OPR WORKING THREAD PART THREE

Happy Sunday.

Here are the HJC copies of all these documents:

- Memorandum for the Attorney General
- OPR Final Report
- OPR 1st Draft Report
- OPR 2nd Draft Report
- Yoo Response to OPR 2nd Draft
- Yoo Response to OPR Final Draft
- Bybee Response to OPR 2nd Draft
- Bybee Response to OPR Final Draft
- Mukasey and Filip Responsem

And burnt has made available searchable copies to everything here.

My notes on the first draft are here.

My notes on the second draft, the Mukasey response, and the Yoo response are here.

I'm going to go through the first Bybee response in this thread. All page references will be to the PDF page, not the document page.

Mahoney's Lies

I have read enough of Margolis' response to have had the impression that Maureen Mahoney, Bybee's lawyer, was much more attentive to her client's needs than Bybee was when he was working in OLC.

But the first paragraph—which is replete with outright errors and propaganda—changes my mind on that front.

> Six months after the September 11,2001 attacks, United States forces captured top al Qaeda leader Abu Zubaydah. Because Zubaydah had assumed the role of chief military planner for al Qaeda, he possessed critical imminent threat information. In particular, the Central Intelligence Agency ("CIA") determined that Zubaydah had information about a "second wave" of devastating attacks targeting, among other things, the tallest building in Los Angeles. After Zubaydah resisted traditional interrogation methods, the CIA developed an enhanced strategy for Zubaydah and asked the attorneys at the Department of Justice's Office of Legal Counsel (OLC) for its opinion on the legality ofusing ten specific interrogation techniques to interrogate him. The request required OLC to interpret the federal criminal anti-torture statute found at 18 U.S.C. §§ 2340-2340A-a statute that had never before been interpreted by any court. The statute defines torture as an act "specifically intended to inflict severe physical or mental pain."

It is true that they captured Abu Zubaydah (aka "Boo boo") roughly six months after 9/11. But almost everything else in this paragraph is false—and was known to be false when Mahoney wrote it. We know that AZ was not a top AQ leader, was not the chief military planner for AG (ferchrissakes, KSM was!). It is true that CIA claimed AZ had information about a second wave of attacks. But he didn't. We also know that AZ responded to traditional interrogation methods. And OLC was not asked to opine on the legality of ten techniques. They were asked to opine on twelve (the ten that got approved, plus diapering and mock burial). And it wasn't until days before the opinion was released that CIA asked for approval of those specific techniques.

In short, Mahoney's response is premised on

known lies.

Maybe we should report her to her bar council…

As it turns out, this is not just empty lies—she returns to this false portrayal of what happened later in the document to support her argument that this was a limited opinion.

> On March 28, 2002, American and Pakistani intelligence agents captured Abu Zubaydah, a top al Qaeda leader. After the death of Mohammed Atef during the American invasion of Afghanistan in November 2001, Zubaydah had assumed the role of chief military planner for al Qaeda, ranking in importance only behind Osama bin Laden and Ayman Zawahiri. Shortly after Zubaydah's capture, in early April 2002, the CIA's Office of General Counsel began discussions with the Legal Advisor to the National Security Council ("NSC") and OLC concerning the CIA's proposed interrogation plan for Zubaydah. OPR gives no weight to and even fails to acknowledge that the Techniques Memo related only to Zubaydah, a known, hardened terrorist, trained in resistance whose mental and physical conditions were known to the CIA. The CIA asked OLC to evaluate the legality of ten specific interrogation methods proposed for use with Zubaydah.3

Of course, we know they were already subjecting Binyam Mohamed to sleep deprivation at this time.

Who reviewed the document

This is interseting. Maybe Mahoney wants to provide us more detail of the review process, because that doesn't appear in the report.

> Various drafts of the memos were reviewed by the Attorney General, the White House Counsel, the Deputy White

> House Counsel, the CIA General Counsel, the NSC General Counsel, the Attorney General's legal advisor, the Head of DOJ's Criminal Division, and the Vice President's Legal Counsel.

Especially since almost all of these people were more involved in the memo with Bybee's name on it than Bybee was.

But it's also interesting because it puts Addington more strongly in the mix than he admits.

Mahoney repeats the Addington canard

Mahoney repeats an error that Miguel Estrada makes, too:

> Third, OPR either ignores or misrepresents critical evidence. For example, OPR assails the memos for including sections discussing the Commander-in-Chief power and possible common law defenses, while utterly ignoring sworn congressional testimony that the client specifically requested OLC to include such a discussion.

