

NO ONE SAW THE BYBEE ONE MEMO, EITHER

One last detail from last years' torture hearings before HJC. At the hearing with Daniel Levin, Keith Ellison asked whether, if someone relied on the Bybee One memo (the "organ failure" one), whether they could be prosecuted.

Mr. ELLISON. Do you believe that the earlier memo gave license to people following its direction to engage in illegal techniques, interrogation techniques?

Mr. LEVIN. Well, it included a definition of torture that I frankly disagreed with and which would have, I think, allowed techniques that I would have concluded violated the statute. And it included this discussion of ways that you could overcome the statute, even if it applied and otherwise would have been violated.

Mr. ELLISON. So if somebody were to rely on that memo, the earlier memo, they would have been violating the law intentionally?

Mr. LEVIN. If somebody relied on the first part of that memo and went up to the limits of what it allowed, in my view they would be violating the law.

Now, again, maybe I am wrong and the earlier memo is correct. If somebody relied on the other constitutional overrides of these defenses, in my view they might well have been violating the law. It obviously would depend on the circumstances.

Mr. ELLISON. Did that ever happen?

Mr. LEVIN. I don't know. I don't know. I know there have been lots of

investigations into sort of how things ended up happening and who was relying on what. My understanding was that that memo was very—was not broadly circulated. And so I don't know whether people who were engaging in any conduct were even aware of the memo, let alone relying on it. [my emphasis]

Levin reports—about the Bybee One memo—something similar to what we've heard about the Bybee Two memo: that not many of the torturers had seen the document.

Beyond that, officials said it wasn't clear that any CIA interrogators were ever informed of the limits laid out in the Justice Department memo.

"A number of people could say honestly, correctly, 'I didn't know what was in it,' " said a former senior U.S. intelligence official familiar with the inner workings of the interrogation program.

So if both these reports are correct, then the torturers can't claim to be relying on the Bybee One memo, nor can they claim to be relying on the Bybee Two memo.

Which say, of the documents we've seen, the JPRA document remains a candidate (which described the waterboarding as it occurred, not as it was approved in writing), or the Legal Principles document (the oldest known copies of which date to 2003).

One more note: remember Daniel Levin's background. He took over at OLC in 2004, but before that he was the Chief of Staff at FBI. So he would have a very different understanding of these investigations than, say, John Yoo might.