U.S. Department of Justice

Office of Legal Counsel

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e of the Deputy Assistant Attorney General

Washington, D.C. 20530

January 14, 2002

Honorable William H. Taft, IV
al Adviser
. Department of State
shington, D.C. 20520

r-Will:

Thank you for your memorandum of January 11, 2002, commenting on our Office's draft ion concerning the application of treaties and laws to al Qaeda and Taliban militia detainees. lways, we appreciate the careful consideration that you and your staff have brought to these ortant issues, and we welcome the valuable perspective brought by your expertise in matters ternational law and policy. And it goes without saying that we respect the discretion and atch with which you have brought your resources to bear on our draft opinion.

Your comments have proven quite valuable to us in our ongoing consideration of the cation of treaties and domestic laws to the question of the treatment of those captured g the Afghanistan conflict. We would like to clarify where your Office and ours appear to [redacted], you evidently agree with our conclusion in Part II of the draft Opinion that be[redacted] the al Qaeda terrorist organization would not receive the protections of the Geneva entions. Our sole area of disagreement concerns the legal status to be accorded to members Taliban militia. Second, as we understand your position, our Offices also agree that the nt detention conditions in Guantanamo Bay would constitute neither a grave breach of the va Conventions within the meaning of Article 130 of Geneva Convention III nor a violation ir common Article 3, which establish basic humanitarian standards of treatment. Although ffer on the reasons for that conclusion, we both therefore agree that the War Crimes Act, 18 . § 2441, could not be implicated by the decisions of the President and his advisers ming the current detention conditions. Our Opinion will serve as the Department of s binding interpretation of the WCA, and it will preclude any prosecution on these ds.

Although we have similar bottom lines, we differ in reasoning on the way there. After lly reviewing your memo, we cannot agree with your view that the "most important factual ptions on which [the] draft is based and its legal analysis are seriously flawed," and that its sions "are actually incorrect as well as incomplete." Your interpretation of the Geneva ntions would provide members of the Taliban militia and perhaps even members of al with the protections accorded prisoners of war (POWs). We disagree: detainees from roups do not meet the requirements of Geneva III, and the President has the constitutional ty to suspend any treaty obligations with respect to these groups, although the United

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That said, let me explain the changes we are making in our draft in response to the main thrust of your comments, which concern the treatment of members of the Taliban militia.

First. As we understand your comments, you believe that the existing facts do not demonstrate that Afghanistan indeed was a failed state. You also do not believe that the President constitutionally can suspend the operation of the Geneva Conventions. You are certainly entitled to make your case on the facts, although we disagree with your interpretation of them, since many of them involve diplomatic pronouncements rather than domestic legal judgments. We disagree, however, that with your conclusion that the President does not have the plenary constitutional power to suspend treaties at his discretion. You argue, for example, that "while most treaties to which the United States is a party can be terminated or suspended by the United States, there are some limitations in treaties or in general principles of treaty law that constrain that power." As a matter of domestic constitutional law, that statement is simply incorrect. As we have made clear both in the opinion at issue here and earlier ones,[3] the President's constitutional power to suspend treaties is plenary. It cannot be limited under the Constitution.

Nonetheless, we are rearranging the order of the argument to make clear that the failed state issue is directly linked to the power of suspension. Our analysis does not mean that Afghanistan's status as a failed state, under international law, automatically terminated the United States' treaties with that nation. If that is the reading you drew from our opinion, we wish to correct that misimpression here, and in our draft Opinion. Instead, our view is that the President has the plenary constitutional power to suspend our treaties with Afghanistan for the period preceding the installation of the provisional government under the Bonn agreement. Afghanistan's status as a failed state is the factual basis upon which the President can exercise that power. The President could also exercise that power based upon other facts, such as the developing information about the close integration between al Qaeda and the Taliban, the universal refusal to acknowledge the Taliban as a government, and the fact that the President and the other leaders of our government emphasized that our war was not with Afghanistan, but with a violent, religious militia that had given harbor to, and was sustained by, terrorists.

