



Washington University School of Law Alumni Lectures

Ethical Standards for Government Legal Advisors - The Torture Memos



In Conjunction With The Whitney R. Harris
Institute for Global Legal Studies

Kathleen Clark

April 22, 2005

Agenda

Introduction

Torture Memo

● Background

● Contents

Ethics

Implications

Conclusion

Justice Department's Office of Legal Counsel

- Written by Deputy Asst. AG John Yoo
- Signed by Asst. AG Jay Bybee

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- Unprecedented assertions of executive power
- Abandon both:
 - constitutional protections for criminal defendants &
 - international law protections for combatants

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“The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the US Government.”

---Army Field Manual 34-52
Intelligence Interrogation



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- Nov. 2001 President's Military Order
Authorizing Military
Commissions
- Feb. 2002 President declares al Qaeda not
protected by Geneva Conventions
- Sum. 2002 capture of high-level al Qaeda
members
- Aug. 2002 Justice Department's OLC issues
Torture Memo



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Justice Department's Office of Legal Counsel

Constitutional & Statutory Background

Gives legal advice to executive branch

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Cruel, inhumane or degrading treatment

- Issue of extraterritorial reach
- Relation to constitutional standards

Torture

- Implementing statute prohibiting torture applies extraterritorially

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- Defines Torture Narrowly
- Says President can authorize torture
- Claims defenses to prosecution under statute

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“Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”



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Ignores:

- Constitutional Text:
 - Congress' war powers
- Constitutional Precedent:
 - *Youngstown Sheet and Tube Co. v. Sawyer*
- History

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Asserts defenses that have been consistently rejected by federal courts:

- necessity
- national self-defense

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August 2002

- Torture Memo Issued by OLC

June 2004

- Memo Leaked to press
- Memo Withdrawn by DOJ

December 2004

- Replacement Memo Issued by OLC

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Government lawyers are:

“subject to State laws and rules . . . governing attorneys in each State where such attorney engages in that attorney's duties”

-- McDade Amendment
28 USC § 530B

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Parallel to Corporate Lawyers

- identifying the client
- entity v. office holder

Model Rule 1.13

- recent changes
- requires going “up the ladder”
- permits outside whistleblowing

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Advocacy:

standard = non-frivolous

- Model Rule 3.1
- Federal Rule of Civil Procedure 11

Advising:

Standard = candor

- Model Rule 2.1 – Candor to client
- Model Rule 1.4 – Inform client

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failed to be candid with client
– Model Rule 2.1

failed to inform the client
– Model Rule 1.4

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Accountability for Torture

No Independent Counsel statute

Congress

– same party as President

Role of state bar authorities?

PA?

DC?



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Q & A

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