Testimony of

Admiral John Hutson

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TESTIMONY OF JOHN D. HUTSON
BEFORE THE UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
CONCERNING THE NOMINATION OF ALBERTO GONZALES
FOR CONFIRMATION
AS ATTORNEY GENERAL OF THE UNITED STATES
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I am John Hutson. I'm the Dean and President of the Franklin Pierce Law Center in Concord, New Hampshire. I served as a judge advocate in the United States Navy from 1972-2000. I was the Judge Advocate General of the Navy from 1997-2000.

Having dedicated most of my professional life to military service, it is not an insignificant event for me to come here to testify in opposition to the confirmation of an Administration nominee for high office. I don't do this lightly, but these are issues about which I feel very strongly. In a very real way, this nomination presages the next four years for this country because more than any other discipline, it is the Rule of Law that directs our future. The Attorney General of the United States should be the chief enforcer of that Rule of Law. One of the few things Judge Gonzales got right in his infamous January, 2002 memo is when he stated, "The Attorney General is charged by statute with interpreting the law for the Executive Branch. This interpretive authority extends to both domestic and international law." Given the analysis that follows in that same memo, the fact that he has now been nominated to that very position should be of great concern to us all. Perhaps more than any other cabinet officer, the Attorney General has cherished public responsibilities to the people, distinct from the role of legal or political advisor to any particular president.

My opposition to this nomination focuses primarily on Judge Gonzales' January 25, 2002 memorandum, the subject of which is DECISION RE APPLICATION OF THE GENEVA CONVENTION ON PRISONERS OF WAR TO THE CONFLICT WITH AL QAEDA AND THE TALIBAN. In this memo, Judge Gonzales states that, "this new paradigm [the war against terrorism] renders obsolete Geneva's strict limitation on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, script..., athletic uniforms, and scientific instruments." He further urges the President to disregard it because he argues that adherence would restrict the war effort and potentially create criminal liability for war crimes.

In addition, other legal analyses were drafted by administration officials which Judge Gonzales did not repudiate, at least not on the record. These memoranda defined torture very narrowly, the defenses to torture broadly, and gave the President carte blanche in prosecuting the war on terror.

I believe Judge Gonzales' January 25 memorandum was shallow in its legal analysis, short-sighted in its implications, and altogether ill-advised. Frankly, it was just wrong. Moreover and importantly, it and the other memoranda it drew from and formed the basis for, [the Bybee memorandum (January 22, 2002 from Assistant Attorney General Jay Bybee), the Yoo memorandum (August 1, 2002 from Deputy Assistant Attorney General John Yoo) and the legal analysis from the DoD Working Group (April 4, 2003)] when taken together "set the conditions" for the horrific events that followed. They took the United States from the role we have held for generations on the world stage as the avatar for the Rule of Law and proponent of human rights to being just another nation trying to evade our legal obligations. I believe they place our troops and our citizens in even greater harm's way by lowering the bar on acceptable conduct and fueling bitterness and resentment that encourages recruits to the enemy's cause. It weakens our coalition and removes long held limitations on the most destructive of all human endeavors--warfare.

Let me begin with some discussion about why adherence to the Rule of Law in general and the Geneva Conventions in particular are so important for our country. I'll then turn to my specific concerns about Judge Gonzales' January 25 memorandum , and finally the very negative impact of that document on our national security and the safety of our present and future military forces.

As with individuals, the most important attribute of a nation is integrity. Integrity is the characteristic that ensures goodness in a society. Webster defines "integrity" as "firm adherence to a code especially moral ...values," or "incorruptibility."

Integrity in a nation ensures several outcomes. One is that other nations can be confident in dealing with a nation of integrity that it will always take whatever action its leadership believes to be the moral, not simply the expedient, action; it will take the right course and stay on the high road. Interaction among nations will be predicable. A particular nation's course of action will be consistent and dependable through time. Predictability and dependability foster peace and security. Unpredictability and undependability foreshadow unrest and insecurity.

The most important reason for our leaders to strive for integrity at all times is because Americans want to be a nation of integrity. It is simply the right thing to do, regardless of any utilitarian or expedient benefit. It's never too late to do the right thing, and this hearing provides an opportunity to do that.

