MEMORANDUM

TO: Counsel to the President

FROM: William H. Taft, IV

SUBJECT: Comments on Your Paper on the Geneva Convention

The paper should make clear that the issue for decision by the President is whether the Geneva Conventions apply to the conflict in Afghanistan in which U.S. armed forces are engaged. The President should know that a decision that the Conventions do apply is consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years. It is consistent with the advice of DOJ lawyers and, as far as is known, the position of every other party to the Conventions. It is consistent with UN Security Council Resolution 1193 affirming that "All parties to the conflict [in Afghanistan] are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions ..." It is not inconsistent with the DOJ opinion that the Conventions generally do not apply to our world-wide effort to combat terrorism and to bring al Qaeda members to justice.

From a policy standpoint, a decision that the Conventions apply provides the best legal basis for treating the al Qaeda and Taliban detainees in the way we intend to treat them. It demonstrates that the United States bases its conduct not just on its policy preferences but on its international legal obligations. Agreement by all lawyers that the War Crimes Act does not apply to our conduct means that the risk of prosecution under that statute is negligible. Any small benefit from reducing it further will be purchased at the expense of the men and women in our armed forces that we send into combat. A decision that the Conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged
deprives our troops there of any claim to the protection of the Convention in the event they are captured and weakens the protections afforded by the Conventions to our troops in future conflicts.

The structure of the paper suggesting a distinction between our conflict with al Qaeda and our conflict with the Taliban does not conform to the structure of the Conventions. The Conventions call for a decision whether they apply to the conflict in Afghanistan. If they do, their provisions are applicable to all persons involved in that conflict - al Qaeda, Taliban, Northern Alliance, U.S. troops, civilians, etc. If the Conventions do not apply to the conflict, no one involved in it will enjoy the benefit of their protections as a matter of law.