

**MEMORANDUM CONCERNING**  
**THE REPORT OF INVESTIGATION REGARDING**  
**ALLEGATIONS OF MISHANDLING OF CLASSIFIED DOCUMENTS**  
**BY FORMER ATTORNEY GENERAL ALBERTO GONZALES**

**For the United States Department of Justice**

**Office of the Inspector General**

*Respectfully submitted,*

**White & Case LLP**

George J. Terwilliger III

*Counsel for the Honorable  
Alberto R. Gonzales*

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**I. Introduction:<sup>1</sup> The Necessity of an Effective Response to the Attacks of September 11, 2001, Presented Government Leaders with Unprecedented Issues and Challenges Under Existing Law and Practice**

The Office of the Inspector General (“OIG”) has concluded an inquiry regarding former Attorney General Alberto R. Gonzales’ handling of certain classified notes of a March 10, 2004, meeting (“the Notes”) and a relatively small amount of other classified material. We are grateful that the OIG has afforded Judge Gonzales and his counsel an opportunity to review its Report on this subject. We provide herein our comments regarding the subject matter of the OIG’s *Report of Investigation Regarding Allegations of Mishandling of Classified Documents by Former Attorney General Alberto Gonzales* (“Report”) and related circumstances. Before addressing the Notes themselves and other classified documents at issue, we believe it is important to place them in a proper context.

It is far too easy to forget that on September 11, 2001, the United States suffered a devastating, violent attack on its homeland and its citizens. The September 11, 2001, attacks were mounted by violent Islamic extremists, driven by ideology, who specifically targeted for death civilian noncombatants in order to pursue strategic objectives.

Since attacks of this nature were not anticipated, the government did not have in place a ready array of tools designed to address or thwart the obvious threat of further similar attacks. The bombing attack on the World Trade Center in 1993 had been viewed, however incorrectly, as a law enforcement matter. Both the outstanding criminal investigation and successful prosecution of the terrorists who had traveled to the United States for that operation, and the related prevention of attacks on other New York City landmarks through the arrest and conviction of Sheikh Omar Abdel Rahman, may have engendered a false sense of security.<sup>2</sup> As the 9/11 Commission has reported, these law enforcement successes “obscur[ed] the need to examine the character and extent of the new threat facing the United States” because the law enforcement process “was meant, by its nature, to mark for the public the events as finished—case solved,

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<sup>1</sup> This submission is unclassified.

<sup>2</sup> THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 72 (authorized ed., 2004) [hereinafter 9/11 COMM’N REPORT].

justice done.”<sup>3</sup> Thus, it is not surprising that as of September 11, 2001, the United States governmental and legal infrastructure was largely unprepared to deal with combat-level threats by foreign-born combatants seeking to perpetuate violent attacks on United States citizens at home.

Immediately after the attacks, the existing parameters of domestic law enforcement and domestic national security operations and legal authorities were challenged by the objective of detecting further threats and thwarting them. The responsibility to respond to the threat of further violence and to establish constitutionally permissible defenses to further attacks fell to the national leadership. Working in completely unprecedented circumstances, executive and legislative leaders had to devise strategies to ferret out clandestine potential attackers both in the United States and abroad. Legal officers had a responsibility at the outset to identify the limits of authority under the Constitution, statutes, and judicial and historical precedents by which the needs of those operationally responsible for the nation’s defense could be met. These tasks included securing the nation from such further attacks as might have been planned and disrupting the planning and execution of those contemplated, but not yet capable of reaching fruition. Congress worked with the Executive to define further existing legal authorities, and to create new authorities necessary to combat this threat. In this context, the Bush Administration undertook certain classified intelligence activities for the purpose of obtaining information deemed critical to counter-terrorism objectives. The program publicly acknowledged by the President in December 2005 and later described as the “terrorist surveillance program” (“TSP”) was a part of these activities.