As I've shown in the last thread you cannot use Addington's comments as defense here.

Here's more on Addington (I'm going to come back to this in a long cranky post):

> On July 15, 2002, Y00 instructed [Koester] to include a footnote in the memo explaining that OLC would not address defenses or the effect of the Commander-in-Chief power on the statute because OLC had not been asked about those issues. Later that day, Yoo met again with Gonzales, Addington, and possibly Flanigan. Addington confirmed that around this time he requested that Y00 include in the memo's analysis a discussion of the Commander-in-Chief power and other possible defenses to a

> prosecution under the statute. See From the Department of Justice to Guantanamo Bay, Administration Lawyers and Administration Interrogation Rules (Part III): Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties ofthe H Comm. on the Judiciary, 110th Congo 38-42 (2008) (testimony of David Addington, Chief of Staff, Vice President of United States) ("2008 Addington Testimony"). On July 16, 2002, after receiving Addington's request, Yoo asked [Koester] to begin work on the additional sections. She completed a revised draft on July 23, 2002.4 Plainly, OPR's criticism that the Commander-in-Chief and defenses sections were not necessary is just flat wrong ifthe client requested the analysis.
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> 4 While the OLC attorneys were working on the memo, on or around July 16, 2002, the CIA contacted AAG Chertoff and requested a letter providing an advance declination of prosecution for the interrogation of Zubaydah. The Criminal Division turned down the request, explaining that it was not DOJ policy to issue preactivity declination letters. OPR seems to suggest from the timing of DOJ's denial of the advance declination and the addition of the Commander-in-Chief and defense sections that Yoo somehow improperly sought to circumvent the declination by including these sections in the memo. Draft Report at 31. As explained infra, this conjecture is refuted by Addington's uncontradicted congressional testimony and rests on the mistaken premise that identification of possible defenses somehow immunized CIA agents from prosecution.

And more.

> OPR's assertion is factually incorrect, or at least is not supported by the

> evidence. In fact, there is sworn congressional testimony, which OPR has ignored, directly contradicting OPR's conclusion. In particular, on June 26, 2008, David Addington testified that John Yoo had included the sections on defenses and Commander-in-Chief authority because this is "what his client asked him to do" and that Addington himself had requested those sections. From the Department ofJustice to Guantanamo Bay, Administration Lawyers andAdministration Interrogation Rules (Part III): Hearing Before the Subcomm. ofthe Constitution, Civil Rights, and Civil Liberties ofthe H Comm. on the Judiciary, 110th Congo 42 (June 26, 2008) (testimony of Addington) (emphasis added). Moreover, Addington noted, "it is the professional obligation of the attorney to render advice on subjects that the client wants advice on." Id. It is remarkable that OPR cites only a portion of this highly relevant testimony. See Draft Report at 31, 156 (noting that Addington told Yoo that he was "glad you're addressing these issue," but failing to note that Addington testified that he had specifically requested Y00 to draft those portions of the Memo). Either OPR failed to read the entire transcript ofAddington's congressional testimony or it purposefully omitted reference to Addington's statement. Cf Draft Report at 129 ("Selective quotations that omit relevant information are at worst, misrepresentations, and at best, reflect sloppy research and writing."). Furthermore, Addington's testimony is bolstered by the facts that OPR does deign to include. Although Y00 had previously made the decision not to include the sections, after a July 16, 2002 meeting with White House officials, including Gonzales, Addington, and

> Flanigan, Yoo did an about-face and asked_to begin drafting the two new sections. Furthermore, in response to a question from Philbin regarding inclusion of the sections, Y00 once stated that "they want it in there." Draft Report at 155-56. And the Standards Memo itself refers to "your request for advice" on the Commander-in-Chief issue. Standards Memo at 31. The most natural reading of these facts is, as Addington confirmed, that the client asked for the inclusion of those topics.

This is interesting. The OPR report focuses on State—and shows evidence that Yoo did keep DOD in the loop. But Mahoney adds DOD to the mix. This claim was made in the Rockefeller narrative, which may be where she got it from.

> The NSC ordered OLC not to discuss work on the matter with either the State or Defense Departments and the Attorney General decided which divisions of the Justice Department were to review the memos.

This is stronger than the report is:

> On July 12,2002, Yoo and met with White House Counsel Alberto Gonzales, White House Deputy Counsel Timothy Flanigan, and Counsel to the Vice President David Addington to review the memo.

