legal back-and-forth described above.

The Military Commissions

In the uproar over the administration's military detention policies post-9/11, Gonzales has also been a strong public advocate of the president's plan to try certain al Qaeda and Taliban operatives in military commissions (with procedures far more prosecution-friendly than military courts-martial). Moreover, in defending these military commissions, Gonzales has repeatedly failed to address the pressing concerns of the civil liberties and human rights communities.

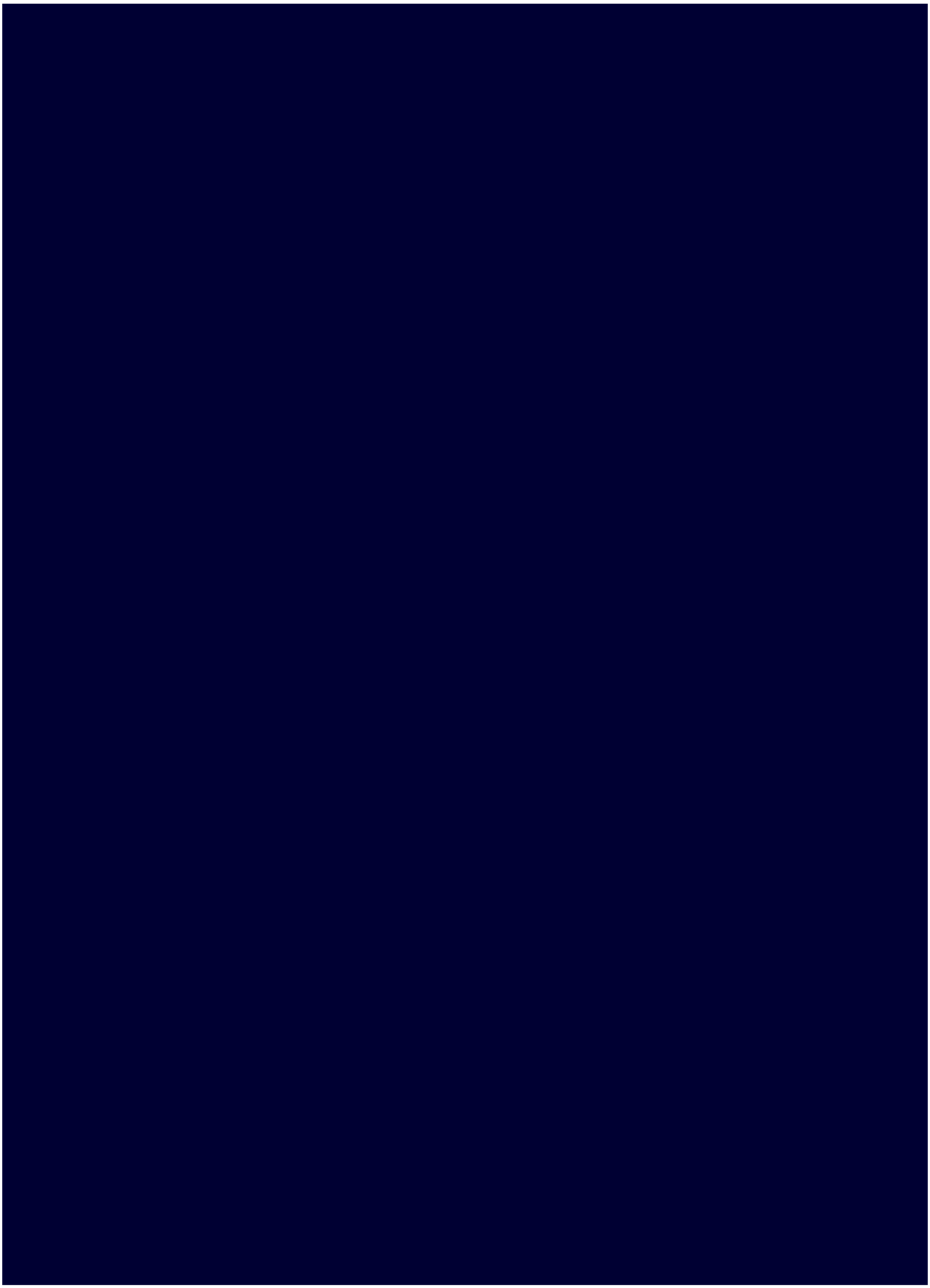
"The suggestion these commissions will afford only sham justice like that dispensed in dictatorial nations is an insult to our military justice system," he wrote.[11] Gonzales failed to mention, however, that the current system differs markedly in evidentiary standards, insulation from command influence and other key protections against wrongful conviction than traditional courts-martial or even the arcane military commissions of World War II.[12] As conservative columnist William Safire wrote in response to the above comment, "Many attorneys friendly to this White House know that order was egregiously ill drafted. The White House counsel, Alberto Gonzales, defended the order on this Op-Ed page by denying or interpreting away its most offensive provisions."[13]

