



Washington University School of Law Alumni Lectures

Ethical Standards for Government Legal Advisors - The Torture Memos



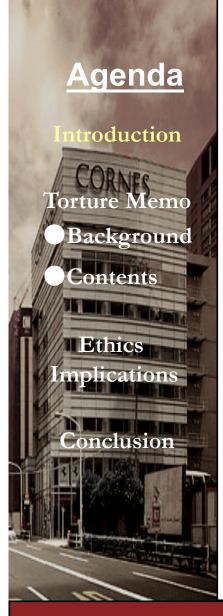
In Conjunction With The Whitney R. Harris
Institute for Global Legal Studies

Kathleen Clark

April 22, 2005



August 1, 2002 Torture Memo

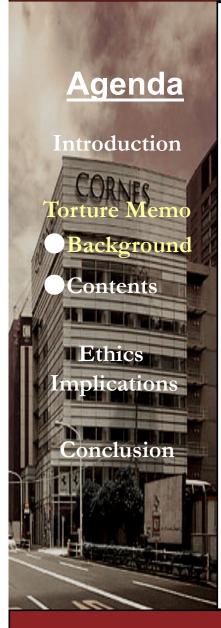


Justice Department's Office of Legal Counsel

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



"new paradigm" for 'war on terror'



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



Traditional Approach to Interrogation:



"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



Chronology



Nov. 2001 President's Military Order Authorizing Military

Commissions

Feb. 2002 President declares al Qaeda not

protected by Geneva Conventions

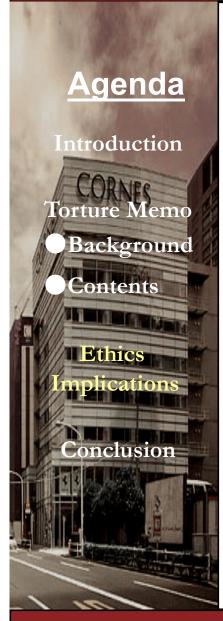
Sum. 2002 capture of high-level al Qaeda

members

Aug. 2002 Justice Department's OLC issues

Torture Memo





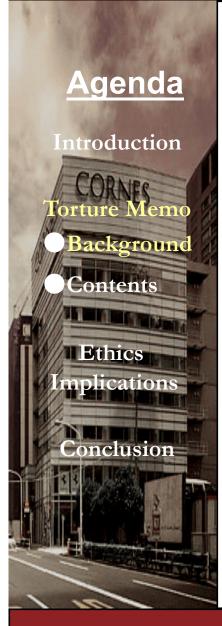
Justice Department's Office of Legal Counsel

Constitutional & Statutory Background

Gives legal advice to executive branch



Convention Against Torture



Cruel, inhumane or degrading treatment

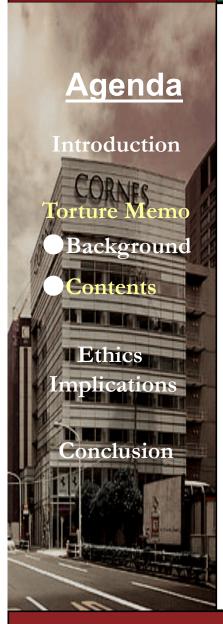
- •Issue of extraterritorial reach
- •Relation to constitutional standards

Torture

•Implementing statute prohibiting torture applies extraterritorially



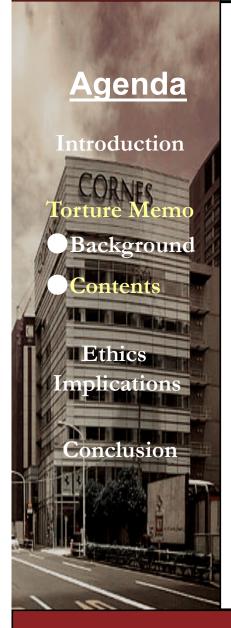
Memo Gets Around Torture Prohibition in 3 Ways



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



It Defines Torture Narrowly

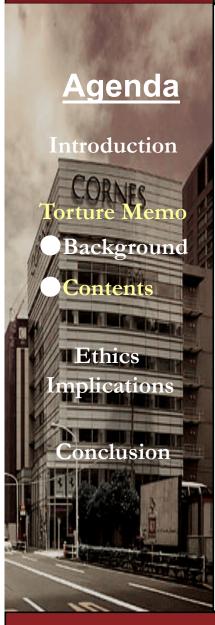


"Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."





