

Testimony of

Mr. John Yoo

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Mr. Chairman, thank you for the opportunity to appear before your committee today to discuss the reconstruction of Iraq and its constitution. I wish to complement you and the committee for convening today's hearings on this important subject, which will be critical to providing for Iraq's long-term stability and ensuring that Iraq will become a law-abiding member of the international community. Rather than discuss any specific element of a proposed Iraqi constitution, I appear before you today to discuss the authority of the United States, under domestic and international law, to make fundamental changes to the constitutional law and government institutions of Iraq. I conclude that United Nations Security Council resolutions and the international law of occupation provide the United States with broad discretion to establish a new Iraq constitution, one that guarantees fundamental human rights protected by democratic institutions that limit government power.

I have studied these issues for much of my career. I recently left the Department of Justice, where I served as Deputy Assistant Attorney General in the Office of Legal Counsel (OLC). OLC advises the executive branch on all legal questions, including those involving treaties and international law. I am currently a visiting fellow at the American Enterprise Institute, and a professor of law at the University of California at Berkeley School of Law (Boalt Hall), where I have taught foreign affairs law, international law, and constitutional law, since 1993. It was also my great honor to have served as General Counsel of the Senate Judiciary Committee under Chairman Hatch from 1995-96. I wish to make clear that the views expressed here are my own, and do not represent those of the American Enterprise Institute or the University of California.

I. Domestic Law and Occupation

Under our domestic law, occupation of a nation is merely the continuation of hostilities, and thus the reconstruction of Iraq falls within the war powers of the federal government. Occupying foreign territory during the transition period between an armed conflict and a declaration of peace, and establishing fundamental institutional changes to the government of an enemy nation, may be essential to reaching a successful conclusion to war. If allowed to remain in existence, the institutions of an occupied nation may continue to pose a threat to the safety of U.S. troops or the national security. Or the government institutions of the defeated enemy have been so degraded or destroyed that they cannot provide security and basic services to the local population. If left to suffer, a local population may become hostile to the United States. To be fully successful, military operations in an occupied territory may have to continue even as the immediate need for force has subsided.

In several previous armed conflicts, the United States has exercised its authority to occupy and govern a foreign nation after a successful military campaign. The Supreme Court has clearly upheld this authority. In *MacLeod v. United States*, for example, which arose during the U.S. military occupation of the Philippines during the Spanish-American War, a unanimous Supreme Court explained that

[t]he right to . . . occupy an enemy's country and temporarily provide for its government has been recognized by previous action of the executive authority, and sanctioned by frequent decisions of this court. The local government being destroyed, the conqueror may set up its own authority, and make rules and regulations for the conduct of temporary government, and to that end may collect taxes and duties to support the military authority and carry on operations incident to the occupation.

The Court similarly stated with respect to the U.S. occupation of Puerto Rico that

[u]pon the occupation of the country by the military forces of the United States, the authority of the Spanish Government was superseded The government must be carried on, and there was no one left to administer its functions but the military forces of the United States. . . . The right of one belligerent to occupy and govern the territory of the enemy while in its military possession, is one of the incidents of war, and flows directly from the right to conquer. We, therefore, do not look to the Constitution or political institutions of the conqueror, for authority to establish a government for the territory of the enemy in his possession, during its military occupation, nor for the rules by which the powers of such government are regulated and limited. Such authority and such rules are derived directly from the laws of war, as established by the usage of the world, and confirmed by the writings of publicists and decisions of courts - in fine, from the law of the nations."

As the Supreme Court has further made clear, the power to establish an occupation government and to make decisions concerning reconstruction flow directly from the President's Commander-in-Chief power.

It is not difficult to see why occupation and reconstruction of a defeated enemy may be an important aspect of the war power. Eliminating a threat to the national security or achieving U.S. foreign policy goals may not only require the occupation of an enemy nation until its capacity to attack the United States has ended, but also the extensive reordering of an occupied nation's domestic institutions. Replacing a hostile government with new institutions may make the defeated nation less of a threat to the United States, both now and in the future, and may end human rights abuses. At the end of World War II, the United States not only occupied part of Germany, it completely refashioned, along with the other Allied powers, German government institutions. The United States believed that preventing Germany from "ever again becoming a threat to the peace of the world" would require "the elimination of Nazism and militarism in all their forms, the immediate apprehension of war criminals for punishment, the industrial disarmament and demilitarization of Germany, with continuing control over Germany's capacity to make war, and the preparation for an eventual reconstruction of German political life on a democratic basis." Similarly, the United States also reordered the Government of Japan following the conclusion of World War II, although these changes, unlike those in Germany, were carried out with the consent of the Japanese Government. Again, the rationale underlying this fundamental government reform was to guarantee that Japan would not again become a military threat to the United States or the world.

