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Obama Embraces 'Transnational' Law

The Senate never approved Protocol 1 of the Geneva Convention.

By DOUGLAS J. FEITH

This month, President Barack Obama declared he has a "legal obligation" to treat wartime detainees according to provisions of a treaty that the United States has never ratified. The maneuver raises a basic question: Who makes law for Americans?

The standard answer, drawing on the Constitution, is Congress. One of American democracy's quaint conceits, after all, is that laws should be made by the people American voters have elected.

But that old-school answer doesn't satisfy those in the progressive "transnational legal norms" movement. Frustrated that elected officials often refuse to enact the measures they favor, these reformers aim to persuade judges that progressive ideas on war crimes, arms control, the death penalty and other matters should be accepted as rights. They encourage judges to ground these rights not in local statutes produced by legislators, but in treaties, laws and court decisions of other countries, in academic writing, and in customary international law.

This legal movement, potent in Europe, has had less success in this country, where citizens fervently safeguard democratic accountability and national sovereignty. But Mr. Obama has brought some eminent transnational law supporters into his administration, including the chief lawyer at the State Department, Harold Koh. And the president's announcement about the proper way to treat wartime detainees is a precedent-setting endorsement of transnational legal theory.

The move hasn't gone unnoticed. Sen. Jon Kyl (R., Ariz.) has already criticized the announcement, and more opposition can be expected from senators protective of their advice-and-consent authority on treaties.

The treaty Mr. Obama cited is Protocol 1 to the Geneva Conventions on the laws of war. Drafted in the mid-1970s, the Carter administration signed Protocol 1, but President Ronald Reagan, after years of interagency review, concluded that it is "fundamentally and irreconcilably flawed," because it contains provisions that would "undermine humanitarian law and endanger civilians in war."



Associated Press

President Barack Obama makes a statement about limited military action against Libya.

Reagan noted that one of its provisions would undo the traditional distinction between international and non-international conflicts. Another would grant prisoner-of-war status and other privileges to irregular forces—even if they fight in civilian garb and violate the laws of war by using terrorism.

In opposing Protocol 1, Reagan was accepting the unanimous recommendation of his top military and civilian advisers, and no later president reversed Reagan's decision. The Senate has never approved ratification of Protocol 1, so it never became U.S. law.

Yet Mr. Obama declared that America has a "legal obligation" to adhere to a portion of Protocol 1: Article 75, which establishes standards for detainee treatment. While acknowledging that the U.S. government still has "significant concerns" about Protocol 1, the president says he accepts Article 75 as consistent with current American practice. His key conclusion: "The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well."

What makes this statement so controversial is not the substance of Article 75 (the protection it gives detainees has bipartisan support). Rather, it is the fact that the president is embracing a treaty provision never approved by the Senate.

The administration's language carefully tracked the formula by which the practice of nations can win acceptance as customary international law. Such law is based on the idea that some practices—like the ancient rule against killing diplomats—have been adhered to nearly universally for so long as legal obligations that they have achieved the status of law throughout the world. Since the beginning of the American republic, presidents and judges have accepted certain practices as customary international law deserving of respect by U.S. officials and courts. But the standards for qualifying have to be extremely high, for obvious reasons. The lifetime of Protocol 1—a few decades—doesn't qualify as a long time.

If Article 75 is accepted as customary international law, then how could Mr. Obama deny that the rest of Protocol 1 also qualifies? And what of all other treaties with a long list of parties? If a large number of countries, simply by joining a treaty, can convert it promptly into customary law, then America loses its right to opt out.

In the coming months, the Senate will have the opportunity to declare that Protocol 1 is not, in whole or in part, a U.S. legal obligation. It can shore up American sovereignty by making that point.

Mr. Obama has the constitutional authority to make his own detainee policy. And, if he wants to, he can issue a regulation or an executive order using principles from Article 75. But the Constitution does not empower him to recognize as a legal obligation a part of a treaty that the Senate has never approved.

Mr. Feith, a senior fellow at the Hudson Institute, served as under secretary of defense from 2001 to 2005. He is the author of "War and Decision: Inside the Pentagon at the Dawn of the War on Terrorism" (Harper, 2008).

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