

January 8, 2018

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

I write regarding the nomination of Howard C. Nielson to the United States District Court for the District of Utah. Human Rights First has serious concerns about Mr. Nielson's qualifications for this position, and we urge you to carefully and fully examine his record before advancing his nomination.

In 2005, while serving as Deputy Assistant Attorney General at the Office of Legal Counsel (OLC), Mr. Nielson wrote a legal memorandum entitled "Whether Persons Captured and Detained in Afghanistan are "Protected Persons" under the Fourth Geneva Convention."<sup>1</sup> In his memo, Mr. Nielson determined that civilians captured and detained by the United States are not entitled to the protections of that Convention unless they are being held in the physical territory of the United States. This finding necessarily excluded Iraqi and Afghan detainees being held overseas at the time as well as the vast majority of civilians that would ever be held by the United States, as most American wars are fought overseas.

Mr. Nielson's determination is in direct contradiction to clearly established law. In *Hamdan v. Rumsfeld* in 2006, the Supreme Court noted that when the Geneva Conventions were drafted, they were intentionally broad, so as not to limit their protections.<sup>2</sup> One law of war expert, a former international lawyer at the State Department, wrote the following of Nielson's memo: "rather than being an effort to provide rigorous, candid, and objective legal advice, the memorandum is actually an exercise in shoddy, results-oriented advocacy poorly masked as legal analysis."<sup>3</sup>

In addition, Mr. Nielson has a worrisome history regarding torture and abusive treatment of detainees held in U.S. custody. During his time at the OLC, Mr. Nielson worked for Steven Bradbury, who is widely known now as the author of several of the "torture memos" that provided the legal justification for the CIA's use of torture following the attacks of September 11<sup>th</sup>.<sup>4</sup> Mr. Bradbury's torture memos are widely discredited – including by officials who worked with him at the time – as incorrect, inappropriate, and results-oriented, and they have been withdrawn. However, in 2007, Mr. Nielson responded to criticism of the torture memos with a *Washington Post* Letter to the Editor, arguing that Mr. Bradbury was a "careful lawyer of unimpeachable integrity and sound judgment" who "always strives to get the law right."<sup>5</sup> Mr. Nielson also suggested in that letter that he may have worked with Mr. Bradbury on some of the torture memos.

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<sup>1</sup> <https://www.justice.gov/sites/default/files/olc/legacy/2009/12/30/aclu-ii-080505.pdf>

<sup>2</sup> <https://www.supremecourt.gov/opinions/05pdf/05-184.pdf>

<sup>3</sup> <https://www.justsecurity.org/50739/parsing-howard-nielsons-sources-thesis-support/>

<sup>4</sup> <https://www.politico.com/story/2017/11/14/bradbury-confirm-torture-memos-244897>

<sup>5</sup> [http://www.washingtonpost.com/wp-dyn/content/article/2007/10/11/AR2007101102148\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/10/11/AR2007101102148_pf.html)

Before advancing his nomination, the committee should determine the full extent of Mr. Nielson's legal views on whether it is permissible to torture or otherwise abuse detainees, and what role, if any, he had in the development of the infamous "torture memos." Federal judges enjoy lifetime appointments and must maintain the public's trust through impartial application of the law. Mr. Nielson has not demonstrated his ability to do so and should not be confirmed until he does.

Sincerely,

Raha Wala  
Director for National Security Advocacy  
Human Rights First