The Texas Clemency Memos

As the legal counsel to Texas Governor George W. Bush, Alberto R. Gonzales—now the White House counsel, and widely regarded as a likely future Supreme Court nominee—prepared fifty-seven confidential death-penalty memoranda for Bush's review. Never before discussed publicly, the memoranda suggest that Gonzales repeatedly failed to apprise Bush of some of the most salient issues in the cases at hand.

by Alan Berlow

On the morning of May 6, 1997, Governor George W. Bush signed his name to a confidential three-page memorandum from his legal counsel, Alberto R. Gonzales, and placed a bold black check mark next to a single word: DENY. It was the twenty-ninth time a death-row inmate's plea for clemency had been denied in the twenty-eight months since Bush had been sworn in. In this case Bush's signature led, shortly after 6:00 P.M. on the very same day, to the execution of Terry Washington, a mentally retarded thirty-three-year-old man with the communication skills of a seven-year-old.

Washington's death was barely noted by the media, and the governor's office issued no statement about it. But the execution and the three-page memo that sealed Washington's fate—along with dozens of similar memoranda prepared for Bush—speak volumes about the way the clemency process was approached both by Bush and by Gonzales, the man most often mentioned as the President's choice for the next available seat on the Supreme Court.

During Bush's six years as governor 150 men and two women were executed in Texas—a record unmatched by any other governor in modern American history. Each time a person was sentenced to death, Bush received from his legal counsel a document summarizing the facts of the case, usually on the morning of the day scheduled for the execution, and was then briefed on those facts by his counsel; based on this information Bush allowed the execution to proceed in all cases but one. The first fifty-seven of these summaries were prepared by Gonzales, a Harvard-educated lawyer who went on to become the Texas...
Gonzales's summaries were Bush's primary source of information in deciding whether someone would live or die. Each is only three to seven pages long and generally consists of little more than a brief description of the crime, a paragraph or two on the defendant's personal background, and a condensed legal history. Although the summaries rarely make a recommendation for or against execution, many have a clear prosecutorial bias, and all seem to assume that if an appeals court rejected one or another of a defendant's claims, there is no conceivable rationale for the governor to revisit that claim. This assumption ignores one of the most basic reasons for clemency: the fact that the justice system makes mistakes.

A close examination of the Gonzales memoranda suggests that Governor Bush frequently approved executions based on only the most cursory briefings on the issues in dispute. In fact, in these documents Gonzales repeatedly failed to apprise the governor of crucial issues in the cases at hand: ineffective counsel, conflict of interest, mitigating evidence, even actual evidence of innocence.

The case of Terry Washington was typical. Gonzales devoted nearly a third of his three-page report on Washington to the gruesome details of the crime. He informed Bush that the victim, Beatrice Huling, was a twenty-nine-year-old restaurant manager, and wrote, "An
autopsy determined she suffered 85 stab wounds, seven of which were fatal, and was eviscerated." But the summary refers only fleetingly to the central issue in Washington's clemency appeal—his limited mental capacity, which was never disputed by the State of Texas—and presents it as part of a discussion of "conflicting information" about the condemned man's childhood. (The page containing this discussion is missing from the copy of the summary signed by Bush, raising the possibility that he never actually saw it before authorizing Washington's execution.) Most important, Gonzales failed to mention that Washington's mental limitations, and the fact that he and his ten siblings were regularly beaten with whips, water hoses, extension cords, wire hangers, and fan belts, were never made known to the jury, although both the district attorney and Washington's trial lawyer knew of this potentially mitigating evidence. (Washington did not testify at his trial or his sentencing.)

Gonzales's lack of attention to Washington's mental retardation is particularly surprising because demand was growing nationwide to ban executions of the retarded, and because the most highly publicized case of a retarded defendant, that of Johnny Paul Penry, was even then playing itself out in Texas courts. The miscarriages in the Washington case were also precisely the kind of thing Bush claimed to want to be told about. "I don't believe my role is to replace the verdict of a jury with my own," he wrote in his autobiography, A Charge to Keep (1999), "unless there are new facts or evidence of which a jury was unaware, or evidence that the trial was somehow unfair." Such information had indeed come to light in Washington's case, yet Gonzales's memorandum did not tell Bush about it.