Gonzales's comments about the legality of the commissions are doubly dubious in light of the November 2004 federal court decision declaring the tribunal system unlawful in the case of Salim Ahmed Hamdan, a suspected al Qaeda member.[14] Judge James Robertson of the United States District Court for the District of Columbia specifically repudiated Gonzales's primary argument: that Taliban and al Qaeda combatants held at Guantánamo were not entitled to an individual determination of their prisoner of war status.[15] At the time this report went to print, Robertson's decision remains on appeal to the Supreme Court.

Enemy Combatants

Finally, it remains unclear who, precisely, championed the idea of detaining both citizen and noncitizen "enemy combatants" out of reach of criminal due process or international law. Many commentators believe, however, that given his influence on matters of national security, Gonzales must have played a key role. Indeed, "[i]t was his office that conceived of the term 'enemy combatant' as a way to indefinitely detain American citizens accused of terrorism..."[16]

And, in defending the decision to detain Jose Padilla and Yasser Esam Hamdi, both United States citizens, as enemy combatants, administration officials stressed that the detentions had been reviewed and approved at the highest levels of the administration. Gonzales should be held accountable for taking the extreme position that the executive branch should be able to



- Finally, we know that President Bush himself signed a directive authorizing the creation of a web of secret CIA detention facilities overseas.[24] It has also been reported that the Department of Justice officially prepared a memorandum discussing the types of interrogation techniques that the CIA can use against high-level al Qaeda detainees, which are presumably even more aggressive than those used in Iraq, Afghanistan and Cuba.[25] Sources in another article said that Gonzales, Haynes and David Addington, Vice President Cheney's counsel, discussed various techniques, and found acceptable the controversial gambit known as "water-boarding," in which detainees are made to believe they are in imminent danger of drowning.[26]

See Appendix I for a listing of pertinent material that the government refuses to disclose to the public and the Senate.

III. The Need for an Independent Attorney General

Under current law, the primary mechanism for

and that the latter two were expanded shortly before the 2004 election, it remains a very open question whether President Bush (and Attorney General Gonzales) are going to face a scandal akin to Whitewater or Iran-Contra before the second term ends.

Finally, the ACLU is particularly concerned that the promotion of the White House counsel to attorney general will impair the Department of Justice's ability to conduct full and fair investigations of possible criminal civil rights or civil liberties violations.

IV. Civil Liberties Concerns

Gonzales's civil liberties record is incomplete, but troubling nonetheless. His time on the Texas Supreme Court contains some clues as to how he would approach civil liberties concerns as attorney general, and reports of his involvement in civil rights and civil liberties issues as White House counsel provide further details. The following discussion pieces together as comprehensive a picture as possible of Gonzales's constitutional philosophy.

The "Global War on Terrorism" and Domestic Law Enforcement

Attorney General John Ashcroft is often targeted as the main public cheerleader for the broad expansions of domestic government surveillance and investigative power authorized in the wake of 9/11. Although he certainly deserves the criticism he receives, there have been reports that Gonzales actually makes the final legal decisions as to what the administration will approve.

Media reports have indicated that this was particularly true during the Congressional negotiations over the USA Patriot Act, the 2001 counterterrorism bill that has become a rallying cry for the public backlash against the Bush administration's abridgments of certain civil liberties:

> Ashcroft has had to adjust to the fact that there are few decisions of importance made in the Justice Department without the explicit approval of the White House and its counsel's office... As a former senator, he began negotiating with his old colleagues as to what concessions might be made to pass what became the USA Patriot Act... But when the White House was informed of his discussions, he was stunned to be told that he was not authorized to make such offers.
>
> Even though the legislation centered on the law enforcement world he headed, Ashcroft was told that Alberto R. Gonzales, the White House counsel, and his deputy, Timothy Flanigan, would make any major decisions.[36]

Given Gonzales's apparent proximity to the drafting of the Patriot Act, we fear he may not be receptive to the calls on both the left and the right for certain refinements in the law. Indeed, former solicitor general Theodore Olson explicitly mentioned that Gonzales would follow Ashcroft as a "staunch" defender of the Patriot Act.[37]

See www.aclu.org/patriot for more information on the Patriot Act.

Hostility to Executive Accountability and Open Government

adherence to a strict presumption of secrecy in its official dealings. Gonzales should face tough questioning about whether he truly believes, as his advice to the president suggests, that the president has a duty, for the sake of national security or to expand the scope of the executive's authority, to insulate the office from its traditional level of accountability.

