

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

January 23, 2002

NOTE FOR JUDGE GONZALEZ

I attach a copy of a memorandum for John Yoo, which comments on his latest draft opinion. Basically, it seems to me the issue here is whether we want to admit that we are carrying out our commitments under international law or assert that we are not required to do so while following an identical course of conduct. I fail to see the advantage in repudiating our treaty obligations when our actions conform to them. There is too much at stake to make a purely academic point at this time. (Inasmuch as our actions conform to the requirements of the Convention and in no event involve "grave breaches" or treatment inconsistent with common article 3, there is no violation of the War Crimes Act.)



William H. Taft, IV

Attachment:
As stated.

cc: Secretary of State



United States Department of State

Washington, D.C. 20520

January 23, 2002

MEMORANDUM

TO: John C. Yoo
Deputy Assistant Attorney General
Office of the Legal Counsel
United States Department of Justice

FROM: William H. Taft, IV
Legal Adviser

SUBJECT: Your Draft Memorandum of January 18

Thank you for providing us with a copy of your revised draft memorandum to William J. Haynes, II. While I appreciate that there have been a number of revisions that take into account our earlier comments, we continue to have fundamental problems with the proposed analysis.

We agree with several of the practical conclusions of your analysis. In particular, we agree that the proposed treatment of members of al Qaeda and the Taliban at Guantanamo does not entail criminal responsibility under the War Crimes Act nor does it present constitutional problems. We also agree that the proposed course of conduct is defensible under the 1949 Geneva Conventions. But we have difficulties with the analysis itself; many of ~~the fundamental legal concepts and the factual predicates~~ are in our view seriously flawed.

::

As you know from our previous comments, our view is that, as a matter of international law, the Third Geneva Convention applies to the armed conflict in Afghanistan because it "arises between" two High Contracting Parties to the Convention under common Article 2. The legal status of both al Qaeda and Taliban detainees must therefore be assessed under the Third Convention. Applying the Convention, our three principal conclusions are that:

1. Al Qaeda terrorists lack any plausible basis upon which to claim POW status. Even those terrorists captured in Afghanistan, however, are entitled to the fundamental humane treatment standards of common Article 3 of the Geneva Conventions -- the text, negotiating record, subsequent practice and legal opinion confirm that common Article 3 provides the minimal standards applicable in any armed conflict.
2. Taliban fighters -- i.e., those who truly owe their allegiance to the Taliban rather than al Qaeda -- are entitled to POW status, at least as a rebuttable presumption. Should there be doubt under Article 4 about individual Taliban fighters, as we expect there would be, an "Article 5 tribunal" should determine their appropriate status.*
3. A finding that the Third Convention applies does not preclude the possibility of deviating from the strict text as necessary for reasons, for example, of security or the temporary nature of the facilities. Deviations may not be considered violations, but even where they are, our good faith application of the rules in the severe security environment at GTMO would excuse such actions except in cases related to the grave breach and other core humane treatment provisions.

Your drafts have not persuaded us that these conclusions as to the requirements of international law are in any way unsound. Indeed you have barely addressed the requirements of international law, inasmuch as you rely on your conclusion under domestic law that it is not binding on the President in any case. Since your revised analysis is substantially similar to the earlier draft, our fundamental difficulties are for the most part already noted and explained in our earlier memorandum, and so those comments remain applicable to your revised draft. In particular, we refer you back to our comments related to your analysis of the application of the Third Convention and customary international law, with which we continue to find fundamental flaws.

* If the President or Secretary of Defense were to decide that there is no doubt that Taliban fighters as a group, like members of al Qaeda, lack any plausible basis upon which to claim POW status, we believe we could defend this approach under the Convention in the unprecedented situation we face.

We also continue to find the discussion of treaty suspension under domestic and international law to be muddled and confusing. We agree that the President has the constitutional authority, in the exercise of his constitutional functions as Commander in Chief and in the conduct of foreign affairs, to take steps that are not necessarily in compliance with treaty obligations or, for that matter, with customary international law. Yet this conclusion can be reached in a more simple and straightforward fashion, as your office has done in various opinions over the years, including your recent opinion on ABM treaty suspension.

As we understand it, your discussion of "suspension" for domestic law purposes is not about "suspension of treaties" as commonly understood, but instead refers to the potential for the President to deviate from or even breach treaty obligations from the point of view of domestic law. The analysis first refers to the President's plenary authority with respect to treaties. This by itself is sufficient to establish the President's legal authority.

But then the analysis reverts, unnecessarily, to the earlier, narrower view under which suspension must be "justified" according to particular "grounds." It concludes that "the President would have the ground to decide that the Nation's Geneva III obligations were suspended as to Afghanistan" if he determined, *inter alia*, that Afghanistan was a "failed State" and effectively "Stateless" under the Taliban. We do not believe that such analysis of "grounds" is necessary for purposes of domestic law, and the grounds asserted in this instance are unsustainable. To our knowledge, the President has not made, (and the facts would not support,) such determinations, which would be contrary to the United States' official position with respect to Afghanistan during the relevant time.

Under international law, the concept of "suspension" is very different. The analysis of suspension under international law in the draft opinion should simply be deleted, as it is unnecessary and because it suffers from so many different legal and practical problems. In essence, the current line of argument seems to be that we can treat Taliban forces now and in future in whatever way we wish in order to punish the Taliban for their past

breaches of the treaty. This argument has three major flaws: First, it depends on the ability of the President to make a retroactive determination of suspension, despite the fact that such a retroactive determination may not be allowed under governing treaty law. Second, it does not explain how such a determination with respect to the Taliban in the past would relieve us of our current obligations to the recognized government of Afghanistan in the present. The detentions in Guantanamo are not in the past, they are in the present and future, so it is our current obligations that would apply. Finally, the line of argument in the OLC opinion fails to take into account that reciprocal mistreatment is not a recognized remedy for breach under the Geneva Conventions.

Given that there is still rather fundamental disagreement on the overall analysis, little purpose would be served by noting in detail each difficulty that we have with the revised analysis. We should note, however, that in addition to our legal concerns there are also a number of factual and legal inaccuracies in your draft. We would be ready to provide you with a compilation of those we have identified.

We remain prepared to work with you to address our concerns about your draft.

cc: Judge Gonzalez