Obtaining information about terrorist organizations, their capabilities, agents, and plots is a mainstay of defense against further attacks. It is easily recognized that in a society and culture that promotes and protects individual liberties, pursuing such information can bring significant pressure upon existing legal authorities for domestic and international intelligence gathering. Likewise, that the scale and swiftness of the necessary intelligence collection, both far greater than in a prior time, might test the timeliness of existing legal procedures is similarly

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<sup>3</sup> 9/11 COMM’N REPORT, *supra* note 2, at 72-73; *see id.* at 72 (“Neither President Clinton, his principal advisers, the Congress, nor the news media felt prompted, until later, to press the question of whether the procedures that put [the terrorists] behind bars would really protect Americans against the new virus of which these individuals were just the first symptoms.”).

unsurprising. The activities and conduct of those involved in perpetuating the September 11 attacks, and the group or groups with which they were associated, also made devastatingly clear that existing distinctions in law and policy between domestic and international intelligence regarding terrorist threats to the United States homeland was an artificial one. Because of the nation's commitment to individual liberty and freedom, it is a challenge to obtain timely the information needed for an effective defense and to simultaneously respect and maintain cherished constitutional safeguards.

Fortunately, the founders of the nation and authors of the Constitution foresaw that some challenges to the nation's safety were not predictable. They also recognized that, in matters of national defense, most often the government needs to act decisively and quickly. As a result, the Constitution vests the authority for commanding national defense, as well as the responsibility and political accountability for its exercise, in one individual, the President.<sup>4</sup> Those with a responsibility to advise the President as to his legal authority to act in the national defense had a duty to assist in identifying means by which, under law, the President could direct the intelligence community to obtain the information deemed necessary to defend the nation against further attacks.<sup>5</sup> Judge Gonzales was part of that effort, first in his role as Counsel to the President and later as Attorney General. The core program to effectuate this information-gathering, of which TSP was a part, was and remains, for obvious reasons, a highly classified project.

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<sup>4</sup> Congress recognized the President's authority to deter and prevent acts of international terrorism in its recent authorizations for the use of military force. *See* Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF] ("the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States"); Authorization for the Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, 1500 (2002) (same, referring to AUMF)

<sup>5</sup> The President's ability and authority to act is not dependent on the learned advice or approval of his legal advisors, including the Attorney General; this fact does not, however, deprive the President of recourse to his advisors at any time. For example, Attorney General Edward Bates provided President Lincoln with General Bates' opinion regarding Lincoln's authority to suspend the writ of habeas corpus in time of insurrection and public danger. *Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op. Att'y Gen. 74 (1861), 1861 WL 1951. The ultimate decision whether to suspend the writ was President Lincoln's; indeed, he had suspended the writ months earlier. *See* Letter from President Abraham Lincoln to Winfield Scott, Commanding Gen. of the Army (Apr. 27, 1861), *available at* <http://teachingamericanhistory.org/library/index.asp?document=414> (last visited Aug. 19, 2008); President Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *available at* <http://teachingamericanhistory.org/library/index.asp?documentprint=1063> (last visited Aug. 19, 2008) (noting that "[i]t was decided that we have a case of rebellion" and promising "an opinion, at some length, . . . by the Attorney General").

It should also not be surprising that reasonable minds might reasonably disagree about how to apply both long-existing and new legal authorities to the necessary intelligence objectives. The mere fact of disagreement only extols the virtues of reasoned debate and does not bear on whether such activities were proper under the law. Were disagreement as to legal issues to be construed as indicative of impropriety, conduct by both the government and private persons that is subjected to legal debate across America every day might be termed “improper” simply because credible and learned individuals have a different view about the nature and application of relevant legal standards. This is especially the case when the legal questions themselves arise in unprecedented circumstances. Respect for the rule of law does not turn on whether points of law are debatable. On the contrary, the rule of law *invites* debate about the interpretation and application of legal standards. Indeed, debate and a level of disagreement as to the law is a virtue, not a vice.

In meeting the responsibilities of his public service positions in connection with the response to the September 11 attacks, Judge Gonzales was entrusted with knowledge concerning the government’s most sensitive and highly classified information, programs, and activities. As a result, he handled vast amounts of information and materials classified as top secret or top secret sensitive compartmented information (“SCI”). The only instances in which his handling of such material has been questioned involves these few pages of personal notes that he prepared at the direction of the President to memorialize a most significant meeting with congressional leaders concerning national security matters and a relatively few other SCI classified materials. The best available evidence shows that Judge Gonzales kept both materials in a safe in the inner sanctum of the Office of the Attorney General that was appropriate for classified materials generally, but not these specifically. We believe that it is appropriate that the OIG take cognizance of this record.

