

IN DEFENSE OF ALBERTO R. GONZALES AND THE 1949 GENEVA CONVENTIONS

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The historic Iraqi elections of January 30, 2005 restored real democracy to that long-oppressed nation for the first time in half a century, providing compelling vindication to supporters of Condoleezza Rice's confirmation as Secretary of State. Likewise, the growing consensus behind the President's decision that al Qaeda terrorists are morally entitled to humane treatment but not legally entitled to the additional special privileges afforded to prisoners of war under the Third Geneva Convention of 1949 provides compelling vindication to supporters of Judge Alberto R. Gonzales's nomination to be our nation's 80th Attorney General. Securing a proper resolution to this debate is critical to the ongoing success of our global war against terrorism.

I.

The nomination of Judge Alberto Gonzales to serve as our nation's 80th Attorney General and our first of Hispanic descent is the American dream come true. He is a talented lawyer, a dutiful public servant, and a good man. He is a great Texan and an inspiring American success story. I am honored to call him my friend. Yet his nomination faces noisy, if ultimately futile and unjustified, opposition.

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I have known the Judge for many years, and I can tell you that the media is absolutely right to refer to him as the “Man from Humble.”¹ That refers not just to Humble, Texas, where he grew up, but also to the fact he is a modest, self-effacing man. The son of migrant workers, his childhood home where his mother still lives today was built by his father and uncle. As a child, he sold soft drinks at Rice University football games where he dreamed of one day going to school.

Mr. Gonzales is the first person in his family to go to college. After graduating from Rice University and Harvard Law School, he joined a prestigious international law firm headquartered in Texas and became one of its first minority partners. He eventually caught the eye of a Texas governor who saw a uniquely talented yet modest man and appointed him general counsel, Secretary of State, Texas Supreme Court Justice, and eventually, counsel to the president.

Thus, Judge Gonzales combines stellar legal credentials with an inspiring American success story. Despite this, some liberal legal elites and special interest groups in Washington have sharply attacked his nomination, citing his legal work in support of the war against terrorism.

Gonzales unequivocally opposes torture. He also opposes extending international legal privileges to those not legally entitled to them. And he’s right: al Qaeda fighters should not be immune from questioning techniques used every day in police stations across America, or equipped with tools that could be used against our own troops. They shouldn’t get combat immunity for striking the Pentagon, nor be treated better than an American citizen accused of a crime.

II.

In the opening months of 2002, the Bush administration announced plans to transfer a number of al Qaeda and Taliban fighters captured and detained by U.S. armed forces to Guantanamo Bay, Cuba, for further detention and questioning. The administration also announced that, although these detainees would be treated humanely, as a legal matter they

1. See, e.g., Michael Duffy et al., *Bush’s Man From Humble*, TIME, Nov. 22, 2004, at 56.

were not entitled to the numerous additional privileges afforded to prisoners of war under the Geneva Convention.²

The administration's interpretation of the Geneva Convention was not only legally correct, but also essential to national security. After all, the ability to question al Qaeda fighters is essential to preventing future acts of terrorism.³ As Judge

2. See Press Briefing by Ari Fleischer, Feb. 7, 2002, available at <http://www.whitehouse.gov/news/releases/2002/02/20020207-6.html>.

3. See, e.g., THE INDEPENDENT PANEL TO REVIEW DEPARTMENT OF DEFENSE DETENTION OPERATIONS, FINAL REPORT 8 (2004) [hereinafter DOD REPORT], available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> ("At Guantanamo, the interrogators used those additional techniques with only two detainees, gaining important and time-urgent information in the process."). As a March 10, 2005 press release from my office, entitled "Detainees Have Provided Critical Information, Still Pose a Threat to Troops, U.S.," announced:

WASHINGTON—In response to a request from U.S. Sen. John Cornyn (R-Texas), a member of the Senate Armed Services Committee, the Pentagon provided the following information on the critical intelligence provided by detainees in military custody, as well as the threat posed by the enemy to our troops and our homeland security.