Not only did Gonzales ignore Washington's mental limitations, but he didn't mention that Washington's trial lawyer had failed to enlist a mental-health expert to testify on Washington's behalf (although he was entitled to one under a 1985 Supreme Court ruling), which in a death-penalty case clearly suggests ineffective counsel. Nor did he mention that ineffective counsel and mental retardation were in fact the central issues raised in the thirty-page clemency petition. Gonzales noted only that the petition had been rejected by the Board of Pardons and Paroles, a body that one federal judge condemned in 1998 for its tendency to rule on clemency appeals without any investigation or discussion among its members.

Gonzales declined to be interviewed for this story, but during the 2000 presidential campaign I asked him if Bush ever read the clemency petitions of death-row inmates, and he equivocated. "I wouldn't say that was done in every case," he told me. "But if we felt there was something he should look at specifically—yes, he did look from time to time at what had been filed." I have found no evidence that Gonzales ever sent Bush a clemency petition—or any document—that summarized in a concise and coherent fashion a condemned defendant's best
argument against execution in a case involving serious questions of innocence or due process. Bush relied on Gonzales's summaries, which never made such arguments.

Did Gonzales reserve the most important issues and documents in the Washington case for a more extensive oral briefing of the governor? Only he and Bush know. It is highly unlikely, however, given that Gonzales usually presented an execution summary to the governor on the day of an execution and that, as he has acknowledged, his briefings typically lasted no more than thirty minutes—far too little time for a serious discussion of a complex clemency plea. Bush's appointment calendar for the morning of Washington's execution shows a half-hour slot marked "Al G—Execution."

All governors claim that they agonize over death penalty decisions. During his time in office Bush made numerous statements to this effect, among them "I take every death penalty case seriously and review each case carefully" and "Each case is major, because each case is life or death." In his autobiography he wrote, "I review every death penalty case thoroughly" and added, referring to his legal staff, "For every death penalty case, they brief me thoroughly, review the arguments made by the prosecution and the defense, raise any doubts or problems or questions." Bush always maintained that this review provided what he called a "fail-safe" method for ensuring due process and certainty of guilt. Asked about the governor's handling of capital cases, Johnny Sutton, Governor Bush's adviser on criminal-justice policy, told The New York Times in May of 2000, "This is probably the most important thing we do in state government."

But Gonzales's execution summaries belie these assurances of thorough and judicious review. The memoranda seem attuned to a radically different posture, assumed by Bush from the earliest days of his administration—one in which he sought to minimize his sense of legal and moral responsibility for executions. Bush repeatedly cited a Texas statute that says a governor may do nothing more than grant a thirty-day reprieve to an inmate unless the Board of Pardons and Paroles has recommended a broader grant of clemency. Admittedly, the governor's clemency authority is far more limited in Texas than in, for example, Illinois, where Governor George Ryan unilaterally commuted the death sentences of 167 men and women last January, shortly before leaving office. Nevertheless, Bush's failure to intervene was governed as much by personal choice as by legal limitation. Had Bush wanted to commute a sentence or otherwise prevent an execution, he unquestionably could have done so. Members of the BPP are appointed by the governor to six-year rotating terms. By the end of his governorship Bush had appointed all eighteen members. If he or Gonzales had had any serious doubts about a particular case, even on the morning of a scheduled execution, Bush could easily have prevailed on the board to reconsider the matter—to conduct an investigation, hold
hearings, interview witnesses, or do whatever else was necessary to resolve those doubts.

In fact, on one highly controversial occasion, in 1998, Bush intervened with the board before it had a chance to make a recommendation to him. Henry Lee Lucas had been convicted of nine other murders (for which he was serving six life sentences, two seventy-five-year sentences, and one sixty-year sentence) but had also confessed falsely to hundreds more. After the 1984 trial at which Lucas was sentenced to death, it became apparent that he hadn't even been in Texas when the victim had been murdered; investigations by two successive state attorneys general subsequently concluded that Lucas had been wrongly convicted. Concerned that Lucas was about to be executed for a crime he hadn't committed, Bush's office let the BPP know that Bush was unwilling to see that happen. The BPP soon recommended (with a 17-1 vote) commutation to life in prison, which Bush then approved. Explaining his decision, Bush noted that the jurors at Lucas's trial "did not know" certain facts that came out only after trial. Gonzales could have raised a similar concern in his Terry Washington summary, but didn't.