## **II. The OIG Report of Investigation**

It is clear from the Report that there is no evidence that the acknowledged shortcomings in Judge Gonzales’ handling of this material resulted in any unauthorized disclosure of classified information. We also submit that the Report demonstrates that Judge Gonzales’ best recollection is that he always placed the Notes in the most secure place over which he had immediate

personal control. While the Report provides a basis to conclude that information made available to Judge Gonzales would indicate that the safe was not a proper storage place for the Notes or other SCI material, we submit that a fair assessment of the facts does not support a conclusion that Judge Gonzales consciously knew that the safe was inadequate because it was not in a sensitive compartmented information facility (“SCIF”) and acted in contravention to that knowledge.

Lastly, Judge Gonzales’ handling of the Notes which precipitated this inquiry is best understood by giving due consideration to the context in which he made and maintained the Notes. This context explains the reasons why Judge Gonzales believed he should retain the Notes and secure them in the Office of the Attorney General.

### **III. Factual Background to the Making and Maintenance of the Notes**

#### **A. Intelligence Activities Subject to Reauthorization**

The President authorized several classified intelligence activities shortly after September 11 in response to the attacks.<sup>6</sup> The activities are subject to reauthorization by the President approximately every 45 days.<sup>7</sup> The Notes and Judge Gonzales’ understanding of the Notes’ importance relate to a meeting between executive and legislative branch officials concerning particular aspects of these intelligence activities.<sup>8</sup>

In addition to his statutory role as head of the Department of Justice (“the Department”), the Attorney General is also charged by statute with the duty of being legal advisor to the President.<sup>9</sup> Concurrent with the reauthorization process, the President solicits advice from the Attorney General regarding the legal authorities relevant to conducting the intelligence activities. The activities’ civil rights implications are monitored by the National Security Agency’s Inspector

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<sup>6</sup> Letter from J.M. McConnell, Dir. of Nat’l Intelligence, to Sen. Arlen Specter, Ranking Member, S. Comm. on the Judiciary (July 31, 2007).

<sup>7</sup> *Id.*

<sup>8</sup> Certain activities acknowledged by the President after their unauthorized disclosure by *The New York Times* have been termed the Terrorist Surveillance Program (“TSP”); the TSP is not the full extent of the activities subject to periodic reauthorization. *See id.*; James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005.

<sup>9</sup> 28 U.S.C. § 511 (2007).

General and General Counsel.<sup>10</sup> The Attorney General’s advice regarding the legal basis for the activities is an aid to the exercise of the President’s constitutional authority, but is not a prerequisite to the President’s authority to direct that such activities be undertaken.<sup>11</sup> Selected congressional leadership was also apprised of these activities.<sup>12</sup> The pending March 11, 2004, expiration of a particular 45-day authorization for the several intelligence activities approved by the President is the context in which the events relevant to the creation of the Notes occurred.<sup>13</sup>

## B. Attorney General Ashcroft Hospitalized

On March 4, 2004, Attorney General John Ashcroft was diagnosed with a severe case of gallstone pancreatitis and surgery was scheduled for March 9, 2004, at 12:00 p.m.<sup>14</sup> As a result, the Administration understood that then-Deputy Attorney General James B. Comey would be providing the Department’s advice as to the legal authorities for the activities subject to periodic review.<sup>15</sup> Although Mr. Comey subsequently testified that he became “[A]cting [A]ttorney General” when General Ashcroft was hospitalized, it appears that a more precise description

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<sup>10</sup> U.S. DEP’T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 5 (2006) [hereinafter U.S. DEP’T OF JUSTICE, REPORT ON LEGAL AUTHORITIES]; President George W. Bush, Press Conference of the President (Dec. 19, 2005), <http://www.whitehouse.gov/news/releases/2005/12/print/20051219-2.html> (last visited Aug. 18, 2008).

<sup>11</sup> U.S. DEP’T OF JUSTICE, REPORT ON LEGAL AUTHORITIES, *supra* note 10, at 6-10; see *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearing Before the S. Comm. on the Judiciary, Part IV*, 110th Cong. 15-16 (May 15, 2007), available in LEXIS, Federal News Service [hereinafter *SJC Hearing, May 15, 2007*] (statement of James Comey, former Deputy Att’y Gen.) (expressing uncertainty that the Department’s certification was a statutory or regulatory prerequisite to presidential authorization, even though past practice had been to obtain the Department’s certification).

