

# JAMES HO AND TORTURE

## Highlights:

- James Ho wrote a memo that was cited in the 2002 “Bybee” memo used to authorize torture during the Bush administration.
  - Ho wrote a memo that international treaties did not apply to prisoners in the war on terror, which was later cited to authorize torture.
  - Ho’s memo was not made available to the Senate during his confirmation hearing to the Fifth Circuit.
  - Ho downplayed his role in the torture memo noting he was two years out of law school and did not have “power or authority.”

## Ho Wrote A Memo That Was Cited In The 2002 “Bybee” Memo Used To Authorize Torture During The Bush Administration

### HO WROTE A MEMO THAT WAS LATER CITED BY THE BUSH ADMINISTRATION TO AUTHORIZE TORTURE

**As Attorney Advisor At The Office Of Legal Counsel Between 2001 And 2003, Ho Authored A Memo That Concluded International Treaties Did Not Apply To Prisoners In The War On Terror.** According to ProPublica, “James Ho moved from the Justice Department's civil rights division to the Office of Legal Counsel shortly after Sept. 11. He authored at least one key memo concluding that international treaties don't apply to the prisoners in the War on Terror.” [ProPublica, [1/28/09](#)]

**Ho’s Memo Was Titled “Re: Possible Interpretations Of Common Article 3 Of The 1949 Geneva Convention Relative To The Treatment Of Prisoners Of War.”** According to the Senate Judiciary Committee, “FEINSTEIN: At your nomination hearing, Senators Durbin and Whitehouse both asked you questions about a memo you had written during your time in the Justice Department’s Office of Legal Counsel (OLC). Your memo, entitled Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, was cited in one of the three ‘torture memos’ signed by then-head of OLC Jay Bybee. I have written to the Department of Justice asking them to waive any privilege over this memo and disclose it to the Committee. It is critically important that the Committee understands your work on the torture memos and on detainee-related matters more generally.” [Senate Judiciary Committee, [11/22/17](#)]

### Ho’s Memo Was Cited In The 2002 “Bybee” Memo, Which Was Used To Authorize Torture During The Bush Administration

**Ho’s Memo Was Cited In The 2002 “Bybee” Memo, Which Was Used To Authorize Torture During The Bush Administration.** According to the Texas Tribune, “During his confirmation hearing last month, Ho faced questions about his contributions to the the infamous 2002 ‘Bybee memo,’ a product of then-President George W. Bush's administration that authorized the use of torture against certain detainees. Ho wrote a memo that is cited in that document, but Ho's writing has not been made public due to attorney-client privilege, he told the committee.” [Texas Tribune, [12/14/17](#)]

### HO’S MEMO WAS NOT MADE AVAILABLE TO THE SENATE DURING HIS CONFIRMATION HEARING TO THE FIFTH CIRCUIT

**Ho’s Memo Was Not Made Available To Senate Judiciary Committee.** According to the Senate Judiciary Committee, “FEINSTEIN: At your nomination hearing, Senators Durbin and Whitehouse both asked you questions about a memo you had written during your time in the Justice Department’s Office of Legal Counsel (OLC). Your memo, entitled Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, was cited in one of the three ‘torture memos’ signed by then-head of OLC Jay Bybee. I have written to the Department of Justice asking them to waive any privilege over this memo and disclose it to the Committee. It is critically important that the

Committee understands your work on the torture memos and on detainee-related matters more generally.” [Senate Judiciary Committee, [11/22/17](#)]

## **HO DOWNPLAYED HIS ROLE IN THE TORTURE MEMO**

**Ho Justified Writing The Memo By Stating He Was Only Two Years Out Of Law School When He Wrote Memo For The Office Of Legal Counsel.** According to the Senate Judiciary Committee, “FEINSTEIN: As noted above, your memo was titled Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. What did your memo conclude? HO: It is my understanding that the Department of Justice has never waived privilege with respect to this memo that I wrote as an attorney for the United States. That said, I am authorized to report that, as the most junior attorney in the Office of Legal Counsel, I typically engaged in legal research for the Deputy Assistant Attorneys General. As a career line attorney and member of the professional staff of the Justice Department, and not a political appointee, I did not have the power or authority to reach any legal conclusion on behalf of the office. (At the time this particular memo was written, I would have been out of law school for just over two years.)” [Senate Judiciary Committee, [11/22/17](#)]

**Ho Justified Writing The Memo By Stating That He “Did Not Have The Power Or Authority To Reach Any Legal Conclusion On Behalf Of The Office.”** According to the Senate Judiciary Committee, “FEINSTEIN: As noted above, your memo was titled Re: Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. What did your memo conclude? HO: It is my understanding that the Department of Justice has never waived privilege with respect to this memo that I wrote as an attorney for the United States. That said, I am authorized to report that, as the most junior attorney in the Office of Legal Counsel, I typically engaged in legal research for the Deputy Assistant Attorneys General. As a career line attorney and member of the professional staff of the Justice Department, and not a political appointee, I did not have the power or authority to reach any legal conclusion on behalf of the office. (At the time this particular memo was written, I would have been out of law school for just over two years.)” [Senate Judiciary Committee, [11/22/17](#)]

### **Ho Claimed He Had No Involvement In The Bybee Memo**

**Ho Claimed He Had No Involvement In The Bybee Memo And That He First Learned Of The Memo From The Press While He Was Working For John Cornyn.** According to the Senate Judiciary Committee, “HO: I had no involvement in the Bybee memo. I first learned of the Bybee memo when it was reported in the press, well after I left the Office of Legal Counsel and joined the Senate Judiciary Committee staff as chief counsel to Senator John Cornyn. As the most junior attorney in the Office of Legal Counsel, I typically engaged in legal research for the Deputy Assistant Attorneys General. As a career line attorney and member of the professional staff of the Justice Department, and not a political appointee, I did not have the power or authority to reach any legal conclusion on behalf of the office. (At the time my memo was written, I would have been out of law school for just over two years.) As is apparent from the face of the Bybee memo, my memo involved common article 3 of the Geneva Convention. By contrast, the Bybee memo concerned various federal statutes, as well as the Torture Convention. Common article 3 of the Geneva Convention did not provide any support for the conclusions reached by the Bybee memo—as the Bybee memo itself points out.” [Senate Judiciary Committee, [11/22/17](#)]

### **Ho Claimed His Memo Did Not Analyze The Legality Of Any Method Of Torture**

**Ho Claimed His Memo Did Not Analyze The Legality Of Any Method Of “Enhanced Interrogation.”** According to the Senate Judiciary Committee, “FEINSTEIN: Did your memo address whether any particular ‘enhanced interrogation technique’ constituted torture? HO: It is my understanding that the Department of Justice has never waived privilege with respect to this memo that I wrote as an attorney for the United States. That said, I am authorized to report that, to the best of my recollection, I had no involvement in analyzing the legality of any proposed method of enhanced interrogation” [Senate Judiciary Committee, [11/22/17](#)]