

YOO'S SUPERVISORS DIDN'T KNOW ABOUT THE JULY 13, 2002 FAX

As I pointed out in my last post, when Jonathan Fredman wrote the Abu Zubaydah torture team in Thailand to tell them they had gotten the green light to torture, he cited not the Bybee One memo which had just been signed, but a July 13, 2002 Yoo fax, for his discussion of intent.

This is significant not just because the language on intent in the fax lacks some of the caveats in the Bybee One Memo. But also because it appears Yoo was freelancing when he wrote the July 13 fax.

To be sure, the evidence that Yoo was freelancing when he wrote this fax is not as clear cut as it was for the Legal Principles/Bullet Point documents. Unlike the Legal Principles documents, this fax is on OLC stationary and signed by Yoo, making it appear, at least, like a formal OLC opinion.

But Yoo's superiors at DOJ claim to have known nothing about it.

In response to July 2008 questions from the Senate Armed Services Committee, Jay Bybee said in October 2008 that he did not recall any written guidance to CIA before the August 1 memo.

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,"

Similarly, when asked in July 2008 whether anyone from his department had authorized torture before August 1, 2002, John Ashcroft claimed he "didn't know."

Mr. NADLER. Thank you, Mr. Chairman. Attorney General Ashcroft, in your testimony you mentioned Abu Zubaydah, who was captured in March 2002. The Inspector General report on the FBI's role in interrogation makes clear that he was interrogated beginning in March of that year. The Yoo-Bybee legal memo was not issued until August 2002. So was the interrogation of Abu Zubaydah before August 2002 done without DOJ legal approval?

Mr. ASHCROFT. I don't know.

Mr. NADLER. Well, did you offer legal approval of interrogation methods used at that time?

Mr. ASHCROFT. At what time, sir?

Mr. NADLER. Prior to August of 2002, March 2002.

Mr. ASHCROFT. I have no recollection of doing that at all.

Mr. NADLER. And you don't know if anyone else from the Department of Justice did?

Mr. ASHCROFT. I don't know.

[snip]

Mr. WEXLER. So from March to August, did you offer any legal approval of the interrogation methods used at that time?

Mr. ASHCROFT. I don't have any recollection of doing so.

Mr. WEXLER. And did anyone else at the Department of Justice?

Mr. ASHCROFT. I don't know. I don't know.

And there is evidence that Jack Goldsmith didn't learn about it until just before he left DOJ.

While we don't have any clear statement from

Jack Goldsmith showing that he did not know of this memo, we do know that John Rizzo sent the memo to Patrick Philbin on June 22, 2004, the same day Philbin and Goldsmith withdrew the Bybee One memo. There would be little reason to send the memo if Philbin knew of it or if OLC had a copy in its files. (Remember that Rizzo sent this at the same time that Scott Muller and Jack Goldsmith were in a dispute about CIA's representation of the legal advice OLC gave CIA that appeared in the IG Report.)

Yoo, for his part, parsed very carefully when asked in June 2008 whether he did anything that John Ashcroft didn't know about:

Mr. COHEN. Mr. Yoo, you worked for Mr. Ashcroft, did you not?

Mr. YOO. Mr. Ashcroft was the Attorney General when I was at the Justice Department.

Mr. COHEN. Right. Did you consider yourself an employee of his?

Mr. YOO. I am sorry, sir?

Mr. COHEN. You were an employee of his. You were in the chain of command. You were underneath him, correct? Is that right?

Mr. YOO. Yes, sir.

Mr. COHEN. Did you communicate with Mr. Addington sometimes and not relay those communications through Mr. Ashcroft's office and keep him outside the loop?

Mr. YOO. Sir, I never did anything to keep Mr. Ashcroft out of the loop.

Mr. COHEN. So Mr. Ashcroft had knowledge of everything that you discussed with Mr. Addington, is that correct, sir?

Mr. YOO. As I explained in my opening statement, in the development of the August 2002 memo, we notified the Attorney General's office that we had

received a request for the memo. They, the Attorney General's office, dictated who and whom we could not discuss it with. We shared drafts of the memo with the office of the Attorney General and the office of Attorney General approved the memo.

Yoo's (sworn) comments would be consistent with two possibilities: that he did not tell Ashcroft's office about this fax, or that he did not consider this memo to be part of the more general request for the memo.

So either Yoo's former supervisors at DOJ were lying or forgetting, or they did not know of the July 13 memo (and may not have as late as 2008), which would go on to serve as CIA's basis to claim that the torturers had no intent to torture Abu Zubaydah, and therefore had not done so.