II. International Law and Occupation

International law authorizes a victorious nation both to establish its own temporary occupation government and to make changes in the laws of the defeated nation prior to the conclusion of a treaty of peace. This authority includes the power to make fundamental institutional changes to the government of an occupied nation. Here, I will address the sources of law that establish the authority of the United States, as an occupying power, to replace the forms of the previous Hussein regime with new governmental institutions and a new constitution. These sources include Security Council Resolutions under Chapter VII of the United Nations Charter, which gives the Council the authority to bind member nations, and the international law of occupation as expressed in treaties and state practice.

United Nations Authorization. The United States has been authorized by the Security Council to occupy Iraq and, as a consequence, to establish a constitution and form of government that will end the threat posed by the Hussein regime to international peace and security. This authority comes from two sources, the original 1991 authorization to use force against Iraq (S.C. Res 678), and the recent May, 2003 Security Council resolution approving the occupation of Iraq at the end of major combat operations in Iraq (S.C. Res. 1483).

In 1991, the Security Council enacted a resolution that recognized the legitimacy of the U.S.-led international coalition's use of military force against Iraq. Security Council resolution 678 explicitly recognized that member states

could "use all necessary means": (1) to respond to the Iraqi regime's substantial violations of the terms of the cease-fire set forth in UNSCR 687 that suspended hostilities between Iraq and a U.S.-led international coalition in 1991; and (2) to restore international peace and security in the area. In particular, Iraq had flagrantly breached its various obligations under UNSCR 687 regarding the destruction and dismantling, under international supervision, of its weapons of mass destruction ("WMD") programs. The Security Council itself decided last year that Iraq "has been and remains in material breach of its obligations under relevant resolutions, including resolution 687" as a result of its failure to comply with its disarmament obligations. In the same resolution, the Security Council also recalled that those obligations imposed upon Iraq under UNSCR 687 constituted "a necessary step for achievement of [UNSCR 687's] stated objective of restoring international peace and security in the area."

The Security Council's authorization to "use all necessary means" to disarm Iraq and to restore international peace and security in the area includes not only the use of force but also the subsequent occupation. An occupation of Iraq is necessary to locate, catalog, dismantle, and destroy all Iraqi WMD programs and thus ensure that Iraq is in compliance with UNSCR 687. Given the lengths to which the Hussein regime has gone to conceal its WMD programs and the years it has had to hide its arms, the United States cannot rid Iraq of its WMD programs during the course of major combat operations. In addition, were the United States and its coalition partners to depart from Iraq immediately following the end of combat, the peace and security of the region might be threatened. Violence could erupt among Iraq's various ethnic and religious groups that could spill beyond Iraq's borders. Iraq could descend into a state of anarchy. Such a development would not only threaten Iraq's neighbors but also could turn Iraq into a haven for terrorist organizations. A humanitarian crisis could also result from political turmoil, leading to a flood of refugees entering and destabilizing Iraq's neighbors. Remnants of the current Iraq regime could seek to reconstitute themselves, which would pose a threat to Iraq's neighbors. To fulfill the goals of U.N. Security Council Resolution 678, the United States must occupy Iraq, establish an interim administration, and construct stable Iraqi government institutions that will help to restore peace and security to the region.

The U.S.'s authority to occupy Iraq is confirmed by Resolution 1483, which was adopted by the Security Council on May 22, 2003 by a unanimous vote (with Syria not voting). In that resolution, the Security Council recognized the United States and Great Britain as the "occupying powers" in Iraq, and it encouraged "efforts by the people of Iraq to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender." The Security Council resolved "that the United Nations should play a vital role in humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance." It also called upon the United States and Great Britain "consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working toward the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future." In addition to approving the financial arrangements for the sale of Iraqi oil and the use of the proceeds, Resolution 1483 "calls upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907."

