

2003 Justice Department memo justifies torture, presidential dictatorship

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On Tuesday, the Defense Department released a 2003 memo asserting the right of the US president to order the military to torture prisoners.

The memo is signed by then-Deputy Assistant Attorney General John Yoo and is dated March 14, 2003, one week before the launch of the Iraq war. It is the latest memo to be released that argues for virtually unrestrained executive powers as part of the president's "Commander-in-Chief" authority.

The memo should serve as a sharp warning about the type of barbaric methods the US government is employing and will continue to employ to suppress all international and domestic opposition.

The timing of the memo indicates that it was intended at least in part to provide a justification for the future torture of prisoners captured during the Iraq war. It includes many of the arguments contained in an August 1, 2002, memo (signed by Assistant Attorney General Jay Bybee, but drafted by Yoo), but the later document is more expansive and directed explicitly at prisoners held by the military.

The memo was kept secret for five years and was only released pursuant to a Freedom of Information Act request by the American Civil Liberties Union.

The specific purpose of the Yoo memo was to outline the position of the Office of Legal Counsel (OLC)—the body that speaks for the Justice Department on legal matters—on interrogations of "alien unlawful combatants held outside the United States." However, most of the arguments are structured to apply to anyone, including American citizens held in the US.

One of the most significant assertions is that the president has the authority to override US and international law as part of the "war on terror." Yoo writes, "Any construction of criminal laws that regulated the President's authority as Commander in Chief to determine the interrogation and treatment of enemy combatants would raise serious constitutional questions whether Congress had intruded on the President's constitutional authority."

The *Washington Post* noted April 2 that the memo was released in the midst of an intense controversy within the military over interrogation policy. After a rebellion by military lawyers protesting some of the more extreme interrogation methods, "then-Defense Secretary Donald H. Rumsfeld in December 2002 suspended a list of aggressive techniques he had approved, the most extreme of which were used on a single detainee at the military prison at Guantánamo Bay, Cuba," the newspaper

reported. "Largely because of Yoo's memo, however, a Pentagon working group in April 2003 endorsed the continued use of extremely aggressive tactics."

A few months later, in the fall of 2003, Rumsfeld sent General Geoffrey Miller, then in charge of interrogations at Guantánamo Bay, to Iraq where he advised military officials at the Abu Ghraib prison. The photographs and videos of the horrible abuse of Iraqi prisoners at Abu Ghraib were taken shortly thereafter.

Yoo belonged to a group of lawyers in the Bush administration that drafted legal memoranda following the attacks of September 11, 2001. The group included David Addington, then-legal counsel and later chief of staff for Vice President Dick Cheney; Alberto Gonzales, then-White House counsel and later attorney general; and William Haynes, the general counsel for the Pentagon.

The group operated under the direction of Cheney and George W. Bush, and therefore the Yoo memo is an expression of administration policy. Memos drafted by the group justified preemptive war, the violation of the Geneva Conventions, domestic spying, military commissions and torture, among other crimes. Each document included prominently an argument for the unfettered power of the president as Commander-in-Chief and constituted together the basic outline of a presidential-military dictatorship.

The 81-page memo released Tuesday is filled with pseudo-legal reasoning advanced to justify torture. First, Yoo argues that the Constitution, including the prohibition on "cruel and unusual punishment" does not apply to "alien enemy combatants held abroad." Second, he argues that US law cannot restrict the interrogation of *any* "enemy combatant" held by the military, since interrogation is part of the president's Commander-in-Chief powers.

Third, Yoo argues that international treaties, and in particular the Convention Against Torture (CAT), are essentially meaningless. In the process, he argues that applicable American domestic law and Constitutional rights cannot prevent torture against anyone held by the US military.

According to Yoo, the definition of torture under CAT is limited to the definition contained in the War Crimes Act. Yoo repeats a linguistic analysis he included in the earlier torture memo, which defined torture under the War Crimes Act so narrowly as to allow for almost anything.