At the outset of his administration Governor Bush presented a standard for clemency that all but ensured that few if any death sentences would be seriously examined. "In every case," he wrote in *A Charge to Keep*, "I would ask: Is there any doubt about this individual's guilt or innocence? And, have the courts had ample opportunity to review all the legal issues in this case?" This is an extraordinarily narrow notion of clemency review: it seems to leave little, if any, room to consider mental illness or incompetence, childhood physical or sexual abuse, remorse, rehabilitation, racial discrimination in jury selection, the competence of the legal defense, or disparities in sentences between co-defendants or among defendants convicted of similar crimes. Neither compassion nor "mercy," which the Supreme Court as far back as 1855 saw as central to the very idea of clemency, is acknowledged as being of any account.

The record suggests that what Bush described in his autobiography as "a fair hearing and full access to the courts" meant in reality nothing more than that a case had received some sort of legal attention at all state and federal levels. In the case of Karla Faye Tucker, the first woman executed in Texas in more than a hundred years, Bush wrote to at least two constituents that he had refused to grant a reprieve precisely because "the courts, including the United States Supreme Court," had "reviewed the legal issues in this case" and denied all appeals. But clemency is a political act, not a judicial one. By eliminating "legal issues" from executive consideration, Bush in effect refused to address what were often the condemned person's strongest claims. Indeed, the fact that courts have rejected a defendant's legal claims arguably places an added burden on a governor—as the conscience of the state and the literal court of last resort—to conduct a scrupulous review.
This is especially true in Texas, where more than a third of executions in the United States since 1976 have occurred; where half of all capital cases are overturned on appeal because of errors during trial; where seven innocent men have been freed from death row, including one under Bush; where, according to The Dallas Morning News, nearly a quarter of the condemned were represented by attorneys who had been disciplined for professional misconduct; and where 30 percent of those executed under Bush between his inauguration in 1995 and June 11, 2000, according to the Chicago Tribune, were represented by attorneys who presented no mitigating evidence or only one witness during the sentencing phase of the trial. Given this environment, Gonzales's neglect of mitigating evidence in the clemency-review process is highly problematic.

But the real problem with citing thorough court review as a standard for denying clemency is that none of the 152 executions Bush approved would have landed on his desk had the cases not already passed through all the courts. To assert—as Bush did—that defendants have "full access to the courts" does not establish any sort of guideline for ensuring due process; it merely describes the judicial process.

Although Terry Washington's guilt was never seriously disputed, in at least two other capital cases profound doubts about guilt were raised by the defense but virtually ignored by Gonzales. In the case of David Wayne Stoker, for example, Gonzales devoted just eighteen sentences to the extraordinarily complex circumstances of the crime, leaving out essentially all the mitigating evidence and failing to address a multitude of questions about both the evidence against Stoker and his due-process rights. Ronnie Thompson, a key state witness, initially told the police, and then the court, that Stoker had confessed to a 1986 murder. But following Stoker's conviction Thompson recanted, explaining that he'd lied in court because the prosecutor had threatened to bring a perjury charge against him if he didn't stick to his original account. Bush should have been told that. During Stoker's trial, in 1987, Thompson's wife, Debbie, left him to move in with Carey Todd, the prosecution's chief witness; she got a piece of the Crime Stoppers reward that Todd received for naming Stoker. Gonzales failed to mention that drug and weapons charges against Todd were dropped the very day he testified against Stoker; and that Todd thus had an apparent motive for setting him up. Gonzales also failed to mention that a state investigator, a police officer, and Todd all lied in court about what Todd received for his testimony; that the jury wasn't told about Todd's possible motive for framing Stoker; and that James Grigson, a psychiatrist who testified that Stoker was a sociopath who would "absolutely" be violent again (thereby making him eligible for a death sentence), had never even examined Stoker. Grigson, whose expert testimony has helped send dozens of men to death row, earning him the nickname Dr. Death, had been expelled from the American Psychiatric
Association two years before the Stoker case was reviewed by Gonzales and Bush, because his testimony had repeatedly been found to be unethical. Another expert medical witness against Stoker, Ralph Erdmann, had relinquished his medical license in 1994 after pleading no contest to seven felonies tied to falsified evidence and botched autopsies. A special prosecutor's investigation of Erdmann concluded that he falsified evidence in at least thirty cases, and that if "the prosecution theory was that death was caused by a Martian death ray then that was what Dr. Erdmann reported." All this information was in the public record, yet Gonzales mentioned none of it in his memorandum to Bush.

