

Testimony of

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TESTIMONY
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This nation was founded on the concepts of support for the Rule of Law. It is largely what makes us the great nation we are. Thomas Paine said in 1776 that "The cause of America is the cause of all mankind." More recently, the renowned geopolitical commentator Bono is reported to have opined that "America isn't just a country, it's an idea."

That cause, that idea, has been the source of America's strength and leadership in the community of nations throughout the years. We are embroiled in an important struggle against world wide terrorism at this particular moment in history. This does not have to be an existential struggle, however. The enemy can't defeat us militarily. He has limited command, control or communications. He has no lift capability. His weaponry is rudimentary, albeit improving as time wears on.

So the terrorists can't win by killing us or even breaking our will to fight. Victory for the enemy is to bring us down to his level, to make us more like him. Our greatest weapon in this struggle is not our military, strong though it is; it isn't our economy or abundant natural resources. It isn't the island nature of our land mass. Thomas Paine and Bono had it right. Our greatest strength is our ideas and our ideals. That's the weapon we used to win the Cold War and that's how we can win this war.

This is an asymmetric war. As such, the strategy should not be to pit strength against strength as in conventional wars. Rather, we must match our strengths against the enemy's weaknesses. We don't have enough bombs, bullets or body bags to sacrifice in this effort against IEDs. The enemy's weakness is that they are devoid of ideals. They have no real vision for a peaceful world. We must win an asymmetric war by matching our strength--our ideas and ideals--against his weakness, a philosophy abjectly devoid of the same.

Although the enemy can't defeat us militarily, we can commit national suicide. Recent history has demonstrated that we are willing to disarm our great nation of our ideals and suffer from self-inflicted wounds. Just as we must fight this war knowing there will be future wars, we must also fight it confident in the knowledge that a peace will eventually ensue. We may not know when, but it will come. If we so debase ourselves by forsaking the Rule of Law for the present, we won't survive the peace in the future.

The notorious January, 2002 memo from then Presidential counsel, Alberto Gonzales, drafted according to all accounts by Department of Justice lawyers, was one of the first and certainly one of the bloodiest self-inflicted wounds. That memo led to the horrors of Abu Graib, indefinite detention at Guantanamo Bay, and Combatant Status Review Tribunals.

Compliance with the Rule of Law shouldn't be viewed a goal which we aspire to achieve. Rather, it provides the floor below which we dare not sink. It is fundamental to our existence as a civilized nation and must not be trivialized as being "quaint" or avoided as an impediment to misguided expediency.

Law isn't practiced in a vacuum, it is practiced in real life and while good lawyers know the law, great lawyers know about life. That's a quality we need in our next Attorney General. The job description should call for a wise counselor, not just a clever lawyer.

We know that in the recent past, the opinions of the Judge Advocates General of the several Services were not followed, and apparently not even seriously considered. In some cases, their opinions weren't even solicited. The JAGs, however, understand that this isn't the last war we will ever fight. It's not the next to last war. Plato said that only the dead have seen their last war. Moreover, the JAGs know military history well enough to know that this isn't the worst war we have ever fought. We lost 600,000 men in the Civil War, 400,000 in World War II, 50,000 in Korea and 58,000 in Vietnam. Those facts are the part of life and death that military lawyers understand and consider when offering legal advice. They are looking over the horizon to the next war and recognize that we should not ignore the rules by which wars are fought by civilized nations, the "law of armed conflict", just because the war on terror happens to be the present war. As we all know, the effort against terrorism won't end in January, 2009, but in many ways we have been fighting it as though it will.

During the Civil War, which truly was an existential struggle, President Lincoln commissioned Dr. Francis Lieber to devise what came to be called the "Lieber Code" to lay out how we would treat Confederate prisoners in light of the horror of Andersonville Prison. This was the precursor to the Hague Conventions and then the Geneva Conventions. Lincoln's Attorney General, Edward Bates, didn't tell him that it would be inappropriate to treat enemy prisoners as human beings. In the wake of another existential war, World War II, the United States saw fit to adopt the Geneva Conventions, somewhat ironically to protect U.S. troops from the enemy, not the other way around.

The legal missteps we have taken recently, particularly with regard to the application of the Geneva Conventions broadly and interrogation policy specifically, will haunt us for generations unless they are corrected quickly and unequivocally. We must convince the world that we will comply with the Geneva Conventions to the letter, not just because we must, but because we can. We do it out of strength, not weakness; courage, not cowardice. We don't fear prosecution for war crimes under the War Crimes Act, as the January, 2002 memo suggests because we will not even be close to that line.