"This information makes clear that our military has been successful in gaining needed information from the terrorists in their custody, and is a stark reminder of the enemy we are fighting around the world," Cornyn said.

Information obtained from detainees has:

- Provided information about al-Qaeda operatives and the identities of seven explosives trainers who remain at large
 - Identified 11 fellow detainees as bin Laden bodyguards who may have information as to his whereabouts
 - Identified the locations of terrorist training compounds and safe houses and routes used for smuggling terrorists and equipment
 - Provided information on al-Qaeda training techniques used to build improvised explosive devices (IEDs) threatening our troops as well as training on the use of poisons.
 - Helped decode widespread financial networks used to fund terrorist activities
 - Explained the al-Qaeda recruitment process and how terrorist travel is facilitated
 - Provided insights into the type of individuals sought out for terrorist recruitment
- Detainees at Guantanamo Bay continue to pose a threat to Americans:
- At least ten former detainees have rejoined the fight against coalition forces.
 - One released detainee assassinated an Afghan judge.

The following statements were made by detainees there:

- "The people who died on 9/11/2001 were not innocent."
- "Their day is coming. One day I will enjoy sucking their blood . . ."
- "I will arrange for the kidnapping and execution of U.S. citizens living in Saudi Arabia. Small groups of four or five U.S. citizens will be kidnapped, held, and executed. They will have their heads cut off."

Gonzales rightly noted during his confirmation hearing, the war on terrorism is essentially a war of information.⁴ The United States simply must use all available legal means to obtain the information and intelligence necessary to protect the American people from further terrorist attack—a position shared even by the witnesses at the hearing who were hostile to Judge Gonzales.⁵

When its Geneva position was first announced, however, the administration was harshly criticized for failing to extend prisoner-of-war privileges to al Qaeda fighters⁶—and those same criticisms are now being repeated by some opponents of Judge Gonzales’s nomination.⁷

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- “Not only am I thinking about threatening the American public, but the whole world.”
 - “There is no need to ask for forgiveness for killing a Jew.”

4. See *Nomination of Alberto Gonzales to be U.S. Attorney General: Hearing Before the Senate Comm. on the Judiciary* at 65, 109th Cong. (Jan. 6, 2005) (statement of Alberto Gonzales) (“What I can say is that after this war began, against this new kind of threat, this new kind of enemy, we realized that there was a premium on receiving information. In many ways this war on terror is a war about information. If we have information, we can defeat the enemy.”).

5. At the confirmation hearing, Deans Harold Koh and John Hutson responded to questions accordingly:

Senator Cornyn. Do you agree or disagree that the United States Government should use all lawful means to gather actionable intelligence that is likely to save American lives? Dean Hutson?

Admiral Hutson. I agree.

Senator Cornyn. Mr. Koh?

Mr. Koh. I agree with “lawful means”

Id. at 166.

6. See, e.g., Bryan Bender, *Red Cross Disputes US Stance on Detainees*, BOSTON GLOBE, Feb. 9, 2002, at A1 (“President Bush’s decision to deny prisoners of war status to Taliban and Al Qaeda detainees brought another round of international criticism yesterday The International Committee of the Red Cross in Switzerland said it considered both the Taliban and Al Qaeda fighters held by US forces at the US Naval Base in Guantanamo Bay, Cuba, to be prisoners of war.”); Amnesty International, Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay, Apr. 15, 2002, available at <http://web.amnesty.org/library/Index/ENGAMR510532002> (“Amnesty International believes that those captured and held by the USA during the conflict in Afghanistan must be presumed to be prisoners of war, whether they belong to the Taleban or al-Qa’ida. The Taleban were effectively the armed forces of Afghanistan when the US military operations began in October 2001, and al-Qa’ida fighters appear to have been an integral part of such forces, thus fulfilling the requirements of Article 4(1) of the Third Geneva Convention.”).