<sup>12</sup> See Letter from John Negroponte, Dir. of Nat’l Intelligence, to Rep. J. Dennis Hastert, Speaker of the H.R. (May 17, 2006), available at <http://www.usatoday.com/news/2006-05-17-nsa-list.pdf> (last visited Aug. 19, 2008) (identifying Members of Congress who were briefed on the subset of these activities subject to reauthorization publicly known as the TSP).

<sup>13</sup> See, e.g., *SJC Hearing, May 15, 2007, supra* note 11, at 5 (statement of James Comey).

<sup>14</sup> Press Release, U.S. Dep’t of Justice, Attorney General John Ashcroft to Undergo Procedure at G.W. Hospital (Mar. 9, 2004), [http://www.usdoj.gov/opa/pr/2004/March/04\\_ag\\_148.htm](http://www.usdoj.gov/opa/pr/2004/March/04_ag_148.htm) (last visited Aug. 18, 2008).

<sup>15</sup> See Letter from Alberto Gonzales, Att’y Gen., to Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary 1-2 (Aug. 1, 2007) (on file with author); Dan Eggen, *Ashcroft is Admitted to GWU Hospital*, WASH. POST, Mar. 6, 2004 (Mr. Comey “will act in Ashcroft’s stead.”); Eric Lichtblau & Lawrence K. Altman, *Ashcroft in Hospital with Pancreatic Ailment*, N.Y. TIMES, Mar. 6, 2004 (Mr. Comey “will effectively be responsible for the day-to-day operations of the [Department of Justice], although he will not assume the title of acting attorney general.”) (attributed to a senior Department official); see also *Oversight of the U.S. Dep’t of Justice: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 58-59 (July 24, 2007), available in LEXIS, Federal News Service [hereinafter *SJC Hearing, July 24, 2007*] (statement of Alberto Gonzales, former Att’y Gen.) (acknowledging that he should have known Mr. Comey’s status, but recalling that there was some confusion about whether and when the White House received the documentation relating to Mr. Comey’s acting status); *id.* at 58 (explaining that, regardless of Mr. Comey’s formal status, it was understood that Mr. Comey would be providing the Department’s opinion of the activities’ legality).

would be that Mr. Comey generally performed duties of the Attorney General pursuant to his authority as Deputy Attorney General.<sup>16</sup> The distinction, though fine, is not without significance as on March 10, 2004, prior to the hospital visit, General Ashcroft may have retained his authority as Attorney General even as Mr. Comey performed duties of the Attorney General on his behalf due to his illness, whether as the “Acting Attorney General” or pursuant to his authority as the Deputy Attorney General to act in the Attorney General’s stead.

**C. Deputy Attorney General Comey’s Advice as to an Aspect of the Intelligence Activities Prompted a Meeting with Congressional Leadership**

On Tuesday, March 9, 2004, Mr. Comey orally advised the Administration that he was reversing the Attorney General’s prior written advice, given for several years since the inception of the activities, regarding the legal basis for the classified terrorist intelligence activities, stating that he saw no legal basis for certain aspects of the activities subject to reauthorization.<sup>17</sup>

The Attorney General’s approval of a legal basis for the activities was not a legal prerequisite to presidential authorization of the activities. Nonetheless, the Administration sought a dialogue with the congressional leadership to explore the potential for a legislative solution to Mr. Comey’s objections.<sup>18</sup> [REDACTED] an emergency meeting to this end [REDACTED] took place on March 10, 2004, in the White House Situation Room between representatives of the Executive Branch, including members of the intelligence community, and a group of congressional leaders informally known as the “Gang of Eight”—the bipartisan leaders of both Houses of Congress and of both intelligence committees.<sup>19</sup>