I will review the authority provided by the Geneva Conventions and the Hague Regulations shortly. It is important, however, to understand that by making clear that the two treaties apply to the occupation of Iraq, the Security Council has explicitly recognized that the United States may exercise the broad authorities granted by those conventions. Further, Resolution 1483 expresses the Security Council's hope that Iraq will reform its government in order to establish representative institutions subject to the rule of law and protection for human rights. The Security Council, however, did not detail the specific authorities that would empower the United States and its allies to move Iraq toward a constitution with democratic institutions. Therefore, the power to achieve these goals must flow from the existing international law of occupation, as expressed in state practice and applicable treaties. These sources allow the occupying powers, here the United States and Great Britain, to alter the domestic laws, including the constitution and government institutions, in order to provide for stability and security in Iraq, to protect the basic human rights of Iraqis, and to restore international peace and security in the region.

Customary Law and the Hague Regulations. The laws of war govern the conduct of warfare by and between states. This body of law is both reflected in the customary practice of nations and codified in various texts, including the Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 ("Hague Convention") and the Geneva Conventions. The laws of war recognize that, as the result of armed conflict, any surviving elements of the enemy nation may be incapable of providing public services and maintaining security.

Additionally, victorious armies have sought to control enemy territory in order to deprive the enemy of valuable resources and to produce surrender. The laws of war thus include a specific set of rules to govern the conduct of military occupations and the operation of military government. This international law of occupation not only authorizes a victorious nation to occupy enemy territory and establish a military government; it also recognizes the authority of an occupant to change the local laws, including government institutions.

Because the international law of occupation is partially formed by custom and practice, and, as will be explained below, the central treaty on occupation does not apply to Iraq, it is important to review the historical development of the legal rules in this area. Historically, an occupying army enjoyed wide discretion in administering the territory of a defeated enemy. An occupant was generally considered the permanent and absolute owner of occupied territory. Since the nineteenth century, however, the law has understood the occupying authority to exercise only temporary control over territory. Permanent control would result only from a treaty of peace concluded at the end of a military conflict or the complete subjugation of an enemy. The first efforts to codify the laws of war, and more specifically the law of occupation, began in the United States during the Civil War. In 1862, the War Department commissioned the drafting of a set of basic instructions for Union soldiers on the law of war. Approximately one-third of the resulting General Order No. 100, also known as the "Lieber Code," addressed rules relating to occupation. The Lieber Code explained that "[a] place, district, or country occupied by an enemy stands, in consequence of the occupation, under the martial law of the invading or occupying army, whether any proclamation declaring martial law, or any public warning to the inhabitants has been issued or not."

The institution of martial law, in turn, provided an occupant with the authority both to suspend the laws of an occupied nation and to subject the population of an occupied nation to new laws. The Lieber Code provided, "Martial law in a hostile country consists in the suspension by the occupying military authority of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation." The scope of the occupant's authority to suspend, substitute, or dictate the law of the occupied territory was quite broad, due to the Lieber Code's broad definition of the concept of military necessity.

International efforts to codify the laws of war followed. The 1874 Brussels Declaration, although not a legally binding agreement, specifically authorized the conduct of military occupation, stating that "[t]he authority of the legitimate power being suspended and having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety." Like the Lieber Code, the Brussels Declaration expressly recognized the authority of occupants to change the laws of the indigenous government in certain situations: "With this object he shall maintain the laws which were in force in the country in time of peace and shall not modify, suspend or replace them by others unless necessary." Although the Brussels Declaration established a presumption in favor of "maintain[ing] the laws which were in force in the country in time of peace," it also allowed the occupant to "modify, suspend or replace" those laws when necessity required.

The Brussels Declaration became the basis for the Hague Conventions of 1899 and 1907. The Hague Conventions acknowledged both the legality of military occupation and the authority of occupants to change indigenous laws and institutions. Article 42 of the Hague Convention of 1907, known as the "Hague Regulations," states that "[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." Article 43 of the Hague Regulations sets forth one of the primary legal duties of an occupying power. Because "[t]he authority of the legitimate power [has] in fact passed into the hands of the occupant," the occupant "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

The text of article 43 of the Hague Regulations provides ample authority to the United States to change Iraqi law, including the fundamental change of Iraqi government institutions. Article 43 empowers an occupant to modify an occupied nation's laws if it is necessary to restore and ensure "public order and safety." Given the nature of the current Iraqi regime, the United States may need to make extensive changes to Iraqi laws, including a substantial overhaul of Iraqi government institutions, in order to ensure public order and safety.

