

WERE THE TORTURERS BYPASSING OLC IN JULY 2004?

Update, March 13, 2015: The Torture Report clarify this. First, CIA had not yet rendered the detainee, who was indeed Janat Gul. At the meeting, CIA did ask for a memo, as well as permission to torture Gul because (we now know) a fabricator had claimed he was involved in an election season plot. We've also learned that regardless of what Comey and Goldsmith approved, the CIA used its torture of Gul, after Goldsmith left, to expand the prior authorizations CIA had obtained to incorporate what they had actually used.

✖ Jay Bybee thinks it's really damning that Jim Comey attended a July 2, 2004

Principals meeting at which the torture of one particular detainee (he says it was Janat Gul, though there are reasons to doubt it) was discussed.

Comey joined Ashcroft at a NSC Principals Meeting on July 2, 2004 to discuss the possible interrogation of CIA detainee Janat Gul. Report at 123. Ashcroft and Comey conferred with Goldsmith after the meeting, leading to Goldsmith's letter to Muller approving all of the techniques described in the Classified Bybee Memo except for the waterboard. Id (PDF 26-27)

I'm not so sure. In fact, it appears that the key approvals happened after Comey had left that meeting—and Goldsmith's "approval" appears to have been an attempt to put some limits on the CIA after the White House had approved the techniques.

Let's review everything that led up to that meeting.

In April, per the OPR Report, Jack Goldsmith and

Steven Bradbury began work on a memo to replace the March 2003 Yoo memo. Meanwhile, in response to the CIA Inspector General Report's description of torture as it was being administered, Goldsmith advised CIA General Counsel Scott Muller on May 27 not to use waterboarding (and to strictly follow the descriptions of the other nine authorized techniques carefully). On June 7 and 8 news of the torture memos appeared in the WSJ and WaPo. After learning in a phone call with John Yoo about some of the back-channel advice CIA and DOD had gotten, Goldsmith told Muller on June 10 that CIA was going to have to put things in writing if it wanted further OLC opinions on torture (Goldsmith appears to have kept the proof that he faxed it to CIA). On June 16, Goldsmith told Ashcroft he would withdraw the Bybee One memo and then resign. On June 22, in an off the record briefing, Comey, Goldsmith, and Philbin renounced the Bybee One memo. And on June 28, the Supreme Court ruled against the Administration in the Hamdi case.

The entire torture program, the torture architects surely believed, was at risk. In his book, Jack Goldsmith reports that the CIA and White House accused him of "buckl[ing]" in the wake of the Abu Ghraib scandal. And Addington sniped that Goldsmith should give him a list of any OLC opinions Goldsmith still stood by.

In this context on July 2—ten days after Goldsmith publicly withdrew the Bybee One memo and four days after the Hamdi decision—the CIA asked to torture again.

The Vaughn Index of OLC documents relating to the torture program gives a few details of what led up to the request. Document 44 is a fax from CIA to DOJ (note, nothing in the description refers to OLC) noting the CIA has taken custody of a particular detainee.

This is a two-page memo with a fax coversheet, providing legal advice regarding the CIA securing custody of a detainee and use of interrogation

methods.

Document 45 is a document—apparently internal to CIA—requesting of CIA’s General Counsel permission to torture a detainee.

This document is a ten page memo from the CIA’s Office of General Counsel requesting legal guidance on the proposed interrogation of a specific detainee.

It appears the Principals meeting on July 2, 2004 occurred within that context: DOJ was trying to reel in a torture program that had gotten out of control, while CIA had a detainee newly in custody and a torture plan they planned to use with him. And so, Jay Bybee revealed, Jim Comey and John Ashcroft attended a Principals meeting to discuss approval of the CIA’s interrogation plan.

But it appears that the crucial discussion about which torture methods to use with this detainee didn’t happen at that meeting. Rather, it happened after the meeting, or at least after the two biggest torture skeptics at the meeting left.

Some time after the meeting that day, Muller sent John Bellinger a memo and CCed it to Comey. The cover sheet twice directed “EYES ONLY NO COPIES,” suggesting Comey shouldn’t share it, perhaps not even with Goldsmith. In addition to the cover sheets, the one page memo—on plain paper, not CIA stationary, explained:

Subsequent to today’s meeting we have had further discussions that clarified the extent of today’s approval of certain techniques. The authorized techniques are those previously approved for use with Abu Zubaydah (with the exception of the waterboard) and the 24 approved by the Secretary of Defense on 16 April 2003 for use by the Department of Defense. I have relayed this

information to the CIA's
Counterterrorist Center.

In other words, after Comey and Bellinger left the meeting, "we" (Muller doesn't explain who all were included in that "we") "had further discussions" in which they "clarified the extent of today's approval of certain techniques."

This is Muller telling Comey (and Bellinger) what got approved. This is CIA telling DOJ what got approved, not DOJ telling CIA what was legal.

Which is why two other details from these documents are so interesting. It appears that CIA sent DOJ (though not necessarily OLC) notice that they had taken custody of a particular detainee. But it doesn't appear that CIA, at first, sent DOJ (much less OLC) its interrogation plan. And Goldsmith, the guy who was deep in the middle of conducting new legal analysis on torture for both the CIA and DOD, was apparently not at the Principals Meeting at all where the torture approvals were discussed.

Not that it would have mattered anyway, since the real discussion appears to have happened after Comey left.

Now, whether or not Muller intended to keep the torture approval secret from Goldsmith, he did find out about it. On July 7, Goldsmith wrote Muller—referencing and following up on Muller's July 2 "conversation" with Comey and Ashcroft—noting CIA should adhere to the safeguards and limits laid out in the Bybee Two memo and the DOD guidelines on the techniques.

Contrary to what Bybee insinuates, Goldsmith's instructions were the same instructions he had given generally on May 27, to stick to the limits in the Bybee Two memo and the DOD techniques. This was not Goldsmith "approving" of the techniques CIA wanted to use—whatever stuck around after Comey and Bellinger had left the Principals meeting had made the approval, not Goldsmith. Rather, Goldsmith was cautioning CIA,

for the second time, to stick to what few limits had existed in the Bybee Two memo.

Ten days later, Goldsmith would leave DOJ, three weeks earlier than he originally intended to leave.

One final detail. The SSCI Narrative describes a Principals meeting at which attendees agreed to have OLC do a new memo, that one assessing whether the torture program complied with the Convention Against Torture.

In July 2004, the CIA briefed the Chairman and Vice Chairman of the Committee on the facts and conclusions of the Inspector General special review. The CIA indicated at that time that it was seeking OLC's legal analysis on whether the program was consistent with the substantive provisions of Article 16 of the Convention Against Torture.

According to CIA records, subsequent to the meeting with the Committee Chairman and Vice Chairman in July 2004, the CIA met with the NSC Principals to discuss the CIA's program. At the conclusion of that meeting, it was agreed that the CIA would formally request that OLC prepare a written opinion addressing whether the CIA's proposed interrogation techniques would violate substantive constitutional standards, including those of the Fifth, Eighth and Fourteenth Amendments regardless of whether or not those standards were deemed applicable to aliens detained abroad.

But that was **not** the July 2 Principals meeting. We know from the CIA Briefing List that Jay Rockefeller and Pat Roberts were briefed on July 15. So the meeting at which the Principals agreed to get an OLC memo on the Convention Against Torture was a second Principals meeting, not the July 2 one, one that may well have taken place after Goldsmith's departure.

Admittedly, this is all very sketchy. But it appears that, early in July 2004, the White House dictated to DOJ what torture methods would be approved. And only after Congress got involved did the White House agree to niceties like OLC opinions.