<sup>16</sup> See 28 U.S.C. § 508(a) (2007) (“In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office . . . .”); compare *SJC Hearing, May 15, 2007, supra* note 11, at 5 (statement of James Comey) (“I became the acting attorney general.”), with Att’y Gen. Order No. 2711-2004, 69 Fed. Reg. 13,628, 13,676 (Mar. 9, 2004) (Mr. Comey, as the Deputy Attorney General, signed an order on behalf of the Attorney General amending regulations pertaining to the Radiation Exposure Compensation Act Amendments of 2000.), and Price Changes to Federal Register Publications, 69 Fed. Reg. 12,781, 12,783 (Mar. 17, 2004) (Mr. Comey, as the Deputy Attorney General, signed an order endorsing price changes.), and Lichtblau & Altman, *supra* note 15 (Mr. Comey “will effectively be responsible for the day-to-day operations of the [Department of Justice], although he will not assume the title of acting attorney general.”), and *id.* (“To the extent that the attorney general is hospitalized or incapacitated, [a] senior official said, Mr. Comey has the power to carry out virtually all of the attorney general’s duties.”).

<sup>17</sup> *SJC Hearing, May 15, 2007, supra* note 11, at 5 (statement of James Comey); see *id.* at 16 (Mr. Comey did not believe there was a legal basis for “aspects of this matter.”).

<sup>18</sup> *SJC Hearing, July 24, 2007, supra* note 15, at 15-16, 61-62 (statement of Alberto Gonzales).

<sup>19</sup> *Id.* at 9-10 (statement of Alberto Gonzales). On March 10, 2004, the members of the Gang of Eight were Speaker Dennis Hastert, House Minority Leader Nancy Pelosi, House Permanent Select Committee on Intelligence Chairman

The purpose of this meeting was to inform the congressional leadership of Mr. Comey's change to the Department's prior advice regarding the legal basis for the intelligence collection program in question and to discuss possible legislative solutions that would support the particular aspect of the activities in question.<sup>20</sup> At this meeting, a consensus was expressed by the Gang of Eight on two issues: first, that legislation regarding the particular aspect in question would be difficult to secure without disclosing, and therefore compromising, the activities;<sup>21</sup> and second, that the Administration should not allow the activities' authorization to lapse while the Administration "look[ed] for a way ahead."<sup>22</sup>

Judge Gonzales has been heavily criticized, including by Mr. Comey and members of the United States Senate, for his and then-Chief of Staff to the President Andrew H. Card, Jr.'s visit to Attorney General John Ashcroft in the hospital that same evening. The criticism centers on the notion that Secretary Card and Judge Gonzales sought, in Mr. Comey's words, "to take advantage of a very sick man."<sup>23</sup> The truth belies this unfounded accusation.

Secretary Card and Judge Gonzales went to speak with the Attorney General because the President told them to do so. They went to inform the Attorney General of the outcome of the meeting with the Congressional leadership because:

- (a) The matter was judged to be of such importance as to justify informing the congressional leadership about a matter of conflicting legal advice to the President;

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Porter Goss and Ranking Member Jane Harman, Senate Majority Leader Bill Frist, Senate Minority Leader Tom Daschle, and Senate Select Committee on Intelligence Chairman Pat Roberts and Vice Chairman Jay Rockefeller IV.

<sup>20</sup> *Id.* at 15-16 (statement of Alberto Gonzales).

<sup>21</sup> *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 19 (Feb. 6, 2006) [hereinafter *SJC Hearing, Feb. 6, 2006*] (statement of Alberto Gonzales).

<sup>22</sup> *See SJC Hearing, July 24, 2007, supra* note 15, at 16 (statement of Alberto Gonzales) ("The consensus in the room from the congressional leadership is that we should continue the activities, at least for now, despite the objections of Mr. Comey. There was also consensus that it would be very, very difficult to obtain legislation without compromising this program, but that we should look for a way ahead.").

<sup>23</sup> *SJC Hearing, May 15, 2007, supra* note 11, at 7 (statement of James Comey).

- (b) The congressional leadership had reached a consensus that the activities should continue—notwithstanding the Department’s about-face,<sup>24</sup>
- (c) Mr. Comey’s position was a reversal of the Attorney General’s own prior position on the issue; and
- (d) The program affected was a matter of paramount confidentiality and importance to the nation’s safety.