Further, it is important to emphasize that even if the Hague Regulations were read to impose a stricter standard upon United States conduct, it would not legally bind our military occupation in Iraq. The Hague Regulations do not govern

the U.S. conflict with Iraq because Iraq is not a party to Hague. Article 2 of Hague makes clear that its provisions apply only to armed conflicts between parties. Thus, the international law that applies to the United States is actually that created by custom and state practice, and to the extent that the text of article 43 and state practice deviate, the latter would control rather than the former. In any event, state practice would be relevant even if the Hague Regulations applied of their own force because it would illustrate how nations have interpreted article 43 over time.

In the period between the Hague Regulations and the signing of the Geneva Conventions of 1949, occupying nations often instituted changes in the laws and governmental institutions of the occupied territory. During World War I, for example, when Germany occupied Belgium, it supplanted the Belgian court system and divided Belgium into separate administrative regions. Germany also enacted new legislation governing trade, commerce, banking, and welfare, and raised taxes. When Great Britain occupied French and Italian colonies in North Africa during World War II, it replaced the colonial governments with administrative divisions. It also established new government systems, including a new judicial system, when the local administrative system in Somalia collapsed. During the Allied occupation of Fascist Italy, the United States and Great Britain established an Allied Military Government of Occupied Territories that eliminated all Fascist institutions in Italy, removed Fascists from power, and repealed laws that discriminated on the basis of race, creed, or color. These developments were probably inevitable due to article 43's ambiguity. Nothing in the text of the phrase "unless absolutely prevented" establishes any substantive standard for what grounds must exist to overcome the presumption in favor of the status quo. And in interpreting this vague text, occupying nations generally will have powerful motives for interpreting article 43 as broadly as possible. By the end of World War II, state practice had established the authority of an occupying power to implement fundamental changes in the laws and government of an occupied country.

The Fourth Geneva Convention. In response to Axis atrocities during World War II, an attempt was made in the Fourth Geneva Convention ("Geneva IV") to clarify the laws of occupation. Geneva IV formally recognized the authority of an occupying nation to alter local laws. Unlike the case with the Hague Regulations, both the United States and Iraq are parties to Geneva IV. The terms of the Convention apply to any military conflict between the two countries and to the U.S. occupation of Iraq.

Article 64 of Geneva IV gives the United States significant authority to alter the laws of Iraq during the occupation. Article 64 provides that "[t]he penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention." Article 64 then states: "[t]he Occupying Power may . . . subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them." *Id.*

The Red Cross commentary to Geneva IV states that article 64 of the Convention "expresses, in a more precise and detailed form, the terms of Article 43 of the Hague Regulations, which lays down that the Occupying Power is to respect the laws in force in the country 'unless absolutely prevented.'" Article 64, however, contains two important differences from Article 43. First, article 64 establishes a much weaker presumption in favor of the status quo, and it applies it only to the criminal laws. Second, article 64 does not limit to criminal laws the "provisions" to which the occupied territory may be subject. We may infer from this language that an occupying power may take measures under article 64 that include constitutional, civil, or administrative law as well as criminal.

Article 64 and customary international law empower the United States to impose "provisions" for a variety of enumerated purposes, without regard to whether such provisions can or cannot be reconciled with current law, and absent any strong presumption in favor of the status quo ante. For instance, article 64 explicitly empowers an occupant to institute those measures essential "to maintain[ing] the orderly government of the territory, and to ensur[ing] the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them." In this respect, Geneva IV memorialized state practice under the Hague Regulations, which recognized an occupant's expansive authority to alter laws, including government institutions, in order to maintain the security of its military forces, preserve its military gains, and maintain domestic order. Occupying nations possess the authority to dismantle institutions that pose a threat to domestic or international peace and order, such as the Nazi regime in Germany. Commentators have also

construed state practice to include all of the legitimate purposes of war, such as the promotion of democracy and the protection of fundamental human rights.

