

DID CIA LIE TO DOJ ABOUT WHEN THEY TORTURED HASSAN GHUL?

As I noted in January, comments Mark Udall made in the course of confirming Stephen Preston to be DOD General Counsel make it clear that CIA's lies about a detainee generally believed to be Hassan Ghul are one of the new revelations in the Torture Report. For a number of reasons, I believe one thing CIA lied to DOJ about is **when** they tortured Ghul.

As I'll show in a follow-up post, the question of when they tortured Hassan Ghul may reflect not just on the torture program, but also on the dragnet.

The public record claiming Ghul was tortured in July and August, 2004

We can lay out a rough timeline of the torture of the detainee believed to be Ghul based on several data points. First, Jay Bybee's response to the Office of Professional Responsibility report (see page 22) makes it clear a July 2, 2004 Principals Committee meeting pertained to detainee "Janat Gul," custody of whom CIA had reportedly (see PDF 59) just obtained (Bybee would not have been at the meeting – he had become a Circuit Court Judge over a year earlier – so he must be relying on what the OPR report says).

In addition, we can trace back the documents leading up to a reference to "Gul" in the May 30, 2005 CAT memo (see page 7). That reference describes an August 25, 2004 letter that asked for permission to use – among other things – water dousing and abdominal slaps. The approval to that request, dated August 26, 2004, cites the August 25 letter, an August 2, 2004 letter from John Rizzo, and a July 30, 2004 letter. An August 6, 2004 letter approving waterboarding

also cites the August 2 Rizzo letter.

In the August 10, 2005 Techniques memo, some of these same documents are cited; the memo also reveals its subject was obese and had heart problems. Although the Techniques memo approved waterboarding, it said it was not used with the subject of the memo because of a medical contraindication.

All of this would seem to give the following chronology for Hassan Ghul's torture (assuming he is the detainee referred to as Gul):

July 2, 2004: CIA obtains custody and in a Principals Committee meeting discusses his torture

July 7, 2004: Goldsmith provides guidance on acceptable techniques

July 22, 2004 (5 days after Goldsmith's departure): John Ashcroft approves the use of all Bybee Memo techniques, except for waterboarding

July 30, 2004: Letter to Daniel Levin including description of torture techniques

August 1, 2004: Government raises threat level in advance of election year threats, announces surveillance of financial institutions, though reports are years old

August 2, 2004: Letter from John Rizzo to Levin, including details on when the CIA would use waterboarding and a medical and psychological assessment of Ghul

August 6, 2004: Daniel Levin advises that subject to reservations, CIA's use of waterboarding not illegal

August 19, 2004: Letter to Daniel Levin detailing new limits on waterboarding

August 25, 2004: In letter to Daniel Levin asking to water douse Ghul, CIA

claims the CIA believed (when it got custody) Ghul had actionable intelligence on “pre-election” threat to United States, had extensive connections to various al Qaeda leaders, members of the Taliban, and Zarqawi, and had tried to set up a meeting “at which elements of the pre-election threat were discussed”

August 26, 2004: Levin approves four new techniques with Ghul, including water dousing

This chronology suggests DOJ repeatedly told CIA waterboarding was not permissible in the weeks after Jack Goldsmith withdrew the Bybee Memo, but after the National Security establishment raised the threat level on August 1 because of years-old surveillance in the US, DOJ relented and approved waterboarding with Ghul. Subsequently, it appears, CIA decided Ghul was not healthy enough – either because of his heart condition or his obesity – to undergo waterboarding, so they instead water doused him in near-freezing temperatures.

The problem with this chronology

There is just one problem with that chronology: the CAT memo discusses two detainees (see page 6). The description of the first detainee – someone involved in the alleged 2004 pre-election threat – mentions the August 25 letter which elsewhere in the memo ties to Gul by name.

The description of the second detainee is, given the description of his capture on a mission to Abu Musab al-Zarqawi, almost certainly Ghul.