In physics the law of entropy holds that through time any system will degrade to disorder and ultimately to chaos unless there is an outside force that ensures order in the system. That applies equally to the solar system, the community of nations and to the United States. That outside force ensuring world order is the regime of international treaties, obligations and customary international law. Without adherence to these, we will surely devolve to disorder through time.

This is particularly true in wartime. War is simply the state of the ultimate, but hopefully temporary, disorder. Its only value is to provide the time and space necessary for real solutions to take place---diplomatic, economic, political, and social. War is not a solution in itself and cannot be used to justify national misbehavior or loss of national integrity.

In disagreements or arguments between individuals, it is important that they not act in a manner that so poisons their relationship that it cannot recover. The same is true with nations. It's easy to act with integrity in peacetime when things are going smoothly. The true test of national integrity is in wartime. We must wage war in such a way that we are able ultimately to resume peace.

The Geneva Conventions envision an end to the hostilities and to the destruction of war. They envision a return to peace. They provide a framework for the conduct of the war that will enable the peace to be sustained and flourish. We must not be deterred just because our enemy in a war on terror doesn't comply with the Conventions. Our unilateral compliance will aid in the peace process. Moreover, it should have been understood that violations of the Conventions, or ignoring them, doesn't help bring an end to the war. To the contrary, as we have seen, this only adds ferocity to the fighting and lengthens the war by hardening the resolve of the enemy. Our flagrant disregard for the Conventions only serves as a recruiting poster for this enemy and for our enemies for generations to come.

For over half a century and many conflicts, the Geneva Conventions have served us well as the accepted rules of conduct in wartime, the Rule of Law with which civilized nations comply. They comply because they are nations of integrity. They also comply out of pure self interest. Nations always act in what they believe to

be their self interest. They may miscalculate what their self interest is, but they always act in what they believe it to be. It is in our self interest is to comply with the Geneva Conventions under any circumstances. To do otherwise risks waging such an unlimited war that we are no longer perceived to be a nation that values the Rule of Law or supports human rights. Other nations learn from our actions more than our words. Moreover, if we move away from the Geneva Conventions and toward unlimited warfare, our own troops are imperiled in this war and future wars by our enemies who will follow suit.

If the United States complies with the rules of conduct as laid out by the Geneva Conventions, we can endeavor to force others, including our enemies, to comply as well.

The converse is also true. If we fail to live up to the aspirations of the Geneva Conventions, we will have served as the wrong kind of role model. We will have stepped down from the pulpit from which we can preach adherence to the Rule of Law in war.

In the wake of World War II, the U.S. leadership advocated the adoption and reaffirmation of the Conventions because they served the ultimate interest of the United States. Eisenhower, Truman, Marshall, Senator Vinson and others envisioned another step in the historical journey toward the quintessential oxymoron, civilized warfare. They supported the warfighting concepts contained in the Geneva Conventions because those rules would protect U.S. troops in the field. Their concern was to safeguard our troops from mistreatment by the enemy, not to protect the enemy from mistreatment by U.S. forces. Judge Gonzales' memorandum completely eviscerated the original vision of the Geneva Conventions.

Where GPW (Geneva Convention Relative to the Protection of Prisoners of War) talks about scrip, athletic uniforms, commissaries and the like, American proponents were thinking of the treatment we could demand for U.S. prisoners of war, not how we should avoid providing those amenities to enemy prisoners we held. Far from being quaint, these stand as bulwarks protecting U.S. troops who are captured.

Our disregard for the Conventions will likely deter potential future allies from joining us. If we comply with the Geneva Conventions only when it's convenient, who will fight alongside us? The answer is only other nations which also don't want to be hamstrung by so-called quaint and obsolete rules. We will become an outlaw nation that wages unlimited warfare and only like-minded renegade nations will fight with us. In the past we have always insisted on compliance. We are a special nation in the history of the world and should be shouting from the rooftops that we will always insist that all our allies enforce those rules that serve to protect us all and demonstrate and preserve our humanity. Rather, we are leading the way in the other direction. That displays either a gross disregard or an abject lack of understanding for the implications of our actions.

Since World War II and looking into the foreseeable future, United States armed forces are more forward-deployed both in terms of numbers of deployments and numbers of troops than all other nations combined. What this means in practical terms is that adherence to the Geneva Conventions is more important to us than to any other nation. We should be the nation demanding adherence under any and all circumstances because we will benefit the most.

