

February 4, 2005

Committee on Homeland Security and Governmental Affairs
Committee on the Judiciary
United States Senate

Dear Senator:

We write to you to express concerns regarding the nomination of Judge Michael Chertoff for the position of Secretary of Homeland Security. We have carefully reviewed his written answers and oral testimony before the Committee on Homeland Security and Governmental Affairs, and we believe that many important questions deserve further exploration regarding Mr. Chertoff's role in the post 9/11 detentions in the U.S. and in the coercive interrogation policies stemming from the 2002 Office of Legal Counsel memorandum on torture. The only way to fully address these issues is to now refer his nomination to the Senate Committee on the Judiciary which has both the continuing jurisdiction over and expertise on these matters.

Judge Chertoff, then the assistant attorney general in charge of the Justice Department's Criminal Division, played a leading part in the post 9/11 detentions of more than 800 individuals in the United States. These detentions entailed the round-up of hundreds of primarily Arab, Muslim, and South Asian men. Many were held for days, weeks or months without charge and denied any opportunity for release on bond. There is extensive documentation that many were held incommunicado and that there were widespread efforts to prevent access to counsel. They were held in unduly harsh conditions of confinement, and subjected to physical and verbal abuse. Despite Judge Chertoff's testimony regarding this policy, many concerns remain.

Judge Chertoff stated that the Justice Department's plan after 9/11 was to arrest people based on credible leads, that everyone who was arrested was in violation of the law, and that he played no role in the mistreatment of detainees. All of these statements continue to leave very troubling issues unresolved.

First, the report of the Department of Justice Inspector General demonstrated that many people were arrested based on unreliable tips against Arabs and Muslims, and that others were arrested simply because they were in the same place as the persons who were subject to the unreliable tips. In his testimony, Judge Chertoff acknowledged the IG report and said it demonstrated that the Department's "plan as conceived had not been executed perfectly." It appears, however, that there were no terrorism-related leads to justify the arrest of the vast majority of detainees, thus throwing into question whether the Department had a plan other than the mass roundup of Arabs and Muslims.

Second, some of the detainees were never charged under immigration or criminal laws, but were held as material witnesses. In addition, many of the detainees were not charged for weeks or even months, indicating that there were no charges against them when they were arrested and that authorities had to search for technical immigration violations with which to charge them.

Third, although Judge Chertoff has testified that he was unaware that detainees were not getting access to counsel and that this should not have happened, there were contemporaneous press reports and he certainly knew of, and most likely participated in the extraordinary decision to withhold the names of the detainees and subject them to secret deportation hearings. This secrecy, which Judge Chertoff has never deplored or disavowed, facilitated the abuses described by the IG, including the denial of access to counsel.

While Judge Chertoff deplored the mistreatment of detainees, we remain concerned about the misuse of the immigration laws and the material witness authority and about strategies and policies that use racial or ethnic identity as proxies for real investigative leads in counterterrorism.

In addition to the Secretary of DHS's role in enforcing our nation's immigration laws, the Secretary's role includes managing immigration benefits and services and welcoming our nation's newcomers. Judge Chertoff has not demonstrated extensive knowledge of immigration policy or services beyond enforcement of immigration laws in an anti-terror context. As such, it is vital that the Judiciary Committee determine his views regarding immigration services such as asylum and naturalization, and also ensure that Mr. Chertoff will rely upon individuals in DHS with the experience and commitment to implement and enforce our immigration laws, not simply as a controversial adjunct to anti-terror efforts, but with full recognition of the vital role immigration plays in the vitality and prosperity of our nation.

Finally, we are concerned about the role Judge Chertoff played in developing and facilitating the discredited interrogation policies authorized by the August 2002 Office of Legal Counsel memo. We believe that his testimony raised more questions than it answered. He testified that he saw a draft of that memo and participated in discussions concerning specific interrogation techniques, although he denied approving any specific technique. However, none of the documents concerning his role have been made public or even disclosed to the Senate. Dean Harold Koh of Yale Law School has described the OLC memo, recently withdrawn by the Justice Department, as "perhaps the most clearly erroneous legal opinion I have ever read.... [Its] apparent purpose is to explore how US officials can use tactics tantamount to torture against suspected terrorists, without being held criminally liable." Judge Chertoff, as head of the Criminal Division, knew that extensive interrogations of persons held abroad were ongoing. Given the extremely troubling nature of the August 2002 OLC memo and the gravity of the problems that subsequently emerged from its adoption, it is important for the Judiciary Committee to determine precisely what input Judge Chertoff had into the drafting of the memo and whether he endorsed the memo in his discussions with intelligence officials.

The best way to pursue all the unanswered questions regarding Judge Chertoff is to refer his nomination to the Judiciary Committee for further hearings. The Judiciary Committee has continuing jurisdiction over immigration enforcement and services, and its members have extensive expertise with respect to immigration procedures as well as criminal law. The Judiciary Committee, of course, also has expertise with respect to the role of the Justice Department in advising other agencies about their obligations under federal law.

We thank you for your consideration. If you have any questions, please contact:
Rob Randhava, Policy Analyst, Leadership Conference on Civil Rights at (202) 466-6058.

Respectfully,

American-Arab Anti-Discrimination Committee
American Civil Liberties Union
American Friends Service Committee
Arab Community Center for Economic and Social Services, 2651 Saulino Ct., Dearborn, MI
Asian Law Caucus
Asian Pacific American Legal Center of Southern California
Bill of Rights Defense Committee
Center for American Progress
Center for National Security Studies
Coalition of Humane Immigrant Rights of Los Angeles
Illinois Coalition for Immigrant and Refugee Rights
The Interfaith Alliance
Lawyers' Committee for Civil Rights Under Law
Leadership Conference on Civil Rights
Legal Momentum (the new name of NOW Legal Defense and Education Fund)
National Asian Pacific American Legal Consortium
The National Coalition Against Repressive Legislation
National Network for Immigrant and Refugee Rights
The New York Immigration Coalition
Veterans for Common Sense