Secretary Card’s and Judge Gonzales’ impending arrival to meet with the Attorney General was announced by a telephone call from the President to General Ashcroft’s hospital room. When informed that the two were coming, Deputy Attorney General Comey (unaware, one would hope, of the extraordinary engagement of members of Congress on the issue) rushed to the Attorney General’s hospital room. He reportedly demanded that an armed security detail of FBI agents (whose sole responsibility is the Attorney’s General’s safety) secure Mr. Comey’s continued presence in the room during the meeting between the President’s emissaries and the Attorney General, putting the FBI in a potentially compromising position, at best.<sup>25</sup> Rather than an instance where the President’s emissaries were trying to take advantage of anyone, what emerges in fact is an instance of a subordinate official seeking to interpose himself between the President and a high-level, official communication to his Attorney General on a vital matter of national security.

Many critics of Judge Gonzales’ performance in office concerning these intelligence activities do nothing more than conclude that Mr. Comey’s legal views were correct while those who had previously provided contrary advice as to the authority for the activities were wrong. While Mr. Comey’s view may be a legitimate one, it logically is of no more or less weight than conclusions to the contrary previously reached by other officials, including the Attorney General. Thus, however one might view the merits of Mr. Comey’s position, it provides no logical basis to

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<sup>24</sup> *SJC Hearing, July 24, 2007, supra* note 15, at 16 (statement of Alberto Gonzales); *SJC Hearing, Feb. 6, 2006, supra* note 21, at 19 (statement of Alberto Gonzales); *see also* GEORGE TENET, AT THE CENTER OF THE STORM: MY YEARS AT THE CIA 238 (2007) (“At one point in 2004 there was even a discussion with the congressional leadership in the White House Situation Room with regard to whether new legislation should be introduced to amend the FISA statute, to put the [terrorist surveillance] program on a broader legal foundation. The view that day on the part of members of Congress was that this could not be done without jeopardizing the program.”).

<sup>25</sup> *See SJC Hearing, May 15, 2007, supra* note 11, at 6 (statement of James Comey).

criticize or condemn Judge Gonzales for carrying out the President's directive to consult directly with the Attorney General on the matter. Seen in light of the true reason for its occurrence, the criticism of Judge Gonzales for meeting with the Attorney General can be seen as demonstrably hyper-inflated rhetoric without basis in fact.

That there was disagreement, even impassioned debate, concerning the application of the relevant legal authorities to the intelligence activities in question does not offend the rule of law. On the contrary, the rule of law invites and encourages such debate. No participant in that discussion has a claim to infallibility. One person, however, here the client of both the White House Counsel and the Attorney General, had a duty to decide what steps were legally authorized and necessary to the safety of the nation's citizens. Judge Gonzales believed in good faith that his view, shared by colleagues, of the pertinent legal authorities was correct and Mr. Comey believed, no doubt in equally good faith, that his view, also shared by colleagues, was correct. Judge Gonzales is grateful to have served a president willing to address the issue under such difficult circumstances. Indeed, the importance of the continuation of the particular intelligence activities at issue and the congressional leadership's support for doing so, notwithstanding Mr. Comey's advice, was punctuated by the Madrid train bombings that occurred the following day.<sup>26</sup>

#### **D. Creation of the Notes**

The President instructed Judge Gonzales to prepare notes memorializing the March 10 Situation Room meeting. Judge Gonzales considered the Notes he prepared to be one of the most important and sensitive documents in his possession. While Judge Gonzales acknowledges that he should have recognized that certain aspects of the Notes contained a limited number of references that could lead a limited number of paragraphs therein to be classified, he never consciously thought of them as less than the most sensitive of documents he handled concerning a candid discussion with congressional leaders about a national security matter. As Attorney General, Judge Gonzales did not reconsider whether the Notes also reflected classified national security information. He believed that his continued custody of the Notes was insufficient to

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<sup>26</sup> *SJC Hearing, July 24, 2007, supra* note 15, at 16 (statement of Alberto Gonzales).

transfer control of the Notes to the Department, and he never intended to cause such a transfer of control.