Its President as CINC Analysis:

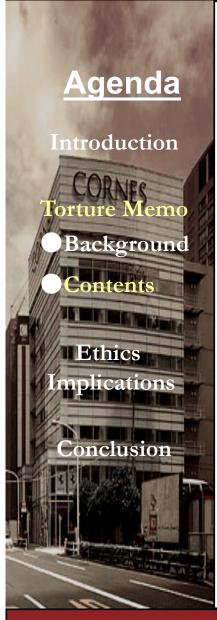


Ignores:

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



Its Analysis of Defenses

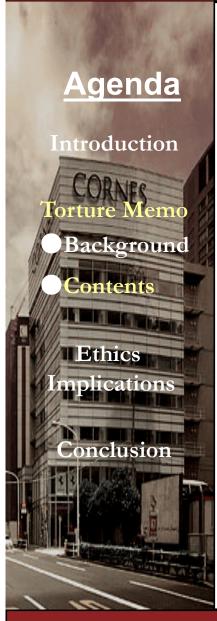


Asserts defenses that have been consistently rejected by federal courts:

- necessity
- national self-defense



Chronology (Cont'd)



August 2002

- Torture Memo Issued by OLC

June 2004

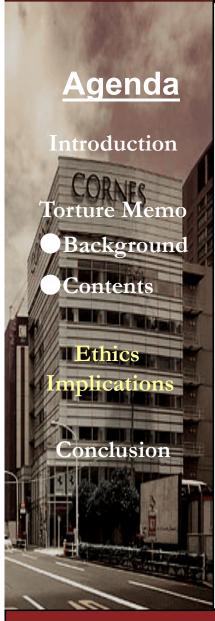
- Memo Leaked to press
- Memo Withdrawn by DOJ

December 2004

- Replacement Memo Issued by OLC



Ethics & the Government Lawyer



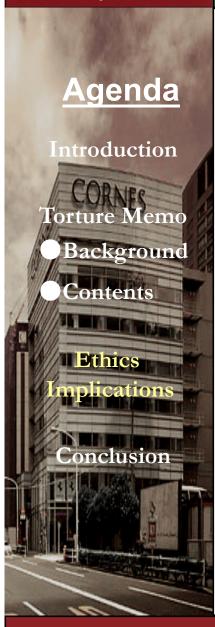
Government lawyers are:

"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



Government Lawyers & Identity of Client



Parallel to Corporate Lawyers

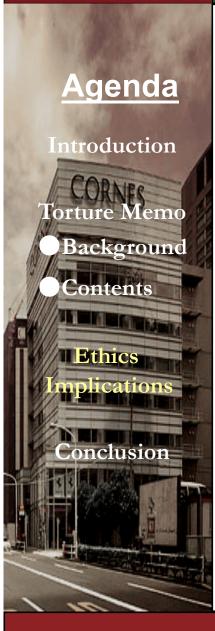
- identifying the client
- entity v. office holder

Model Rule 1.13

- recent changes
- requires going "up the ladder"
- permits outside whistleblowing



Advocacy v. Advising



Advocacy:

standard = non-frivolous

- •Model Rule 3.1
- •Federal Rule of Civil Procedure 11

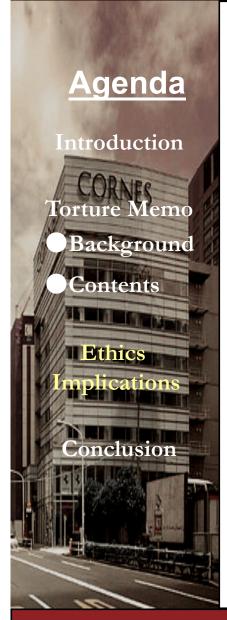
Advising:

Standard = candor

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



Ethical problems with Torture Memo



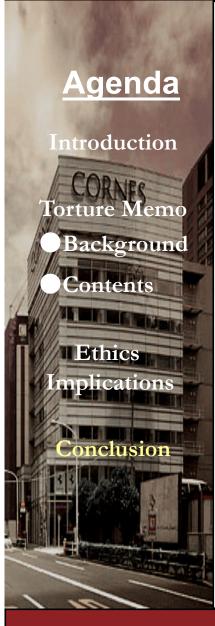
failed to be candid with client

- Model Rule 2.1

failed to inform the client

– Model Rule 1.4





Accountability for Torture

No Independent Counsel statute

Congress

same party as President

Role of state bar authorities?

PA?

DC?





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