Bybee's lawyer makes it clear that Bybee was very involved in helping Cheney prevent his Energy Task Force records from becoming public.

> During the summer of 2002, in addition to his work on national security issues, Judge Bybee, as head of OLC, was also heavily involved in a number of other difficult and pressing legal matters. Of particular note, Judge Bybee was engaged in the district court litigation in

> Walker v. Cheney, No. 02-340 (DD.C.). The attorneys in that case were working closely with the Department's Civil Division and the Solicitor General's Office. The legal issues involved in the case were peculiarly within Judge Bybee's expertise because his scholarly research had been cited as authority by both sides. See Jay S. Bybee, Advising the President: Separation a/Powers and the Federal Advisory Committee Act, 104 Yale L.J. 51 (1994).

Mahoney makes an argument that the torture that Bybee authorized was different from the torture that we prosecuted the Japanese for. But her argument is refuted by the practice of waterboarding.

> At his confirmation hearing, Attorney General Holder stated that "[i]fyou look at the history of the use of that technique used by the Khmer Rouge, used in the Inquisition, used by the Japanese … waterboarding is torture." But Holder offered no analysis under the statute and also relied on the uninformed assumption that "waterboarding" as it has been used throughout "history" is the sarne technique as that described in the Techniques Memo. In fact, they are quite different. In the Japanese version used on American soldiers, for example, "water was forced through [the victim's] mouth and nostrils into his lungs and stomach until he lost consciousness"; "[p]ressure was then applied, sometimes by jumping upon his abdomen to force the water out"; the victim was then revived and the process repeated. Judgment: IMTFE 1058, ch. VIII, Conventional War Crimes (Atrocities), available at http://www.ibiblio.org/hyperwariPTO/IMTFE/IMTFE-8.html; see also Evan Wallach, Drop by Drop: Forgetting the History a/Water Torture in Us. Courts, 45 Colum.

> J. Transnat'l L. 468, 486-88 & nn.78-84 (2007) (two gallons of water poured directly into nose and mouth until victim loses consciousness); id. at 491-94 (prisoner forced to swallow and inhale the "vile concoction" of water containing human refuse and kerosene, often rendering him unconscious).

Now, to be fair, when John Helgerson reported that the waterboarding in practice did not match the waterboarding in the memo and described precisely this kind of forced drinking of water, that was a comparison to teh Techniques memo. But the Bybee One memo is basically what authorized the torturers to overstep the limits in Bybee Two.

Yoo came out of Addington meeting knowing how to write carte blanche.

> 31 The email from Y00 on July 18, 2002, stating that he has "a good idea about how we are going to do it now," is consistent with Addington having recently requested the additional sections, leading Yoo to state with certainty that he then understood how the memo would be structured.

A wise paragraph from Bybee's lawyer:

> Executive branch attorneys (OLC and the AG) have long taken a robust view of Executive Authority, without regard to whether it was a minority view. The Clinton administration, for example, was "excoriated" for its "'absolutist pretensions' in military affairs" and "Clinton's OLC wrote several opinions arguing that the President could disregard congressional statutes that impinged on the Commander in Chief or related presidential powers." Goldsmith at 36. Numerous administrations have either explicitly or implicitly found

> the War Powers Resolution unconstitutional and ignored it. In fact, “every President has taken the position that [WPR] is an unconstitutional infringement by the Congress on the President’s authority as Commander-in-Chief.” Richard F. Grimmett, Congressional Research Service, Library of Congress, War Powers Resolution: Presidential Compliance 2 (2002); see also Overview ofthe War Powers Resolution, 8 O.L.C. 271,281-83 (Oct. 30, 1984) (Olson) (instances of Presidents Nixon, Ford, Carter and Reagan moving troops into actual or imminent
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> hostilities without complying with WPR).

This is the problem with OLC: it’s become a shop whose purpose is to justify abuse of power. For both Democrats and Republicans.

Fundamental problem with the self defense—this isn’t what OLC is supposed to do.

> At bottom, what OPR actually takes issue with is that the authors did not adequately lay out how a government defendant could successfully raise a necessity defense, but the Memo never purported to demonstrate how the defense could be successful under every conceivable fact pattern that might arise in the future. Again, as Judge Bybee, confirmed, the purpose of the section was simply to identify the defenses as potentially applicable in a criminal prosecution.

It’s not his job to exercise oversight.

> At his deposition, Judge Bybee stated that he routinely asked his staff whether they had included all relevant information.