As the title of Nixon White House counsel John Dean's new book suggests, the "secret" Bush administration has been "Worse than Watergate" in keeping sunlight out of the West Wing.[38]

For instance, on Nov. 1, 2001, the White House issued an executive order, drafted by Gonzales, exempting more than 68,000 pages of Reagan administration records from release. Reportedly, the records involved the private communications of President Reagan, Vice President George H.W. Bush and top aides (some of whom serve currently in the George W. Bush White House). Gonzales proposed a series of delays on releasing the Reagan records to allow President Bush to invoke a "constitutionally based privilege or take other appropriate action."[39]

Though little noticed at the time, the Gonzales presidential papers order is actually a sweeping change to open government laws. The current regime allows records to be kept secret indefinitely, and significantly reduces the checks placed on executive authority. Prior to the order, presidential papers were presumed disclosable after 12 years, which historians (and the ACLU) argue was enough time to protect executive privilege and reduce any chilling effect on the candor required in effective executive consultations.

Gonzales rejected these arguments, saying "the pursuit of history" should not "deprive a president of candid advice while making crucial decisions."[40] Also of note is Gonzales's lead role in the aggressive assertion of executive privilege surrounding public calls for release of documents pertaining to Vice President Cheney's energy policy task force.[41]

The Death Penalty: The Clemency Memos

During his tenure as governor of Texas, George W. Bush permitted 150 executions, a record unsurpassed in recent history.[42] He granted clemency in only one case. Gonzales, his then-legal counsel, prepared 57 briefs on these cases, usually presented to the governor on the morning of the planned execution. The classified documents outlined the facts of the case, and presented a summary of the arguments for clemency.[43] Though Governor Bush frequently claimed to agonize deeply over permitting an execution to go forward, a review of the memorandums by Alan Berlow at *A* suggested that the reviews were only cursory.[44]

The summaries of arguments in favor of clemency were far less prominent in the memorandums than the details of the crime, and frequently omitted mention of crucial mitigating factors like contradictory testimony at trial, inadequate legal counsel and even possibly exculpatory evidence.[45] In addition, Governor Bush often publicly insulated himself from criticism by arguing that his clemency powers were relatively limited. He also claimed he could not affirmatively recommend clemency without a finding by the Board of Pardons and Paroles (BBP), which was — at the time of his election to the presidency – entirely composed of his appointees. Presumably, had he any doubts about an impending execution, he could have asked the BPP to review the case.[46]

Indeed, as reported by Berlow, Governor Bush did approach the BPP in the case of Henry Lee Lucas, and the board recommended (by a vote of 17 to 1) to commute Lucas' sentence to life

without parole. Reportedly, Governor Bush recommended commutation because the jurors "did not know" certain facts when they sentenced Lucas to death.[47] Indeed, Lucas had confessed to a series of murders that he could

be personally troubling to me as a parent, it is my obligation as a judge to impartially apply the laws of this state without imposing my moral view on the decisions of the Legislature."[56]

That said, Gonzales has made several statements possibly hinting at his personal stance on abortion rights. "All I'll say about it is, how I feel personally may differ with how I feel about it legally.... It's the law of the land," he said in 2001.[57] Given these ambiguities, Gonzales should also be asked if he played any role in the issuance of an executive memorandum on the first day of Bush's presidency restoring the ban on funding by the U.S. Agency for International Development for international groups that advocate or provide counsel on abortion.

Affirmative Action

Gonzales's record on equal opportunity programs could be seen as both promising and troubling. Though he was intricately involved in drafting the administration's briefs in the two University of Michigan admissions cases decided by the Supreme Court in 2003, Gonzales apparently sought to weaken the language.[58] After Gonzales started "carving up" Solicitor General Theodore Olson's language, Olson had "pangs of conscience in accepting it."[59] The result was a brief opposing the admissions policy, saying it looked too much like quotas, but supporting race-conscious diversity measures.

We urge Gonzales to clarify his personal position on the use of race-conscious equal opportunity programs to increase diversity, remedy ongoing discrimination or end the continued ramifications of past discrimination.

The Bush Administration's Support for the Federal Marriage Amendment

Gonzales's personal stance on discrimination based on sexual orientation is unclear. However, in discussing the administration's consideration of the Federal Marriage Amendment ("FMA"), Bush announced in August 2003 that he had assigned "lawyers" to examine the different legislative approaches to banning same-sex marriage.[60] Although President Bush did not identify Gonzales as one of the assigned lawyers, the Senate Judiciary Committee ought to explore Gonzales's role on the issue.