Stephen Latimer, who represented Stoker in his clemency appeal, told me recently that he received a call from Gonzales's office about a week to ten days before the execution, advising him that there would be no reprieve. The timing is significant, because Gonzales's execution summary is dated June 16, 1997, the day of Stoker's execution. If that decision had been made a week or more before Bush even read the summary, it is fair to ask whether Bush was actually in the loop or—as many suspected—had simply made clear to both Gonzales and the BPP that he wasn't interested in commutations.

The handling of Stoker's clemency appeal was not unusual. Consider the case of Billy Conn Gardner, whose death-penalty case was plagued by issues of incompetent counsel, dubious witness testimony, and unheard mitigating evidence.

Gonzales's report to Bush gave no sense of these circumstances. It matter-of-factly described the robbery of a high school cafeteria in Dallas, during which Gardner, wearing a stocking to obscure his face, allegedly shot and fatally wounded Thelma Row, sixty-four, a cafeteria worker. Also in the cafeteria at the time was Paula Sanders, a co-worker who had told her husband, Melvin, that several thousand dollars in daily cafeteria receipts were processed in a back room at the school. Melvin, who drove the getaway car, claimed that he had persuaded Gardner to participate.

Paula, who knew Gardner, said that she could provide no description of the assailant, because her back was turned. Before Row died, however, she had been able to describe a man with a "bony face ... and a two-inch goatee." Gonzales didn't tell Bush that the state was unable to produce a single witness who recalled ever seeing Gardner with a goatee, or that two witnesses to the shooting—Carolyn Sims and the school custodian, Lester Matthews—described a man with reddish-blond hair, whereas Gardner's hair was black. Matthews nevertheless positively identified Gardner as the killer, and Gonzales accepted this testimony at face value—although Matthews didn't know Gardner, admitted to having seen the killer for only three or four seconds, and didn't actually identify him until his third police interview, three months after the crime. Also missing from
Gonzales's memo were the facts that only after prosecutors threatened to bring other charges against Melvin Sanders did he finger Gardner as the murderer, and that in exchange for this testimony Sanders received complete immunity from prosecution for the murder and probation for pending forgery and firearms charges. The state also agreed not to prosecute Paula Sanders.

Gonzales told Bush in his summary that Paula "testified that she was unaware of the robbery plans"; but he neglected to mention that she had received several phone calls only minutes before the robbery and shooting, and that according to Carolyn Sims (whose name is absent from Gonzales's report), she appeared "nervous and upset" after taking these calls. Sims was not deposed until years after the trial, during Gardner's habeas corpus appeal. More important, Gardner's lawyer never interviewed Paula Sanders and met with Gardner only once before jury selection, for fifteen minutes, raising an obvious suggestion of ineffective counsel—which Gonzales also dismissed with no discussion.

The case is a disconcerting tangle of speculation and uncertainty. What Gonzales should have made clear to Bush during the clemency review is that the case involved many unanswered and troubling questions. Gardner was put to death on February 16, 1995.

The Gonzales memoranda suggest that Gonzales was rarely, if ever, prompted to delve deeply into the cases he was reviewing for Bush. In his summary of the case of Carl Johnson, for example, dated September 18, 1995, the day before Johnson's execution, Gonzales failed to mention that Johnson's trial lawyer had literally slept through major portions of the jury selection. His memo on Irineo Tristan Montoya, dated June 18, 1997, the day of Montoya's execution, omits the single most important issue in the case: an alleged violation of international law, which had been brought to Bush's attention by, among others, the U.S. Department of State. His memo on Bruce Edwin Callins, dated May 21, 1997, the day of Callins's execution, fails to note that Callins's appeal to the Supreme Court generated the most famous death-penalty dissent in the past quarter century, written by Justice Harry Blackmun, a longtime death-penalty supporter.

