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EIR Exclusive

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# Former State Department Legal Advisor Blames DOJ Lawyers for Prisoner Abuse

by Edward Spannaus

The abuse of detainees “was predictable,” as a consequence of the decision made by Department of Justice (DOJ) lawyers in early 2002 that the Geneva Conventions would not apply to al-Qaeda personnel, the State Department Legal Advisor at the time has charged.

The former Legal Advisor, William H. Taft IV, said that the Justice Department’s conclusion to disregard the Geneva Conventions “unhinged” those who were responsible for the treatment of detainees at Guantanamo, detaching them from the legal guidelines that had governed the treatment of captives by the U.S. military for decades.

Taft, who was the Legal Advisor to Secretary of State Colin Powell in 2001-05, made these charges in a March 24 keynote speech to a conference on the Geneva Conventions, at the Washington College of Law of American University.

A number of legal specialists consulted by this news service believe that Taft’s statement—which has received no news media coverage except for this news service—is the first time that any high-level current or former Administration official has acknowledged the connection between the decision to reject the application of the Geneva Conventions, and the abuse and torture of prisoners which later occurred at Abu Ghraib and elsewhere.

## The January 2002 Dispute

Taft is no Johnny-come-lately to this view. On Jan. 9, 2002, lawyers in the Justice Department’s Office of Legal Counsel (OLC) had drafted a memo to the Pentagon, arguing that neither Taliban nor al-Qaeda forces should be subject to the protections of the Geneva Conventions.

Taft and his staff hurriedly drafted a 40-page memorandum, which Taft sent to the OLC lawyers on Jan. 11, 2002, telling them that their advice was “seriously flawed,” and that their conclusions were “incorrect as well as incomplete.” The memorandum tore apart the OLC’s arguments, and warned that a determination that the Geneva Conventions did not apply, could lead to conduct by U.S. personnel that would constitute a “grave breach” of the Conventions, raising “a risk of future criminal prosecution for the U.S. civilian and military leadership and their advisors.”

Secretary of State Powell sent a memo to White House Counsel Alberto Gonzales and National Security Advisor Condoleezza Rice on Jan. 26, 2002, arguing strongly against Presidential determination that the Geneva Conventions did not apply to the conflict in Afghanistan, warning that this “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,” and outlining a series of likely adverse consequences for the United States and the conduct of U.S. foreign policy.

Powell’s recommendations were ignored, as were the recommendations of the Joint Chiefs of Staff and other senior military officers. On Feb. 7, at the urging Vice President Dick Cheney and others, President Bush issued an order declaring that the protections of the Geneva Conventions did not apply to either Taliban or al-Qaeda detainees.

## ‘It Was Predictable’

In his March 24 remarks, Taft said that, if the United States were going to depart from the law of war, “there ought to have at least been some particular justification, or at least some practical benefit for departing from this guideline.” But since neither the military nor the civilian leadership of the Pentagon saw any such justification or benefit, when they were considering the issue in January 2002, they did not propose to deviate from the requirements of the Geneva Conventions in respect to the treatment of the detainees in Guantanamo.

“The original Rules of Engagement issued to the forces fighting in Afghanistan, had rather directed that the Geneva Conventions be complied with, in the treatment of persons taken into custody, regardless of whether they were, strictly speaking, entitled to this,” Taft said. “In this respect, the rule followed the American practice in Vietnam, where the Viet Cong were treated in accordance with the Conventions, even though it was understood that this was not required.”

Taft continued:

“It has been a continuing source of amazement—and, I may add, considerable disappointment to me—that, notwithstanding the stated intention of the Pentagon’s leadership, to

comply with the requirements of the Conventions, without qualification, lawyers at the Department of Justice thought it was important to decide at that time, that the Conventions did not apply to al-Qaeda as a matter of law, and to qualify the commitment to apply them as a matter of policy to situations where this was 'appropriate' and 'consistent with military necessity.'

"This unsought conclusion unhinged those responsible for the treatment of the detainees in Guantanamo from legal guidelines for interrogation of detainees reflected in the Conventions, and embodied in the Army Field Manual for decades.

"Set adrift in uncharted waters, and under pressure from their leaders to develop information on the plans and practices of al-Qaeda, it was predictable that those managing the interrogation would eventually go too far, and news reports now indicate that, from time to time, that happened."

Karen Greenberg, director of New York University's Center on Law and Security, and co-author of the recently issued book *The Torture Papers*, told *EIR* that "Taft remains a courageous voice of reason and restraint in the discussion of the treatment of detainees."

She added: "He agrees with those who have asserted that the decision that the Geneva Conventions did not apply to al-Qaeda in certain circumstances not only freed those responsible for the treatment of detainees from legal constraints, but set a tone for behavior that was well out of compliance with the Geneva Conventions and the Army Field Manuals for Interrogation."

### **Military Lawyers 'Standing in the Way'**

More light on the dynamics that were operating between civilian and military lawyers during this period, was shed by the Navy's top legal officer at the time, recently retired Adm. Michael Lohr, who was the Judge Advocate General (JAG) for the Navy.

Speaking at the American Society of International Law (ASIL) in Washington on April 1, Lohr said that military lawyers were viewed with suspicion by civilians in the Pentagon, and were accused of "standing in the way of getting information" from terrorists. Lohr said that it was "not easy" in 2002-03 for officers who supported compliance with the Geneva Conventions; they were viewed as non-supporting of the war on terror, by the Intelligence and Policy people. (Although Lohr didn't mention any names, the two Undersecretaries of Defense for Intelligence, and for Policy, at this time were Stephen Cambone and Doug Feith, respectively.)

Lohr was in this position during the deliberations of the Pentagon Working Group on detention and interrogation; he said that he cannot discuss what happened there, although it has been reported that the JAGs were completely frozen out of the discussions. Any memos that he wrote, are still classified. Lohr said, again being cautious, that the military lawyers were



*Former State Department Legal Advisor William H. Taft IV said that abuse of prisoners "was predictable" when Justice Department lawyers overturned decades of the U.S. military's adherence to the Geneva Conventions.*

not trusted by the Pentagon civilians, attributing this information to "newspapers," since he cannot discuss much of what he knows.

### **Criminal Prosecution Possible**

Speaking on the same ASIL panel as Lohr, international law expert Scott Horton, a lecturer at Columbia University's School of Law, also raised the possibility of criminal prosecution of Justice Department lawyers. The United States is facing a crisis around the torture and abuse of prisoners, Horton said, pointing out that the DOJ has refused prosecution in a number of cases of abuse. Because of its role in writing memoranda saying that interrogation methods such as "waterboarding" were permitted to be used, it is impossible for the Justice Department to conduct a fair investigation, Horton charged.

"There is no basis for an argument that the Department of Justice lawyers involved, have immunity from potential criminal liability," Horton stated. "My belief is that legal ethics issues"—the topic of the panel discussion—"are the least of their problems."

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