

# DAN LEVIN'S SEPTEMBER MEMO

I have said before that Dan Levin's September 2004 Memo is one of the most interesting documents in Monday's entire document dump. DOJ describes the document as "OLC's view on the previous and current guidance it provided to CIA and DOD." As the date implies, it was written some time in September, though given the underscore in place of a date, it's not clear whether this is more than a draft or even whether it was sent. It was addressed to John Ashcroft and Jim Comey by title.

The document is important and interesting for several reasons. I suspect it reflects ongoing difficulties on the part of DOJ to recover from John Yoo's free-lancing and generally crappy lawyering. It provides an important marker of the discussions transpiring in fall 2004 on interrogation. And it provides critical insight to the Bradbury memos from spring 2005.

Since the document is heavily redacted, I'll recreate the entire text of the document, along with my comments below. The original text is in blockquotes with my comments interspersed.

You have asked for an update on the status of interrogation advice.

## A. GENERAL ADVICE

### 1. Previously Given

a. The primary prior general advice was an unclassified August 1, 2002 memorandum from Jay Bybee to Judge Gonzales interpreting the torture statute. It contains discussion of a variety of matters that are not necessary to resolving any issues to date.

This refers to the Bybee One memo—the memo invoking organ failure that Jack Goldsmith had

withdrawn on June 22, 2004.

Levin states that this discusses "a variety of matters that are no necessary to resolving any issues to date," which suggests that thus far, the Bybee Two memo was adequate to authorize the interrogations that Levin knew of.

## 2. Current/Pending

a. [one description redacted]

This redacted pending memo must describe the Levin memo to Comey completed on December 30, 2004. I find it particularly interesting that this is redacted, since the memo itself has been unclassified and available for years. This suggests that Levin, Ashcroft, and Comey may have had a shared understanding about what that memo had to do to replace the Bybee One memo—an understanding that we're not allowed to know about. As a reminder, the December 2004 Levin memo is the one with the footnote backing off of full renunciation of the Bybee One memo.

## B. CIA ADVICE

### 1. Previously Given

a. The primary prior advice was a classified August 1, 2002 memorandum from Jay Bybee to John Rizzo discussing ten techniques under the torture statute (attention grasp, walling, facial hold, facial slap (insult slap), cramped confinement, wall standing, stress positions, sleep deprivation, insects placed in a confinement box, and the waterboard).

This is the refers to the Bybee Two memo; Jack Goldsmith had authorized use of all but the waterboard for one detainee but reinforced the importance of adhering to its guidelines on July 7. Note that in the July 7 memo, Goldsmith also approved 24 techniques that Rummy had submitted in an April 15, 2003 memo.

Note, not included among the "previously given" advice is the "Legal Principles" document which CIA had tried to claim was official OLC advice, but which Goldsmith had rejected. Its absence from this list is not a surprise, however, given that this is, effectively, an internal DOJ list.

## 2. Current/Pending

a. The Attorney General reaffirmed the conclusion as to nine of the techniques (excluding the waterboard) in a July 22, 2004 letter to John McLaughlin.

This refers to this letter, which was a generalized reassertion of what Goldsmith had approved on July 7. Ashcroft's letter to McLaughlin did not refer to the military's 24 techniques.

b. In addition, I have written letters as to three detainees to date:

i. [redacted] [the waterboard is currently subject to the following limits: no more than two sessions a day; sessions on no more than 5 out of 30 days; sessions last no more than two hours each; no single application can exceed 40 seconds and no more than 6 applications exceeding 10 seconds in any one session; no more than 12 minutes total application per day]

This appears to pertain to this letter—dated August 6 and seemingly related to Hassan Ghul (based on the length of the redactions and comments in the 2005 Bradbury memos). But there's a problem. In the letter, Levin approved the following limits on waterboarding: no more than two sessions a day; sessions on no more than 15 out of 30 days; sessions last no more than two hours each; no more than 20 minutes per day. So already, it appears that Levin approved the waterboard for more uses than he told Comey and Ashcroft about. He references the Bybee Two

memo—so he may be implying limits from that—but that allows for 20 to 40-second applications.

In other words, the limits he says are in place do not match the limits that appear in the August 6 letter.

There are a couple of explanations for that. Levin also references an August 2 letter from Rizzo—and it's possible Rizzo put these lower limits in that letter (though just the day before, CIA was pushing for even higher limits). It's possible there was another letter entirely or an oral limitation—or Levin is discussing another detainee entirely.

And one more thing appears to be happening with the exchange between CIA and Levin. CIA may be trying to get the limits as used on Khalid Sheikh Mohammed and Abu Zubaydah approved, while Levin is—at least somewhat—insisting on the Bybee Two memo.

But from the documents we've seen so far, the limits Levin claims to have set don't match the limits he seems to have set.

My discussion of Ghul continues below.

ii. [details of second detainee letter redacted]

iii. [details of third detainee letter redacted]

These detainees appear to correspond with these letters:

- September 6, 2004 approval for use of twelve techniques (attention grasp, walling, facial hold, facial slap (insult slap), cramped confinement, wall standing, stress positions, sleep deprivation, dietary

manipulation, nudity, water dousing, and abdominal slap) with a detainee whose last name is around 9 characters long (and whose full name is much longer than the detainee in the September 20 letter).