Instead, what we see in the January, 2002 memo from Judge Gonzales and the other legal memoranda which were prepared during that time period from the Department of Justice and Department of Defense, is a short-sighted, narrow minded, and overly legalistic analysis. It's too clever by half, and frankly, just plain wrong. Wrong legally, morally, practically, and diplomatically.

The memo is incorrect in its conclusion that that Geneva Convention regarding POWs does not apply to the conflict in Afghanistan against the Taliban and their partners, al Qaeda. Afghanistan is a party to the Convention. The United States fought the Taliban as the de facto government of Afghanistan, in control of 90% of the country, and its armed forces as the "regular armed forces" of a party to the Convention. Those facts entitled Taliban and al Qaeda combatants from Afghanistan to a determination on a case-by-case basis of their status as prisoners of war. Moreover, any detainee not entitled to POW status is nevertheless entitled to basic humanitarian protections guaranteed by the Geneva Conventions and customary international law. This is the position taken by the State Department, but rejected by Judge Gonzales.

Judge Gonzales begins his rationale for this erroneous position by stating that the "war against terror is a new kind of war." That may be. But the war in Afghanistan was not new in any fundamental way. The Geneva Conventions could be applied to that war without any great difficulty, just as we applied them in Iraq and every war we have fought since World War II. They are all new kinds of wars at the time you fight them, with new enemies, new weapon systems, and new tactics and strategies.

The Conventions are designed to apply in all armed conflict and the immediate aftermath of armed conflict. They are designed to apply to combatants--persons taking direct part in hostilities and regular members of the armed forces. There simply is no case for concluding that the Geneva Conventions were obsolete regarding the war in Afghanistan. They formed the proper applicable law and concluding they did not was simply incorrect.

Although it may still be our self-interest, it is difficult to apply the Geneva Conventions to a terrorist when he is not taking part in an armed conflict because the Conventions were not intended to apply to those settings. Criminal law is designed to apply to violent, unlawful acts outside the situation of intense inter-group armed hostilities, i.e. war. Fundamentally, Judge Gonzales' problems with the Geneva Conventions stem from his attempt to apply the wrong law to the problem of terrorism.

As he should have anticipated, but apparently didn't, his error was compounded as the war on terror expanded to Iraq and included American citizens as enemy combatants. Once he reduced his legal analysis to simply that the Geneva Conventions don't apply to terrorists without explaining what law, if any does apply, he created a downward spiral of unruliness from which we have not yet pulled out.

His memo is slightly over three pages long. Almost one full page is devoted to listing and rationalizing his two positive reasons for concluding the Conventions do not apply: preserving flexibility and "substantially reduce(ing) the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441)."

On less than one half page, 21 lines, Judge Gonzales lists seven reasons why they should apply or the impact of non-application (an action which he describes to the President as "...reconsideration and reversal of your decision....") These are:

*since 1949 the United States has never denied their applicability
*unless they apply U.S. could not invoke the GPW if enemy forces threatened or in fact mistreated our forces
*War Crimes Act could not be used against the enemy if they don't apply
*it would invoke "widespread condemnation among our allies and in some domestic quarters" for us to turn away from the Conventions
*encourage other countries to look for technical "loopholes" in future conflicts
*other countries would be less inclined to turn over terrorists or provide legal assistance to us;

And finally, and notable for its understatement,

*"A determination that GPW does not apply to al Qaeda and the Taliban could undermine U.S. military culture which emphasizes maintaining the highest standards of conduct in combat, and could introduce an element of uncertainty in the status of adversaries."

The paragraph of the memo which discusses the interplay between the Section 2441 of the War Crimes Act and the Geneva Conventions is particularly striking. To his credit, Judge Gonzalez is remarkably frank and candid. Without apparent embarrassment, he asserts as one of the chief reasons to not invoke the Conventions the argument that such action "reduces the threat of domestic criminal prosecution under the War Crimes Act (18 U.S.C. 2441)." He essentially opines that the Conventions create problems because "grave breaches" of the Conventions would constitute war crimes under the domestic legislation which, unlike the Conventions themselves, is enforceable in U.S. courts. He says, "...it would be difficult to predict with confidence what action might be deemed to constitute violations of the relevant provisions of the GPW." He references as examples of this problem the difficulty he sees in defining such phrases from the Conventions as "outrages upon personal dignity" and "inhuman treatment." Later in that paragraph he offers, "...it is difficult to predict the needs and circumstances that could arise in the course of the war on terrorism."

