

BYBEE: NO WRITTEN ADVICE PROVIDED TO ANY AGENCY PRIOR TO AUGUST 1, 2002

When Jay Bybee responded to written questions from Carl Levin about the torture authorizations in October 2008 (at a time when the Office of Professional Responsibility investigation was well-advanced, if not done), he made the following assertion.

While Judge Bybee said that he did not recall "any written advice provided to any governmental agency prior to August 1, 2002, on the meaning of the standards of conduct required for interrogation under the federal anti-torture statute or on specific interrogation methods," the August 1, 2002 memos were not the only occasion on which DOJ provided legal advice on the CIA's interrogation program.

That's interesting, because we know that on July 13, 2002, John Yoo wrote John Rizzo a letter in which he mapped out how to avoid prosecution for torture. He wrote:

This letter is in response to your inquiry at our meeting today [not attended by Bybee] about what is necessary to establish the crime of torture, as set forth in 18 USC 2340 et seq. The elements of the crime of torture are: (1) the torture occurred outside the United State; (2) the defendant acted under the color of law; (3) the victim was within the defendant's custody or physical control; (4) the defendant specifically intended to cause severe mental or physical pain or suffering; and (5) the act inflicted

severe mental or physical pain or suffering.

[snip]

Moreover, to establish that an individual has acted with the specific intent to inflict severe mental pain or suffering, an individual must act with specific intent, i.e., with the express purpose, [sic] of causing prolonged mental harm in order for the use of any of the predicate acts to constitute torture. Specific intent can be negated by a showing of good faith.

Now, it's possible that Bybee did not consider this "written advice," but it sure seems to address the topic at hand (and note, Bybee did not say "opinion," but only "written advice"). It's possible he lied—though I would imagine his answers to Levin very closely matched the answers he gave to OPR to what would presumably be remarkably similar questions.

Just as likely, I think Bybee may not have known about this letter. On June 22, 2004, the day OLC withdrew the Bybee One memo, John Rizzo faxed the letter (including the fax cover sheet Yoo originally used) back to Daniel Levin. That either suggests Rizzo was trying to remind Levin of the meeting on July 13, 2002 (which Levin had attended as FBI Chief of Staff). Or he was providing OLC, where Levin had moved, with a copy of a letter that was not otherwise in their files.

This earlier letter lays out the torturer's strategy for establishing a "good faith" immunity from torture. Is it possible Bybee didn't know about it?