

# WHY JOHN YOO'S ATTEMPTS TO "NEGATE" THE TORTURERS' INTENT FAILS

In my last post, I showed how the Bybee Two memo, purporting to find each of ten torture techniques used with Abu Zubaydah legal, was a very specific response to John Yoo's July 13 memo to John Rizzo. The July 13 memo had basically said, "if you consult with experts that tell you techniques won't cause prolonged mental harm, then it will "negate" any intent you had to use specific acts listed in the torture statute to cause mental pain and suffering." So, in response, CIA barraged John Yoo and Jennifer Koester with information purportedly showing that waterboarding and sleep deprivation did not cause prolonged mental harm, Yoo and Koester threw it into a memo, and said that as a result those techniques weren't torture.

But there's a problem with the gimmick (even aside from the offensiveness of the premise): the timing.

The memo itself bears evidence that the CIA had already used at least some of these techniques by the time they asked for the opinion. And the details we now know surrounding the process make it clear that they didn't even consult the experts until after they used some of the techniques. Indeed, it appears that one of the studies they claim to have "consulted" was actually an experiment they conducted on Abu Zubaydah himself. That is, they're citing their own "study" on Abu Zubaydah as their expert advice to prove they didn't have the intent of causing him prolonged mental suffering.

**The torturers had already used the techniques before getting approval**

Now, there are many reasons to suspect that the

torturers used waterboarding (and perhaps mock burial) before August 1. But I can't prove that. But their single-minded concern about mental suffering—and not physical suffering—dating back at least to July 10, 2002 strongly suggests that they may have already done something to cause AZ prolonged mental suffering. Otherwise, what would explain the imbalance in their focus?

But there are several details in the Bybee Two memo itself that show they had already used some of the techniques on AZ.

Take, for example, my observation of the other day: a draft of Abu Zubaydah's psychological evaluation noted that "he showed strong signs of sympathetic nervous system arousal (possibly fear) when he experienced the initial 'hard' dislocation of expectation intervention following session 63." [my emphasis] Well, it turns out we have seen that term, "dislocation of expectation" before ... in the Bybee Two memo, where Yoo describes the whole point of the ten torture techniques!

As part of this increased pressure phase, Zubaydah will have contact only with a new interrogation specialist, whom he has not met previously, and the Survival, Evasion, Resistance, Escape ("SERE") training psychologist who has been involved with the interrogations since they began. This phase will likely last no more than several days but could last up to thirty days. **In this phase, you would like to employ ten techniques that you believe will dislocate his expectation regarding the treatment he believes he will receive** and encourage him to disclose the crucial information mentioned above. [my emphasis]

They knew at this point that AZ had already been subjected to such a condition, even while they were purportedly approving the ten techniques in the future.

More damning, though, are the admissions that they had already subjected him to sleep deprivation. There's the admission they had subjected him to sleep deprivation in the description of the technique itself.

You have orally informed us that you would not deprive Zubaydah of sleep for more than eleven days at a time and that you have previously kept him awake for 72 hours, from which no mental or physical harm resulted.

Then there's a more interesting reference, because it shows up in the section on page 8 that regurgitates his psychological evaluation.

During detention, Zubadaydah has manged his mood, remaining at most points "circumspect, calm, controlled, and deliberate." He has maintained his demeanor during aggressive interrogations and **reductions in sleep**. You describe that in an initial confrontational incident, Zubaydah showed signs of sympathetic nervous system arousal (which you think was possibly fear). [my emphasis]

Now, this entire larger section repeats back the content of the psychological evaluation (though the use of the word "confrontational" shows they were citing from the later draft of it), almost all in the same order at the paragraph level as it appears in the evaluation. There is nothing in the unredacted document referring to sleep deprivation. But this entire passage otherwise replicates the paragraph spanning pages 3-4 of the evaluation. Which strongly suggests that the redaction also spanning pages 3-4 includes a discussion of both aggressive interrogations and sleep deprivation.

And as an aside, I find it all the more curious that they orally admitted to using sleep deprivation for 72 hours; how does that add to

the admission in the psychological evaluation?

In any case, Yoo spends long sections of this memo trying to make the case that CIA consulted experts on sleep deprivation, so that when they use it in the future, they will do so with the confidence that it won't cause prolonged mental harm. But that doesn't do anything to "negate" their intent to cause him harm in the past, when they already had used it.

**CIA didn't consult experts until after they used some of these techniques**

And, given the other details we know about the memo writing process, we can date when they consulted experts to construct Section II of the Bybee Two memo. For a number of materials cited in there, we know they received the information after July 24. For example, here's the OPR Report's description of Jennifer Koester receiving these materials after July 24.