His meaning is clear. We don't want to implicate the War Crimes Act via "grave breaches" of the Geneva Conventions because we can't predict whether we may need to engage in what may be defined as outrages on personal dignity and inhuman treatment during the war on terror. This is a stunning observation. It certainly undermines good order and discipline within the military. More importantly, if we can't define those terms, how can we expect the enemy to do so? How can we ever demand that they not engage in such conduct having now said the prohibitions are incapable of definition?

Although he doesn't advocate the reasons with any strength or conviction, Judge Gonzales at least was able to identify the damage that following his advice would cause. Unfortunately, he fails utterly to comprehend the degree or consequences of that damage. Nor does he seem to appreciate the consequences of even advancing his ultimate conclusion: "I believe that the arguments for reconsideration and reversal are unpersuasive."

Law is not practiced in a vacuum. It's practiced in real life. The issues are real, affecting real people. They aren't purely academic or just curious intellectual exercises.

A careful, honest reading reveals that the legal analysis of the January, 2002 memo is very result oriented. It appears to start with the conclusion that we don't want the Geneva Conventions to apply in the present situation, and then it reverse engineers the analysis to reach that conclusion. That approach may be appropriate for a criminal defense counsel who starts with the proposition that the client is not guilty and figures out how to best present that case, but it is not the kind of legal thoughtfulness one would expect from the legal counsel to the commander-in-chief.

It is also very oriented to the immediate situation. It considers only the events at that moment in time and space. It fails to adequately consider the practical implications of characterizing the relevant provisions of the Geneva Conventions as "obsolete" and "quaint." Once those words are written down they rang a bell that cannot be unrung. If the Geneva Conventions were obsolete and quaint in 2002, they are obsolete and quaint for all time. Those two words will come back to haunt us forever, or until the Conventions are "modernized." The problem is that it's a bit like going to war with the Army you have, not the Army you would like to have. These are the rules that we went to war with. We must make them work. We must live, or die, with them.

The Bush Administration should officially and unequivocally repudiate Judge Gonzales' erroneous position on the applicability of the Geneva Conventions. It is not the case that the Conventions are obsolete in regulating armed conflict. Perhaps they can be improved and updated to deal with the new face of asymmetrical warfare and the Administration should work for that, but in the meantime they are the binding law and they serve us well. If new international law is needed for the struggle against terrorism, then that law should be developed, too, but do not throw out the Geneva Conventions because his poor legal analysis couldn't make them fit.

When I have spoken out publicly on these matters over the course of the last two years, often someone in the back of the room, or a caller on a radio talk show, pipes up with the argument that "they are all terrorists and look at what they have done to us." I find that argument to be singularly unpersuasive and unbecoming of the United States. Judge Gonzales, however, echoes the argument when he says in the memo, "Finally, I note that our adversaries in several recent conflicts have not been deterred by GPW in their mistreatment of captured U.S. personnel, and terrorists will not follow GPW rules in any event." That statement is both true and reprehensible coming from the President's legal counsel. For that to be urged as a justification for not applying the Rule of Law in the war on terror is beneath the dignity and civility of the United States. Although more articulately stated than I generally hear it, it is the same argument I have come to expect from someone in the back of the room or an anonymous caller on talk radio.

The United States has supported the Geneva Conventions and urged other nations to do so for over half a century. Now, suddenly, they are characterized by the President's counsel as quaint and obsolete. He argues they may impede our freedom to commit what might otherwise be violations of our own War Crimes Act; we don't want this outdated international law to inhibit our ability to outrage human dignity and engage in inhuman treatment.

