

DID DOJ “LOSE” THE SMOKING GUN TORTURE DOCUMENT?

You know what I find surprisingly absent from the OPR Report?

Any discussion of how—just days after potentially receiving a document making clear that SERE techniques were torture and that torture was not effective—John Yoo still authorized the use of torture in US interrogations.

Here are the last two paragraphs of that document:

(U) Another important aspect of the debate over the use of torture is the consideration of its potential impact on the safety of U.S. personnel captured by current and future adversaries. The unintended consequence of a U.S. policy that provides for the torture of prisoners is that it could be used by our adversaries as justification for the torture of captured U.S. personnel. While this would have little impact on those regimes or organizations that already employ torture as a standard means of operating, it could serve as the critical impetus for those that are currently weighing the potential gains and risks associated with the torture of U.S. persons to accept torture as an acceptable option.

(U) CONCLUSION: The application of extreme physical and/or psychological duress (torture) has some serious operational deficits, most notably, the potential to result in unreliable information. This is not to say that the manipulation of the subject’s environment in an effort to dislocate their expectations and induce emotional

responses is not effective. On the contrary, systematic manipulation of the subject's environment is likely to result in a subject that can be exploited for intelligence information and other national strategic concerns. [my emphasis]

This document was written by JPRA—the people that administer the SERE program from which our torture program was purportedly reverse-engineered. It provides clear evidence that, on July 25, 2002, JPRA was aware of an ongoing debate over whether or not to use torture with prisoners in US custody. The document clearly states that torture leads to unreliable information. And the document calls these techniques “torture.”

You'd think, if there were proof Yoo had read it, that OPR would include some discussion of how JPRA's expert opinion that this was torture should have affected Yoo's own definition of torture (heck—JPRA's language here would be more on point than the “organ failure” language that Yoo and Jennifer Koester used to define torture). You'd think, given the experts' opinion that torture produced unreliable information, OPR would have challenged Yoo's acceptance of the CIA's claims that torture was the only way to get Abu Zubaydah to reveal the intelligence they claimed he had. You'd think OPR would ask Yoo why—given his reliance on the same JPRA experts to claim that waterboarding didn't cause psychological harm—he chose to ignore this document from JPRA.

This document, in other words, ought to be a cornerstone of OPR's analysis of Yoo's failure to provide independent analysis and include all relevant information about what constituted torture. It ought to be used as proof that Yoo knew he was authorizing what the experts deemed to be torture.

If OPR had proof Yoo read this document, it would be the “smoking gun” that when he wrote

the torture memo he knew he was deliberately authorizing torture.

But it's not clear whether Yoo did read it. And it's not clear that if he did, proof to that fact would still have been in OLC's collection of torture documents by the time OPR got around to reviewing those documents.

If the document appears in the OPR Report, it would appear in the discussion on PDF 62 describing Koester receiving a bunch of additional information from CIA on the torture program.

Over the next few days, [redacted] sent [Jennifer Koester] additional information relating to the proposed interrogation, including a psychological assessment of Abu Zubaydah and a report from CIA psychologists asserting that the use of harsh interrogation techniques in SERE training had resulted in no adverse long-term effects.

[Redacted] also provided additional information about the proposed interrogation program to [Koester]. On July 26, 2002, [redacted] sent [Koester] three memoranda the CIA had obtained from the Department of Defense Joint Personnel Recovery Agency (JPRA) and the United States Air Force. The memoranda, dated July 24 and July 25, 2002, were in response to requests for information from the DOD Office of General Counsel about SERE interrogation techniques. The two JPRA memoranda were in response to a request for information about interrogation methods used against United States prisoners of war, and the techniques used on students in SERE training. The Air Force memorandum was from a psychologist who served in the Air Force's SERE training program. The memorandum discussed the psychological effects of SERE training, noting that the waterboard was 100% effective as an

interrogation technique, and that the long-term psychological effects of its use were minimal.

[~10 line paragraph redacted]

I suspect—as I’ll discuss in a later post—that redacted passage discusses the lists of techniques used against American POWs and on students in SERE training. Moreover, this JPRA document is so inflammatory, if it were in the OPR Report, it ought to serve as a cornerstone of OPR’s analysis of Yoo’s bad lawyering rather than just one 10-line paragraph. But there appears to be no sign of it.

Yet, at least when DOD General Counsel was putting together the information that appears to have gone in that packet, the JPRA memo was included in it. And Jim Haynes suggested that the entire packet was forwarded to DOJ. The SASC Torture Report explains,

On July 26, 2002, JPRA completed a second memorandum with three attachments to respond to the additional questions from the General Counsel’s office.

[snip]

The first attachment to the July 26, 2002 memo was “Physical Pressures used in Resistance Training and Against American Prisoners and Detainees.”¹⁹² [see PDF 211ff for excerpts] That attachment included a list of techniques used to train students at SERE school to resist interrogation. The list included techniques such as the facial slap, walling, the abdomen slap, use of water, the attention grasp, and stress positions.¹⁹³ The first attachment also listed techniques used by some of the service SERE schools, such as use of smoke, shaking and manhandling, cramped confinement, immersion in water or wetting down, and waterboarding.

[snip]

Mr. Haynes also recalled that he may have been “asked that information be given to the Justice Department for something they were working on,” which he said related to a program he was not free to discuss with the Committee, even in a classified setting.