The United States may reasonably conclude that institutions of the former Hussein regime pose a substantial threat to the security of the Armed Forces during the occupation of Iraq. Consequently, in order to protect the safety of the U.S. Armed Forces during an occupation of Iraq, it would almost certainly be necessary for Iraqi law to be changed so that these government institutions are dismantled. The preservation of the forms of the Hussein regime could also represent a danger to the national security of the United States. As Congress has found, the Iraqi government has generally demonstrated a continuing hostility to the United States. The Iraqi government has harbored and aided international terrorist organizations that threaten the lives and safety of American citizens. Just last year, Congress found that the current Iraqi regime posed a continuing threat to the national security of the United States, due to its possessions of chemical and biological weapons, pursuit of nuclear weapons capability, and support for terrorist organizations. Congress specifically noted Iraq's capability and willingness to use weapons of mass destruction and the risk that the current Iraqi regime would employ those weapons in an attack upon the United States or provide them to terrorists who would do so. Iraq has also been a danger to the region. It has twice invaded its neighbors without provocation.

The historical record shows that the maintaining current Iraqi government institutions would constitute a threat to the national security of the United States and the safety of the U.S. Armed Forces in Iraq. Geneva IV and customary international law permit the United States to replace those institutions with others that would endanger neither the national security of the United States nor the safety of the U.S. Armed Forces. Given the Iraqi government's past behavior, the retention of the current Iraqi regime would be inimical to the establishment of peace and security in the Middle East.

Article 64 also expressly authorizes occupants to make alterations to laws of the indigenous government in order to protect rights guaranteed by Geneva IV. The rights afforded by Geneva IV sweep broadly. For example, article 27 provides that "[p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs." It establishes that "[t]hey shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity." It declares that "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." And it finds that "all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion." All of these rights are subject to the qualification that "the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war."

Other provisions of Geneva IV require an occupying power to care for the population of an occupied country. Article 50 provides that "[t]he Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children." Under articles 55 and 56, the occupying power must, "[t]o the fullest extent of the means available to it," provide for "the food and medical supplies of the population," and "in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate," as well as ensure and maintain, "with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics."

Given the Iraqi government's abysmal record in the area of human rights, the United States cannot fulfill its obligations under Geneva IV without replacing the institutions of the Hussein regime. The regime maintained its hold on power only by brutally repressing the Iraqi people. It systematically murdered those perceived to be a threat to the regime. Hussein's security forces routinely tortured Iraqis, with beatings, rape, the breaking of limbs, and the denial of food, water, and medical treatment being commonplace. Needless to say, the regime did not tolerate political dissent, other political parties, or freedom of religion. It also displayed an utter disregard for the welfare of Iraqi women and children. Given the barbaric nature of the Hussein regime, the United States must eliminate the institutions of the Hussein government to carry out all of the duties placed upon it by Geneva IV and to protect the basic human rights given to the Iraqi people. Clearly, this will require the United States to establish a new Iraqi constitution and representative government institutions.

Although the drafters of Geneva IV formally recognized the expansive authority of an occupying nation to change the laws of an occupied nation, they did establish one significant substantive limitation. Article 47 forbids the introduction of any changes to the status quo that would deprive the population of Geneva IV rights. Article 47 states:

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

Therefore, the United States cannot alter the laws, including the government institutions of Iraq, in a manner that is inconsistent with the basic rights recognized by Geneva IV.

Some may argue that article 64 limits the occupying nation's authority to those changes that would last only during the occupation. While an occupying nation would possess the power to enact temporary measures necessary to fulfill its obligations under Geneva IV, maintain order and security, and ensure its national security along with the security of its armed forces, article 64 and customary international law would not grant an occupying power the authority to make permanent changes in governmental institutions or constitutional law. To be sure, there will be circumstances in which an occupying power will need to suspend or modify the laws of an occupied nation only on a temporary basis. For example, in the midst of civil disorder, an occupant may resort to interim emergency measures, such as a curfew. In other situations, however, temporary measures will be plainly inadequate for an occupant to accomplish the legitimate purposes of occupation. In order for the United States to fulfill its obligations, maintain an orderly government, and protect its national security as well as the security of its armed forces while occupying Iraq, it almost certainly will be necessary for the United States to change Iraqi law to dismantle current Iraqi government institutions and create new ones to take their place.

Conclusion

International law provides the United States with ample authority to establish a new Iraqi constitution and democratic governmental institutions as part of its duty to secure public safety in Iraq, protect the basic human rights of Iraqis, and to restore international peace and security to the region.