BEN WITTES RELIES ON OBVIOUSLY FALSE DOCUMENT TO CLAIM OTHER DOCUMENT FALSE

For those coming from Wittes' so-called response to my post, here's my response to that response, which shows that Wittes effectively cedes the point that Fredman's memo is dishonest.

In a post subtitled "Just Shut Up About Jonathan Fredman" (really!) Ben Wittes argues we should not hold former CIA Counterterrorism Center lawyer Jonathan Fredman responsible for paraphrases attributed to him in the Senate Armed Services Committee report on torture because Fredman wrote a memo claiming he didn't say those things and because he's a career official, not a political appointee.

> Fredman is a personal friend of mine, but this is getting ridiculous. It's one thing to hold political appointees responsible for the things they did, said, and wrote. It's quite another thing to hold career officials accountable for things they *didn't say, do, or write.*

Now, in point of fact, Fredman's memo does not deny saying "if the detainee dies, you're doing it wrong." He says,

> Those notes, which were misleadingly labeled by their author as "minutes," to the best of my knowledge were never circulated for comment and contain several serious misstatements of fact. Those misstatements were then compounded by the false allegation at the hearing that the so-called minutes contained quotations from me; the first page of

> those so-called minutes themselves expressly states that “all questions and comments have been paraphrased” – and, I might add, paraphrased sloppily and poorly.

And,

> I expressly warned that should a detainee die as a result of a violation, the responsible parties could be sentenced to capital punishment.

And,

> I noted that if a detainee dies in custody, there will and should be a full investigation of the facts and circumstances leading to the death.

And,

> I again emphasized that all interrogation practices and legal guidance must not be based upon anyone’s subjective perception; rather, they must be based upon definitive and binding legal analysis from the Department of Justice;

And, after specifically asserting the paraphrase about the Istanbul conference is inaccurate, Fredman concludes,

> I did not say the obscene things that were falsely attributed to me at the Senate hearing, nor did I make the absurd comment about Turkey that the author similarly misrepresented. The so-called minutes misstate the substance, content, and meaning of my remarks; I am pleased to address the actions that I did undertake, and the statements that I did make.

Now perhaps Fredman includes “if the detainee

dies, you're doing it wrong," in his reference to "obscene things," but he doesn't specifically say so.

Funny, isn't it? That a lawyer would write a 6-page memo purportedly denying he said something really outrageous, but never get around to actually denying the statement in question, even while specifically denying another one?

Yet Wittes tells us to shut up shut up shut up about his friend, based on that non-denial denial.

Now, in a twitter exchange about Fredman, Wittes assured me he read both the SASC report and the OPR report on torture. So either he's a very poor reader, or he doesn't want to talk about how disingenuous it has since become clear Fredman's memo was.

The rest of the memo is, by itself, proof that Fredman misrepresents his own actions relating to torture.

Let's review the timing of all this. Fredman made the alleged statement in Gitmo in October 2002. Less than two months later, Gul Rahman would die in the CIA's Salt Pit prison after having been subjected to water dousing — which was not then an approved torture technique — and left to freeze to death. So you can understand why Fredman would want to claim, after the fact, he didn't have such a cavalier attitude about detainees tortured to death, and also that he warned about the consequences of killing a detainee.

When Fredman wrote his memo to SASC in 2008, the Committee and the public had not seen most of the torture memos, including the Bybee memo that approved waterboarding but not water dousing, much less the underlying backup documents.

So when Fredman asserted this in his memo …

> In light of the importance of the issue, CIA sought an authoritative statement of Federal law from the Department of

> Justice, whose Office of Legal Counsel provides the legal advice which is binding upon all Federal departments, agencies, and employees. We did so specifically to avoid having the anti-torture statute misinterpreted as in any way subject to an individual's particular perception.

… it left the utterly misleading impression that the CIA followed the Bybee memo, contrary to what the CIA Inspector General had already shown (and may have also been intended to rebut the paraphrase of Fredman stating that "The CIA makes the call internally on most of the types of techniques found in [a DOD list of interrogation methods], and this discussion").

Since then, we've discovered several things about Fredman's role in torture approvals that prove his claims are false.

First, CIA began torturing people well before DOJ got involved. After the torturers exceeded the limits Fredman's office imposed, the office just retroactively approved the new limits. No hallucinations, no foul, was the considered legal judgment of Fredman's office, apparently.

Months later, when Fredman wrote the Abu Zubaydah torture team, translating DOJ's guidance, he did not rely on the authoritative memos approved by Jay Bybee. Instead, he relied on a fax John Yoo wrote, purportedly without the involvement or awareness of Bybee, several weeks earlier. That's important, because the earlier fax used a different standard for what constituted torture than the authoritative August 1 memo. It held that,

> [T]o 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

The authoritative memo — the one Fredman chose not to rely on — admitted the possibility that causing severe mental pain or suffering might amount to torture regardless of intent.

Now, we don't know what guidance Fredman's office provided to the folks at the Salt Pit who killed Gul Rahman. But we know several things about CIA's conduct after it.