Karla Faye Tucker's 1998 clemency review is one of the few in which any evidence exists of a significant discussion between Bush and Gonzales, and the only instance in which Gonzales is known to have provided any documentation beyond the execution summary. Bush cites the Tucker case as evidence of his compassion and his attentiveness to the process of clemency review. Gonzales has said that he and Bush began discussing Tucker's case months before the execution. Bush's autobiography devotes fifteen pages to Tucker. He writes that he anguished over his decision and had difficulty sleeping the night before her execution, and that signing off on it "was one of the
hardest things I have ever done"; in the moments leading up to Tucker's execution he "felt like a huge piece of concrete was crushing me as we waited."

Why should Bush have been so tormented by assenting to Tucker's execution? According to the Bush standard for clemency, her case wasn't even worthy of consideration. Tucker didn't claim that she was innocent of murdering Jerry Lynn Dean and Deborah Thornton with a three-foot-long pickax in 1983. She said that she had been treated fairly by the courts and deserved her punishment. What helps to explain Bush's concern, of course, is that Tucker's case was the most highly publicized of any during his tenure as governor. In prison Tucker had become a born-again Christian, like Bush. Her execution was opposed by, among others, one of Bush's daughters and a slew of otherwise ardent death-penalty supporters, including Pat Robertson and Jerry Falwell, who became convinced that she was remorseful, repentant, and rehabilitated. Nevertheless, dozens of Texas death-row inmates could claim similar conversion experiences, remorse, and repentance; and dozens had compelling claims regarding innocence or due process.

More than anything else, the Tucker case illustrates how Bush sought to deny responsibility for executions. "I could not convert Karla Faye Tucker's sentence from death to life in prison [without the BPP]," Bush stated, citing Texas law. Gonzales made the same point in a letter to the papal nuncio in Washington, who before the BPP made its recommendation had written Bush on behalf of the Pope to solicit clemency for Tucker: "Ms. Tucker's sentence can only be commuted by the Governor if the Texas Board of Pardons and Paroles recommends a commutation of sentence." Of course, Bush did intervene in the subsequent Lucas case before hearing from the BPP.

Gonzales did not tell the papal nuncio that even after the BPP denied clemency the governor could have invoked a thirty-day reprieve to postpone this or any other execution. Bush didn't use this power because he had no interest in impeding the BPP, which was infamous for rubber-stamping executions. In a December 1998 district court hearing on a lawsuit brought by the death-row inmate Joseph Stanley Faulder (in whose trial a principal state witness was promised more than $10,000 by the prosecutor to testify), Judge Sam Sparks concluded, "It is abundantly clear the Texas clemency procedure is extremely poor and certainly minimal." Sparks found that "none of the members" of the BPP read clemency petitions in their entirety; that "a flip of the coin would be more merciful than these votes"; and that the board provided no rationale whatsoever for its clemency recommendations. "There is nothing," Sparks said during the hearing, "absolutely nothing that the Board of Pardons and Paroles does where any member of the public, including the governor, can find out why they did this."
Alberto Gonzales told me in 2000 that in his execution briefings he always presented Governor Bush with a "detailed factual background of what happened," along with "other outstanding facts or unusual issues." Yet a close examination of the written execution summaries he prepared for Bush certainly raises questions about the thoroughness of Gonzales's approach—and, ultimately, given the brevity of the summaries and the timing of their arrival at the governor's office, about the level of attention Bush could possibly have devoted to the clemency process. In his summaries of the cases of Terry Washington, David Stoker, and Billy Gardner, Gonzales did not make Governor Bush aware of concerns about ineffective counsel, essential mitigating evidence, and even compelling claims of innocence. These were all matters of life or death, requiring in-depth explanation and discussion, that no attorney in Gonzales's position should leave out of a written case summary or save for a thirty-minute oral briefing—especially if both are to be delivered on the very day of a scheduled execution. In a state where the criminal-justice system has erred with well-documented regularity, this was a grave failing.