

THE MOCK BURIAL IN THE OPR REPORT

CIA's torturers asked DOJ to let them use mock burials. But DOJ said no.

PDF page 42 of the OPR Report (searchable copy [here](#)) includes a list of the torture techniques that Mitchell and Jessen recommended be used with Abu Zubaydah. Whereas the Bybee Two Techniques memo approves ten techniques, Mitchell and Jessen recommended twelve. In other words, Mitchell and Jessen asked for two techniques to be approved that did not get specific approval.

One of these (technique 10) is diapering. We know they used diapers anyway as it was a critical element of their sleep deprivation and stress position techniques.

Technique 12 remains redacted in this report. But as I pointed out last week, PDF page 178 of the First Draft includes an unredacted reference to the technique.

Goldsmith viewed the Yoo Memo itself as a "blank check" that could be used to justify additional EITs without further DOJ review. Although Yoo told us that he had concluded that the mock burial technique would violate the torture statute, he nevertheless told the client, according to Fredman and Rizzo, that he would "need more time" if they wanted it approved. [my emphasis]

The twelfth technique—which Mitchell and Jessen wanted approved but which Yoo excluded because of the rush to approve waterboarding—is mock burial.

There must have been significant discussion about the decision to exclude mock burial from the Bybee Two memo, because the reference to its exclusion in the report itself (PDF page 60 in

the Final Report) includes a page and a half of redactions following the discussion of leaving it out.

That redaction almost certainly includes a discussion of why mock burial was so important to include in the memo: Because we know that James Mitchell threatened to use it in May 2002. And after Mitchell did threaten to use it, Ali Soufan called it "borderline torture." After he told FBI's Counterterrorism Assistant Director Pasquale D'Amuro about the technique, D'Amuro instructed him to leave the black site. As follow-up to this meeting, a bunch of DOJ bigwigs—including Michael Chertoff—had a meeting about Abu Zubaydah's interrogation. At about the same time, Chertoff refused to give the CIA advance declination of prosecution for torture.

Curiously, the DOJ's IG Report on torture says the CIA asked for 10 torture techniques to be included in its OLC memo, not 12.

Now, it's not clear whether Mitchell and Jessen ever did use mock burial with Abu Zubaydah. Zubaydah didn't mention it in the narrative he gave to the ICRC of his treatment.

But there are two more reasons why Yoo's refusal to approve mock burial is dangerous for the CIA. First, an FBI agent told CIA and DOJ that the technique was borderline torture. Nevertheless, the CIA asked to have the technique available to it.

Also, any legal discussion of why mock burial would be a problem would focus on how torture statutes prohibit the threat of imminent death. Yet after mock burial was specifically excluded as a torture technique, CIA torturers went on to threaten detainees with a power drill and a gun. In other words, someone at that CIA had already been told, specifically, that they could not use the threat of imminent death on detainees. But on at least two occasions, they did so anyway.