From: David_S._Addington@ovp.eop.gov
Sent: Tuesday, July 06, 2004 9:16 AM
o: Goldsmith, Jack; Philbin, Patrick; David_G._Leitch@who.eop.gov; Alberto_R._Gonzales@who.eop.gov; John_B._Bellinger@nsc.eop.gov
Subject: RE: More Yoo

Attachments: tmp.htm; lat_both.gif; tmsreprints_bug.gif; NSci=703&di=d001&pg=&ai=2161924


tmp.htm (8 KB)

lat_both.gif (3 KB)

tmsreprints_bug.gif (993 B)

NSci=703&di=d001&pg=&ai=216192...

There was a good editorial in the Wall Street Journal today, too.

-----Original Message-----
From: Leitch, David G.
Sent: Tuesday, July 06, 2004 8:57 AM
To: Gonzales, Alberto R.; Addington, David S.; Bellinger, John B.; 'jack.goldsmith@usdoj.gov'; 'patrick.philbin@usdoj.gov'
Subject: More Yoo

<http://www.latimes.com/>

http://www.latimes.com/news/opinion/commentary/la-oe-yoo6jul06,1,2843715.story

COMMENTARY

A Crucial Look at Torture Law

By John C. Yoo

July 6, 2004

Among the Justice Department memos released recently by the Bush administration, the one that generated the most criticism, dated Aug. 1, 2002, considered the definition of torture under federal criminal laws.

Its critics have attacked the differences between the memo's conclusions and the definition of torture in the 1984 Convention Against Torture. They've attacked its discussion of possible defenses against prosecution and of the scope of the commander in chief's power. Most of all, they have attacked the fact that it did not consider policy or moral issues.

The Justice Department's office of legal counsel, in which I served, produced the memo. It is important to understand the memo's function so that future administrations may receive such candid advice on the most delicate and important kinds of legal questions.

First, there is a clear and necessary difference between law and policy. The memo did not advocate or recommend torture; indeed, it did not discuss the pros and cons of any interrogation tactic. Rather, the mo sought to answer a discrete question: What is the meaning of orture" under the federal criminal laws? What the law permits and what policymakers chose to do are entirely different things. Second, there

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was nothing wrong - and everything right - with analyzing a law that establishes boundaries on interrogation in the war on terrorism. Unlike previous wars, our enemy now is a stateless network of religious extremists. They do not obey the laws of war, they hide among peaceful populations and launch surprise attacks on civilians. They have no armed forces per se, no territory or citizens to defend and no fear of dying during their attacks. Information is our primary weapon against this enemy, and intelligence gathered from captured operatives is perhaps the most effective means of preventing future attacks.

An American leader would be derelict of duty if he did not seek to understand all his options in such unprecedented circumstances. Presidents Lincoln during the Civil War and Roosevelt in the lead-up to World War II sought legal advice about the outer bounds of their power - even if they did not always use it. Our leaders should ask legal questions first, before setting policy or making decisions in a fog of uncertainty.

Third, there are no easy legal answers about torture, despite the moral certitude displayed by the administration's critics. The Reagan and first Bush administrations developed a strict test for torture - the "specific intent" to inflict "severe physical or mental pain or suffering" - that was adopted by Congress and the Clinton administration in 1994. It uses words rare in the federal code, no prosecutions have been brought under it, and it has never been interpreted by a court.

As a result, the 2002 memo looked to other federal laws, domestic and international judicial decisions, legislative history and presidential and diplomatic records, which reinforced the conclusion that the United States intentionally defined torture strictly.

It is easy now for critics to claim that the work was poor; they haven't produced their own analyses or confronted any of the hard questions. For example, would they say that no technique beyond shouted questions could be used to interrogate a high-level terrorist leader, such as Osama bin Laden, who knows of planned attacks on the United States?

Lawyers who must answer such questions must also explain possible defenses. For example, if a police officer were to ask when the use of force is allowed, a lawyer would first explain that killing constitutes murder or manslaughter, but he should also explain when self-defense or necessity would permit the use of force without criminal sanctions.

Self-defense and necessity are long-accepted defenses to criminal prosecution, and Congress chose not to preclude them in its statute barring torture, despite language in the Torture Convention to the contrary. Similarly, precedent and history support the idea that the president, as commander in chief, may have to take measures in extreme wartime situations that might run counter to Congress' wishes. To ignore these issues would deny policymakers a view of the entire playing field.

Our system has a place for the discussion of morality and policy. Our elected and appointed officials must weigh these issues in deciding on how it will conduct interrogations. Ultimately, they must answer to the American people for their choices. A lawyer must not read the law to be more restrictive than it is just to satisfy his own moral goals, to prevent diplomatic backlash or to advance the cause of international human rights law.

However valid those considerations, they simply do not rest within the province of the lawyer who must make sure the government understands what the law permits before it decides what it should do.

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John C. Yoo, a law professor at UC Berkeley and a scholar at the merican Enterprise Institute, served in the Justice Department from 001 to 2003.

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