Managerial role

> As should be plainly obvious, the vast majority ofOPR’s criticisms regarding the substance ofthe memos relate to researching, Shepardizing, and checking citations-in short, the work ofthe line attorneys at OLC. Judge Bybee’s role with regard to the Memos was a managerial one. Judge Bybee, who, as the head of OLC, was responsible for overseeing an office of over twenty extraordinarily talented and experienced attorneys, cannot be held responsible for conducting independent research or Shepardizing every case. OLC produced numerous memos over his tenure, which all required a significant amount ofleg work. The head ofOLC must be able to delegate tasks and trust the work of his subordinates. Otherwise, the office would cease to function. Here, Judge Bybee had exceptionally well-qualified staffing on the memos, including three former or future Supreme Court law clerks, one ofwhom was an extensively-published professor considered by many to be an expert in the relevant doctrine. See, e.g., John C. Yoo, UN Wars, US War Powers, 1 Chi. J. Int’l 1.. 355 (2000); John C. Yoo,
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> Kosovo, War Powers, and the Multilateral Future, 148 U. Pa. 1.. Rev. 1673 (2000); John C. Yoo, Treaties and Non-SelfExecution, 94 Am. Soc’y Int’l 1.. Proc. 47 (2000); John C. Yoo, Globalism and the Constitution: Treaties, Non Self-Execution, and the Original Understanding 99 Colum. L. Rev 1955 (1999); John C. Yoo, CLIO at War: The Misuse ofHistory in the War Power Debate, 70 U. Colo. 1.. Rev. 1169 (1999); John C. Yoo, The First Claim: The Burr Trial, United States V. Nixon, and Presidential Power, 83 Minn. 1.. Rev. 1435 (1999); John C. Yoo, The

> Continuation ofPolitics by Other Means: The Original Understanding ofWar Powers, 84 Cal. 1.. Rev 167 (1996); Harold Hongju Koh & John Choon Yoo, Dollar DiplomacylDollar Defense: The Fabric ofEconomics and National Security Law, 26 Int'l Law. 715 (1992).

And more on that:

> Third, the standards of managerial review implicit in the Draft Report will cripple efficiency among managing government attorneys. Under OPR's interpretation of Rule 1.1 's duty of competence, managers like Judge Bybee can never rely on the legal research of even the most credentialed attorne s e. ., Y00, a former Supreme Court clerk and professor. He will be compelled — on pain of professional reprimand — to cite check every case and independently research every area oflaw to make sure no relevant cases or counterarguments are missing. This is untenable on numerous levels. As head of OLC, Judge Bybee had constant demands on his time, and was not in a position to duplicate the work of his line attorneys. As former Attorney General John Ashcroft, who held ultimate responsibility for the OLC memos, noted: "[I]t is important to bear in mind that each week during my tenure as Attorney General-and especially following 9/11scores of critically important matters came to my desk…. Necessarily, then, I did what every attorney general and cabinet officer must: I daily relied on expert counsel and painstaking work of experienced and skilled professionals who staff the Department." From the Department of Justice to Guantanamo Bay, Administration Lawyers and Administration Interrogation Rules (Part V): Hearing Before the Subcomm. on the

> Constitution, Civil Rights, and Civil Liberties of the H Comm. on the Judiciary, 110th Congo 5 (2008) (statement of John Ashcroft). This is not to suggest that Attorney General Ashcroft should be held to the same standard as Judge Bybee, but to point out that Judge Bybee should not be held to the same legal competence standard as those who actually drafted the memos. This is all the more true given that Judge Bybee had fewer than two weeks in which to review the memos. Draft Report at 37. In this space oftime, it was literally impossible for Judge Bybee to have conducted the sort of review OPR demands. In addition, OPR's insistence on the inclusion of countervailing views and exhaustive citation of applicable case law will cause future OLC memoranda to balloon in size, in sharp contrast to OLC's current practice of giving succinct opinions for their sophisticated clientele unlike those of federal judges or authors of law review articles.

Very good point—which she expands on here.

> Moreover, why wouldn't such responsibility extend to Judge Bybee's superior? OPR itself acknowledges that Ashcroft, was "ultimately responsible for the [Memos] and for the Department's approval of the CIA program[,]" but OPR concludes that "it was not unreasonable for senior Department officials to rely on the advice from OLC." Draft Report at 189. (Remarkably, OPR notes "that Ashcroft was at least consistent in his deference to OLC." Id) That must be equally true as to Judge Bybee's justifiable reliance on his well-trained staff.

Evidence that Margolis was brought in earlier

than it seems.