(U) A second attachment to the July 26, 2002 JPRA memo to the General Counsel’s office was entitled “Operational Issues Pertaining to the use of Physical/Psychological Coercion in Interrogation.”¹⁹⁸ In attachment two, JPRA stated that the memo did not purport to address the “myriad legal, ethical, or moral implications of torture; rather, [the memo focused on] the key operational considerations relative to the use of physical and psychological pressures.”¹⁹⁹

(U) Attachment two described operational risks associated with using “physical and/or psychological duress” (a phrase that JPRA used interchangeably with “torture” throughout most of attachment two) in interrogations. ²⁰⁰ The attachment said that one risk was that the use of these methods would increase the “prisoner’s level of resolve to resist cooperating.”²⁰¹ JPRA explained that “[0]nce any means of duress has been purposefully applied to the prisoner, the formerly cooperative relationship cannot be reestablished. In addition, the prisoner’s level of resolve to resist cooperating with the interrogator will likely be increased as a result of harsh or brutal treatment.”²⁰²

[snip]

The third attachment to JPRA’s July 26, 2002 memo was a memo from the Chief of

Psychology Services at the Air Force SERE school, Jerald Ogrisseg, on the "Psychological Effects of Resistance Training."²⁰⁷ That memorandum, which was generated in response to a specific request from the General Counsel's office, described available evidence on the long-term psychological effects of Air Force SERE training on US personnel and commented from a psychological perspective on the effects of using the waterboard.

Reading closely, it appears that OPR believes that Koester received three things on July 26—attachment one (Physical Pressures) and attachment three (Psychological Effects) from the DOD packet, plus a document on techniques used against American POWs (two similar documents are described on PDF 208 and were attached to a memo prepared for DOD for use with DOJ on July 25). But we know that before that packet left DOD, the second attachment was the JPRA document calling these techniques torture.

And that's why the fact that OLC hasn't maintained control over these documents is so important.

As we can see, there is a discrepancy between how SASC describes the packet that was collected in DOD and the packet that OPR says Koester received on July 26, 2002—because the JPRA document describing these techniques as torture appears to have gotten swapped out for a description of techniques used against US POWs. If we could trust the provenance of the documents in OLC's SCIF, we could see what documents actually made it to OLC. But we can't—there's an apparent discrepancy between the multiple descriptions of the July 26, 2002 packet in the FOIA and what OPR reports Koester to have received.

Here's what the FOIA Vaughn Indices say:

2007 short form:

Document 7, 07/26/2002, 13 page Top Secret packet, w/fax cover sheet, 2-page memo, 6-page memo, 2-page memo, and 2-page memo providing legal advice

2007 long form:

Document No. 7 is a 13-page document dated 26 July 2002 that consists of a 1-page fax cover sheet, a 2-page memorandum, a 6-page memorandum, a 2-page memorandum, and a 2-page memorandum. It is classified TOP SECRET.

The memoranda contain confidential client communications from the CIA on a matter in which it requested legal advice from OLC.

2009 version:

Document 7, 7/26/02, Secret memo requesting legal advice

This is a twelve-page memo from the DOD discussing resistance training techniques to special designated high-risk-of-capture personnel. It includes a fax cover sheet from CIA to DOD. The DOD document is being referred to DOD for reprocessing or a determination that it has previously been processed in this litigation.

That is, both 2007 descriptions say there are four, not three, attachments in this packet, which doesn't correspond with either OPR's or SASC's description of the packet. And while the 2009 description may not be inconsistent with the SASC description of the packet (that is, the entire 3-part packet could be described as describing SERE training), that wouldn't seem to include the third document OPR says Koester got—something describing techniques used historically on US POWs.

To make things worse, the July 26 packet was

closely associated with a July 25 packet that OLC seems to suspect also came from DOD (in which there were two descriptions of treatment of US POWs). This is the packet the description of which was already inconsistent in 2007, and has since disappeared entirely.

2007 short form

Document 6, 07/25/2002, 46 page Top Secret memo providing legal advice

2007 long form

Document No. 6 is a 60-page document dated 25 July 2002 that consists of a 3-page memorandum and six attachments of 2 pages, 7 pages, 10 pages, 13 pages, 13 pages, and 12 pages, respectively. It is classified SECRET.

The memorandum and attachments contain confidential client communications from the CIA on a matter in which it requested legal advice from OLC.

2009 version

Document 6, 7/25/02 59 page Secret memo (from and to DOD) providing legal advice, not located

This packet has been alternately described to include 46 pages, 60 pages (including a 3-page cover memo), and 59 pages. As with the July 26 packet, it has been described to be classified at both Top Secret and Secret levels. Between the July 25 and July 26 packets, there are four 2-page documents that could be the JPRA document. And if DOD just forwarded the memos it got to CIA, this packet, not the July 26 one, would include the descriptions of torture used on US POWs.

Now, it may well be that the JPRA document was intercepted before the packet got sent to OLC. John Rizzo testified to Congress that "his

office was the vehicle” for passing this information along.

Mr. Rizzo stated that his office was “the vehicle” for getting the interrogation practices analyzed in the Second Bybee memo to the Department of Justice.”

And indeed, the redacted name in the OPR Report seems to be a lawyer at CIA, if not Rizzo’s office. So it’s possible that CIA thought better of sending over to DOJ a document labeling these interrogation techniques as torture. But given the way CIA once had, for a period in 2007, unfettered control of the documents in question, we may never know whether it got sent over to DOJ.

All of which leaves us with a more questions than answers about why the smoking gun document calling torture torture didn’t appear in the OPR Report:

- Is the JPRA document in the OPR Report?
- If so, is it still in OLC’s documents?
- If not, did the JPRA document ever get sent to OLC?
- If not, did the JPRA document get removed by someone in DOD or someone in CIA?

That document probably either got removed before it got sent to DOJ (in which case either Haynes or Rizzo is culpable) or it disappeared from a SCIF. Finding out which happened would place the smoking gun—intent to authorize a program of torture—in a member of the War Council’s hands.