Over the next few days [after July 24], [redacted] sent [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 techniques 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. [my emphasis]

Even without the dates included in the OPR Report, we know from the SASC report that this information wasn't even requested until this time frame, and it was hurriedly completed in the days before DOD sent it to CIA who sent it on to DOJ. Thus, while we don't know the dates of the documents included in the large packet of information sent on July 25 which subsequently disappeared from OLC's SCIF (!), we know that a number of the reports cited in the Bybee Two memo weren't even written until late July.

And then there's the psychological evaluation of AZ. While we don't have the exact report or reports that OLC received, it appears they were still drafting it on July 24 and 25.

As I showed in my last post, Yoo made great stock of the efforts with which CIA did its due diligence to make sure these techniques wouldn't cause prolonged mental harm, and based on that he said "you do not meet the specific intent necessary" to torture under the torture statute.

Because you have conducted the due diligence to determine that these procedures, either alone or in combination, do not produce prolonged mental harm, we believe that you do not meet the specific intent necessary to violate Section 2340A.

[snip]

Reliance on this information about Zubaydah and about the effect of the use

of these techniques more generally demonstrates the presence of a good faith belief that no prolonged mental harm will result from using these methods in the interrogation of Zubdayah.

But they clearly hadn't done this due diligence when they used at least some of these techniques. Yoo may think he can use their homework assignment to show that they did not have the specific intent to cause prolonged mental harm on July 26, 2002. But he can't then claim they didn't have the specific intent to cause prolonged mental harm in May and June.

**They appear to be using their own "study" on Abu Zubaydah as their expertise on sleep deprivation**

As I noted in the last post, whereas Yoo cites several actual people in his section on waterboarding (Jerry Ogrisseg is one, plus two people with extensive experience in the SERE program), he doesn't cite any specific studies in his section on waterboarding.

You have also reviewed the relevant literature and found no empirical data on the effect of these techniques, with the exception of sleep deprivation. With respect to sleep deprivation, you have informed us that it is not uncommon for someone to be deprived of sleep for 72 hours and still perform excellently on visual-spatial motor tasks and short-term memory tests. Although some individuals may experience hallucinations, according to the literature you surveyed, those who experience such psychotic symptoms have almost always had such episodes prior to the sleep deprivation. You have indicated that the studies of lengthy sleep deprivation showed no psychosis, loosening of thoughts, flattening of emotions, delusions, or paranoid ideas. **In one case, even after eleven days of**

deprivation, no psychosis or permanent brain damaged [sic] occurred. In fact, the individual reported feeling almost back to normal after one night's sleep. Further, based on the experiences with its use in military training (where it is induced for up to 48 hours), you found that rarely, if ever, will the individual suffer harm after the sleep deprivation is discontinued. Instead, the effects remit after a few good nights of sleep. [my emphasis]

Yoo appears to be simply reporting back a bunch of claims CIA made to him, claims which have no names attached to them.

And one of the studies noted—indeed, the study justifying CIA's proposed limit to keep AZ awake for 11 days—sure looks a lot like what AZ himself explained had already happened.

I was transferred to a chair where I was kept, shackled by hands and feet for what I think was the next 2 to 3 weeks.

[snip]

The cell and room were air-conditioned and were very cold. Very loud, shouting type music was constantly playing. It kept repeating about every fifteen minutes twenty-four hours a day. Sometimes the music stopped and was replaced by a loud hissing or crackling noise.

[snip]

I could not sleep at all for the first two to three weeks. If I started to fall asleep one of the guards would come and spray water in my face.

The shackling to a chair is the description CIA would later use for how they induced sleep deprivation in those who could not stand. Add in the noise, cold temperature, and water flicking,

and they were using several means by which to keep AZ awake. And, he claims, this period lasted for two to three weeks. Even assuming he lost track because of disorientation, it's clear they subjected him to far more than the 72 hours they had claimed to do.

Combine AZ's own observations with what several people told Jason Leopold.

For example, one current and three former CIA officials said some videotapes showed Zubaydah being sleep deprived for more than two weeks. Contractors hired by the CIA studied how he responded psychologically and physically to being kept awake for that amount of time. By looking at videotapes, they concluded that after the 11th consecutive day of being kept awake Zubaydah started to "severely break down." So, the torture memo concluded that 11 days of sleep deprivation was legal and did not meet the definition of torture.

That is, according to these sources, the experiments on AZ appear to be the source of the claim that someone could experience sleep deprivation for 11 days. [Update: Though see W0's point here.] The study on AZ appears to have been key study cited to support their claim that sleep deprivation didn't cause prolonged mental harm. They used their own study among others in their claims about sleep deprivation.

They used AZ's own torture as "proof" that it wasn't torture.

And, if these descriptions are accurate, it means that this early stage sleep deprivation already had caused AZ severe mental suffering.

No wonder the CIA lawyers were worried that the torturers might be found to have specific intent to cause severe mental suffering.