

HJC TESTIMONY: MR. UNITARY EXECUTIVE AND MR. YOO, TWO



Coverage of the hearing is on CSPAN3, the Committee stream, and good coverage (featuring Scott Horton and Jane Mayer) on KPFA.

Scott; Yoo, any discussion of SERE techniques?

Yoo: Can't discuss.

Nadler: We need to know why.

Yoo: According to DOJ, privilege both attorney-client privilege and classified.

Nadler: Attorney-client not valid here. Classified is valid if it applies.

Yoo: I have to follow it.

Nadler: It's difficult to assert your assertion of privilege on this issue bc Bradbury testified earlier this year and said it was adapted from SERE. How can this be privileged?

Yoo: Recognize that a-c does not apply. It is their privilege to raise. If you and DOJ have disagreement.

Nadler: Bradbury is the one making the decision on these privileges, but he answered the question.

Scott; Addington, SERE?

ADD: no, I don't think I did, but no reason to dispute what Bradbury said.

Scott: Is torture illegal?

ADD: as defined by statute, it would be illegal.

Scott: international agreement of when it's torture and when it isn't?

ADD: Is a treaty in effect ...

Scott: Don't people know when it's torture and when it's not.

ADD: Senate put in reservation.

Scott: 9/11 did not change definition of torture.

Schroeder: it'd be hard to prosecute on opinion.

Scott: Does Administration have ability to write up such an opinion and torture people based on ridiculous memo.

Schroeder: No.

Scott: is it an excuse to torture if you got good information.

Schroeder: Treaty admits no exceptions.

Scott: If you're going to go around torturing based on your memo, how do you know beforehand whether you're going to get good information.

Yoo: Disagree with the premise of question.

Scott: If you can't get information via other techniques, can you use harsher techniques?

Yoo: Nothing in statute that says anything about that.

Watt: Schroeder. Comment on your testimony, policy and law. In 22 years I practiced law, I had a client, who when he didn't like my advice, he would say the lord told him to do otherwise. Are there things that go beyond Yoo's memo?

Schroeder: Hope I'm not joining ADD and Yoo, not able to answer your question. We've read reports that water-boarding used on some subjects.

Watt: Would that go beyond Yoo's memo?

Schroeder: I'd need to know more on water-boarding.

Watt: Recourse that public and Congress would have would be impeachment?

Schroeder: [Pondering] It would be difficult under legal theory in August 2002, to think of

what remedy would be available other than impeachment.

Watt: What recourse does the public have against an Attorney.

Schroeder; Not in position to suggest that the advice the individuals gave didn't know it wasn't the best advice they could give.

Watt: Is there some recourse that the public has if the advice was egregious?

Schroeder: Bar Association.

Watt: Public has little recourse.

Schroeder: Disciplinary proceeding regarding disbarment first.

Cohen: Yoo, you worked for Ashcroft. Did you consider yourself an employee of his?

Yoo: Yes sir.

Cohen: Did you communicate with ADD sometimes and not communicate with Ashcroft.

Yoo; I never did anything to keep Ashcroft out of the loop.

Cohen: So Ashcroft knew of everything you did.

Yoo: We notified the AG, AG dictated who we could discuss it with, we shared drafts. There's not way that

Cohen: Did General Ashcroft express concerns about you keeping him out of the loop.

Yoo: Can't discuss any particular conversation.

Nadler: What's the privilege.

Yoo: Any information or conversations covered by instruction of DOJ, either attorney client, or deliberative.

Nadler: Which privilege are you asserting.

Yoo: Justice Department, and a-c.

Nadler: How is the a-c implicated in a question about your communication with a superior. Are

you the attorney in your position of the AG? Was he your client?

Yoo: It's the DOJ who's saying.

Nadler: Not authorized to discuss deliberative comments. Or confidential pre-decisional advice. The question was, did AG express concerns about your relationship with Addington. Does not ask about deliberative comments.

Yoo: After consultation. My recollection is that no, I never had such a discussion with AG.