The next Attorney General must convince the world that the United States will always comply with the admonitions contained in the 1950 publication The Armed Forces Officer (DA Pam 600-2):

The United States abides by the laws of war. Its Armed Forces, in their dealing with all other peoples, are expected to comply with the laws of war in the spirit and to the letter....Wanton killing, torture, cruelty, or the working of unusual and unnecessary hardship on enemy prisoners or populations is not justified in any circumstance. Likewise, respect for the reign of law, as that term is understood in the United States, is expected to follow the flag wherever it goes....War looses violence and disorder, it inflames passions and makes it relatively easy for the individual to get away with unlawful actions. But it does not lessen the gravity of his offense or make it less necessary that constituted authority put him down....

If the United States could hold itself up to that standard in the wake of World War II and in the midst of the Korean War, we should be able to do that now. Our new Attorney General must understand that we are not somehow lesser Americans than our forebears of 57 years ago. We can live up to that legacy proudly. I believe we crave that kind of leadership now.

Our next Attorney General, as the chief law enforcement officer in the nation, must be finely attuned to the needs of the military in prosecuting this and any future conflict.

I know from my service as the Navy JAG during Janet Reno's tenure as Attorney General how crucial it is to have an AG who listens to the Military Service perspective and directs the Justice Department to do the same. That is not to argue that the AG and DoJ must always defer to the Service or DoD perspective, but they must solicit it and respect it. They must also ensure that the General Counsel of the Department of Defense listens to and seriously considers the legal opinions of the respective JAGs. The DoD GC is potentially in a very awkward situation with two masters, the Secretary of Defense and the Attorney General.

The General Counsel of DoD, or any Department for that matter, must be encouraged by the Attorney General to stand tall in the face of political pressure when the situation requires it and then supported when he or she does. They must know that it is acceptable to disagree at times. Indeed, it is virtually a requirement in a dynamic organization dealing with difficult issues of supreme importance. A lawyer who is simply a lackey for his or her boss, or worse, provides a pretext of legal cover for misadventures, is worse than worthless, they are dangerous.

The next Attorney General must be capable of recognizing a legal problem, step back from it and analyze it in the context of real life and understand the non-legal consequences of his advice. One might think, "What a clever lawyer. He defined "torture" so narrowly and the defenses to torture so broadly that we can never be found guilty. He has done a great service to the Nation." One would be dead wrong. We have seen the consequences of that sort of twisted legal analysis and we must never repeat it.

Admiral Rickover taught us that there is only one person responsible and that is the person at the top. In terms of the execution of the laws of the United States, that is the Attorney General. He sets the tone. He sets the parameters for debate or even whether debate will be tolerated.

As the Dean of a law school, I travel around the country talking to lawyers, non-lawyers and law students. I certainly talk to law students at the Franklin Pierce Law Center virtually every day. I find it increasingly difficult to explain how we have come to this point in our legal history. I certainly can't justify it. It would be one thing to explain missteps taken in the aftermath of 9/11 if they had been quickly corrected. But how do I explain that even recently the CIA has been authorized to engage in cruel interrogation based on secret legal advice from the Department of Justice? I tell lawyers and law students that I believe law to be the highest calling of all. A society's system of justice determines the goodness or the badness of that society. Not the economy, not military strength, not art, not medicine, but how it treats individuals determines how "good" a society is. In entropic terms, the Rule of Law is the outside force that holds our society together through time. When that force for goodness in the society is impaired, the very fabric of our society is imperiled. Haven't we seen that effect or read about it in history in so many other societies over the millennia? Dare we let the United States become the next former world power because we forsake the Rule of Law?

The Attorney General sits atop that pinnacle in the Executive Branch. As such, the Attorney General is perhaps the most important Cabinet officer of all. He or she must have sublime respect for law but also recognize that laws are meaningless, just words on paper, outside of the context in which they apply. The Attorney General must have an eye to the future, not just the present. The laws must be respected and valued, not viewed as an impediment to be avoided by clever but not wise interpretation. I believe the Rule of Law has come off the rails in recent years. Our next Attorney General must work tirelessly and courageously to get it back on the tracks.

I respectfully urge you to consider these values when you consider the confirmation of Judge Mukasey. He will determine whether the current failures are a swing of the pendulum or a plateau.