7. See *Nomination of Alberto Gonzales to be U.S. Attorney General: Hearing Before the Senate Comm. on the Judiciary* at 527, 109th Cong. (Jan. 6, 2005) (prepared statement of Sen. Edward Kennedy) (“[L]egal positions that you [Gonzales] have supported have been used by the Administration, the military and the CIA to justify torture and Geneva Convention violations by military and civilian personnel. Memos you solicited, endorsed, approved or acquiesced in undermined longstanding traditions in our military and weakened important protections for our own troops serving abroad by violating the

These critics misunderstand the requirements of the Geneva Convention. Under Article 4 of the 1949 Geneva Convention, only lawful combatants are eligible for POW privileges.⁸ Notwithstanding the contention of some critics, even the Red Cross's own guidelines make clear that, to earn POW privileges, combatants must satisfy all four conditions of lawful combat: being commanded by a person responsible for his subordinates, having a fixed distinctive sign recognizable at a distance, carrying arms openly, and conducting their operations in accordance with the laws and customs of war.⁹

Accordingly, Mr. Bush determined that the United States shall treat all detainees humanely, but that as a legal matter, neither al Qaeda nor the Taliban militia are entitled to the numerous additional privileges afforded to POWs under the Geneva Convention.¹⁰ The former is not even a state, let alone a party to the Geneva Convention, while the latter does not comply with all four required conditions of lawful combat.

Do Judge Gonzales's critics honestly believe that al Qaeda complies with the laws of war? After all, al Qaeda's sworn purpose is to terrorize innocent civilians in flagrant violation of the fundamental principles of the laws of war.

Not surprisingly, then, the Bush administration's legal interpretation of the Geneva Convention enjoys overwhelming support. It is not only well grounded in the text, structure, and history of the convention as documented in authoritative

military's golden rule: that we treat captured enemy forces as we would want our own prisoners of war to be treated."); Press Release, Sen. Carl Levin, Statement Regarding the Nomination of Alberto Gonzales (Feb. 3, 2005), *available at* <http://levin.senate.gov/newsroom/release.cfm?id=231515> ("Consistent with Judge Gonzales' January 2002 memo, the President determined on February 7, 2002, that the Geneva Convention on the Treatment of Prisoners of War does not apply to the conflict with Al Qaeda, and that because Taliban combatants were 'unlawful combatants' they were not entitled to POW status under the Convention and would not be protected by the Geneva Conventions The President's February 7, 2002, determination created a legal vacuum—a never-never land for detainees in our custody.").

8. Convention Relative to the Treatment of Prisoners of War, August 12, 1949, art. 4, 6 U.S.T. 3316, 75 U.N.T.S. 135.

9. INT'L COMM. OF THE RED CROSS, COMMENTARY III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 44 (Jean de Preux ed., 1960). Those guidelines specifically state that all "regular armed forces" must comply with the four conditions, even where Article 4 of the Convention is not explicit. *See id.* at 53 n.1, 63.

10. *See supra* note 2.

international law treatises¹¹ but has also been affirmed by federal courts across the country.¹²

In addition, the administration's position has been endorsed by the 9/11 commission¹³ and the Schlesinger report,¹⁴ as well as numerous legal scholars and international legal experts from across the political spectrum.