Cohen: Any discussion at all where he indicated concern that you were not within your authorities. If WaPo and General Ashcroft said that he had that conversation, then AG Ashcroft would not have proper recall.

Yoo: My answer is

Cohen: I've got that, you don't recall. I've been here a while.

Cohen: Shocked the conscious. Do you believe that?

Yoo: Interpreting cruel and inhuman treatment. Constitutional amendments use that phrase.

Cohen: Shocked conscience depends on whether it's without justification. Do you recall that?

Yoo: Memo says that.

Cohen: Malice and sadism before prosecuted. Where did those words come from?

Yoo: Case law.

Cohen: are you saying the law states it depends on my intent?

Yoo: Memo does not say that. Quotes several cases among many factors.

Cohen: is there anything that you think the President cannot order?

Yoo: You're asking my opinion now. Opinions do not address that question. Those questions not

before us. Today, a number of things, I don't think any American president would order, and one of those things is torture of detainees.

Nadler: Gentleman yield. Will you answer the question. Not would he, but could he, legally?

Yoo: Not fair to ask without any facts.

Nadler: So there is nothing conceivable to which you can answer no, without knowing facts and context?

Yoo: You're trying to get me to answer a broad question.

Nadler: Yield back.

Cohen: What branch is the Vice President.

King? Objection

Cohen: What branch are we in.

ADD: Neither to executive nor legislative, attached by Constitution to latter. 1961.

Cohen: Legislative branch.

ADD: babbling on.

ADD: Attached by Constitution to the latter. Constitution further says that Congress consists of Senators and Representatives.

Cohen: So he's a barnacle.

ADD: I don't consider Congress a barnacle.

King: On behalf of ranking member, I object to participation of non-subcommittee. Subcommittee participation could lead to situation where 10 others want to participate.

Nadler: Gentleman's objection is correct. Precedent has been set many times over, I regret that the gentleman insists on point of order. I apologize to gentleman from MA.

Nadler: You stated to WS earlier that your involvement in CIA program greater than military program?

ADD: A number of meetings. Participating in legal meetings.

Nadler: You just said you're not a member of executive branch. Why was lawyer for VP in such a meeting?

ADD: VP's provide advice.

Nadler: And participate in various agencies business.

ADD: Modern VPs provide assistance and they provide staff. When the President's staff wishes to have us participate?

Nadler: President asked?

ADD: We were included because it's the practice.

Nadler: Any involvement in destroy tapes.

ADD: No

Nadler: If CIA's program illegal do you bear responsibility?

ADD: Legal or moral opinion? Legal opinions...

Nadler: Given your legal involvement with CIA, would your discussions have any bearings.

ADD: No I wouldn't be responsible. [may have said "except for moral"]

Nadler: AG and DAG not aware of your memo on DOD memo?

Yoo: Notified that we received request?

Nadler: Did you notify and send them copy of memo.

Yoo: drafts.

Nadler: Your prepared testimony said that these offices received drafts.

Yoo: DOJ has directed me.

Nadler: Not to name particular individuals.

Yoo: My recollection at time was that in delivering drafts to OAG, Counselor.

Nadler: Who

Yoo: Chongoli. My recollection in DAG, principle ADAG, Chris Wray.

Nadler: Did those offices make comments or revisions.

Yoo: Comments Yes. I don't recall revisions one way or another.

Nadler: Can you say who made those comments?

Yoo: Any comments we would have received would have come from the people I just mentioned.

Nadler: Did you understand DAG and AG approved this memo?

Yoo: Could not issue without approval of their office. I can't remember whether they sent memo signing it.

Nadler: What do you mean approval by DAG or AG, besides them personally.

Yoo: We received comm from OAG.

Nadler: Why was opinion signed by you instead of by head of OLC?

Yoo: I don't have the dates in front of me. Bybee just about to go onto the bench. Timing of memo were very close, couldn't be certain still in office.

Nadler: Schroeder?

