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Brunson, Anne C (L-LM)

From: Stewart, David P (SBU)
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To: Dolan, JoAnn (SBU)
Subject: FW: John Yoo WSJ Op Ed

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-----Original Message-----

From: intlaw-bounces@list.mail.Virginia.EDU [mailto:cpowell@law.fordham.edu]
Sent: Friday, May 28, 2004 10:52 PM
To: Julian.G.Ku@hofstra.edu; GOLOVED@juris.law.nyu.edu; intlaw@virginia.edu; gfox@wayne.edu
Subject: John Yoo WSJ Op Ed

In case you haven't seen it, here is Yoo's response to criticism of his January 2002 memo, published in an op-ed in Wednesday's Wall Street Journal, in which he seeks to differentiate Guantanamo from Abu Ghraib....

* Catherine Powell

Terrorists Have No Geneva Rights
 Wall Street Journal
 By JOHN YOO
 May 26, 2004; Page A16

In light of the Abu Ghraib prison scandal, critics are arguing that abuses of Iraqi prisoners are being produced by a climate of disregard for the laws of war. Human rights advocates, for example, claim that the mistreatment of Iraqi prisoners is of a piece with President Bush's 2002 decision to deny al Qaeda and Taliban fighters the legal status of POWs under the Geneva Conventions. Critics, no doubt, will soon demand that reforms include an extension of Geneva standards to interrogations at Guantanamo Bay. The effort to blur the lines between Guantanamo and Abu Ghraib reflects a deep misunderstanding about the different legal regimes that apply to Iraq and the war against al Qaeda. It ignores the unique demands of the war on terrorism and the advantages that a facility such as Guantanamo can provide. It urges policy makers and the Supreme Court to make the mistake of curing what could prove to be an isolated problem by disarming the government of its principal weapon to stop future terrorist attacks. Punishing abuse in Iraq should not return the U.S. to Sept. 10, 2001 in the way it fights al Qaeda, while Osama bin Laden and his top lieutenants remain at large and continue to plan attacks. It is important to recognize the differences between the war in Iraq and the war on terrorism. The treatment of those detained at Abu Ghraib is governed by the Geneva Conventions, which have been signed by both the U.S. and Iraq. President Bush and his commanders announced early in the conflict that the Conventions applied. Article 17 of the Third Geneva Convention, which applies to prisoners of war clearly state that: "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever." This provision would prohibit some interrogation methods that could be used in American police stations. One thing should remain clear. Physical abuse violates the Conventions. The armed forces have long operated a system designed to investigate violations of the laws of war, and ultimately to try and punish the offenders. And it is important to let the military justice system run its course. 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." To be sure, Art. 31 of the Fourth Convention prohibits any "physical or moral coercion" of civilians "to obtain information from them," and there is a clear prohibition of torture, physical abuse, and denial of medical care, food, and shelter. 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.

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A response to criminal action by individual soldiers should begin with the military justice system, rather than efforts to impose a one-size-fits-all policy to cover both Iraqi saboteurs and al Qaeda operatives. That is because the conflict with al Qaeda is not governed by the Geneva Conventions, which applies only to international conflicts between states that have signed them. Al Qaeda is not a nation-state, and its members-as they demonstrated so horrifically on Sept. 11, 2001 -- violate the very core principle of the laws of war by targeting innocent civilians for destruction. While Taliban fighters had an initial claim to protection under the Conventions (since Afghanistan signed the treaties), they lost POW status by failing to obey the standards of conduct for legal combatants: wearing uniforms, a responsible command structure, and obeying the laws of war.

As a result, interrogations of detainees captured in the war on terrorism are not regulated under Geneva. This is not to condone torture, which is still prohibited by the Torture Convention and federal criminal law. Nonetheless, Congress's definition of torture in those laws-the infliction of severe mental or physical pain-leaves room for interrogation methods that go beyond polite conversation. Under the Geneva Convention, for example, a POW is required only to provide name, rank, and serial number and cannot receive any benefits for cooperating.

The reasons to deny Geneva status to terrorists extend beyond pure legal obligation. The primary enforcer of the laws of war has been reciprocal treatment: We obey the Geneva Conventions because our opponent does the same with American POWs. That is impossible with al Qaeda. It has never demonstrated any desire to provide humane treatment to captured Americans. If anything, the murders of Nicholas Berg and Daniel Pearl declare al Qaeda's intentions to kill even innocent civilian prisoners. Without territory, it does not even have the resources to provide detention facilities for prisoners, even if it were interested in holding captured POWs.

It is also worth asking whether the strict limitations of Geneva make sense in a war against terrorists. Al Qaeda operates by launching surprise attacks on civilian targets with the goal of massive casualties. Our only means for preventing future attacks, which could use WMDs, is by acquiring information that allows for pre-emptive action. Once the attacks occur, as we learned on Sept. 11, it is too late. It makes little sense to deprive ourselves of an important, and legal, means to detect and prevent terrorist attacks while we are still in the middle of a fight to the death with al Qaeda. Applying different standards to al Qaeda does not abandon Geneva, but only recognizes that the U.S. faces a stateless enemy never contemplated by the Conventions.

This means that the U.S. can pursue different interrogation policies in each location. In fact, Abu Ghraib highlights the benefits of Guantanamo. We can guess that the unacceptable conduct of the soldiers at Abu Ghraib resulted in part from the dangerous state of affairs on the ground in a theater of war. American soldiers had to guard prisoners on the inside while receiving mortar and weapons fire from the outside. By contrast, Guantanamo is distant from any battlefield, making it far more secure. The naval station's location means the military can base more personnel there and devote more resources to training and supervision.

A decision by the Supreme Court to subject Guantanamo to judicial review would eliminate these advantages. The Justices are currently considering a case, argued last month, which seeks to extend the writ of habeas corpus to al Qaeda and Taliban detainees at Guantanamo. If the Court were to extend its reach to the base, judges could begin managing conditions of confinement, interrogation methods, and the use of information. Not only would this call on the courts to make judgments and develop policies for which they have no expertise, but the government will be encouraged to keep its detention facilities in the theater of conflict. Judicial over-confidence in intruding into war decisions could produce more Abu Ghraibs in dangerous combat zones, and remove our most effective means of preventing future terrorist attacks.

Mr. Yoo, a law professor at Berkeley, is a scholar at the American Enterprise Institute, and a former Bush Justice Department official.

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