Intelligence indicated that prior to his capture, [redacted] “perform[ed] critical facilitation and finance activities for al-Qa’ida,” including “transporting people, funds, and documents.” Fax for Jack Goldsmith, III, Assistant Attorney General, Office of Legal Counsel, from [redacted] Assistant

General Counsel, Central Intelligence Agency (March 12, 2004). The CIA also suspected [redacted] played an active part in planning attacks against United States forces [redacted] had extensive contacts with key members of al Qaeda, including, prior to their captures, Khalid Sheikh Mohammed ("KSM") and Abu Zubaydah. See id. [redacted] was captured while on a mission from [redacted] to reestablish contact with al-Zarqawi. See CIA Directorate of Intelligence, *US Efforts Grinding Down al-Qa'ida* 2 (Feb 21, 2004).

It's as if the CAT memo refers to one detainee whom they call Gul and another detainee who clearly is Ghul.

The earlier torture of Ghul

Then there's the other thing that doesn't make sense: that CIA would wait 6 months before they started torturing Ghul (though during that period he did, of course, provide intelligence about Osama bin Laden's courier that would eventually lead to OBL, but that didn't stop CIA from going on to torture him).

And there are pieces of evidence that suggest Ghul's torture did come earlier. Not only was he captured in January 2004, not only do the references to him in the CAT memo date to this period, but an exchange of letters and opinions in March seems to have paved the way to render Ghul – as a foreigner tied to Al Qaeda and therefore not a protected person – out of Iraq (though Goldsmith has said no detainee was ever rendered relying on these memos, which would seem to require Ghul having been rendered earlier).

January 22 or 23, 2004: Hassan Ghul detained by Kurds

February 21, 2004: Directorate of Intelligence document, "US Efforts Grinding Down al-Qa'ida," may pertain to

Ghul. It says detainee in question was captured while on a mission “to establish contact” with Zarqawi

February 24, 2004: Tenet mentions Ghul—along with top al Qaeda members—in hearing before SSCI

March 12, 2004: Letter to Goldsmith (possibly in support of rendition opinion) claims detainee (possibly Ghul) “perform[ed] critical facilitation and finance activities for al-Qa’ida,” including “transporting people, funds, and documents,” and says CIA suspected Ghul of playing an active part in planning attacks against United States forces

March 18, 2004: Jack Goldsmith concludes non-Iraqi members of al-Qaeda not “protected persons” under Geneva Convention

March 19, 2004: Jack Goldsmith drafts memo finding that US can remove some people of Iraq

In other words, the CAT Memo detainee who by description, but not name, must be Ghul seems to have been rendered (to Bagram and then to East European black sites we have learned) much earlier, in March.

But the detainee named as “Gul” seems to have been rendered into CIA custody and tortured in July and August of that year.

Postdating the water dousing of Hassan Ghul

There are two reasons why CIA might have wanted to lie about all this. The first – that questions about the legality of his rendition made CIA want to fudge the date – I won’t develop here.

But the second – that CIA had to post-date when they water doused Ghul – would make a lot of sense.

As I have noted, John Yoo freelanced to help CIA develop a set of "legal principles" on torture, which included things like dietary manipulation. CIA tried to present them as a *fait accompli* in 2003 when Patrick Philbin served as Acting OLC head, but he refused to accept them. Then, on March 2, 2004, CIA tried again with Goldsmith. But CIA General Counsel Scott Muller did more than just ask Goldsmith to "reaffirm" the prior torture memos and the "legal principles." He also tried to get him to approve water dousing and one more use of water (plus a still-redacted third technique).

Goldsmith appears to have verbally refused to "reaffirm" policies OLC had never approved, and then in June, he refused to approve the "legal principles."

That is, CIA knew in early March they needed to get water dousing approved.

But they didn't get it approved until over 4 months later, ostensibly for use with a detainee named "Gul."

I could see why CIA might lie to get DOJ to approve techniques they had already used.