Suspension of the Geneva Conventions, further, does not automatically terminate all of our treaty relationships with Afghanistan, as you suggest must happen. As a constitutional matter, the President certainly has the authority to decide to suspend only selected treaties with another country while keeping others intact (as was contemplated temporarily in the case of the Anti-Ballistic Missile Treaty). Thus, the United States could consider its Geneva Convention obligations toward Afghanistan as suspended, while leaving in place our obligations towards them under the United Nations Charter, if the President so desired. Nonetheless, it is certainly true that the factual predicate for suspension of the Conventions would support the temporary suspension of other agreements with Afghanistan as well.

[3] *See* Memorandum for John Bellinger, III, Senior Associate Counsel and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty* (Nov. 15, 2001). Our Office welcomed the opportunity to work with you on this Opinion, and at the time it issued we understood you to fully agree with it.

The fact that the United States has not yet publicly suspended any treaties with Afghanistan, as your comments have catalogued, does not mean that the President cannot treat the conventions as suspended now. Obviously, the unprecedented nature of our war with al Qaeda and the Taliban meant that no immediate decision of suspension could be taken. It has taken time for our policy processes, of which our productive discussions on this and other related questions have been a part, to develop the appropriate legal responses. Diplomatic statements by our representatives in foreign affairs cannot be taken as evidence that forecloses the President's constitutional discretion to reach a judgment concerning our legal relationships with Afghanistan. Once the President decides, however, that our treaty obligations under the Geneva Conventions were inoperative, more consistent declarations of policy by the government could naturally follow. We flatly disagree with the position that because it may be "procedurally impossible at this stage" for the President to suspend the Geneva Conventions in accordance with the Vienna Convention on the Law of Treaties (which, we note, the United States has not ratified), it is therefore not within the President's constitutional authority to suspend performance of those Conventions.

Second. In a curious way, your "bottom line" comes out very close to that of our Office. You argue that the Geneva Conventions need not receive full compliance. Apparently, this is because in past conflicts we have not always met them "to the T," but nonetheless allies and international public opinion did not seem to protest.[4] You appear to believe that international public opinion would be upset only if a) we declared the Conventions did not apply, or b) we committed a grave breach of the Conventions. Hence, you conclude that the United States can deviate from the Conventions so long as we do not commit any grave breaches, which would prohibit only inhumane or egregious treatment of detainees or the deprivation of the Convention's trial procedures. On this basis, you apparently would find that the detention conditions in Guantanamo Bay would be "legal" under the Geneva Conventions.

While it presents an interesting approach to international politics, we think that theory does not work as domestic law. As a domestic legal matter, the United States either is or is not bound, *under the Supremacy Clause of the Constitution*, to obey the Geneva Convention's requirements. The President does not have the discretion to refuse to enforce certain provisions of a law but not others, unless he believes a provision violates the Constitution. His duty is simply to "take Care that the Laws be faithfully executed." It may very well be the case that the United States "did not face substantial criticism," as you say, for our failure to conform to every detail of the Geneva Conventions in the Persian Gulf, Haiti, Panama, or Grenada. But that does not present any legally-cognizable excuse – such as a right of national self-defense or unconstitutionality – that would release the President from his duty to enforce federal law.

[4] It is our understanding that your description of past practice is at odds with the facts, as supplied by our research and by memoranda of the Defense Department. Although your Office cites declarations from different wars that the United States would accord Geneva Convention III treatment to enemy prisoners, there are several examples where the United States, as a policy matter, decided not to comply with the terms of the Convention. Further, it appears that your comments sometimes confuse situations in which the United States said it would act consistently with the Geneva Conventions as a matter of policy with a situation in which we conceded that they applied as a matter of law. Our conduct in Panama provides an important example. There, the United States never conceded that the forces of Manuel Noriega qualified as POWs under the Geneva Convention, but the United States did treat them as if they were POWs as a matter of policy. To make clear the source of our facts, we will cite the Defense Department memoranda and supply you with copies of them.

While it might be convenient for the President to decide to enforce parts of a treaty but not others, it would not be fully in keeping with his constitutional responsibilities.

