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INFO MEMO

January 11, 2002, 8:10 a.m.

FOR: SECRETARY OF DEFENSE

FROM: William J. Haynes II, General Counsel *WJ Haynes II*
1/11/02

SUBJECT: Detainee status

- Will Taft (State Department's Legal Adviser – i.e., State's general counsel) wrote the attached memo to Al Gonzales, with copy to Secretary Powell. I thought you should see it in case the issue comes up today.
- Taft is commenting negatively on a draft Department of Justice memo to me, entitled "Application of Treaties and Laws to al Qaeda and Taliban Detainees."
- That draft DoJ memo concludes that neither the federal War Crimes Act (which makes it a crime to commit grave breaches of certain Geneva Convention requirements) nor the Geneva Conventions apply to the detention conditions in Guantanamo Bay or trial by military commission of al Qaeda or Taliban detainees.
- The Attorney General, acting through the author of the memo – DoJ's Office of Legal Counsel – is responsible to the President to issue binding interpretations of U.S. domestic law on the executive branch. A Treaty is both international and domestic law under the Constitution. I asked for the memo in order to solidify our legal position on these questions.
- Taft argues, among other things, that one of the conclusions of the draft memo (that Afghanistan is a "failed state") should not be made lightly, and that the consequences of the memo's conclusions can not easily be predicted.
- Taft notes that his staff and DoJ come to different conclusions on the status of Taliban military.
- Al Gonzales and I share the same view on these questions. We hope to resolve the issue conclusively very soon.
- The fact that we are having this debate is very sensitive. The consequences of our ultimate conclusion may dictate our prospective actions with respect to the detainees.

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Attachment



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THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

January 10, 2002

NOTE FOR JUDGE GONZALEZ

SUBJECT: Draft Memo from John Yoo

I received yesterday evening a copy of John Yoo's draft memo on the status of detainees. A quick reading suggests to me that at least two points in the piece require careful consideration by this department.

First, the draft presents a legal theory under which one state party to an international treaty is relieved from its treaty obligations with respect to another state party and its citizens upon making a determination that the second party is a "failed state," even while the obligations of the "failed state" and its citizens under the treaty continue in force. This theory has significant implications for the conduct of international relations and little basis in practice. Its unexpected application specifically to the Geneva Conventions in the course of an ongoing armed conflict raises particular issues that must be thoroughly reviewed.


Second, the draft undertakes to show that Afghanistan under the Taliban regime was a "failed state." The extraordinary significance of this determination is evident from the draft's conclusion that treaty obligations owed to such a state by other states lapse. Even if it were less significant, however, such a determination with regard to any foreign state should be made only by the Secretary of State or the President with the advice of the Secretary of State. It should, moreover, be based on established principles and broad foreign policy considerations, not unduly influenced by a desire - however strongly felt - to pursue a particular course of conduct in a specific set of circumstances.

Judge, these issues and some others raised in the draft, including some involved in its discussion of U.S. obligations under customary international law, are of the utmost importance. At stake is how the United States must act to be in compliance with its treaty obligations. Nor



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will U.S. courts be the only fora in which our conduct will be reviewed. We must be on sound ground. Certain violations of obligations under the Geneva Conventions are war crimes. As you know, the Office of the Legal Adviser is responsible for advising the Secretary of State and the President on matters of international law and particularly the interpretation of treaties. In considering the status of captured Taliban military and our obligations under the Geneva Conventions preliminarily, my staff had failed independently to reach the same conclusion as John Yoo's draft does. We must now consider our views in light of that draft and, as you encouraged us, attempt to reach a common position. I expect to complete our review of John Yoo's draft sometime tomorrow, Friday, and will share our thoughts with him (and you) then.



William H. Taft, IV

cc: Secretary of State
John Yoo