- September 20, 2004 approval for use of twelve techniques (attention grasp, walling, facial hold, facial slap (insult slap), cramped confinement, wall standing, stress positions, sleep deprivation, dietary manipulation, nudity, water dousing, and abdominal slap) with a detainee whose last name is around 8 characters long

Note that four new techniques have been introduced on top of the earlier approvals that summer: dietary manipulation, nudity, water dousing, and abdominal slaps. They appear to have been first approved by OLC (though they were mentioned elsewhere) in this August 26, 2004 letter, which appears (again, from name length and the content of the May 10, 2005 Techniques memo) to be a follow-up on Ghul. (Recall that Ghul was deemed, in the end, too obese to waterboard.) Note, these four new techniques correlate with the new techniques introduced in the May 10, 2005 Techniques memo. So what Bradbury was doing in that memo—picking up on work done by Levin—was formalizing the August 6 and August 26 letters and the approvals that followed on that.

If all of this is correct, then it means we've

accounted for all three detainees Levin mentions in his memo, and that the memo was written after September 20.

One more note on detainees. We know for sure that Ghul is one of the detainees being discussed because his name was unredacted in later memos. Two other detainees captured around this time—and alleged to be tied to the alleged election plot—are Ahmed Ghailani and Mohammed Naeem Noor Khan—though neither are necessarily the detainees in question. Ghailani is currently about to be tried—in US civil court—for his alleged role in the 1998 embassy bombings; his civil trial makes it unlikely we tortured him, much. And Khan was reported to be cooperating with the US and was released in 2007.

c. [Description of a general pending memo redacted]

This would seem to be the description of the memo that would replace the Bybee Two memo, which ended up being the May 10, 2005 Techniques memo.

d. CIA has also requested an opinion on whether any of their techniques would "shock the conscience" if that legal standard applied [redacted discussion]

This seems to correlate to the May 30 CAT memo, which was a response to the IG Report's conclusion that the torture program was cruel and inhuman and therefore violative of CAT's prohibition on such treatment. The SSCI narrative describes a July 2004 Principals' meeting at which it was decided to ask for this opinion (partly because the Senate Intelligence leadership—probably Jello Jay—was asking about compliance with CAT).

What's curious about these two memo descriptions is that Levin does not describe the May 10 Combined memo as its own memo (though he may well have included a description of it in section c, particularly since that section is

bigger than section d). That's only interesting because, as we know, they ended up being two totally different memos, with the second one (Combined) being much more general than the first.

### C. DOD ADVICE

#### 1. Previously Given

a. There was a classified March 14, 2003 opinion to William Haynes from John Yoo which contains extensive discussion of the torture statute and other matters that it is not necessary to resolve any issue.

This is the memo that Yoo and Haynes used to sidestep the task force on interrogation just as Bybee was headed out the door. As with the Bybee One memo, Levin seems to be saying there is no urgency to replace the Yoo memo that had been withdrawn by Goldsmith.

b. In addition, we approved 24 specific techniques the use of which the Secretary of Defense approved. Although it is not necessarily clear to me when that was done it was reaffirmed, for example, in a July 7, 2004 letter from Jack Goldsmith to Scott Muller (referring to approval of both CIA and DOD techniques) and also in a July 17, 2004 fax by Jack.

Here's how the SASC Report describes the genesis and "approval" of these 24 techniques.

(U) On April 16, 2003, the Secretary of Defense authorized the Commander of SOUTHCOM to use 24 interrogation techniques. Of the 24 techniques, four – Mutt and Jeff, incentive/removal of incentive, pride and ego down, and isolation – required that the SOUTHCOM Commander make a determination of "military necessity" and notify the

Secretary in advance of using them. The Secretary authorized the use of the other 20 techniques with all detainees at GTMO so long as GTMO personnel adhered to certain safeguards. Those authorized techniques included dietary manipulation, environmental manipulation, sleep adjustment, and false flag, none of which were listed in the Army Field Manual.

(U) In addition to expressly authorizing the 24 techniques listed in his April 16, 2003 memorandum, Secretary Rumsfeld wrote in his memo: "If, in your view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee."

[snip]

Mr. Goldsmith told the Committee that he informed Mr. Haynes in December 2003 that he had determined that only 20 of the 24 techniques authorized by Secretary Rumsfeld were lawful, and that the remaining four techniques were under review.

[snip]

In his interview with Committee staff, Mr. Goldsmith said he eventually determined that all 24 were lawful. That account differs slightly from Goldsmith's account in his book, in which he said that he told Mr. Haynes in December that all 24 techniques were lawful.

Which makes it sound like Goldsmith never did a review, per se, even though the 24 techniques included dietary manipulation, which had not



been approved even for the CIA yet, as well as false flag, which was never approved for CIA.

And back to Levin's memo:

2. Current/Pending

a. [redacted]

In other words, there was an OLC opinion pending in September 2004. I have no idea what that is—presumably DOD asked for something in the follow-up to Abu Ghraib? But I don't know that we've seen that yet.