We may be misreading your theory. You may be arguing that the only true legal obligation imposed by the Geneva Convention is that of the basic humanitarian norms expressed in the grave breaches provision of Article 130. Of course, that reading would render the rest of the Convention either hortatory or mere surplusage. It would mean that the Convention could have ended after common article 3, and still have had the same legal effect as you propose. There is no indication in the text of the Conventions itself, or in our ratification of them, that would suggest that the bulk of the Convention's provisions were to be treated as somehow less binding than common article 3 and article 130.[5] Indeed, the treaties themselves state just the opposite: thus, Article 129 of Geneva Convention III states that "[e]ach High Contracting Party shall take measures for the suppression of *all* acts contrary to the provisions of the present Convention" *other* than grave breaches (emphasis added). We do not think that you intend to argue that the United States need only obey minimal humanitarian standards in order to be legally compliant with the Geneva Conventions in any given conflict.

To be sure, the federal War Crimes Act criminalizes only grave breaches of the Geneva Convention. We fully agree that individual criminal responsibility attaches only to grave breaches of the Convention. But that answers only the question of criminal liability under that statute. It does not address the more fundamental question whether the President must, as a domestic legal matter, adhere to the Geneva Convention. We do not take issue with your point that the United States could claim – as a matter of foreign policy – that it was obeying the Convention, and then depart from it as needs dictate, so long as we did not commit any grave breaches. You have more expertise than our Office in judging whether certain international legal arguments will be accepted by the international public opinion and different international organizations. In fact, we wish to make clear that this Office has no interest or competence in commenting on such policies. But we are afraid that your approach has confused law with policy, in which the decisionmakers may legitimately concern themselves with the effects of international public opinion. Those concerns, however, have no place as a matter of interpreting the domestic legal effect of Article II treaties, just as they would have no place in the interpretation of constitutional or statutory provisions.

As a result, in order to reach your desired outcome, you would have to agree with our interpretation of the President's constitutional authorities. In order for the United States to apply only some portions of the Geneva Convention but not others, the President must decide to suspend the inoperative provisions so as not to be in violation of his constitutional responsibility to execute the laws. We do not believe that the President must make any formal finding to this effect; it would be an automatic consequence of a decision to detain al Qaeda and Taliban militia members in the conditions we understand they will face. There is no other way, consistent with

[5] Furthermore, the suggestion in your longer memorandum that the United States may be excused from performance of what you take to be its legally binding treaty obligations because non-performance is "a matter of necessity" is simply false to most of the obligations the Conventions impose. For example, Article 17 of Geneva Convention III severely restricts the ability of the detaining Power to interrogate POWs, *e.g.*, by stating that POWs who refuse to answer other than a limited range of questions may not be "exposed to unpleasant or disadvantageous treatment of any kind." There would be no practical difficulty in instructing government law enforcement officials to refrain from questioning prisoners at Guantanamo.

the Constitution, for the President to decline to enforce portions of the Geneva Convention. In light of your comments, we will make it clear that there is constitutional support for partially suspending portions of the Geneva Conventions in the manner you suggest.

Third. Your comments strongly argue that customary international law binds the United States "under international law and potentially under domestic law." We wish to emphasize that our opinion does not address the question whether customary international law creates any international legal obligations on the United States, and we will be happy in response to your comments to make that point more clearly. Our Office's only interest in this opinion is to clarify that customary international law does not, *as a matter of domestic law*, place any limitations on the President's authority as Commander-in-Chief, Chief Executive, and sole organ of the Nation in its foreign affairs.

To the extent that your comments suggest that this is "potentially" not the case, we conclude that they are mistaken as a matter of constitutional text and structure, history, and logic. Customary international law is nowhere mentioned in the Supremacy Clause, the Take Care Clause or Article III, it does not create arising under jurisdiction in the federal courts, and it does not undergo bicameralism and presentment, as is required of all other federal law. In fact, Article I, Section 8's delegation to Congress to define and punish crimes against the law of nations makes crystal clear that customary international law can only be incorporated into federal law through legislative enactment. To show that the United States, at times, has publicly followed customary international law is besides the point for purposes of domestic legal interpretation.

We are providing this letter so that you are informed of our response to your comments. Our Office is currently editing the Opinion in line with our comments here, and he plan to send you a copy of that draft tomorrow morning. We ask that we receive any comments on that draft by c.o.b. Wednesday. Please feel free to contact either of us or Jay Bybee, the Assistant Attorney General for the Office, if we can provide you with any further information.

Sincerely,

John Yoo
Deputy Assistant Attorney General

Robert J. Delahunty
Special Counsel