

Torture Memos & Lawyers' Ethics

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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 <u>not</u>
protected by Geneva
Conventions |
| Spring 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- Memo Withdrawn by DOJ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
–DC Rule 2.1

failed to inform the client
–DC Rule 1.4

Contrast with March 3, 2003 Army JAG letter

- Questions OLC's conclusions re:
 - CINC power &
 - necessity defense
- Points out that national & international courts may reject OLC's legal claims
- Identifies policy and political reasons to reject OLC conclusions

Accountability for Torture

No Independent Counsel statute

Congress

– same party as President

Role of state bar authorities?

PA?

DC?

Foreign courts?