**E. Use of the Notes**

Judge Gonzales has great respect for the responsibilities of handling classified information as well as other sensitive information, whether expressly classified or not. Accordingly, he secured the Notes in the safe inside the Attorney General's inner office suite, on the fifth floor of the Main Justice building, within a few strides of the Attorney General's desk. He believed that this safe was a sufficiently secure location for notes of a sensitive nature, and that this safe was also the most secure location to which he had immediate personal access. It is worth noting that while serving as White House Counsel, Judge Gonzales stored the Notes in a safe in his office, which was a SCIF. During Judge Gonzales' tenure as Attorney General, a total of five persons over time had access to the safe in the Attorney General's office in their capacities as personal or special assistants to the Attorney General. Judge Gonzales understood these persons all to have Top Secret security clearances. Judge Gonzales recognizes and agrees with the OIG's conclusion that the Notes and other SCI documents that he stored in the safe within the Attorney General's office was not consistent with the Department's regulations governing the proper storage and handling of information classified as "SCI." Judge Gonzales regrets this lapse, noting, however, that while it does not excuse the use of proper procedures, he undertook these steps without conscious disregard of the requirements for handling and storage of classified information.

Judge Gonzales specifically recalls two events that prompted him to review the Notes while they were stored in the safe at the Department. He has no specific recollection of reviewing the Notes on another occasion.

On May 15, 2007, Mr. Comey testified before the Senate Judiciary Committee and articulated a version of the March 10, 2004, events in General Ashcroft's hospital room. His testimony did not relate the events that occurred at the Gang of Eight meeting that afternoon. At some point after Mr. Comey gave this testimony, Judge Gonzales informed White House Counsel Fred F. Fielding that Judge Gonzales had notes of the Gang of Eight meeting. Subsequently, Judge Gonzales had the opportunity to discuss the Notes in person with Mr. Fielding and read the

Notes aloud to Mr. Fielding. Thereafter, before leaving office Judge Gonzales transferred custody of the Notes to Principal Deputy Assistant Attorney General for the Office of Legal Counsel Stephen G. Bradbury.

Judge Gonzales and the Department team preparing him for his July 2007 testimony before the Senate Judiciary Committee and House Permanent Select Intelligence Committee discussed whether he should describe the Gang of Eight meeting at his congressional testimony to provide the committees with the factual context of his visit to General Ashcroft's hospital room. Judge Gonzales removed the Notes from his inner office safe for this discussion and read the Notes to members of the preparation team who possessed the appropriate clearances to hear Judge Gonzales read the Notes. Such preparation occurred within the Justice Command Center, which is a SCIF. Judge Gonzales ultimately was authorized to testify to the Senate Judiciary Committee, in general terms, about the existence of the Gang of Eight meeting on March 10, 2004, and the consensus reached among the congressional leadership.<sup>27</sup>

#### **IV. Conclusion**

Judge Gonzales' conduct as a public official bespeaks recognition and appreciation of the importance of the proper handling of classified information. He dealt with significant quantities of classified information, particularly concerning our nation's efforts to combat enemies such as those who executed the attacks of September 11. Judge Gonzales is gratified, considering the quantity of classified information he handled during his service as White House Counsel and Attorney General, that there is no evidence suggesting that the information in the Notes or the other classified documents at issue were subject to any unauthorized disclosure. Judge Gonzales accepts responsibility for not securing the Notes and limited other SCI documents in a SCIF and appreciates the professionalism and courtesy with which the OIG conducted a very thorough investigation.

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<sup>27</sup> *SJC Hearing, July 24, 2007, supra* note 15, at 9-10, 15-16, 31 (statement of Alberto Gonzales).

**ADDENDUM TO**

**MEMORANDUM CONCERNING**

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**For the United States Department of Justice**

**Office of the Inspector General**

**August 26, 2008**

*Respectfully submitted,*

**White & Case LLP**

George J. Terwilliger III

*Counsel for the Honorable  
Alberto R. Gonzales*

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## I. Handling of the Classified Materials<sup>1</sup>

Judge Gonzales acknowledges responsibility for not securing materials which included some classified information in full accord with existing requirements for the storage and handling of same. During his service as White House Counsel and Attorney General, Judge Gonzales had occasion to handle significant quantities of top secret, sensitive compartmented information (“TS/SCI”), and the mishandling of the relatively few items that are subjects of the Office of the Inspector General’s (“OIG’s”) Report is the only instance where he apparently failed to adhere fully to relevant security requirements. Judge Gonzales is gratified that no evidence shows that there was any unauthorized disclosure of TS/SCI information resulting from his mishandling and storage of the materials in question.

