

January 9, 2018

Dear Chairman Grassley, Ranking Member Feinstein, and Members of the Senate Judiciary Committee:

We write as retired U.S. military leaders and lawyers, trained and practiced in the laws of war. Our experience has proven that the United States is safest when we abide by those laws. When our allies and enemies view us as extrajudicial actors, our national security suffers, and our servicemen and women are put at risk.

We are deeply concerned that Howard C. Nielson, Jr., who has interpreted the laws of war in a manner that could be read to justify torture, may be confirmed for a lifetime appointment as a federal judge. The Memorandum he authored for the Department of Justice's Office of Legal Counsel (OLC) in 2005 appears to have been a result-driven product. Much like the earlier OLC "Torture Memoranda," which were so fixated upon reaching a pre-determined political conclusion that they were repudiated and withdrawn, it was based on flawed legal reasoning. That the same result-oriented interpretive proclivities would be brought to the federal bench is contrary to the temperament and judicial philosophy traditionally expected of judges.

As military leaders and lawyers, we spent our professional lives fostering respect for the laws of war, including the Geneva Conventions. The Geneva Conventions apply universally. They protect our troops and civilians from mistreatment. Thus, we work untiringly to ensure that American military policy complies with those conventions. Rather than follow where the law leads, Mr. Nielson's 2005 OLC memo struggled to invent a space beyond the reach of the Geneva Conventions, where legal protections for detainees would not apply. There is no such space. In analyzing the scope of the Geneva Conventions, the Supreme Court correctly noted that "nobody in enemy hands can be outside the law." Mr. Nielson's analysis is not only legally unsupported, but it is also dangerous.

Torture is illegal, it doesn't work, and it places our troops in danger. It is an abandonment of American moral leadership, and it frustrates cooperation with our allies where coalition work is crucial to our military goals. Those who attempt to skirt the law should not be rewarded for abandoning American values and endangering our military.

We know from experience that the mere perception that the United States would seek to act beyond the law, especially in justifying detainee mistreatment, emboldens our enemies and undermines our legitimacy.

The Geneva Conventions protect the servicemembers who take enormous risks to defend American values. Attempts, like Mr. Nielson's, to create legal black holes that can justify torture and mistreatment betray those values and undermine our nation's security. They also should not be rewarded with lifetime judicial appointments.

Sincerely,

Rear Admiral Donald Guter, JAGC, USN (Ret.)

Admiral Guter served in the U.S. Navy for 32 years, concluding his career as the Navy's Judge Advocate General from 2000 to 2002. Admiral Guter currently serves as President and Dean of the South Texas College of Law in Houston, TX.

Rear Admiral John D. Hutson, JAGC, USN (Ret.)

Rear Admiral John D. Hutson served in the U. S. Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. Admiral Hutson is Dean Emeritus & Philosopher in Residence at the University of New Hampshire School of Law in Concord, New Hampshire.

Brigadier General David R. Irvine, USA (Ret.)

Brigadier General Irvine served in the United States Army Reserve from 1962 to 2002. He maintained a faculty assignment for 18 years with the Sixth U.S. Army Intelligence School, and taught prisoner of war interrogation and military law for several hundred soldiers, Marines, and airmen. General Irvine served 4 terms as a Republican legislator in the Utah House of Representatives, has served as a congressional chief of staff, and served as a commissioner on the Utah Public Utilities Commission.