

A MOMENTOUS DAY TO LOSE YOUR DOCUMENTATION

As I explained in this post, at least ten documents that OPR should have had to conduct its investigation into the writing of the torture memos disappeared sometime over the course of the investigation (significantly, CIA had an opportunity to come and take all the documents away for a while just after OPR first got access to them).

In this post, I showed how that prevents us—at least using just the unclassified report—from confirming whether or not John Yoo ever read the document making the following points:

- The techniques the US was considering using on detainees amounted to torture
- Torture produces unreliable information
- America's use of torture would increase the chances that Americans, if captured, would be tortured themselves

But there's one more reason losing a large document, sent on July 25, 2002 from CIA and OLC (it probably originally came from DOD), is a problem: Because that document was exchanged on one of the most momentous days of the entire development of the torture memos.

Here's a quick review of the most significant dates in the development of the torture memos:

April 11, 2002: John Yoo and Jennifer Koester officially begin working on the torture memo, though Yoo had already done research for it

July 13, 2002: Michael Chertoff tells CIA, Yoo, and others that DOJ will not issue an “advance declination” (a Get Out of Jail Free card) covering the torture program

July 16, 2002: David Addington, Alberto Gonzales, and Tim Flanigan order Yoo to reverse course and include the Commander-in-Chief and defenses section in the Bybee One memo to make up for not offering an advance declination

July 24, 2002: Yoo gives John Rizzo oral approval to use six torture techniques (attention grasp, walling, facial hold, facial slap, cramped confinement, and wall standing) but says DOJ needs more data before approving waterboarding and other more controversial techniques, possibly including mock burial

“Some point thereafter”: Yoo tells Rizzo it will “take longer” to approve remaining torture methods if mock burial is included

July 25, 2002: CIA sends 46 to 60 pages of documents—possibly DOD documents—to OLC; those documents have since been lost

July 26, 2002: CIA sends 3 (or 4?) more DOD documents to OLC, including a list of torture techniques used in SERE; though the OPR Report doesn’t say it in the unclassified section, OLC verbally approves remaining torture techniques (except mock burial); CIA requests, for the first time, written approval for specific techniques

August 1: Bybee One and Two memos signed, as well as letter to Gonzales on CAT

There are three main plot lines, from what we can see, in the development of the Bybee Memos:

first, the refusal of an advance declination and the replacement with it of other ways to allow torturers to Get Out of Jail Free. Then, the decision not to approve mock burial in an effort to get the memo quickly. And, finally, CIA's last minute request to get the torture techniques approved in a written document.

Two of those three events happened sometime between July 24 and July 26. I'd suggest they might even be related. And 60 pages of documentation (or maybe 46, we don't know)—documents that might explain how mock burial got dropped and/or a written list got added—have disappeared.

My gut feel is that the disappearing documents—assuming their disappearance from a SCIF was not just a remarkable accident—have more to do with the JPRA document than with the change in approach that day. But there's the distinct possibility that those documents also would have explained more about the dropped mock burials and the written list of torture techniques.