Professor Kenneth Anderson, a former general counsel of numerous liberal organizations, including the Soros Foundations and the Open Society Institute, agreed in an amicus brief to the U.S. Supreme Court that "[t]he President's conclusion that the members of al Qaeda, and the Taliban, are

11. See, e.g., INGRID DETTER, *THE LAW OF WAR* 148 (2d ed. 2000) ("Unlawful combatants . . . are not, if captured, entitled to any prisoner of war status."); ALLAN ROSAS, *THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS* 344 (1976) ("[T]he only effective sanction against perfidious attacks in civilian dress is deprivation of prisoner-of-war status."); *id.* at 419 ("[P]ersons who are not entitled to prisoner-of-war status are as a rule regarded as unlawful combatants, and can thus be prosecuted for the mere fact of having participated in hostilities."). In addition, numerous law review articles concur with the Bush Administration's legal interpretation of the Geneva Convention. See, e.g., W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict*, 9 CASE W. RES. J. INT'L L. 39, 41 (1977) (concluding that only "combatants who comply with the legal criteria . . . have the legally privileged status of prisoners of war"); Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145, 184–85 (2000) ("[T]errorists would not qualify under Article 4 of Geneva Convention III as Prisoners of War.").

12. See, e.g., *United States v. Lindh*, 212 F. Supp. 2d 541, 558 (E.D. Va. 2002) ("[T]he President's determination that Lindh is an unlawful combatant and thus ineligible for immunity is controlling here . . . [because] the Taliban falls far short when measured against the four GPW criteria for determining entitlement to lawful combatant immunity."); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 593 (S.D.N.Y. 2002), *rev'd on other grounds sub. nom.* *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) ("[W]hen the President designated Padilla an 'enemy combatant,' he necessarily meant that Padilla was an unlawful combatant, acting as an associate of a terrorist organization whose operations do not meet the four criteria necessary to confer lawful combatant status on its members and adherents. Indeed, even the Taliban militia, who appear at least to have acted in behalf of a government in Afghanistan, were found by Judge Ellis in *Lindh* not to qualify for lawful combatant status.") (citations omitted); *United States v. Arnaout*, 236 F. Supp. 2d 916, 917–18 (N.D. Ill. 2003) (noting that "[a]ll armed forces or militias, regular and irregular, must meet the four criteria if their members are to receive combatant immunity," and concluding that al Qaeda, Hezb e Islami, and the Sudanese Popular Defense Force all fail to satisfy the four criteria).

13. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, *THE 9/11 COMMISSION REPORT* 379–80 (2004) ("The United States and some of its allies do not accept the application of full Geneva Convention treatment of prisoners of war to captured terrorists. Those Conventions establish a minimum set of standards for prisoners in internal conflicts. Since the international struggle against Islamist terrorism is not internal, *those provisions do not formally apply* . . .") (emphasis added).

14. DOD REPORT, *supra* note 3, at 81 ("The Panel accepts the proposition that these terrorists are not combatants entitled to the protections of Geneva Convention III.").

unlawful combatants is clearly correct.”¹⁵ That brief was also signed by numerous former Carter administration officials, former State Department legal advisers, retired judge advocates general and military commanders, and other international law specialists.¹⁶ The Washington advocacy director for Human Rights Watch, Tom Malinowski, a vocal Bush administration critic, has rightly acknowledged that the administration interpretation was “probably correct.”¹⁷

Moreover, the recent confirmation hearing only reinforced the fact that Judge Gonzales has essentially won the debate over the Geneva Convention. Even Senator Patrick Leahy¹⁸—joined by the two law school deans who testified at his invitation, Harold Koh and John Hutson¹⁹—eventually conceded during the course of the hearing that President Bush and Judge Gonzales are correct: al Qaeda fighters are not POWs. And shortly after the hearing, Senator Joseph Lieberman provided a particularly stirring defense of Judge Gonzales and the Administration position on the Geneva Convention on the Senate floor, stating:

As I look back post-September 11, it seems to me in Judge Gonzales’s memo and the memos submitted by the State Department, by the Defense Department and others, there is a very serious and classical American debate going on about how to handle al-Qaida and the Taliban, and prisoners taken from their membership, and what is the relevance of the Geneva Convention to those people. It is an argument by a nation that cares about the rule of law. You can agree with Judge Gonzales’s position in this matter or not. I happen to agree with the ultimate decision made. And the decision was, in my opinion, a reasonable one and ultimately a progressive one. The decision was that under the terms of the Geneva Conventions, al-Qaida simply is not a state party to a convention, it is a terrorist group, and as such its members were not entitled to prisoner-of-war status.

