

DAYS AFTER TAGUBA REPORTED SADISTIC CRIMINAL ABUSE AT ABU GHRAIB, DOD ASKED TO USE MORE TORTURE

On March 13, 2004, according to the OPR Report, Jack Goldsmith and Patrick Philbin went to Jim Comey's house on a Saturday to alert him of something. The military had contacted Goldsmith, wanting to use a more extreme form of torture against a detainee—something like isolation, waterboarding, water dousing, or death threats.* [Update: In this post I explain why I think DOD was requesting extended isolation.] But, as Goldsmith had told DOD General Counsel Jim Haynes the previous December, the March 2003 opinion Yoo wrote that authorized DOD's use of such techniques was hopelessly flawed. Goldsmith wanted to explain the flaws of the memo to Comey to get his support for withdrawing the memo. Comey, who was then acting Attorney General (since John Ashcroft was in the ICU with pancreatitis), agreed with Goldsmith's judgment and—the OPR Report explains—later got John Ashcroft to agree that “any problems with the analysis should be corrected.”

That meeting at Comey's house took place just four days after Goldsmith and Comey refused to reauthorize the President's illegal wiretapping program, just three days after Alberto Gonzales and Andy Card raced to the ICU to attempt to convince John Ashcroft to override Comey and reauthorize the program, just two days after Bush reauthorized the program without DOJ concurrence, and just one day after Comey, Goldsmith, and Philbin threatened to quit if Bush didn't make certain changes to the wiretap program.

The meeting also took place just four days after General Antonio Taguba issued a report finding

that “numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees” at Abu Ghraib. Significantly, two of the allegations made against Americans by detainees that Taguba found to be credible—threatening detainees with a loaded pistol and pouring cold water on them—were among the four restricted torture methods that Haynes asked Goldsmith for authorization to use. While it’s not clear how much Goldsmith knew of DOD’s simmering torture problems (in *Terror Presidency* he said he didn’t learn of Abu Ghraib until it broke in April 2004, though aspects of his book clearly gloss then-classified events), Jim Haynes must have known about them.

The OPR Report doesn’t tell us how this conflict worked out—whether, in response to Goldsmith’s objections, DOD backed off its plans to torture a detainee or whether the White House overruled Goldsmith (or whether, as happened with a number of detainees, they used the technique before they asked to use it).

But we do know this occurred at a point when the White House was rejecting DOJ criticism of its counterterrorism programs. On March 11, in the context of the illegal wiretap program, Alberto Gonzales told Goldsmith that the President “had made an interpretation of law concerning his authorities and that DOJ should not act in contradiction of the President’s determinations.” And on March 16, again in the context of the illegal wiretap program, Gonzales had said,

While the President was, and remains, interested in any thoughts the Department of Justice may have on alternative ways to achieve the goals of the activities authorized by the Presidential authorization of March 11, 2004, the President has addressed definitively for the Executive Branch in the Presidential authorization the interpretation of the law.

In other words, at precisely this moment, the White House was telling DOJ—and Goldsmith and Comey specifically—that what they thought about the law was interesting, but in no way binding on the President. Indeed, Gonzales was telling these two men they had best not act counter to the will of the White House.

I'll explain more how I think this resolved in later posts. But for now, realize that one response DOD made to the Abu Ghraib scandal was to ask for more torture.

*There is some ambiguity in the unclassified OPR Report about what range of techniques DOD was trying to use. ~~In a later post I'll show why I think it was one of the latter three techniques listed here: waterboarding, water dousing, or death threats.~~ [Note, I now think the request was for extended use of isolation, as I explain in this post.]