

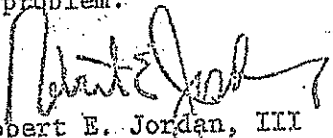
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Moreover, the United States is under an international obligation to enact legislation punishing acts such as those alleged to have occurred. Under Article 146 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (and a similar provision in the Prisoners of War convention), the United States undertook to enact legislation punishing "grave breaches" of the convention, as defined. The Executive Branch took the position (albeit prior to Toth), that its existing legislation was sufficient for this purpose. Hearings on the Geneva Conventions for the Protection of War Victims Before the Senate Committee on Foreign Relations, 84th Congress, 1st Session 24-29, 58-59 (1955). The Executive Branch has not yet proposed a statute to plug the gap left by Toth, although one is now pending in Congress (H.R. 4225). Given the status of our international obligations, there might be some difficulty about discarding our existing authority as worthless without even trying to invoke it.

V. Conclusion

There is statutory authority which would allow discharged servicemen to be tried for violations of the law of war which are alleged to have occurred at My Lai Hamlet. The statutory provisions have been upheld by the Supreme Court, albeit in situations not completely analogous to that involved here. Although there are court decisions indicating some constitutional difficulty about military trial of discharged servicemen, the fact that war crimes are involved may well provide a sufficient basis for the invocation of military jurisdiction in this particular case. Constitutional problems might, in fact, be mitigated by establishing a tribunal which would offer the accused most, if not all, of the protections they would receive in a civilian trial. Given the procedural flexibility available, at least if a military commission were used, any set of procedures compatible with Due Process of Law could be required under authority of a Presidential directive.

If you agree with this view of the law, I would suggest that we attempt to obtain Executive Branch agreement on the propriety of trial by military tribunal in this factual situation. I am ready to assist you in any way you think necessary. Mr. Ronald J. Greene of my staff can be reached on Code 11, extension 53305, to give any necessary assistance to anyone in your office working on this problem.


Robert E. Jordan, III
General Counsel