These materials were stored in a safe suitable for classified materials in the Attorney General’s inner office suite on the fifth floor of the Robert F. Kennedy building, within a few strides of the Attorney General’s desk. As the Report points out, this storage did not meet existing requirements because the safe itself was not located within an approved sensitive compartmented information facility (“SCIF”). Judge Gonzales handled and stored the materials so as to keep them under his personnel control with the intent thereby to prevent their unauthorized disclosure, and he categorically denies that he handled such materials with conscious disregard for their classification status or for the rules and regulations governing the proper handling of such materials.

## II. Transport of the Notes to Residence

The Report’s conclusion that Judge Gonzales transferred the Notes<sup>2</sup> to his personal residence for an indeterminate period of time is apparently inferred from facts that would equally suggest that Judge Gonzales only would have transported the Notes to and/or from his residence until he was able to secure them in the safe in the Attorney General’s office. The inferential conclusion that the Notes were at the residence for an indeterminate period erroneously makes more of the possibility that the Notes were taken home by Judge Gonzales for *any* period than the record

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<sup>1</sup> This submission is unclassified.

<sup>2</sup> Notes created by Judge Gonzales memorializing a March 10, 2004, meeting in the White House Situation Room, at which the congressional leadership was present.

information supports. Rather, the record information suggests that it is most likely that Judge Gonzales may have transported the Notes in his personal possession to and from his home for a very brief period between the evening when he was sworn in as Attorney General and a short time later when the Security Programs Manager for the Office of the Attorney General provided access to the safe in his inner office suite where classified information could be stored.

In light of all the facts, it seems fair and appropriate to give Judge Gonzales' best recollection on this issue the benefit of the doubt, rather than to reject it outright in favor of inferences of questioned strength.

The Security Programs Manager is reported to have provided the office safe combination to Judge Gonzales' assistant some number of days after the day he entered on duty as Attorney General. No specific date is established in the Report for when the combination was made available. We do not believe this information is sufficient to infer that Judge Gonzales therefore stored the Notes at home for this "indeterminate" period. Likewise, the reported fact that some weeks after the period in question the combination to another safe located at Judge Gonzales' home could not be determined is likewise not a sufficient basis to reliably conclude that Judge Gonzales kept the Notes unsecured at home. Rather, the information about the combination to the home safe gives rise to at least an equally probable inference that Judge Gonzales sought to secure the Notes at the Department of Justice as soon as he had access to a safe in his office.

Nor does Judge Gonzales' speculation made to White House attorneys and to the White House Counsel more than two years later—that he may once have taken the Notes home and that he was not sure, when he initially spoke to the White House Counsel, where they were stored—provide the substance necessary to justify the inferences cited in the Report. This speculation turned out to be no more than just that, as Judge Gonzales subsequently looked for and found the Notes in his office safe.

### **III. Intent to Secure the Notes**

We respectfully submit that Judge Gonzales' conduct evinces a desire to secure the classified information and prevent its disclosure, even if the manner of securing the materials did not comply fully with the relevant requirements of security procedures. Judge Gonzales secured the

Notes in a safe in the inner sanctum of the Office of the Attorney General under his direct control or had them for a short time in his personal possession. This seems consistent with his handling of the Notes at the White House where, we note and the Report recognizes, his White House office was a SCIF and he secured the Notes in a safe therein.

The Report also concludes that Judge Gonzales “knew or should have known” the Notes were classified. Inasmuch as he created the Notes, they were not classified as such by some other authority. Judge Gonzales created the Notes at the direction of the President, they concerned very sensitive matters of great import to the nation’s security and he handled them consistent with his belief in the need to maintain their confidentiality. The suggestion that he consciously disregarded this fact is not borne out by the facts nor supported by mere inferences to be drawn from the fact that the Notes referenced classified information.

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Judge Gonzales and his counsel thank the Inspector General for his consideration in permitting our review and comment on the draft report and the opportunity to discuss aspects of it with the Inspector General and his staff. We have noted our gratitude to the OIG, and particularly the staff working on this matter, for the courtesy and professionalism exhibited in working with us.