Judge Gonzales also bears responsibility, along with others, for the other memoranda written to inform those in government and the military about the definitions of torture, defenses, and authority of the President acting as Commander-in-Chief. The Bybee and Yoo memoranda are chilling. They read as though they were written in another country, one that does not honor the Rule of Law or advocate on behalf of human rights. They contain an air of desperation: this is the worst war ever and justifies almost anything in order to win. The concept is that as long as you are a smart enough lawyer, you can find an argument to justify anything. Torture is limited to "inflict(ing)pain that is difficult to endure...equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death." (Bybee Memo)

Even if you surpass that lofty standard, your defenses include "necessity" and "self-defense" (meaning defense of the nation, not personal self-defense). Basically, anything that inhibits the President's discretion is unconstitutional and anything that carries it out is permitted.

No mention is made of U.S. military regulations. All services have their own regulations relating to these issues. The U.S. Army Field Manual 34-52 is representative. It states:

"U.S. policy expressly prohibits acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation. Such illegal acts are not authorized and will not be condoned by the U.S. Army. Acts in violation of these prohibitions are criminal acts punishable under the U.C. M. J. If there is doubt as to the legality of a proposed form of interrogation not specifically authorized in this manual, the advice of the command judge advocate should be sought before using the method in question."

Although Judge Gonzales would surely consider it quaint and obsolete, this is long-standing U.S. military doctrine.

Significantly, these opinions and legal arguments weren't written in some law review article or in an op-ed piece to stimulate national debate. They were written to inform the President as Commander-in-Chief. Unfortunately, we saw the result of that kind of situational, shortsighted legal analysis.

This advice given to the President by Judge Gonzales was not offered with an eye to protecting American troops, as it may seem to be upon a superficial consideration. In both the short term and the long term, it doesn't protect our armed forces, it imperils them. It enables them to engage in the sort of reprehensible conduct we have seen, and it will enable our enemy to also engage in such conduct with impunity.

There are two great spines that run down the back of military discipline. They are accountability and the chain of command. These profound concepts are separate, but related. The concept of accountability means that you may delegate authority, but you can never delegate responsibility. Responsibility always remains with

the person in charge.

Who was responsible for the series of memoranda that were drafted during that time which defined torture so narrowly and defenses so broadly, which argued that the President as Commander-in-Chief enjoys virtually unlimited power? Who failed to stand up and say this is not only bad law; it also fosters bad morals and therefore bad diplomacy, and it leaves our troops at risk? Taking this course will make the United States a less good, less secure, nation.

Who thought this was the single most important, awful war, past or future, and that that justified throwing out all the rules that good people had defended over the years, all for the sake of ill-advised expediency?

The chain of command enables the military to operate effectively and efficiently. For good or evil, what starts at the top of the chain of command drops like a rock down the chain of command. Soldiers, sailors, Marines, and airmen execute the orders of those at the top of the chain and adopt their attitude. Consequently, those at the top have a legal and moral responsibility to protect their subordinates. We don't want the subordinates to feel compelled to second guess the legality, morality, or wisdom of what is decided above them in the chain of command.

If the message that is transmitted is that the Geneva Conventions don't apply to the war on terror, then that is the message that will be executed. The law and over 200 years of U.S. military tradition say that those at the top are responsible for the consequences. Again, law isn't practiced in a vacuum. It's practiced in real life. This isn't just a quaint academic exercise. It affects human beings and the world order.

The United States is now without a peer competitor. This places an awesome responsibility on us because there is no nation or coalition of nations that can forestall our national will. By in large, we can do what we want in the world if we rely solely on military might. Therefore, it is incumbent upon us to also rely on our integrity as a nation in making decisions about the role we will play. It doesn't make us small or weak to voluntarily inhibit our free will; indeed, it is an indication of great strength and discipline. For generations we have justifiably served as a role model for other nations. We have been a paragon of human rights and the world's leading advocate for the Rule of Law. We must not step back from that role now. We must also preserve our self-respect. If we don't respect ourselves, we can't expect others to respect us. Fear alone isn't enough to be a world leader.

The strongest nation on earth can ill afford an Attorney General who engages in sloppy, shortsighted legal analysis or who doesn't object when others do.

The war on terror is crucial to our survival. And survive we will. But there will be other wars to fight in the future just as there have always been in the past. We cannot lose our soul in this fight. If we do, even if we win the military battles, the victories will by Pyrrhic, and we will have lost the war. The Attorney General (designate) has led us down that path. Instead, we need an Attorney General who recognizes that when there is a conflict between law and policy, law prevails.