THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

February 2, 2002

MEMORANDUM

TO: Counsel to the President

FROM: William H. Taft, IV WHT

SUBJECT: Comments on Your Paper on the Geneva Convention

The paper should make clear that the issue for decision by the President is whether the Geneva Conventions apply to the conflict in Afghanistan in which U.S. armed forces are engaged. The President should know that a decision that the Conventions do apply is consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years. It is consistent with the advice of DOS lawyers and, as far as is known, the position of every other party to the Conventions. It is consistent with UN Security Council Resolution 1193 affirming that "All parties to the conflict (in Afghanistan) are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions ..." It is not inconsistent with the DOJ opinion that the Conventions generally do not apply to our world-wide effort to combat terrorism and to bring al Qaeda members to justice.

From a policy standpoint, a decision that the Conventions apply provides the best legal basis for treating the al Qaeda and Taliban detainees in the way we intend to treat them. It demonstrates that the United States bases its conduct not just on its policy preferences but on its international legal obligations. Agreement by all lawyers that the War Crimes Act does not apply to our conduct means that the risk of prosecution under that statute is negligible. Any small benefit from reducing it further will be purchased at the expense of the men and women in our armed forces that we send into combat. A decision that the Conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged

deprives our troops there of any claim to the protection of the Convention in the event they are captured and weakens the protections afforded by the Conventions to our troops in future conflicts.

The structure of the paper suggesting a distinction between our conflict with al Qaeda and our conflict with the Taliban does not conform to the structure of the Conventions. The Conventions call for a decision whether they apply to the conflict in Afghanistan. If they do, their provisions are applicable to all persons involved in that conflict - al Qaeda, Taliban, Northern Alliance, U.S. troops, civilians, etc. If the Conventions do not apply to the conflict, no one involved in it will enjoy the benefit of their protections as a matter of law.

Status of Legal Discussions re Application of Geneva Convention to Taliban and al Qaeda

1. Legal Conclusion re War Crimes Act Liability

- All lawyers involved in these discussions agree that the War Crimes Act does not apply to any actions taken by U.S. officials with respect to al Qaeda or Taliban detainees.

2. Applicability of GPW to Conflict With al Qaeda

- DOJ lawyers have concluded as matter of law that our conflict with al Qaeda, regardless of where it is carried out, is not covered by GPW. Lawyers from DOD, WHC, and OVP support that legal conclusion.
  - DOJ, DOD, WHC, and OVP lawyers believe that this conclusion is desirable from a domestic law standpoint because it provides the best possible insulation from any misapplication of the War Crimes Act to the conflict with al Qaeda, whether in Afghanistan or elsewhere.
  - DOJ, DOD, WHC, and OVP lawyers further believe that this conclusion is appropriate for policy reasons because it emphasizes that the worldwide conflict with al Qaeda is a new sort of conflict, one not covered by GPW or some other traditional rules of warfare.
- DOS lawyers believe that GPW applies to our treatment of al Qaeda members captured in Afghanistan on the theory that GPW applies to the conflict in Afghanistan, not to particular individuals or groups.
- JCS lawyers do not object to DOJ's legal conclusion, provided that JCS' policy concerns are addressed by statements that (1) the U.S. will treat all detainees as if the convention applied; (2) emphasize the importance we attach to the convention; and (3) emphasize our expectation that all other countries will treat our armed forces consistent with the convention.

3. Applicability of GPW to Conflict With the Taliban

- DOJ, WHC and OVP lawyers agree that the President has authority to determine to suspend GPW as between the U.S. and Afghanistan based on a conclusion that Afghanistan is a failed state.
- DOS lawyers disagree with this conclusion and oppose such a determination.
- JCS lawyers oppose the determination on policy grounds to the extent that those policy considerations are not addressed as set forth in the last bullet of 1. above.
- All ~~relevant~~ lawyers agree that ~~(a)~~ Taliban detainees are not POWs ~~and (b) they do not fit within the class of those entitled to any of the other (i.e., non-POW) protections of GPW~~. Thus all ~~relevant~~ lawyers agree that Taliban detainees will not benefit at all from GPW, whether or not GPW is suspended.

- DOJ lawyers believe that it is desirable to adhere to the President's determination of January 18 that GPW does not apply to our conflict with the Taliban in order to provide the best possible level of protection against misapplication of the War Crimes Act. OVP, DOD and WHC lawyers agree that the President's January 18 determination provides the best possible level of protection.

Omit.
1. nuclear this sentence

4. POW Status

- The lawyers involved all agree that al Qaeda or Taliban soldiers are presumptively not POWs, consistent with the President's determination of January 18.

5. Further Screening

- DOJ, WHC, and OVP lawyers believe ~~that the President has definitively determined~~ that al Qaeda and Taliban soldiers who come under U.S. control are not entitled to POW status. ~~They further believe that this determination is conclusive~~ and that no procedures are needed for further screening of any al Qaeda or Taliban detainees. They also believe that non-POW status affords the flexibility to release or transfer any prisoner determined not to be an appropriate candidate for detention, e.g., because he is a low level recruit who poses no continuing threat and who has no relevant information.

The question is being reviewed

- DOD, JCS and DOS lawyers believe that, in the unlikely event that "doubt should arise" as to whether a particular detainee does not qualify for POW status, we should be prepared to offer additional screening on a case-by-case basis, either *pursuant to* Article 5 of GPW (to the extent the convention applies) or *consistent with* Article 5 (to the extent it does not). [The National Security Adviser has advised the Canadian government that this is our policy.]

I confirm

6. CIA Issues

- The lawyers involved all agree that the CIA is bound by the same legal restrictions as the U.S. military.
- They further agree that the CIA enjoys the same high level of protection from liability under the War Crimes Act as the U.S. military.
- CIA lawyers believe that, to the extent that GPW's protections do not apply as a matter of law but those protections are applied as a matter of policy, it is desirable to circumscribe that policy so as to limit its application to the CIA. The other lawyers involved did not disagree with or object to CIA's view.

X. I don't think the we should adopt the Justice position

(A) [redacted bullets]

- DOS lawyers believe this conclusion is desirable from a domestic and international law standpoint because it provides the best legal basis for our detailed treatment of the detainees and strengthens the future counter protections of our forces in Afghanistan and other conflicts.
- DOS lawyers further believe this conclusion is appropriate for policy reasons because it emphasizes that even in the context of conflict the United States lives its conduct on its international treaty obligations and the rule of law, not just its policy preferences.

Insert A

- DOS lawyers believe this conclusion is desirable from a domestic and international law standpoint because it provides the best legal basis for our intended treatment of the detainees and strengthens the Geneva Convention protections of our forces in Afghanistan and other conflicts.

- DOS lawyers further believe this conclusion is appropriate for policy reasons because it emphasizes that even in a new sort of conflict the United States bases its conduct on its international treaty obligations and the rule of law, not just on its policy preferences.