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The Hon. Patrick J. Leahy
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

January 21, 2005

Dear Senator Leahy:

I have read your letter of January 19, 2005, and am prepared to provide my views to you on the issue you raised.

First, I must disassociate myself from those who have attacked Alberto R. Gonzales in connection with issues related to the Torture Convention. I support his appointment and urge you to vote for his confirmation. Judge Gonzales has relied on the opinions of other attorneys on this and other issues, and a distinction must be maintained concerning those opinions and his own considered judgments. Moreover, attorneys acting ethically and in good faith can reach different conclusions on issues. It is unhelpful in developing national policy when personal attacks are launched on those with whom we disagree, despite ample grounds for professional differences.

Second, I have read some but not all the documents to which you refer in your letter, and given the time available have relied on the material quoted in your letter and on my recollection with regard to the intentions of the Bush Administration in submitting the Convention for ratification.

Third, the issue in your letter, as you state, is not whether acts amounting to torture under the Convention are forbidden in areas within the jurisdiction of the US, but to which the Eighth Amendment would not apply. As I understand it, Judge Gonzales has made clear that he believes the Torture Convention and US law require the US government to undertake to prevent and to punish acts amounting to torture committed by US officials anywhere in the world.

Having made these disclaimers, I do not hesitate to say that I disagree with the merits and wisdom of the conclusion reached by the Department of Justice and cited in the response of Judge Gonzales concerning the geographic reach of Article 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Article 16 on its face limits the obligation of the United States to undertake to prevent cruel, inhuman, or degrading acts not amounting to torture to "territory under its jurisdiction." Within such territory, the US is obliged to undertake to prevent such "other" acts, even if they do not amount to torture.

As you state in your letter, the Senate agreed to ratify the Torture Convention at the urging of the Reagan and Bush Administrations, and one of its reservations was that in applying Article 16 the US government would not be obliged to undertake to enforce its provisions, anywhere, in a manner inconsistent with the US interpretation of its almost identically worded Eighth Amendment prohibiting cruel and unusual punishment. As I testified at the time, in writing and orally, the purpose of this reservation was to prevent any tribunal or state from claiming that the US would have to follow a different and broader meaning of the language of Article 16 than the meaning of those same words in the Eighth Amendment. The words of the reservation support this understanding, in that they relate to the meaning of the terms involved, not to their geographic application: "the United States considers itself bound by the obligation under article 16 . . . only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments" (Emphasis added.) The Department of Justice at the time characterized this reservation as "modest," and explained its purpose as being to use established meanings under the Eighth Amendment instead of the Treaty's vague terms that had not yet evolved under international law. No evidence of which I am aware indicates that the reservation was intended to enable the US to refuse to enforce Article 16 in any territory "under its jurisdiction."

The Department of Justice contends, as I understand it, that Article 16 has no application outside the territory of the US, because the Supreme Court has interpreted the Eighth Amendment to be inapplicable beyond our territorial limits. The Department reasons that, since the Senate reservation limited enforcement of Article 16 to the US understanding of the Eighth Amendment's language, and since the Supreme Court has concluded that the Eighth Amendment is inapplicable beyond US territory, Article 16 itself is inapplicable beyond US territory. On the basis of my understanding of the purposes of the Convention, and of the purpose of the reservation related to Article 16 and the Eighth Amendment, I disagree with the Department's view and would urge the Attorney General Designate to accept a different view.

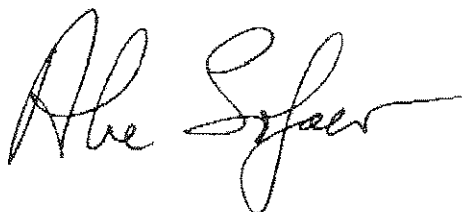
The US has been in the vanguard of efforts to protect human rights within the US and abroad. As President Bush has repeatedly affirmed, the dignity and equality of all human beings stems from natural law, i.e. the principle that the Creator of life has endowed us all equally with the right to be protected from abhorrent conduct. We agreed in the Torture Convention that all humans should be protected against official acts amounting to torture, or "other acts" covered by Article 16, and we undertook to "take effective legislative, administrative, judicial or other measures to prevent acts of torture" and the other acts covered by Article 16, when they occur "in any territory" under US jurisdiction. Article 2 of the Treaty requires us to take measures against acts of torture in territory under our jurisdiction, and we understand this to mean any territory, not just the

territory of the US to which the Eighth Amendment is applicable. Since the underlying objective is the same everywhere – to prevent official acts of torture, cruelty, or other abuse covered by the meanings of the words involved which are within our legal capacity to prevent – no good reason can be given to conclude that the geographic scope of the words in Article 16 should be narrower than the geographic scope of the same words in Article 2.

In conclusion, the reference in the reservation to the Eighth Amendment's language was intended to prevent inconsistent interpretation of our obligations under Article 16, not to excuse us from abiding by its obligations within the "territory" to which it applies by its terms, i.e., territory that is within the jurisdiction of the United States. To interpret it to limit our obligation under Article 16 would arguably allow US officials to act inconsistently with the Treaty – and inconsistently with the Eighth Amendment – in parts of the world in which we have jurisdiction to prevent them from doing so. Judge Gonzales said in his testimony that "we want to be in compliance, as a substantive matter under the Fifth, Eighth and 14th Amendment." I imagine that he and any other person who shares the President's beliefs would not condone or seek to protect any official from the full, potential consequences of behavior so offensive as to violate the cruel and unusual punishment clause in any place where the US has jurisdiction to prevent and punish such conduct.

I hope that these views are helpful to you and the Committee.

Sincerely,

A handwritten signature in cursive script, appearing to read "Alie Sjaer". The signature is written in black ink on a white background.