

DOJ INVESTIGATIONS INTO TORTURE AS A DIPLOMATIC STUNT

I'm back into moving hell this week, so I haven't looked as closely at all the WikiLeaks cables that have come out. But I wanted to add one point to David Corn's story on a cable showing the discussions about a potential Spanish prosecution of our torture lawyers. As Corn describes, the cable chronicles a series of efforts in April 2009—to pressure the Spanish government to quash any prosecution in Spanish courts.

Now, it's worth noting the timing of the cable: April 17, 2009. That is, the day after the Administration released the torture memos. That is, the big piece of news (aside from the chronology of Republican efforts to quash an investigation)—the Spanish Attorney General Candido Conde Pumpido's announcement on April 16 that he would not support a criminal complaint—happened almost simultaneously with the release of the memos that would provide a great deal of evidence for a case against John Yoo, who was one of the six being investigated. The cable was probably even sent before—but not by much—Obama released a statement saying,

In releasing these memos, it is our intention to assure those who carried out their duties relying in good faith upon legal advice from the Department of Justice that they will not be subject to prosecution. The men and women of our intelligence community serve courageously on the front lines of a dangerous world. Their accomplishments are unsung and their names unknown, but because of their sacrifices, every single American is safer. We must protect their identities as vigilantly as they protect our security, and we must provide them with the confidence

that they can do their jobs.

[snip]

The United States is a nation of laws. My Administration will always act in accordance with those laws, and with an unshakeable commitment to our ideals. That is why we have released these memos, and that is why we have taken steps to ensure that the actions described within them never take place again. [my emphasis]

Which is why I think the most critical passages of this cable (which includes DOJ among its recipients) are these ones:

Meanwhile, the Embassy has been involved in DOJ-led talks to have [Chief Prosecutor Jose] Zaragoza – who attended the April 16 press conference – lead a four-person team of GOS officials to Washington for a possible meeting with U.S. Deputy AG David Ogden or AG Eric Holder during the week of May 18. Zaragoza's wife, who is Conde Pumpido's chief of staff, would reportedly be one of the four.

[snip]

Zaragoza has also told us that if a proceeding regarding this matter were underway in the U.S., that would effectively bar proceedings in Spain. We intend to further explore this option with him informally (asking about format, timing, how much information he would need, etc.) while making it clear that the USG has not made a decision to follow this course of action. [my emphasis]

That is, within the larger context of a discussion of past efforts to pressure the Spanish not to investigate, the cable points to

the person whom the US could leverage—Zaragoza—and describes the best means to do so. Zaragoza, the cable makes clear, is telling the US that the best way to halt the Spanish investigation would be to show that “a proceeding regarding this matter were underway in the U.S.”

That was on April 17, the day Obama said there would be no prosecutions. It discussed a meeting between Zaragoza and either David Ogden or Eric Holder to take place in May, at which point the OPR investigation was still pending. And then less than a month after the OPR Report concluding (finding that John Yoo was an idiot, but not criminally or unethically so), Eric Holder announced the Durham investigation into torture. The one for which the primary basis expired with no charges recently. But the same one DOJ claims is ongoing. The one that Harold Koh pointed to—in another diplomatic venue—so as to be able to say with a straight face that the US considers waterboarding to be illegal.

Harold Koh, legal adviser at the US State Department, said on the sidelines of a UN Human Rights Council meeting in Geneva that “there has been a turning of the page” under President Barack Obama.

“I think that the Obama administration defines waterboarding as torture as a matter of law under the convention against torture and as part of our legal obligation... it’s not a policy choice,” Koh told journalists after being asked about the report.

Asked whether the United States was still considering investigation or federal prosecution of those who might have ordered such a practice in the past, Koh said the matter was being examined by Special Prosecutor John Durham in Connecticut.

“Those investigations are ongoing. So the question is not whether they would

consider it, they're going on right now," he explained.

In other words, what this cable shows is the genesis of the plan—on the day after the torture memos were released—to forestall international investigations of US torture by claiming that the US is itself conducting an investigation. It's a claim that continues to this day.

It's not a surprise that the Obama Administration has been pointing to its own investigations—credible or not—to persuade the international community not to hold our torturers accountable. But it is useful to see how the diplomats and the lawyers first hatched that plan.