15. Brief of Amici Curiae Law Professors et al. at 10, *Rasul v. Bush*, 124 S. Ct. 2686.

16. *Id.* at ii–ix.

17. *NewsHour with Jim Lehrer* (PBS television broadcast, Jan. 22, 2002) (statement of Tom Malinowski, Human Rights Watch), available at http://www.pbs.org/newshour/bb/terrorism/jan-june02/pow_1-22.html.

18. *Nomination of Alberto Gonzales to be U.S. Attorney General: Hearing Before the Senate Comm. on the Judiciary* at 57, 109th Cong. (Jan. 6, 2005) (statement of Sen. Patrick Leahy) (“al Qaeda does not have POW protection”).

19. See A note from the Editors, *infra* Appendix.

There is a sentence in Judge Gonzales's letter that was quoted with great derision, laughter, as if it were over the edge. 'In my judgment, this new paradigm,' which is the post-September 11 war on terrorism, 'renders quaint some of the provisions requiring that captured enemy' we are talking here about al-Qaida 'be afforded such things as commissary privileges, scrip advances of monthly pay, athletic uniforms and scientific instruments.'

I think, respectfully, Judge Gonzales was being restrained and diplomatic in using the word 'quaint.' To offer these benefits access to a canteen to purchase food, soap and tobacco, a monthly advance of pay, and the ability to have and consult personal financial accounts, the ability to receive scientific equipment, musical instruments or sports outfits to Khalid Shaikh Mohammed, who planned the attacks against us on September 11, would not be quaint. It would be offensive.

It would be offensive. It would be ridiculous. It would be ultimately unjust.²⁰

Some who grudgingly concede that al Qaeda fighters have no legal right to POW status nevertheless complain that the Administration failed to provide them with hearings to protest their status. To be sure, Article V of the Geneva Convention provides a right to a "competent tribunal" for a determination of one's POW status—but *only* when there is "doubt" about such status.²¹ That's a complex question, of course, for military experts who possess the relevant facts. Yet even the *Washington Post* has editorialized that "[f]ew of the inmates at Guantanamo have a realistic"—let alone valid—"claim to POW status; *certainly none of the al Qaeda inmates do.*"²²

This is not the first time there has been an effort to extend the Geneva Convention to cover terrorists. Nearly two decades ago, President Reagan rejected a proposed amendment to the Geneva Convention—known as Protocol I of 1977—to extend POW status to unlawful combatants, and every subsequent president has taken the same view. As President Reagan rightly argued, "we must not, and need not, give recognition and protection to terrorist groups as a price for progress in

20. 151 CONG. REC. S953 (daily ed. Feb. 3, 2005) (statement of Sen. Joseph Lieberman).

21. Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135.

22. *Guantanamo Troubles*, WASH. POST, Nov. 18, 2004, at A38 (emphasis added).

humanitarian law.”²³ Moreover, President Reagan’s decision was praised at the time by both the *Washington Post* and the *New York Times*. The *New York Times* editorial page concluded that the decision “deserves support,” because the Protocol provided “possible grounds for giving terrorists the legal status of P.O.W.’s.”²⁴ The *Times* agreed with President Reagan’s determination that the Protocol was “fundamentally and irreconcilably flawed,” and concluded: “So Mr. Reagan made the sound choice.”²⁵ Likewise, the *Washington Post* sharply criticized the Protocol, in an editorial entitled “Hijacking the Geneva Conventions.”²⁶ The *Post* argued that “[w]orst of all was the impact of the new rules on the traditional purpose of humanitarian law, which is to offer protection to noncombatants by isolating them from the perils of combat operations. The changes granted status as combatants (and, when captured, as prisoners of war) to irregular fighters who do not wear uniforms and who otherwise fail to distinguish themselves from combatants—in brief, to those whom the world knows as terrorists.”²⁷ Quoting President Reagan himself, the editorial concluded by noting that “[t]he Reagan administration . . . is right to formally abandon Protocol I. It is doing so, moreover, for the right reason: ‘we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.’”²⁸

III.

