

DANIEL LEVIN'S LAST MINUTE "COMBINED" MEMO

I've been looking through some old FOIA documents and noticed an interesting email exchange turned over in one of last August's document dumps (PDF 21-22). It's an email chain between a CTC lawyer (whose name we don't know) and John Rizzo and others regarding a draft of the Combined OLC Memo. I've reversed the order of the email string so it appears chronologically.

02/02/05 12:56PM

From: CTC Lawyer

To John Rizzo [and others, redacted]

cc: [redacted]

Subject: Draft OLC opinion on combined techniques has arrived

OLC wants our comments ASAP (if we have any hopes of having it completed and signed by COB Friday).

OLC also asks if its OK to share this draft opinion with appropriately cleared DOD (Jim Haynes, [redacted] and a few others) and State attorneys (currently only two, Will Taft and now also John Bellinger).

02/02/05 01:26PM

From: John Rizzo

To: CTC Lawyer

cc: [redacted]

Who are "a few others" at DOD?

[redacted] cleared into EITs, and

perhaps [redacted] (check on this) but no one else in DOD OGC, as far as I know. Outside of lawyers, I don't see this is any of anyone's business on the DOD policy side.

02/02/05 01:38PM

From: CTC Lawyer

To: John Rizzo

cc: [redacted, fewer total recipients than first email]

Agree this should be limited to lawyers. I thought, though, that perhaps [redacted] was EIT briefed. The expert, of course, is [redacted].

Now, there are a whole slew of reasons I find this email exchange to be interesting.

Note the date: February 2, 2005. That was two days before Daniel Levin's last day at OLC, which explains the rush to get this memo approved "by COB Friday." In other words, this represents Daniel Levin's last ditch attempt to finish the OLC memo before he moved over to NSC. But this email chain also suggests that Levin believed this memo—the **Combined memo**—was very close to completion at that point. Compare that with what the OPR Report says about Levin's involvement in the Combined memo.

On December 30, 2004, [redacted] provided Levin a copy of a 20-page document entitled "Background Paper on CIA's Combined Use of Interrogation Techniques." [two lines redacted] On January 15, 2005, [redacted] sent Levin an updated copy (December 2004) of the OMS Guidelines and provided comments on portions of Levin's January 8, 2005 replacement draft of the Classified Bybee Memo. 104

[snip]

In describing his work on the issue of EITs, Levin said the CIA never pressured him. Rather, he said it only “made clear that they thought it was important,” but that “their view was you guys tell ‘Us what’s legal or not.” He stated, however, that the “White House pressed” him on these issues.’ He commented: “I mean, a part of their job is to push, you know, and push as far as you can. Hopefully, not push in a ridiculous way, but they want to make sure ‘you’re not leaving any executive power on the table.”

When Levin left the Department in early February 2005, Bradbury became OLC’s Acting AAG. 105 Bradbury continued to work on a replacement for the Classified Bybee Memo, as well as a second classified memorandum that “considered the legality of the combined use of EITs. 106

Bradbury’s point of contact at the CIA for these memoranda was CTC attorney [one line redacted] Correspondence from [redacted] to Bradbury indicates that the CIA provided its comments on the Combined Techniques Memo to OLC on March 1, 2005.

[snip]

106 Levin started working on the combined techniques memorandum before he left the Department, but was unable to complete it before his departure.

So not only does this say that Levin got much further on the Combined memo than it had previously appeared he had, but it seems that the focus was already on the Combined memo, rather than the Techniques memo.

That’s all the more interesting given something

I showed last June. As the OPR passage above makes clear, the memo on Combined Techniques sent to Levin on December 30, 2004 (see PDF 39-57) formed the basis for the Combined Techniques OLC memo. But, as the May 10, 2005 Combined memo and the memo itself makes clear, waterboarding was not included in that memo. In fact, we know CTC sent Bradbury material on waterboarding and sleep deprivation on April 22, 2005 (PDF 104-107) that ultimately filled out his part of his Combined memo. (And note **that** got sent just two days after Jim Comey resigned.)

It seems safe to assume, then, that the draft Daniel Levin tried to push through before he left did not include waterboarding.

So, as it turns out, CIA didn't respond to the memo until almost a month later, when Steven Bradbury, rather than Levin, got to decide what went into the memo. And, presumably, waterboarding got stuck back into that memo after Levin was long gone.

Now add in the actual content of the email exchange: the CTC lawyer was passing on Levin's request to be able to share the memo with DOD and State. CIA seemed to have no big problem with it being shared with State (which is surprising because both Taft and Bellinger—who had just moved to State when Condi moved over as Secretary of State—were torture skeptics). But they did not think that this memo was "anyone's business on the DOD policy side."

Now, we don't know with whom OLC shared the document (or even whether Bradbury, who liked to work in secret, shared the memo with State or DOD after all). But we do know that DOD used the Bybee Memos written for CIA as part of its authorization for Mohammed al-Qahtani's treatment, and we know that John Yoo let Scott Muller review the Yoo Memo before it was finalized. That is, these memos written for one of the agencies tended to be used to serve as authorization for the other agency, and vice versa.

Now, even if I'm right that waterboarding wasn't yet in the memo when Levin sent it for "final" review in February 2002, I assume waterboarding got added back into the Combined memo because of a request from CTC. After all, that's where the additional information on waterboarding came from. Nevertheless, I find it interesting that DOD might have been in the loop at a time when waterboarding may have gotten added back into the Combined memo.

But there's another reason the content of this email is so interesting: because of what we know Levin did two days later, on his last day at OLC. Levin wrote Jim Haynes (one of the people he had wanted to share the Combined Memo draft with) to tell him, formally and perhaps for the first time in writing, that the Yoo Memo had been withdrawn. Levin asked CIA to share a document with DOD that authorized torture (though probably not waterboarding). And two days later, for some reason, he wrote to make sure that there was some final, definitive document telling DOD not to use the Yoo Memo that had led DOD to believe that anything goes.