

THE REQUEST FOR REAFFIRMATION OF TORTURE

✖ This is going to be another weedy post...

I wanted to put two totally bureaucratic pages (PDF 23-24) from the recent FOIA dump into the context of the other known documents in the chronology. The first page is an “Executive Correspondence Routing Sheet,” sent from CIA General Counsel Scott Muller around top CIA management for approval. It reads:

This memo follows General Counsel discussion with the DCI and agreement on the need to seek reaffirmation from the NSC.

And the memo in question (the following page) appears to be a very short memo with the subject, “Review of CIA Interrogation Program,” from John Rizzo circulated to the lawyers involved with the torture program and the top CIA executives on the Executive Correspondence Routing Sheet. The Rizzo memo is dated May 24, 2004; the last signature—that of George Tenet—is dated June 4, 2004.

The routing sheet is interesting not just because Tenet signed it the day after he resigned.

It also shows a glimpse of the bridge by which CIA responded to the CIA IG Report but also (probably) Jack Goldsmith’s unwillingness to reaffirm opinions that OLC had never made by asking the White House for some kind of written re-endorsement of the torture program.

As I’ve shown here and here, when the CIA Inspector General began its review of the torture program in response to the Salt Pit death and abuses of al-Nashiri, CIA and Jennifer Koester and John Yoo (though he denies

involvement) worked back channel to develop a set of "Legal Principles" (elsewhere called "Bullet Points") that would expand the legal authorization DOJ had given CIA's torture program in such a way as to legally excuse the crimes the IG was inspecting. Significantly, the Legal Principles document expanded the already farcical analysis of Article 16 of the Convention Against Torture that Yoo had done in the Bybee One memo.

CIA twice tried to present these Legal Principles to OLC as a fait accompli, first in June 2003, when Patrick Philbin took over many of John Yoo's duties, and then again in March 2004, in conjunction with the finalization of the IG Report and at a time when Goldsmith headed the OLC. Both Philbin and Goldsmith refused to accept the Legal Principles as OLC sanctioned documents.

Now, significantly, the March 2, 2004 set of Legal Principles was itself a request for "reaffirmation" of the torture program's legality. Scott Muller emphasized CIA needed that reauthorization, among other reasons, because they had incorporated new torture techniques based on the OLC "guidance."

For example, using the applicable law and relying on OLC's guidance, we concluded that the abdominal slap previously discussed with OLC (and mentioned in the June 2003 summary points) is a permissible interrogation technique.

Of note, Goldsmith appears to have taken special note of the description of water PFT, which (Muller's note said explicitly) was "intended to ... humiliate" detainees. Given that the IG Report concluded that the torture program probably violated Article 16, this language seemed to flout the prohibitions against cruel, inhuman, and degrading treatment.

Between March 2 and May 24 (when Rizzo wrote his

memo), Goldsmith did not reauthorize the Legal Principles. Nevertheless, CIA incorporated the Legal Principles into the final draft of the IG Report. Goldsmith got a copy of that document some time before May 25 and presumably spoke to Muller about the inclusion of the Legal Principles in it, because on that day, he wrote CIA's IG noting that he had received it and asking for time to review the depiction of OLC's legal advice in the IG Report before it got sent to Congress.

In other words, Goldsmith's continued objection to the inclusion of the Legal Principles in the IG Report is probably what prompted John Rizzo to send out a memo referencing the IG Report (which the CIA called the "Review of the CIA Interrogation Program," the subject of his memo) that appears to have recommended asking NSC for reaffirmation of the torture program.

So faced with Goldsmith's refusal to reaffirm something OLC had never affirmed in the first place, CIA decided to go to the White House and get them to approve of the program in writing. It took 11 days to between the time Rizzo apparently made this recommendation and all the CIA bigwigs signed off on the idea.

The day before he signed this memo, George Tenet resigned.

Then, on day he signed the memo, Tenet wrote Condi requesting the reaffirmation in question. Even in the few unredacted passages in Tenet's letter, he made at least two false claims: that DOJ approved the program in September 2002, and that leaders of the intelligence committees were briefed on "the existence and nature of the Program" ... "from the beginning." (Though perhaps we can forgive Tenet's false claim, since apparently CIA had no fucking clue what it had told Congress at that point.)

It took Condi a week to get back to Tenet, in turn, a week during which the memos leaked to the press. She basically punted the reaffirmation request right back to DOJ.

I have reviewed your memorandum to me of June 4, 2004. As we have already discussed, the next logical step is for the Attorney General to complete the relevant legal analysis now in preparation. Once this work is completed and you have returned from your current travel, we can convene a Principals Committee meeting on this subject. In the interim, I will contact Attorney General Ashcroft to underscore the priority we attach to completing expeditiously the Department of Justice's legal analysis. I also encourage you to carry through on your expressed intention of talking with the Attorney General directly on this subject before any Principals Committee meeting.

Of course, while Condi was dawdling over a document promising to deal with this "priority ... expeditiously," Goldsmith and CIA were still sending documents back and forth. On May 27 (that is, before Tenet first wrote Condi), Goldsmith raised concerns about the conclusions of the IG Report and advised Muller to terminate use of the waterboard and make sure all torture techniques adhered to the descriptions in the Bybee Two memo. On June 10 (the day before Condi wrote back to Tenet) Goldsmith wrote Muller again, repeating and strengthening his refusal to treat the Legal Principles as OLC opinion and also telling Muller that if he wanted an opinion he'd have to put the request in writing; the fact that Goldsmith kept the fax confirmation sheet suggests he wanted proof it had been received at CIA.

Then, after Condi sent the letter punting the issue back to DOJ, things got worse. On June 18, just days after he announced his own resignation, Goldsmith wrote fellow lame duck Tenet, requesting that CIA make two changes to the IG Report, both with regards to what DOJ considered mischaracterizations of DOJ approval

of the torture program (see this post for details). On June 22, Comey and Goldsmith and Philbin withdrew the Bybee Memo.

And it's in that context that on July 2 the Principals meet. Without Goldsmith present. Rather than deal with the program generally, this meeting purportedly related to just one detainee. And, after the two biggest torture skeptics (Jim Comey and John Bellinger) left the meeting, they got a fax, telling what was going to be approved.

(At about this time, what appear to be discussions of whether detainees can be taken from Iraq heat up.)

It appears, finally, that White House wrote a letter "reaffirming" the program on July 21 (see document 63 at PDF 81), after Tenet, Goldsmith and possibly Scott Muller were gone. And the following day, Ashcroft wrote John McLaughlin a half page letter stating the same thing Goldsmith had said on May 27 and July 7, that CIA could use every technique described in the Bybee Two memo except waterboarding, subject to the restrictions in that memo. Ashcroft's letter contained one very important point of emphasis, particularly given the Administration's apparent promise to Congress to get an OLC opinion assessing whether the torture program violated the Convention Against Torture. Ashcroft explicitly said the torture program didn't violate Article 16.

And that's how it happened that, after CIA's own IG concluded that the torture program violated CAT, it was reaffirmed without analysis of whether it violated CAT or not.