> Over the course ofOPR's investigation, Judge Bybee's counsel attempted to maintain open communication, sending letters addressedto_on September 27, 2005, February 17,2006, and October 1, 2008, and to keep abreast ofOPR's investigation. After three years with virtually no word from OPR, during the 2008 holiday season Judge Bybee and his counsel were shocked to learn from David Margolis that not only had OPR completed a draft report with adverse findings that would have placed Judge Bybee's professional career in jeopardy, but that OPRhad already scheduled a date (January 12,2009) on which to release the report to Congress and the public.

Mahoney reveals she did not get an SCI clearance before she wrote her response. This is interesting for two reasons. First, because at the same time Bybee was complaining about this, Yoo was complaining about statutes of limitation. And second, because there are details in Mahoney's report which do not exist in unclassified form and/or certainly didn't when she wrote them.

> Throughout the entire review period, the Draft Report was classified at the sensitive compartmented information level. This fact greatly complicated counsel's ability to review the classified portions ofthe Draft Report and adequately respond to those sections. Moreover,OPR informed Judge Bybee's counsel that the associate immersed in the investigation would not receive the necessary security clearance for four months. After being so informed, counsel submitted to OPR a reasonable proposal that would permit Judge Bybee to respond 60 days from the date that the associate received the appropriate clearance. OPR rejected this

> request as well, instructing counsel to find another associate with the necessary clearance to assist in preparing the response. OPR provided absolutely no explanation whatsoever for its rigid adherence to such an absolutely capricious and rushed deadline. Fortunately for Judge Bybee another associate with the necessary clearance was identified and available to provide assistance with the classified portions of the Draft Report.

Note Mahoney's sources here:

> First, allowing OPR to second-guess the merits ofOLC opinions with the benefit of hindsight and months or years of scrutiny will have a chilling effect, discouraging OLC attorneys from giving meaningful answers to difficult questions and dissuading talented attorneys from choosing to work at OLC or, indeed, in government generally. Fear ofpersonal and professional
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> liability on the basis ofrendering legal opinions will provide strong incentives to simply eschew definite positions, see, e.g., Levin Standards Memo at 16-17 (declining "to try to define the precise meaning of 'specific intent' in section 2340″); Bradbury Techniques Memo at 28 (same), lest future political winds shift direction. See Richard N. Haass, The Interrogation Memos and the Law, Wall St. J., May 1,2009 (,,[P]rosecution of Justice Department officials would have a chilling effect on future U.S. government officials. Few would be brave or foolhardy enough to put forward daring proposals that one day could be judged illegal. …With the threat of prosecution, serious memos on controversial matters will increasingly become the exception rather than the rule."). In his book, The Terror

> Presidency, Jack Goldsmith warned against creating such an excessive sense of caution among government lawyers due to fear of “retroactive discipline.” Goldsmith, The Terror Presidency 93. Indeed, the effects ofOPR’s investigation, even before its findings have been made public, are already being felt. Recently, a 20-year veteran prosecutor, who served in the Department of Justice under presidents of both parties, declined to participate in a bi-partisan government task force, for fear that “a lawyer who in good faith offers legal advice to government policy makers-like the government lawyers who offered good faith advice on interrogation policy-may be subject to investigation and prosecution for the content of that advice, in addition to empty but professionally damaging accusations of ethical misconduct.” Letter from Andrew McCarthy to Attorney General Holder (May 1,2009) (on file with author). As he noted, in light ofOPR’s investigation, “any prudent lawyer would have to hesitate before offering advice to the government.” Id.

I need to check, but I believe this doesn’t state AGAG’s position on waterboarding—at least as stated in his confirmation hearing.

> Once the Standards Memo became public in summer 2004, neither the American public nor Congress rebuked those responsible for its creation; President Bush was reelected that November and Alberto Gonzales was confirmed as Attorney General in early 2005. More recently, former Attorney General Mukasey was confirmed, with significant bipartisan support, despite his agnosticism on whether waterboarding constitutes torture.

Ouch.

> In recent years, after the political winds had shifted, Congress has attempted-but failed-to ban the techniques at issue here, with the votes falling largely along partisan lines. For example, in 2006, an amendment to ban waterboarding failed 46-53. See 152 Congo Rec. Sl0378, Sl0398 (daily ed. Sept. 28, 2006) (Amendment No. 5088 to Senate bill 3930 offered by Senator Kennedy and defeated 46-53). see also, e.g., H.R. 2082, 110th Congo (2008) (failed to override president's veto).