Schroeder: Jay Bybee went onto bench 10 days after. At the time, so far as public record he was still AAG in OLC.

Nadler: After he went on bench, who took that position?

Yoo: There was an acting AAG. Classified matters can only be discussed by people cleared to know about them.

Nadler: that person wasn't cleared?

Yoo: My recollection is that they weren't clear at that time.

Nadler; King has asked to pass.

Conyers: Schroeder, as former acting, any improprieties about how memos put together?

Schroeder: Unusual for memoranda as significant for 9/25 and March memo to be signed by Deputy. If assistant position vacant, I can understand. The kind of memoranda that would be issued by AAG. Practice as Yoo has said to solicit advice of other components where there is disagreement, so in this case there was either unanimity or some disagreements not noted for the record. WRT memoranda that deal with interrogation and torture, there is some expertise on what torture means, bc both State and INS apply decisions based on torture. In both contexts, two departments have administrative understanding. I would have expected that those two reservoirs of internal knowledge. CIA didn't allow State to be contacted. Highly unusual.

Conyers: Yoo has claimed lack of guidance on meaning of torture which was why he used health care statute. Do you have any comment on that circumstance.

Schroeder: To amplify on what I just said, working knowledge that would have provided more guidance. At least for some reference points.

Conyers: Schroeder, Yoo has claimed that August 2002 memo revoked that there's a footnote in revocation memo stating that conclusions remain in force. Am I missing something?

Schroeder: Not my understanding. Levin has testified that's an erroneous interpretation.

Ellison: Schroeder: When a person who's at OLC drafts a memo advising on any legal matter, in your experience, is there an ongoing role?

Schroeder: Vary from topic to topic. Would not be unusual.

Ellison: In your experience, someone trying to carry out, memo doesn't speak to this instance. Does it apply?

Schroeder: No, not unusual.

Ellison, I'd like to know, to what degree did people doing interrogation get directed on how to implement that memo.

Schroeder: Those questions would tend to go through their lawyer chain of command. Unusual to call OLC lawyer directly. Many questions come from GC. Lawyer to lawyer.

Ellison: any interrogation.

ADD: On one trip, saw someone, on a screen.

Ellison: any questions directly?

ADD: I don't recall, don't think it happened, it wouldn't be appropriate.

Ellison: indirectly.

ADD: I spoke to GC office at CIA, but also at DOD.

Ellison: who in mind at CIA.

ADD: General Counsel, Muller. Acting GC, still acting [this is Rizzo].

Ellison: Did you witness going forward. Could you hear it.

ADD: Couldn't hear it?

Ellison: group that made legal decisions on ongoing basis, Gonzales, Jim Haynes, and [yourself]

ADD: Talked regularly with president and counsel, DOD GC, less frequently with CIA GC.

Ellison: Ongoing discussions with Haynes.

ADD: More monitoring what's going on. If legal advice, ask OLC, typically would begin with Gonzales. Heads of agencies get legal advice.

Ellison: Do you deny being war council.

ADD: Never heard that label until Goldsmith wrote his book. I asked someone over here. I'm not a fan of cute names for meetings, it's a

habit in executive branch. I met on a range of issues, some of which dealt with interrogation. At DOD they would list those meetings as "War Council."

King: Back to this hearing purpose. I'm wondering what a person is thinking watching on CSPAN. Rhetorical question. Is it possible to precisely define torture in law.

ADD: Just off top of my head. About the only way I could think of doing is what happened with MCA, can't do this can't do this, and then catchall for dealing with certain things. Difficulty is thinking of everything. You would have a challenge.

Yoo: It is a difficult problem. Way statute was written was vague. it has become more specific, as in referring to Army Manual. We attached as appendix every decision we could find.

King Is it possible to precisely define. Is there room between manual and law, is there a level between manual and law?

Yoo: This all happened after I left govt. My understanding is that the statute refers to the manual.

ADD: Are there things that are not permitted by Army Manual but are short of torture? OLC has some opinions. So I believe yes.

King: I would agree with that answer.