First, Stephen Kappes coached the people who killed Rahman not to record many details of how Rahman died.

> According to two former officials who read a CIA inspector general's report on the incident, Kappes coached the base chief—whose identity is being withheld at the request of the CIA—on how to respond to the agency's investigators. They would report it as an accident.
>
> "The ADDO's direction to the field officer anticipated that something worse had occurred and so gave him directions on how to report the situation in his cable," one of the former officials says.
>
> "The ADDO basically told the officer, 'Don't put something in the report that can't be proved or that you are going to have trouble explaining.' In essence, the officer was told: Be careful what you put in your cable because the investigators are coming out there and they will pick your cable apart, and any discrepancies will be difficult to explain."
>
> As a result, the former official says, the Salt Pit officer's cable was "minimalist in its reporting" on what happened to the prisoner.

So much for CIA's commitment to a thorough

investigation.

Then, after DOJ told CIA's lawyers to collect their own facts about Rahman's death and the mock execution used with Abd al-Rahim al-Nashiri, CIA's lawyers and John Yoo — again, operating outside official OLC channels — wrote another document, dubbed the Legal Principles or Bullet Points, which appeared to help them out of their legal problems in three ways. The document,

- Claimed that techniques "comparable" to those approved by DOJ could also be used with detainees
- Listed a bunch of laws that purportedly did not apply to CIA interrogations
- Claimed "CIA interrogations of foreign nationals are not within the "special maritime and territorial jurisdiction" of the United States" and therefore are not subject to laws like wrongful death

When Pat Philbin took over at OLC, someone at CTC (presumably in Fredman's office) faxed the document to Philbin, claiming it was a finalized document. And when Jack Goldsmith was assessing the OLC memos underlying torture, CIA General Counsel Scott Muller tried again (and also asked Goldsmith to specifically approve water dousing). Yet in spite of those two attempts to tell OLC that this document Yoo had developed by freelancing with CIA counted as an OLC document, Goldsmith ultimately determined that "the bullet points did not and do not represent an opinion or a statement of the views of this Office."

In spite of all that, though, CTC (again, presumably Fredman's office) was the office that

got to determine whether or not anyone should be charged for killing Rahman. Ultimately, they held that,

> If [Matthew] Zirbel, as manager of the Saltpit site, did not intend for Rahman to suffer severe pain from low temperatures in his cell, he would lack specific intent under the anti-torture statute.

That is, Fredman's office (almost certainly he himself; update, this assumes, perhaps incorrectly, CTC wrote its declination memo before Fredman left in April 2004) ultimately determined torture depended only on intent (and wrongful death didn't apply). That's precisely the language in the fax he presented as DOJ's authoritative judgement to Zubaydah's torturers. And, ultimately, it is precisely the kind of subjective determination that Fredman's 2008 memo disavows.

When actual prosecutors finally reviewed that decision, they found that the Salt Pit was outside US jurisdiction and therefore not subject to laws like wrongful death (the Fourth Circuit ultimately disagreed with this judgement, at least with regards to the much less organized Forward Operating Bases).

So here's what the record shows the office Fredman led did. In April 2002, Fredman's office retroactively authorized extreme sleep deprivation (the same treatment and timeframe the UK has deemed cruel and inhuman), apparently without consulting DOJ. Even after DOJ issued an authoritative document, Fredman personally relied on an earlier fax issued without Bybee's involvement. When CIA did ultimately torture someone to death in November 2002, CIA and Yoo attempted to make a new authoritative document, one that would cover for their use of unauthorized techniques to kill someone. And ultimately, Fredman's office used utterly subjective determination — Zirbel's intent — to declare torturing someone to death kosher.

In other words, everything Fredman asserted in his memo about DOJ authorization is contradicted by his actions. It wouldn't be the first time that someone in Fredman's immediate vicinity altered the record on torture after the fact.

Of course, the fact that the rest of the memo presents a false account of Fredman's actions doesn't say anything, one way or another, about whether Fredman said "if the detainee dies, you're doing it wrong," just two months before a detainee died. Then again, the memo doesn't either.

Maybe instead he said "no hallucinations no foul"?

Update: Now that I've reread the "minutes" in their entirety, I note that Fredman reportedly said something even more damning, two months before Gul Rahman froze to death.

> Everything on the BSCT white paper is legal from a civilian standpoint. [Any questions of severe weather or temperature conditions should be deferred to medical staff.]

Now, it's unclear whether the bracketed comment is attributed to Fredman or the notetaker. But it's clear from the context that Fredman envisioned using "severe weather" as a torture technique.

Fredman also allegedly said this:

> The threat of death is also subject to scrutiny, and should be handled on a case by case basis. Mock executions don't work as well as friendly approaches, like letting someone write a letter home, or providing them with an extra book.

The "threat of death" is not "subject to scrutiny." John Yoo had told Fredman, personally, two months earlier that it was not approved. And yet Fredman was purportedly

telling others that it simply needed scrutiny,
as if it could be approved.