JOHN YOO V. ALICE FISHER AND MICHAEL CHERTOFF

Man, if you had to choose whom to believe between John Yoo or Alice Fisher and Michael Chertoff who would it be? John Yoo is a hack—but he's an unashamed hack, proud of his accomplishments. Alice Fisher? Michael Chertoff? They're more of the dishonest hack type.

The reason I ask is that there's a seeming contradiction between what Yoo claims in his March 2003 torture memo regarding DOD practices and Alice Fisher and Michael Chertoff's statements to DOJ's OIG regarding related events. At issue is whether the Criminal Division of DOJ—Fisher was the Deputy Assistant Attorney General in 2003, and just resigned from Criminal Division Chief; Chertoff was head of the Criminal Division when the Administration was developing its torture policies—told OLC how they would treat certain actions criminally. The Yoo Torture Memo claims that OLC had consulted with the Criminal Division about which statutes would not apply to the military during the conduct of war:

> The Criminal Division concurs in our conclusion that these canons of construction preclude the application of the assault, maiming, interstate stalking, and torture statutes to the military during the conduct of a war.

But the DOJ OIG report on torture records Alice Fisher stating that the Criminal Division did not give advice—at least not on the techniques themselves.

> Fisher stated that at some point she became aware that the CIA requested advice regarding specific interrogation techniques and that OLC had conducted a legal analysis. She also said she was

> aware of two OLC memoranda on that topic, but they did not relate to the FBI. Fisher also told the OIG that Chertoff was very clear that the Criminal Division was not giving advice on which interrogation techniques were permissible and was not "signing off" in advance on any techniques. (page 70fn; 113/438)

And Chertoff claims that he was asked—but refused to give—sign off on particular techniques.

> Chertoff said that the Criminal Division was asked to provide an "advance declination" in connection with the CIA's use of some techniques, but that he had refused to provide it. (page 100-101; 143-4/438)

In the sentence immediately following the description of Chertoff's denial, it also describes Chertoff admitting that he reviewed the memo.

> In testimony before the U.S. Senate on February 2, 2005, Chertoff stated that he was asked to review a draft of an OLC memorandum that eventually became the August 1, 2002, OLC memorandum regarding "Standards of Conduct for Interrogation," which is sometimes referred to as the "Yoo memorandum." Chertoff stated in his Senate testimony and his OIG interview that at least some of the CIA "techniques" were described to him at the time.

And then in a footnote, it reminds that the memo Chertoff reviewed did specifically address whether torture would or would not be charged.

> This general opinion did not describe any specific interrogation techniques, but did include an examination of

> "possible defenses that would negate any claim that certain interrogation methods violate the statute" prohibiting torture. A separate DOJ opinion issued the same day stated that the specific techniques approved …

The reason this matters is because if Chertoff did sign off on what would and would not be charged, then the memos basically become attempts to make the illegal legal. Marty Lederman explains,

> From all that appears, John was not acting entirely on his own with respect to the March 14th Opinion. Section II of the memo is where much of the most astounding legal analysis appears. In that section, John concludes that the federal statutes against torture, assault, maiming, and stalking (i.e., threats) simply do not apply to the military in the conduct of war, by virtue of four "canons of construction": (i) that criminal statutes should not be construed to apply to the military during war; (ii) that they should not be construed to apply to the sovereign more broadly; (iii) that they are superseded as to the military by the Uniform Code of Military Justice; and (iv) of course, that if Congress did mean for them to apply in this context, it would be a violation of the Commander in Chief's prerogatives.
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> The memo's application of these canons to these statues (especially the torture statute) is, in my opinion, fairly outrageous, for reasons I'll discuss in further posts. And this section is the heart of the Opinion – the belts and suspenders in support of the basic conclusion that the military need not worry itself about all of these (and other) criminal laws in interrogation of al Qaeda suspects.

> Here’s the remarkable thing: Page 11 of the Opinion states that "[t]he Criminal Division concurs in our conclusion that these canons of construction preclude the application of the assault, maiming, interstate stalking, and torture statutes to the military during the conduct of a war."
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> In other words, John Yoo checked with the Criminal Division as to whether the military could torture and maim detainees in a war, and that Division, which ordinarily strongly resists narrowing constructions of criminal statutes, agreed that the torture and maiming (and other) statutes were inapplicable.

Now, as I said upthread, this is a seeming contradiction. What Fisher and Chertoff appear to be denying is that they bought off on any **specific** torture techniques. That’s different, of course, than buying off on the concept that the Criminal Division would not prosecute torture per se during wartime.

So actually, with their carefully parsed responses, Fisher and Chertoff are probably not lying. They’re just trying to distract from the fact that Chertoff bought off on the larger concept that DOJ would not prosecute torture in time of war—and then gave Yoo the leeway to decide for himself what kinds of torture he wanted to authorize.