

ABU ZUBAYDAH'S TORTURERS RELIED ON JULY 13 YOO FAX, NOT BYBEE MEMO

There's an astounding passage in Bybee's Second Response to the OPR Report that reveals that Abu Zubaydah's torturers relied on a July 13, 2002 memo Yoo sent to John Rizzo, rather than the Bybee One Memo, for their general torture authorization.

In a passage attempting to refute OPR's assertion that the Bybee Memo was written so vaguely it could easily be misinterpreted, Jay Bybee's lawyer, Maureen Mahoney, examines a set of documents the CIA wrote about torture to show (she claims) that CIA never misinterpreted "OLC's advice," including the Bybee One Memo. It's clear that the documents she refers to include at least CIA's own Interrogation Guidelines, the Bullet Points written to summarize OLC's advice, the declination memo the Counterterrorism Center wrote in the Salt Pit killing, and a memo Jonathan Fredman, CTC's top lawyer, wrote to the Abu Zubaydah interrogation team.

Here's how she describes the Fredman memo:

In addition, the documents OPR uses to reveal the CIA's understanding of the standards in the Bybee Memo (e.g., Report at 65-66) do not suggest there was any misinterpretation going on. As shown in subsequent sections, these documents (which Bybee never wrote or saw) were actually correct statements of the law. [Redacted] memo to the Abu Zubaydah interrogation team, for instance, which quoted from Yoo's July 13, 2002 fax to Rizzo, provided a correct summary of the specific intent element. Report at 66; infra Section

N.A. It is correct, as Yoo wrote, that if an individual “undertook any of the predicate acts for severe mental pain or suffering, but did so in the good faith belief that those acts would not cause the prisoner prolonged mental harm, he would not have acted with the specific intent necessary to establish torture.” Report at 48; *infra* Section IV.A. [PDF 32; my emphasis]

We know this memo was from Jonathan Fredman, because Mahoney refers to it again on the next page, and in that reference, the name “Fredman” is not redacted.

As this passage makes clear, Fredman wrote a memo to the Abu Zubaydah torture team including an analysis of how intent plays into Torture Statute. Now, the passage of the OPR Report that discusses this memo (document pages 65-66; PDF pages 71-72) is entirely redacted. But it appears after discussion of the finalization of the Bybee Memo on August 1, 2002, suggesting Fredman’s memo was sent after that date. Indeed, the first passage after the long redacted section refers to “a cable [] sent out last week, following the issuance of the opinions,” which would seem to be a reference to Fredman’s memo. In other words, the memo appears to post-date the Bybee One memo.

Nevertheless, the memo doesn’t refer to the Bybee One Memo for its discussion of intent. Rather, it refers to the July 13, 2002 memo that John Yoo faxed John Rizzo. While we can’t prove it with the redactions, it appears that Fredman made a conscious decision not to refer to the finished, official OLC memo, but instead referred to the more informal fax Yoo had sent earlier in the month.

There are several reasons why Fredman might have relied on the earlier fax rather than the finished opinion. The fax is much more succinct, relying exclusively on intent. At a minimum, the brevity makes for easier citation.

But there is also a different emphasis in the earlier fax. Fully one third of that fax deals with what it takes to be guilty of having specific intent to inflict severe mental pain or suffering. The fax concludes that,

Moreover, to establish that an individual has acted with the specific intent to inflict severe mental pain or suffering, an individual must act with specific intent, i.e., with the express purpose, of causing prolonged mental harm in order for the use of any predicate acts to constitute torture.

Whereas the Bybee One Memo admits that it may not be that simple.

It could be argued that a defendant needs to have specific intent only to commit the predicate acts that give rise to prolonged mental harm. Under that view, so long as the defendant specifically intended to, for example, threaten a victim with imminent death, he would have had sufficient mens rea for a conviction. According to this view, it would be further necessary for a conviction to show only that the victim factually suffered mental harm, rather than that the defendant intended to cause it. We believe that this approach is contrary to the text of the statute.

Given that the torture team's interrogation plan included waterboarding and once included mock burial, Yoo knew that the "threat of imminent death" was not just a hypothetical example, but was the plan. One of his memos excuses such threats entirely, whereas the second one caveats his excuse. Fredman chose to cite from the fax that excused such threats entirely. And that language, notably, is precisely the language Mahoney cites, claiming that Yoo interpreted the statute correctly, even though Yoo himself would

go on the caveat that interpretation just weeks later.

But there's an even simpler reason why Fredman would cite from the July 13 fax rather than the August 1 Bybee Memo in his cable to the torture team. We don't know when the torturers started waterboarding or whether they used mock burial with Abu Zubaydah. AZ himself said it started two and a half to three months after he arrived in the black site in Thailand which—even accounting for some disorientation he had from the torture—would probably put it before August 1. And we know that Condi gave the go-ahead for torture on July 17—provided OLC had approved it, which arguably the July 13 fax already had.

In other words, there's a great deal of evidence to suggest that the torture started before Bybee signed the August 1 memo. In all likelihood, the torturers had already threatened AZ with imminent death. And if you're Jonathan Fredman trying to provide reassurance to torturers in the field that they won't go to jail for their threats of death with Abu Zubaydah, you might cite the earlier "authorization" from OLC to do so.

All this time, we've been arguing over whether the Bybee One Memo could have legally excused the torture of Abu Zubaydah. But the question is moot! Because the torturers weren't relying on the Bybee One Memo. They were relying on a one page fax sent several weeks earlier.