Achieving consensus on the Geneva Convention is not just a victory for the president and Judge Gonzales, it is also a victory for national security. After all, al Qaeda fighters are not professional soldiers—they are war criminals.

Extending POW protection to al Qaeda would be dangerous to our soldiers. The Geneva Convention guarantees POWs access to a variety of devices that could easily be turned into

23. S. TREATY DOC. No. 100-2, at iv (1987).

24. Editorial, *Denied: A Shield for Terrorists*, N.Y. TIMES, Feb. 17, 1987, at A22.

25. *Id.*

26. Editorial, *Hijacking the Geneva Conventions*, WASH. POST, Feb. 18, 1987, at A18.

27. *Id.*

28. *Id.*

weapons against their captors.²⁹ It also forbids POWs from being confined in isolated cells.³⁰ POWs are even entitled to a monetary allowance to purchase goods³¹ and preferential customs treatment for shipments they receive from the outside world.³² *Surely no one claims that we must equip al Qaeda terrorists with tools that could be used to hurt our very own soldiers?*

Recognition of POW status would also dramatically disable us from obtaining the intelligence needed to prevent further attacks on U.S. civilians and soldiers.³³ Under the convention, questioners could not entice detainees to respond by offering creature comforts or other preferential treatment—even though that is standard operating procedure in police stations across our country.³⁴ And because the convention prohibits the holding of detainees in isolation,³⁵ al Qaeda fighters would be able to coordinate with each other to thwart effective questioning. *Surely no one believes that al Qaeda fighters deserve to be treated better than an American citizen accused of a crime?*

POW status even confers broad combat immunity against criminal prosecution before civilian and military tribunals alike.³⁶ *Surely no one contends that al Qaeda fighters had a legal right to strike the Pentagon?*

In addition, giving POW status to unlawful combatants would badly undermine international law itself. The laws of war are

29. See, e.g., Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 18, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entitling prisoners of war to retain all effects and articles of personal use including metal helmets, gas masks, and articles used for personal protection); *id.* at art. 26 (entitling prisoners of war to cooking equipment for food preparation); *id.* at art. 38 (entitling prisoners of war to the necessary equipment for sports and recreation); *id.* at art. 72 (entitling prisoners of war to receive parcels containing scientific equipment and articles of a religious, educational or recreational character which may meet their needs).

30. *Id.* at art. 21 & 25.

31. *Id.* at art. 60.

32. *Id.* at art. 74.

33. See *supra* note 3.

34. *Id.* at art. 17.

35. *Id.* at art. 21 & 25.

36. See, e.g., *Lindh*, 212 F. Supp. 2d at 553–54 (“Lawful combatant immunity, a doctrine rooted in the customary international law of war, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets Importantly, this lawful combatant immunity is not automatically available to anyone who takes up arms in a conflict. Rather, it is generally accepted that this immunity can be invoked only by members of regular or irregular armed forces who fight on behalf of a state and comply with the requirements for lawful combatants.”).

specifically designed to entice combatants to comply with international law by offering better treatment in the event of capture—but better treatment *only* in return for obeying the laws of war. As a renowned treatise on the law governing prisoners of war explains, “the only effective sanction against perfidious attacks in civilian dress is deprivation of prisoner-of-war status.”³⁷

* * *

Reasonable lawyers can certainly disagree on the precise meaning of the Third Geneva Convention. And it is important for all of us to remember that, as we fight the war on terrorism in order to protect America, we do so consistent with American values. Every human being deserves to be treated humanely. The Geneva Conventions have indeed played an essential role in protecting civilians and combatants alike from the ravages of war. No one wants war. But where war is inevitable or necessary to defend our nation against terrorist attack, we should work to ensure that everyone conducts war within the limits and confines of the laws of war. Indeed, it is for that very reason that the Administration’s core legal conclusion—that al Qaeda fighters have no legal right to special POW privileges—deserves the consensus it has finally achieved. And it certainly does not change the fact that Judge Gonzales is an exceptional attorney and a good man who will serve the country as an outstanding Attorney General.

