

CHERTOFF KEEPS WAIVING LAWS

I'm kind of glad that I put off posting on the Administration's waiver of environmental laws so it can put up its pathetic little wall on the border with Mexico.

In a sweeping use of its authority, the Department of Homeland Security said Tuesday that it would bypass environmental reviews to speed construction of fencing along the Mexican border.

Michael Chertoff, the homeland security secretary, issued two waivers covering 470 miles of the border from California to Texas well as a separate 22-mile stretch in Hidalgo County, Tex., where the department plans to build fencing up to 18 feet high into a flood-control levee in a wildlife refuge.

"Criminal activity at the border does not stop for endless debate or protracted litigation," Mr. Chertoff said in a statement.

The announcement angered environmental groups, which have raised concerns through lawsuits and public hearings about the damage that fencing could cause to wildlife. Property owners, particularly along the Rio Grande, have also objected to what they considered federal intrusion on their land and access to the river.

That's because Marty Lederman, in the first of a series on the Torture Memo, noticed something no one has yet noticed in the memo.

From all that appears, John was not acting entirely on his own with respect to the March 14th Opinion. Section II of

the memo is where much of the most astounding legal analysis appears. In that section, John concludes that the federal statutes against torture, assault, maiming, and stalking (i.e., threats) simply do not apply to the military in the conduct of war, by virtue of four "canons of construction": (i) that criminal statutes should not be construed to apply to the military during war; (ii) that they should not be construed to apply to the sovereign more broadly; (iii) that they are superseded as to the military by the Uniform Code of Military Justice; and (iv) of course, that if Congress did mean for them to apply in this context, it would be a violation of the Commander in Chief's prerogatives.

The memo's application of these canons to these statutes (especially the torture statute) is, in my opinion, fairly outrageous, for reasons I'll discuss in further posts. And this section is the heart of the Opinion – the belts and suspenders in support of the basic conclusion that the military need not worry itself about all of these (and other) criminal laws in interrogation of al Qaeda suspects.

Here's the remarkable thing: Page 11 of the Opinion states that "[t]he Criminal Division concurs in our conclusion that these canons of construction preclude the application of the assault, maiming, interstate stalking, and torture statutes to the military during the conduct of a war."

In other words, John Yoo checked with the Criminal Division as to whether the military could torture and maim detainees in a war, and that Division, which ordinarily strongly resists narrowing constructions of criminal

statutes, agreed that the torture and maiming (and other) statutes were inapplicable.

The head of the Criminal Division at the time was Michael Chertoff (now Secretary of Homeland Security). Nine days before the memo was issued, President Bush nominated Chertoff, like Bybee, to be a federal judge on a U.S. Court of Appeals. [emphasis Marty's]

In other words, Lederman believes that Chertoff gave John Yoo (who, as Marty notes, was seemingly working without the authority of the Assistant Attorney General in charge of OLC), the approval to say that a bunch of criminal laws—including those prohibiting torture—do not apply to those conducting war. Lederman suggests that Chertoff shares responsibility for the bastardization of the rule of law that is the Torture Memo.

In almost precisely the same time period, you will recall, Chertoff was allegedly telling well-connected Republican banana companies that it didn't matter if they continued to support right wing terrorists, so long as they helped supply intelligence on the terrorists.

Marty's tidbit puts Chertoff's massive exemption for the goddamned wall in a different light, doesn't it? First the terrorist supporting banana company. And then his goddamned wall. And, as it turns out, Chertoff appears to have been involved in waiving torture laws.