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On Torture and "Administration Interrogation Rules"

Testimony to the US Congress

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Testimony of Marjorie Cohn

"From the Department of Justice to Guantánamo Bay: Administration Lawyers and Administration Interrogation Rules"

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What does torture have in common with genocide, slavery, and wars of aggression? They are all jus cogens. That's Latin for "higher law" or "compelling law." This means that no country can ever pass a law that allows torture. There can be no immunity from criminal liability for violation of a jus cogens prohibition.

The United States has always prohibited torture in our Constitution, laws, executive statements, judicial decisions, and treaties. When the U.S. ratifies a treaty, it becomes part of American law under the Supremacy Clause of the Constitution.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, says, "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture."

Whether someone is a POW or not, he must always be treated humanely; there are no gaps in the Geneva Conventions.

The US War Crimes Act, and 18 USC sections 818 and 3231, punish torture, willfully causing great suffering or serious injury to body or health, and inhuman, humiliating or degrading treatment.

The Torture Statute criminalizes the commission, attempt, or conspiracy to commit torture outside the United States.

The Constitution gives Congress the power to make laws and the President the duty to enforce them. Yet Bush, relying on memos by lawyers including John Yoo, announced the Geneva Conventions did not apply to alleged Taliban and Al Qaeda members. But torture and inhumane treatment are never allowed under our laws.

Justice Department lawyers wrote memos at the request of Bush officials to insulate them from prosecution for torture. In memos dated August 1, 2002 and March 18, 2003, John Yoo wrote the DOJ would not enforce U.S. laws against torture, assault, maiming and stalking, in the detention and interrogation of enemy combatants.

The maiming statute makes it a crime for someone "with the intent to torture, maim, or disfigure" to "cut, bite, or slit the nose, ear or lip, or cut out or disable the tongue, or put out or destroy an eye, or cut off or disable a limb, or any member of another person" or throw or pour upon another person any scalding water, corrosive acid, or caustic substance.

Yoo said, "just because the statute says — that doesn't mean you have to do it." In a debate with Notre Dame Professor Doug Cassell, Yoo said there is no treaty that prohibits the President from torturing someone by crushing the testicles of the person's child. It depends on the President's motive, Yoo said, notwithstanding the absolute prohibition on torture.

Yoo twisted the law and redefined torture much more narrowly than the Torture Convention and the Torture Statute. Under Yoo's definition, you have to nearly kill the person to constitute torture.

Yoo wrote that self-defense or necessity could be defenses to war crimes prosecutions, notwithstanding the Torture Convention's absolute prohibition against torture in all circumstances.

After the August 1, 2002 memo was made public, the DOJ knew it was indefensible. It was withdrawn as of June 1, 2004, and a new opinion, dated December 30, 2004, specifically rejected Yoo's definition of torture, and admitted that a defendant's motives to protect national security won't shield him from prosecution. The rescission of the prior memo is an admission by the DOJ that the legal reasoning was wrong. But for the 22 months it was in effect, it sanctioned and caused the torture of myriad prisoners.

Yoo and other DOJ lawyers were part of a common plan to violate U.S. and international laws outlawing torture. It was reasonably foreseeable their advice would result in great physical or mental harm or death to many detainees. Indeed, more than 100 have died, many from torture. Yoo admitted recently he knew interrogators would take action based on what he advised.

Dick Cheney, Condoleezza Rice, Donald Rumsfeld, Colin Powell, George Tenet, and John Ashcroft met in the White House and micromanaged the torture by approving specific torture techniques such as waterboarding. Bush admitted he knew and approved of their actions.

They are all liable under the War Crimes Act and the Torture Statute. Under the doctrine of command responsibility, commanders, all the way up the chain of command to the commander in chief, are liable for war crimes if they knew or should have known their subordinates would commit them, and they did nothing to stop or prevent it. The Bush officials ordered the torture after seeking legal cover from their lawyers.

The President can no more order the commission of torture than he can order the commission of genocide, or establish a system of slavery, or wage a war of aggression.

A Select Committee of Congress should launch an immediate and thorough investigation of the circumstances under which torture was authorized and rationalized. The high officials of

our government, and the lawyers who advised them, should be investigated and prosecuted by a Special Prosecutor, independent of the Justice Department, for their roles in misusing the rule of law and legal analysis to justify torture and other crimes in flagrant violation of our laws.

For the complete testimony, see http://www.c-spanarchives.org/library/index.php?main_page=product_video_info&products_id=205193-1 .

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