37. ROSAS, *supra* note 11, at 344 (1976).

APPENDIX

A note from the Editors: The confirmation hearing before the Senate Judiciary Committee included a remarkable exchange between Senator Cornyn and Deans Koh and Hutson. That exchange led Professor Douglas Kmiec to later comment:

[O]ne senator in particular, John Cornyn of Texas, came prepared for substantive work—specifically, better ascertaining what was permitted under law to gain information from captured detainees. . . .

From the get-go, Cornyn’s questioning debunked the conflation of the issue of Geneva’s applicability with the Iraq and GTMO prison abuses. . . .

With the facts separated from hyperbole, Senator Cornyn turned to the substance of Gonzales’s legal thinking. The Democrats arranged for a handful of witnesses to criticize Gonzales, but none of them truly refuted (or even rejected) his legal stance. Indeed, the witnesses—a pacifist opposed to the war in Afghanistan altogether and two law deans specializing in international law—seemed, by the conclusion of Cornyn’s questioning, to have little argument at all. To the senator’s principal question, “Did they agree that all lawful means to gather intelligence likely to save American lives should be permitted?,” they all answered affirmatively.

By every measure, Harold Koh, the dean of Yale Law School, is one of the academy’s most respected internationalists. So it was troubling when, in testimony, he persisted in rebuking Gonzales for finding that the war on terror presents a “new paradigm [that] renders obsolete Geneva’s strict limitations on questioning of enemy prisoners.” After Cornyn patiently documented that multiple international scholars had refused to apply Geneva to terrorists, that President Reagan had expressly rejected an amendment to the treaty in the 1980s that would have done so, and that multiple courts have since sided with the Gonzales legal conclusion, Dean Koh conceded: “Well, they fall under Geneva, but they are not POWs.”

Shortly after that, the dean fell silent. Alberto Gonzales merits the confirmation of the Senate and John Cornyn is a senator well worth watching.³⁸

For those who were unable to attend the hearing or to watch it on C-SPAN, we provide relevant portions of the hearing transcript here:

Senator Cornyn. It is not every day that you get to ask the legal questions of the deans, of a couple of law school deans. And Mr. Chairman, they would not let me into Yale Law School, so I did not even bother trying to apply, because I was not qualified. So it is a great honor to be here with such—

Admiral Hutson. We would have been glad to have at Franklin Pierce Law Center, Senator.

Senator Cornyn. Well, it is great to be here with such distinguished legal minds. But, you know, I asked earlier Judge Gonzales—I think it was—whether lawyers disagree about even the matters as important as what you have testified here today, Dean Koh and Dean Hutson. And we already, I believe, have established that there are legal scholars and international law experts who hold a contrary opinion to the one you have expressed today, for example, Dean Koh, with regard to the applicability of the Geneva Convention to terrorists. Would you concede the point that there are respectable legal scholars who hold a contrary opinion?

Mr. Koh. Yes. And I think that you have to define exactly what you mean—the applicability to al Qaeda, the applicability to Taliban. There is a different nose count on each one.

Senator Cornyn. I understand your distinction. But let us talk about al Qaeda first . . . you take the position that Geneva applies to al Qaeda. Is that correct, sir?

Mr. Koh. I take the position that Geneva applies to people who are captured and a tribunal could quickly determine that someone is al Qaeda. And, as for example in the case of Mousawi, he could then be turned over to a criminal proceeding.

