

Washington, D.C. 20520



MEMORANDUM

TO: Counsel to the President
Assistant to the President for National Security
Affairs

FROM: Colin L. Powell

[Handwritten signature] 26/11

SUBJECT: Draft Decision Memorandum for the President on
the Applicability of the Geneva Convention to the
Conflict in Afghanistan

I appreciate the opportunity to comment on the draft memorandum. I am concerned that the draft does not squarely present to the President the options that are available to him. Nor does it identify the significant pros and cons of each option. I hope that the final memorandum will make clear that the President's choice is between

Option 1: Determine that the Geneva Convention on the treatment of Prisoners of War (GPW) does not apply to the conflict on "failed State" or some other grounds. Announce this position publicly. Treat all detainees consistent with the principles of the GPW;

and

Option 2: Determine that the Geneva Convention does apply to the conflict in Afghanistan, but that members of al Qaeda as a group and the Taliban individually or as a group are not entitled to Prisoner of War status under the Convention. Announce this position publicly. Treat all detainees consistent with the principles of the GPW.

The final memorandum should first tell the President that both options have the following advantages - that is there is no difference between them in these respects:

- Both provide the same practical flexibility in how we treat detainees, including with respect to interrogation and length of the detention.
- Both provide flexibility to provide conditions of detention and trial that take into account constraints such as feasibility under the circumstances and necessary security requirements.
- Both allow us not to give the privileges and benefits of POW status to al Qaeda and Taliban.
- Neither option entails any significant risk of domestic prosecution against U.S. officials.

The memorandum should go on to identify the separate pros and cons of the two options as follows:

Option 1 - Geneva Convention does not apply to the conflict

Pros:

- This is an across-the-board approach that on its face provides maximum flexibility, removing any question of case-by-case determination for individuals.

Cons:

- It will reverse over a century of U.S. policy and practice in supporting the Geneva conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general.
- It has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy.
- It will undermine public support among critical allies, making military cooperation more difficult to sustain.
- Europeans and others will likely have legal problems with extradition or other forms of cooperation in law enforcement, including in bringing terrorists to justice.

- It may provoke some individual foreign prosecutors to investigate and prosecute our officials and troops.
- It will make us more vulnerable to domestic and international legal challenge and deprive us of important legal options:

- It undermines the President's Military Order by removing an important legal basis for trying the detainees before Military Commissions.

- We will be challenged in international fora (UN Commission on Human Rights; World Court; etc.).

- The Geneva Conventions are a more flexible and suitable legal framework than other laws that would arguably apply (customary international human rights, human rights conventions). The GPW permits long-term detention without criminal charges. Even after the President determines hostilities have ended, detention continues if criminal investigations or proceedings are in process. The GPW also provides clear authority for transfer of detainees to third countries.

- Determining GPW does not apply deprives us of a winning argument to oppose habeas corpus actions in U.S. courts.

Option 2 - Geneva Convention applies to the conflict

Pros:

- By providing a more defensible legal framework, it preserves our flexibility under both domestic and international law.
- It provides the strongest legal foundation for what we actually intend to do.
- It presents a positive international posture, preserves U.S. credibility and moral authority by taking the high ground, and puts us in a better position to demand and receive international support.

- It maintains POW status for U.S. forces, reinforces the importance of the Geneva Conventions, and generally supports the U.S. objective of ensuring its forces are accorded protection under the Convention.
- It reduces the incentives for international criminal investigations directed against U.S. officials and troops.

Cons:

- If, for some reason, a case-by-case review is used for Taliban, some may be determined to be entitled to POW status. This would not, however, affect their treatment as a practical matter.

I hope that you can restructure the memorandum along these lines, which it seems to me will give the President a much clearer understanding of the options available to him and their consequences. Quite aside from the need to identify options and their consequences more clearly, in its present form, the draft memorandum is inaccurate or incomplete in several respects. The most important factual errors are identified on the attachment.

Purpose

(Second paragraph) The Secretary of State believes that al Qaeda terrorists as a group are not entitled to POW status and that Taliban fighters could be determined not to be POWs either as a group or on a case-by-case basis.

Legal Background

(First bullet) The Memorandum should note that any determination that Afghanistan is a failed state would be contrary to the official U.S. government position. The United States and the international community have consistently held Afghanistan to its treaty obligations and identified it as a party to the Geneva Conventions.

(Second paragraph) The Memorandum should note that the OLC interpretation does not preclude the President from reaching a different conclusion. It should also note that the OLC opinion is likely to be rejected by foreign governments and will not be respected in foreign courts or international tribunals which may assert jurisdiction over the subject matter. It should also note that OLC views are not definitive on the factual questions which are central to its legal conclusions.

Ramifications of Determination that GPW Does Not Apply

(Positive) The Memorandum identifies several positive consequences if the President determines the GPW does not apply. The Memorandum should note that these consequences would result equally if the President determines that the GPW does apply but that the detainees are not entitled to POW status.

(Negative. First bullet) The first sentence is correct as it stands. The second sentence is taken out of context and should be omitted. The U.S. position in Panama was that Common Article 3 of the Geneva Conventions did apply.

Response to Arguments for Applying GPW to the al Qaeda and the Taliban

(First bullet) The assertion in the first sentence is incorrect. The United States has never determined that the GPW did not apply to an armed conflict in which its forces have been engaged. With respect to the third sentence, while no-one anticipated the precise situation that we face, the GPW was intended to cover all types of armed conflict and did not by its terms limit its application.

(Fourth bullet) The point is not clear. If we intend to conform our treatment of the detainees to universally recognized standards, we will be complying with the GPW.