ADD: Someone's got to be able to rely on those opinions. I can think of five off the top of my head. Those people would not have engaged on their conduct without knowing that the AG had said this is lawful. They relied on that. They need to be able to rely on that. We can't leave folks in the field hanging on it.

Davis: Line of questions I pursued earlier. A lot of what we're talking about is interpretation of statute. You've conceded there was a statute. I questioned you earlier why it would not have been important to reach out to the body that drafted the statute. Addington,

you conceded that Specter and Sensenbrenner was not consulted. Why not reach out?

ADD: As a legal matter, I think you're wrong. As a political matter, these were highly classified.

Davis: Very simple question. Let me make this a little bit easier. Yoo talks about an interpretation of anti-torture statute. I happen to think, from a policy standpoint and legal one, come to Congress, ask for statute to be clarified. You did that with PATRIOT. Was there anyone who advocated coming to Congress. Did you advocate it? Do either of you know of anyone who advocated coming to Congress asking for new statute, definition of torture.

ADD: No

Yoo: I don't remember anyone doing that.

Davis: Anyone going to intelligence committees.

ADD: I'd recommend going to OLC which is what the law required.

Davis: Had you come to Congress, you would have shared responsibility. Sometimes you've had to, when SCOTUS told you had to. On your own, you've never done it. That's what this committee ought to be focused on. Policy derived by executive branch didn't feel need to share with Congress, left you with policy that has only your policy on it. Negative legacy for your administration.

ADD: Sounds like you're implying that House and Senate didn't know about interrogation.

Davis: You're not saying intelligence committees knew about this definition of torture.

Watt: My time to Delahunt.

Delahunt; I don't want to proceed unless staff has been able to communicate. US signatory to torture convention. Domestic legislation to implement torture convention. Issue of what constitutes torture, what techniques are implicated, there are some techniques are per se considered torture, such as electric shocks?

Yoo: Electric shocks listed in appendix, violate other statute, torture victim protection act.

Delahunt: What about water-boarding?

Yoo: there is a description in appendix to 2002 memo that talks about trying to drown someone. People referring to lots of different things.

Delahunt: on three different occasions CIA used water-boarding.

Yoo: read same press accounts. Also in statement made by head of CIA.

Delahunt; Addington indicated you've had multiple conversations regarding interrogation with CIA. Did issue of waterboarding come up?

ADD: Not in position to talk about particular techniques.

Delahunt: I'm glad that AQ has a chance to see you, Addington, given your penchant for being unobtrusive. There would be a question whether on those three occasions as to the technique used, whether it was a violation of convention against torture. Agree, Yoo?

Yoo: One of problems, Convention against Torture different ways by different countries. As described by Hayden. May violate treaty as understood by some countries. Our understanding defined by torture victims protection act.

Delahunt: Whatever was used, I think we can agree, if they were used on American military personnel, it would still be an open question, whether violated Convention against Torture.

Yoo; Head of OLC, if we were using it as part of training, that it was his view that would not be violation of statute.

Delahunt: So if it was used by an enemy, an enemy would not be in violation.

Yoo: I don't remember whether Bradbury reached that conclusion. I want to make sure that it's clear what Administration position was.

Nadler: If enemy interrogator used technique on American POW.

Yoo Would depend on circumstances. It would depend on circumstances. Appendix that lists trying to drown somebody.

Nadler Before we conclude. A number of unanswered questions, some on privilege, some on classification. We may need to revisit these questions. Can I get a commitment to make yourselves available.

ADD: I didn't invoke privilege. I said for the same reasons the President said in his speech.

Nadler if we determine we have to have an executive session?

ADD: If you issue a subpoena, we'll got through this again.

Conyers; On balance, I'd like to thank the witnesses for coming forward, they've been, from their perspective they've been as candid as they could, I think they sense they may be likely to return. I want to thank them.

Nadler: I made a hasty observation wrt a member's not repeating objection on Delahunt's being here. I didn't want to cast aspersions on his absence.