On Feb. 24, 2004, Bush called for a constitutional amendment in "defense" of marriage. Though he and his spokesman, Scott McClellan, did not endorse a particular formulation, McClellan did mention the amendments

Immigration

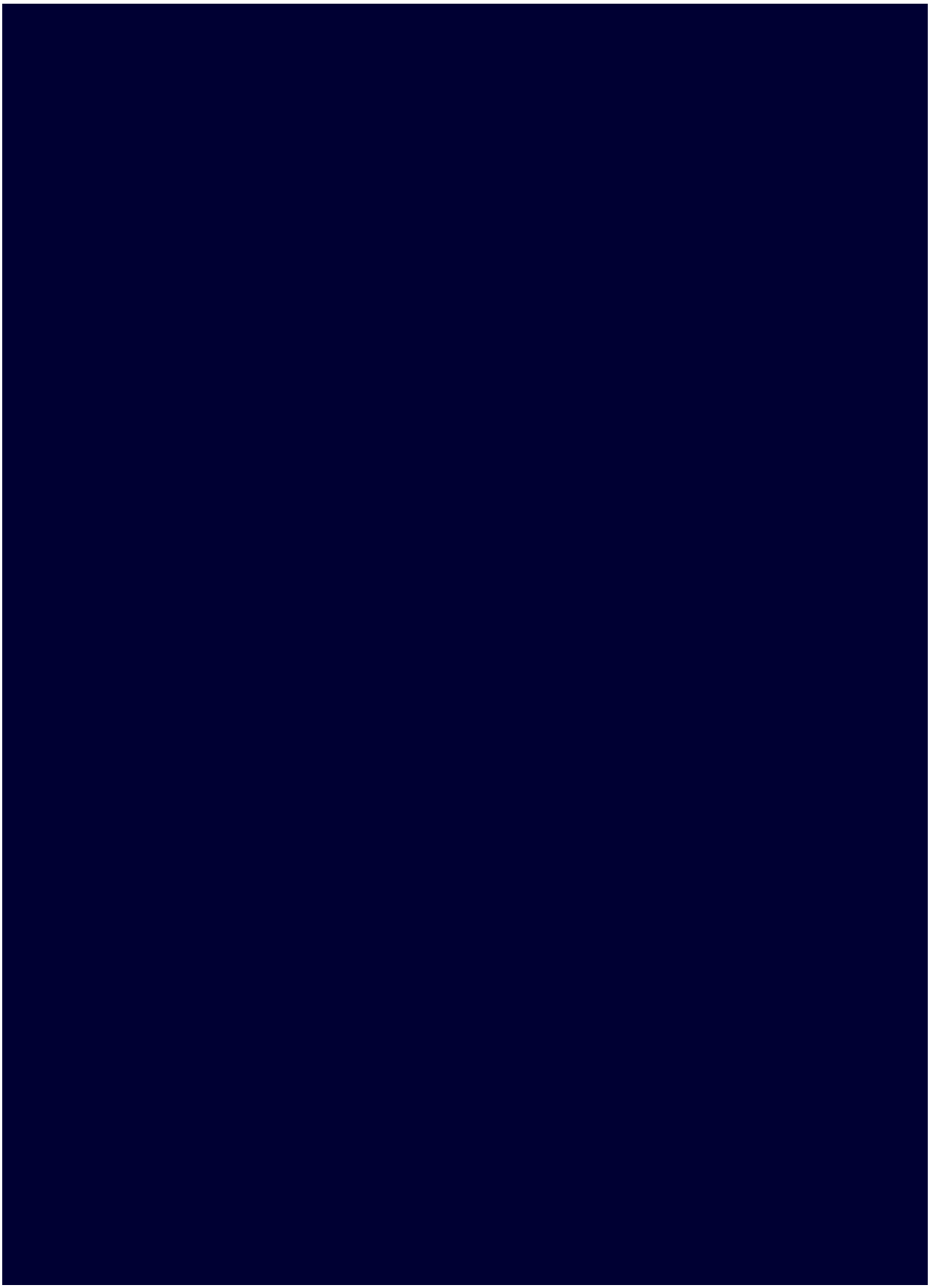
During his tenure as Texas secretary of state,

appears to be a committed friend to the administration, and he has amassed an extensive record as an attorney and jurist.

Gonzales's personal stance on core civil liberties matters will play a critical role in his efforts to balance the need for effective law enforcement and national security with the need for individual freedoms and privacy. Unfortunately, his personal feelings on these matters are largely a subject for speculation, though the evidence that does exist is not heartening.

We respectfully urge the Senate to dig deeper.

Appendix I: Documents that should be released publicly



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[60] Doug Ireland, , THE NATION, Oct. 20, 2003, at 18.

[61] H.J. Res. 56, 108th Cong. (2003); S.J. Res. 26, 108th Cong. (2003).

[62] Alberto Gonzales, , DALL


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