



# human rights *first*

FORMERLY THE LAWYERS COMMITTEE FOR HUMAN RIGHTS

September 29, 2005

Honorable Arlen Specter  
Chairman  
Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, DC 20510

Honorable Patrick Leahy  
Ranking Member  
Committee on the Judiciary  
152 Dirksen Senate Office Building  
Washington, DC 20510

Re: Nomination of Timothy Flanigan for Deputy Attorney General

Dear Chairman Specter and Senator Leahy:

When Timothy Flanigan was nominated to be Deputy Attorney General of the United States, Human Rights First was concerned that his role in developing Administration policy, in particular with regards to the scope of executive power and the legal framework for interrogation rules, could interfere with Mr. Flanigan's ability to faithfully perform the critical law enforcement role his new post would demand. We have followed closely Mr. Flanigan's responses to questioning by the Committee during the confirmation process. Having now studied his answers to written questions by Senators on the Committee, our concerns have only deepened.

We believe that Mr. Flanigan's views and positions on these important issues, as set forth in his oral and written answers, raise serious doubts about his suitability for the second highest law enforcement post in our Government, and we urge the Committee to refrain from moving this nomination forward until these concerns are more satisfactorily addressed.

Letter to Chairman Specter and Senator Leahy

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Our concerns fall into three areas: the scope of the Commander-in-Chief's authority to override laws passed by Congress; the interpretation of the ban on cruel, inhuman and degrading treatment; and the legality of specific interrogation techniques proposed or approved by the Administration.

#### The Commander-In-Chief's Power to Override the Prohibition on Torture of Detainees

Mr. Flanigan was asked whether he agreed with the 2002 opinion of the Justice Department's Office of Legal Counsel (OLC) that the torture statute (18 U.S.C. §§2340-2340A) would be unconstitutional if interpreted to constrain the ability of the President to authorize specific interrogation techniques under his Commander-In-Chief authority. Despite the fact that many on the Committee have expressed serious concerns with this theory of expansive executive power, Mr. Flanigan failed to provide a clear answer. While conceding that the President "is not above the law," Mr. Flanigan refused to repudiate the position expressed in the OLC opinion, saying only that "[i]t would be imprudent to purport to define the limits of the President's constitutional powers based on hypotheticals." We respectfully suggest that consideration of this issue is no longer in the realm of the hypothetical. Mr. Flanigan's failure to articulate his views on this issue leaves the Committee in a difficult position. Without insight into Mr. Flanigan's views on whether the President override a statute enacted to prevent and deter acts of torture, the Committee cannot judge whether Mr. Flanigan would faithfully enforce the criminal law.

#### Cruel, Inhuman, and Degrading Treatment of Alien Detainees by US Personnel Overseas

Mr. Flanigan was asked several times about his opinion on whether U.S. personnel can legally subject aliens overseas to cruel, inhuman, or degrading treatment. Again, Mr. Flanigan failed to address the issue directly. While he articulated Administration *policy* to abide by the substantive constitutional standards incorporated by the Senate reservation to Article 16 of the Convention Against Torture (CAT), "even where such compliance is not legally required," Mr. Flanigan refused to state clearly what his own view was about the legality of such conduct, but his answers suggest that he shares the view of others in the Administration that the prohibition on cruel, inhuman and degrading treatment applies only to conduct by U.S. personnel inside the territory of the United States.

When ratifying the CAT in 1994, the United States attached the following reservation:

That the United States considers itself bound by the obligation under article 16 to prevent "cruel, inhuman or degrading treatment or punishment," 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 to the Constitution of the United States.<sup>1</sup>

The intent of this reservation was not to limit the obligation to refrain from employing cruel, inhuman and degrading treatment or punishment to a particular geographic area, but rather, to bring greater clarity to the terms “cruel, inhuman and degrading treatment or punishment.”

When the Administration’s new interpretation of this reservation became public in the context of the confirmation hearings of now-Attorney General Alberto Gonzales, Abraham Sofaer, the respected legal scholar who served as Legal Advisor to the State Department at the time the Senate was considering ratification of the treaty, flatly repudiated it. As Mr. Sofaer explained, in his January 21, 2005 letter to the Committee:

(T)he purpose of the reservation [to the Convention] 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 related to the meaning of the terms involved, not to their geographic application.* (Emphasis added).

International law is firmly settled in this area. Treaty obligations, including those in the International Covenant on Civil and Political Rights, the Geneva Conventions, as well as those of the Convention Against Torture, prohibit the United States from subjecting citizens and non-citizens alike to either torture or to cruel, inhuman, or degrading treatment or punishment, whether within or without the territory of the United States, whether during armed conflict or peacetime. This prohibition is not subject to derogation.

### Inhumane Interrogation Techniques

President Bush has stated repeatedly that all detainees in U.S. custody will be treated humanely. It is stunning, therefore, that Mr. Flanigan, who previously served as a legal advisor to the President, is unable or unwilling to articulate any clear content for this standard of treatment.. The practical import of the failure to provide clarity to U.S. military and other personnel charged with the difficult and dangerous task of extracting information from detainees becomes clearer every day.

Twice Mr. Flanigan was asked about the legality of specific techniques including waterboarding (simulated drowning), mock executions, physical beatings, and forcing a detainee to assume a painful

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<sup>1</sup> US reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990). <http://www1.umn.edu/humanrts/usdocs/tortres.html>

stress position for an extended period of time. He refused to provide a clear answer, saying only that whether a particular interrogation technique is lawful depends on the facts and circumstances surrounding its use. When asked under what facts and circumstances it would be legal or humane to subject a detainee to mock execution and other such techniques, Mr. Flanigan again failed to provide an answer. His response, however, suggests that he believes there may be circumstances under which such techniques – some of which clearly constitute torture – could be permitted.

This position is at odds with the laws of war and international human rights law. It has been explicitly rejected by most nations, including the United Kingdom and Israel, two of this country's closest allies in the war on terrorism. And any reasonable interpretation of U.S. law would find such conduct illegal.

As the second highest law enforcement official in the United States, Mr. Flanigan would play a critical role in ensuring that the laws prohibiting torture are enforced. His inability to articulate the conduct prohibited under these laws should be of grave concern to the Committee.

We urge you to refrain from moving this nomination forward until the Committee is able to further explore these important issues. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Michael Posner". The signature is written in a cursive, flowing style.

Michael Posner  
Executive Director