

## Robinson, Lawan

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**From:** Jason\_Callen@ca7.uscourts.gov  
**Sent:** Wednesday, May 26, 2004 1:47 PM  
**To:** Goldsmith, Jack  
**Subject:** Re: favor



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I assume that you have seen John Yoo's op-ed in the Wall St. Journal on the Geneva Conventions. The article was of course well-written and I agree with Yoo's overall response to the concerns raised regarding Iraq, but I thought I should bring one part of the commentary to your attention. In talking about the restrictions placed by GC 4 on the treatment of detainees in Iraq, Yoo cites to paragraph 1 of Article 5 of GC 4:

Article 5 of the Fourth Geneva Convention, which governs the treatment of civilians in occupied territories, states that if a civilian "is definitely suspected of or engaged in activities hostile to the security of the States, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in favor of such individual person, be prejudicial to the security of such State."...

Yoo then concludes that b/c of the limitations outlined in paragraph 1, Iraq detainees are entitled to only limited rights under GC 4:

Nonetheless, Art. 5 makes clear that if an Iraqi civilian who is not a member of the armed forces, has engaged in attacks on Coalition forces, the Geneva Convention permits the use of more coercive interrogation approaches to prevent future attacks.

This analysis is problematic b/c paragraph 1 of Article 5 is specifically addressed to detainees captured in the home territory of a belligerent power (this is why paragraph 1 begins w/ "Where, in the territory of a Party to the conflict..."). An example of such a detained person would have been a Japanese citizen detained in the U.S. during WW2. Yoo is right that individuals detained in the home territory of a belligerent power have far more limited rights under the Convention. Paragraph 2 of Art 5, however, specifically addresses detainees in occupied territory:

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

This paragraph (and not paragraph 1) should guide determinations on the rights available to detainees in Iraq. This is significant b/c paragraph 2 only talks about denying detainees rights of communication- there is no suggestion that detainees may be denied other rights provided under the Convention.

Sorry to bother you with all this but I thought I might bring this to your attention in case this issue had come up.

Jason