For example, to constitute torture, "severe pain," under the War Crimes Act, "must rise to a ... level that would ordinarily be

associated with a physical condition or injury sufficiently serious that it would result in death, organ failure, or serious impairment of bodily functions.” A series of other rationalizations are included to justify even worse physical and psychological treatment. (See: “*Washington Post* publishes memo implicating White House in torture of prisoners”)

Even torture as it is narrowly defined in the memo could be used, according to Yoo, on the grounds of self-defense. “If interrogation methods were inconsistent with the United States’ obligations under CAT, but were justified by necessity or self-defense, we would view these actions still as consistent ultimately with international law ... Further, if the President ordered that conduct [torture], such an order would amount to a suspension or termination of the Convention. In so doing, the President’s order and the resulting conduct would not be a violation of international law because the United States would no longer be bound by the treaty.”

If the US president orders torture then that suspends or terminates the Convention Against Torture and therefore, since the Convention is now suspended or terminated ... the conduct cannot be considered illegal! This is the logic of a thug.

Furthermore, according to Yoo, “cruel, inhuman, and degrading treatment” prohibited under CAT is defined by those actions prohibited by the US Constitution, but this is no help to someone imprisoned by the military. The Eighth Amendment prohibition against “cruel and degrading treatment,” for example, only applies to treatment that is not carried out in “good faith.”

“For good faith to be found, the use of force should, among other things, be necessary” in ensuring “the government’s interest,” Yoo writes. “Just as prison officials are given deference in their response to rioting inmates or prison discipline, so too must the Executive be given discretion in its decision to respond to the grave threat to national security posed by the current conflict.”

In other words, if the torture is carried out on the pretext of “national security” or the war on terror, it is in “good faith,” and therefore not “cruel and unusual.” In similar fashion, Yoo dismisses the Fifth and Fifteenth Amendment due process guarantees.

Yoo concludes by arguing that if a government official was after all this charged with torture, he would have several possible defenses, including necessity and self-defense. “If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate a criminal prohibition, he would be doing so in order to prevent further attacks on the United States by the al Qaeda terrorist network,” Yoo wrote. “In that case, we believe that he could argue that the executive branch’s constitutional authority to protect the nation from attack justified his actions.”

Aside from the first argument that the US Constitution does not apply to non-citizens held abroad, the rest of the memo is structured to apply to anyone captured by the American military in the “war on terror.” The memo refers throughout to “enemy combatants,” which the Bush administration has applied to American citizens held in the US, including Jose Padilla.

The section defining the Eighth Amendment as allowing methods employed in “good faith” is especially significant, since

it essentially guts the main protection that US citizens have against torture at the hands of the government. According to this rationale, therefore, an American citizen, captured on the pretext of “terrorism,” can be tortured.

Underscoring the broad intent of the memo, a footnote refers to a previous document that has never been released, entitled *Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States*. The memo was also written by Yoo, along with Special Counsel for the OLC, Robert Delahunty; it is dated October 23, 2001.

The footnote states that in that memo, the OLC “concluded that the Fourth Amendment has no application to *domestic* military operations.” The Fourth Amendment prohibits “unreasonable searches and seizures.” The memo was one of several intended in part to justify the National Security Agency’s illegal domestic wiretapping program, which began officially in October 2001.

However, the earlier Yoo memo had a much broader purpose than simply justifying domestic spying. The only other declassified reference to this memo came in a February 26, 2002 document on the interrogation of prisoners in Afghanistan. Signed by Bybee, the memo states in a footnote that in the same October 23 memo, the OLC “opined that the Posse Comitatus Act ... which generally prohibits the domestic use of the Armed Forces for law enforcement purposes absent constitutional or statutory authority to do so, does not forbid the use of military force for the military purpose of preventing and deterring terrorism within the United States.”

These memoranda were drawn up for one essential purpose: to provide a rationale for overturning all legal and Constitutional restrictions on presidential and military power. While some of the early memos, including the one released this week, were later officially withdrawn by the OLC, the arguments contained in them have never been repudiated. Yoo, now a law professor at the University of California at Berkeley, said in an email to the *Washington Post* that his memos were recalled only “for appearances’ sake.”

While their defenders claim that all of these memos are instruments in the fight against terrorists, this has nothing to do with their real aim. Under conditions of growing inequality, economic crisis and militarism, the American ruling class is laying the foundations for mass repression.

The release of the recent memo has provoked little reaction from the Democrats, who endorse the so-called “war on terror” and have been complicit in all the criminal actions of the Bush administration. Neither of the remaining Democratic Party presidential hopefuls, Senators Hillary Clinton and Barack Obama, has condemned or commented on the Yoo torture memo.



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