Senator Cornyn. But for example, if there is a status hearing to determine the status of an enemy combatant, and they are determined to be, at that status hearing, a member of al Qaeda, would they be entitled to the protections of the Geneva Convention, in your opinion, Dean Koh?

38. Douglas W. Kmiec, *A Tortured Issue: Sorting through the Gonzales confusion*, NAT'L REV. ONLINE, Jan. 18, 2005, at <http://www.nationalreview.com/comment/kmiec200501181125.asp>.

Mr. Koh. Well, they fall under Geneva, but *they are not POWs*, and they should then be treated as common criminals and prosecuted.

Senator Cornyn. But nevertheless entitled to humane treatment. Is that correct?

Mr. Koh. Yes.

Senator Cornyn. Okay. And Dean Hutson, do you have a contrary view, or do you take the same position?

Admiral Hutson. I take the same view.

. . . .

Senator Cornyn. Well, let me get back, before we digress too much, to my earlier point, and that is that lawyers disagree. I mean, that is one of the things that attract some of us to the law, either as law professors, as practitioners, or as judges. For example, Dean Koh, you have a colleague at Yale Law School, Ruth Wedgwood, do you not?

Mr. Koh. She has left Yale and gone to Johns Hopkins.

Senator Cornyn. Okay. But at one time she was at Yale. Do you regard her as an expert in international law, including some of the issues we are talking about here, the applicability of Geneva?

Mr. Koh. She is a friend and colleague of mine with whom I often disagree on points of law.

Senator Cornyn. Exactly. That is really my point. And you do know that she has filed—she joined, along with former Carter administration officials, an amicus brief in *Shafiq Rasul v. George Bush* and argued, for example, that “[t]he President’s conclusion that [the] members of al Qaeda and the Taliban are unlawful combatants is clearly correct.”

Therein lies your disagreement, is that correct?

Mr. Koh. But I think you make an important point, Senator, which is disputes among lawyers are often resolved at the Supreme Court. In that case, the Bush administration’s position in *Rasul* was rejected definitively by the Supreme Court.

Senator Cornyn. Certainly not on the basis of Geneva Convention applicability?

Mr. Koh. The issue was sent to a habeas corpus proceeding, and Justice Souter, in another opinion issued that day, suggested the question that the issue of Geneva could be raised there.

Senator Cornyn. Sure. And one judge does not make a disposition on a controlling issue of law. You would agree with that, would you not?

Mr. Koh. I think we are moving to a definitive resolution of these issues, but I think that these issues are going to continue to be disputed and resolved in the courts.

Senator Cornyn. . . . Would you agree, Dean Koh, [that] Federal judges, have decided in three different cases that the President's position and Judge Gonzales's position on the Geneva Convention is correct? Are you aware of that?

Mr. Koh. If one of those cases is the Padilla case, that case was reversed by the Second Circuit. If another case—

Senator Cornyn. But for lack of jurisdiction, right? . . .

Mr. Koh. And I think you also need to include into the mix Judge Robertson's opinion in the D.C. Circuit, which has in part suspended the military commission proceeding precisely because of the Geneva Conventions. And—

Senator Cornyn. Is that the one that is on appeal right now?

Mr. Koh. Yes. And then—

Senator Cornyn. Well for the record, the ones I am referring to are the *Arnaout* case, the *John Walker Lindh* case, the American Taliban—

Mr. Koh. Which is a plea bargain.

Senator Cornyn. Well, I beg your pardon, sir. It is 212 F.Supp.2d 541. It is not a plea bargain. This is the one where he claims immunity from prosecution by virtue of his being protected by the Geneva Convention and a POW, but the court held he was not entitled to the protection of the Geneva Convention.

[Dean Koh chooses not to respond.]

Mr. Chairman, given the late hour and my commitment to you not to go much farther than a couple of more questions, we will save all these interesting discussions perhaps for a later time. But thank you.