

THE BOSTON PHOENIX

Alberto Gonzales, the devil you don't know

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November 19, 2004

Hold that sigh of relief. Sure, we're getting rid of the worst attorney general in recent memory (and, yes, that includes the Nixon administration's infamous John Mitchell, who wasn't as bold as John Ashcroft, and who talked a better game than he played). However, we may be getting a smarter, more sophisticated, better-spoken, more devious and considerably more dangerous replacement in former White House counsel Alberto Gonzales.

To many who would adopt the "anybody but Ashcroft" position, Gonzales would seem, in the words of New York senator Charles Schumer, to be a "better candidate" for AG. But if Gonzales's legal résumé demonstrates anything, it's that the government can commit even the vilest atrocities — executing a person without due process, torturing prisoners in total secrecy — so long as they're authorized by a legal analysis bearing only the faintest patina of plausibility. And, now, fittingly, Gonzales is being rewarded for this shrewdness with the position of top governmental prosecutor — and possibly a future slot on the Supreme Court.

Earlier this year, long before he was picked to be Ashcroft's successor, Gonzales earned the ire of civil libertarians and decent people everywhere by masterminding one of the more nefarious, underhanded and dangerous legal evasions ever concocted by a government lawyer. In June, the *Wall Street Journal* and the *Washington Post* reported that Gonzales and his high-level White House legal and working group had prepared memoranda that claimed the president could lawfully ignore international treaties and congressional statutes in ordering the use of torture and other palpably criminal techniques on enemies captured in the "war on terror." (See "[Advice of Counsel: Torture Is Okay](#)," This Just In, June 18.)

To many in the press, this was evidence that the White House wanted to twist the law to give the president as much authority as possible to extract information from captive terrorists. We, however, saw evidence of something more sinister and calculating: that Gonzales and the memos' authors *intentionally* proffered outlandish legal advice so that, should officials working under the president ever be held accountable for violating international law, they could point to the memos as a plausible defense. Any agents of the federal government prosecuted for torturing a prisoner — in Abu Ghraib, Guantánamo, or elsewhere — could claim they were merely complying with the advice of the government's legal counsel, and the person who had instructed them could claim the same defense. In moral terms, it's barely indistinguishable

from Nazi war criminals' assertions at Nuremberg that they were merely "following orders." Unlike the Nuremberg defense, however, the "advice of legal counsel" doctrine is an old and established defense in criminal cases, designed to show that the defendant acted on a good-faith assumption that what he or she was doing was lawful. Such advice is usually given, however, by an ethical lawyer writing on the basis of his or her sincerely held legal views, rather than as a cynical tactic offered in advance to give the guilty a colorable defense.

As shocking as these practices are, Gonzales has a history of crafting ambitious end runs around the law. In 1997, as the legal counsel to then-Texas governor George W. Bush, Gonzales sent a letter to the US State Department claiming that the Vienna Convention on Consular Relations, which became US law in 1969, simply didn't apply to Texas. At the time, the Lone Star State was preparing to execute a Mexican national, Irineo Tristan Montoya, who had been convicted in 1985 of murder. The Mexican government complained that Texas had violated the Vienna Convention in denying Tristan Montoya access to legal counsel from his home country. Mexico was also concerned that Tristan Montoya, who did not speak English, had signed, in the absence of a lawyer, a confession he couldn't even read. According to Gonzales, however, because Texas was not a signatory to the Vienna Convention, it didn't have to play by those standards. (Gonzales must have forgotten that Texas is no longer an independent republic.) Two days after Gonzales's letter was written, Tristan Montoya was executed, to much public outcry in Mexico and abroad. (Disclosure: Harvey Silverglate's law firm participated in the defense of one of the Mexicans on Texas's death row.)

Ominously, the fact that President Bush has for some time been considering Gonzales as a possible Supreme Court nominee suggests that Gonzales's stint as attorney general may be just a steppingstone to a much more powerful career, and one without a term limit to boot. If Gonzales can be shepherded through the attorney-general confirmation hearings unscathed, and if he can be confirmed despite the White House torture memos, it'll offer convincing proof that he can withstand Supreme Court confirmation hearings a year or two down the line. Unfortunately, if Gonzales gets sworn in as a Supreme Court justice, he will likely bring along his novel interpretation of the rule of law: figure out what you want to do, and then twist the law to authorize it. It'll make a mockery of the administration's claimed devotion to "strict constructionism" — the theory that judges should follow the law rather than make it up to suit their ideology.