

HOW JOHN YOO NEGATED THE MENTAL SUFFERING OF DEATH THREATS IN THE BYBEE TWO MEMO

It's time to read the Bybee Two memo again.

Since the OPR Report came out, we've learned the following (some of it was already out there, but I, at least, hadn't noticed it):

- After his 63rd interrogation session, Abu Zubaydah experienced what his torturers call "hard dislocation"
- An "issue arose" during the interrogation of Abu Zubaydah that two CIA lawyers discussed via email on July 10, 2002
- In the days following CIA lawyers' discussion of that issue, Criminal Division Chief Michael Chertoff got his own briefing on the torture memo (July 11), followed the next day by a meeting with Alberto Gonzales and probably David Addington (July 12), followed the next day by a larger briefing including Gonzales, Chertoff, John Rizzo and FBI Chief of Staff Daniel Levin that covered

both the planned torture techniques and the torture memo (July 13)

- After Chertoff told CIA at that July 13 meeting that he would not issue an advance declination of prosecution for torture, Rizzo asked for and received a memo laying out “the elements of the torture statute;” the July 13 memo focused closely on the definition of intent to cause mental suffering; Yoo’s supervisors John Ashcroft and Jay Bybee claim to be unaware of the memo
- In his cable to AZ’s torture team written after both Bybee Memos were completed, Counterterrorism Center lawyer Jonathan Fredman relied on the language on intent from the July 13 memo, not the Bybee One memo
- Also after the meeting at which Chertoff refused an advance declination, David Addington appears to have directed John Yoo to include several affirmative defenses in the Bybee One memo
- The next draft of the memo—dated July 23 and for the first time addressed to Alberto Gonzales—included the affirmative defenses

Addington had asked for as well as language on intent to cause mental harm adopted from the July 13 memo

- In the days following that draft, several things happened to change the approach to torture authorization
- CIA removed mock burial on its list of torture techniques because approving it would hold up the overall memo
- CIA asked for a separate letter addressing specific techniques—what would become the Bybee Two memo
- As part of several packets of information they received from CIA on the long term mental effects of torture, Yoo and Jennifer Koester almost certainly received a draft psychological evaluation noting that AZ had experienced “hard dislocation” after session 63, though we can’t prove that they saw that phrase because the copy of the document they received has been altered before being released in FOIA
- A large packet of information received on the same day as one of the draft

psychological evaluations disappeared from the OLC SCIF

All those details make it fairly clear that the Bybee Two memo was designed to respond to the July 13 memo. But they also help to prove that it failed to do what it was intended to do.

How John Yoo told the CIA to “negate” their specific intent to torture

Yoo’s July 13 memo stated that several things were necessary to prosecute torture for the infliction of mental suffering:

- The commission of certain kinds of predicate acts, that included but were not limited to the use of procedures designed to profoundly disrupt the senses and/or the threat of imminent death
- The infliction of prolonged mental harm as a result of those predicate acts
- The specific intent to inflict the severe mental suffering from those predicate acts

But even if someone had the specific intent to commit those predicate acts and prolonged mental harm resulted, Yoo included an escape hatch. He basically said that if a person had conducted studies and based on those studies had concluded that prolonged mental harm would not result, then he could claim to have been operating with a good faith belief that those actions did not cause prolonged mental harm.

Specific intent can be negated by a showing of good faith. Thus, if an

individual undertook any of the predicate acts for severe mental pain or suffering, but did so in the good faith belief that those acts would not cause the prisoner prolonged mental harm, he would not have acted with the specific intent necessary to establish torture. If, for example, efforts were made to determine what long-term impact, if any, specific conduct would have and it was learned that the conduct would not result in prolonged mental harm, any actions undertaken relying on that advice would have be [sic] undertaken in good faith. Due diligence to meet this standard might include such actions as surveying professional literature, consulting with experts, or evidence gained from past experience.

In other words, to “negate” the specific intent to cause prolonged mental harm that constituted torture, you could do a bunch of study and if that study showed no prolonged mental harm had resulted from these actions in the past, you could then claim that you had no idea that those actions might cause prolonged mental harm in the future, and therefore any deliberate actions that ended up causing prolonged mental harm weren’t really torture.

Abacadabra!!!

As I’ll show below, the Bybee Two memo was designed to show that CIA had done that kind of study. (Note, this is not an original observation; I’m fairly certain both Jeff Kaye and William Ockham have made this observation in the past.) But, as I’ll show in a follow-up post, it fails in what it was designed to do.

One-third of the Bybee Two memo purports to prove that torture doesn’t cause prolonged mental harm

There are two ways the Bybee Two memo demonstrably responds to the terms laid out in

the July 13 memo. First, check out the overall structure. There are three parts to the memo, as follows:

I. A “factual” section laying out the proposed treatment of AZ, including descriptions of each of the 10 torture techniques

II. A section describing the steps CIA has taken “to ascertain what effect, if any, these techniques would have on Zubaydah’s mental health”

III. An analysis of the proposed techniques to show that they would not cause severe physical or mental pain or suffering, followed by a section showing that, therefore, the torturers could not be said to have the specific intent to cause severe pain or suffering

Seeing the single-minded focus in the July 13 memo on mental pain and suffering, and then seeing that middle section in the Bybee Two memo is striking both because the recitation of data in it so neatly responds to Yoo’s gimmick for “negating” any risk of having the specific intent to cause prolonged mental suffering, but also for the seeming lack of concern over physical suffering.

The section simply cites a number of purported experts to claim that both SERE training in general and waterboarding and sleep deprivation in particular have not caused long-term mental suffering (though unlike the evidence on waterboarding, which Yoo cites by name, he simply glosses the studies on sleep deprivation, probably because actually looking at studies would have shown that sleep deprivation does cause long-term mental harm). And then the section regurgitates a lot of Abu Zubaydah’s psychological assessment in order to claim him mentally fit to be tortured.

There’s no attempt to cite studies showing that waterboarding and sleep deprivation are

physically safe at all. And there's almost no attention to the question of whether AZ is physical fit to be tortured; the memo does state repeatedly that CIA has said they won't do anything to exacerbate the wound he suffered during capture, but it describes neither that wound nor his long-standing head injury (at least not in the unredacted sections).

In other words, they seemed certain that the torture techniques they purportedly hadn't used yet were physically safe, yet very concerned with showing that they had considered whether they were psychologically safe.

Yoo's efforts to pretend that mock burial, sleep deprivation, and waterboarding don't amount to intent to cause mental suffering

But it's not enough for Yoo to simply cite the purportedly expert data showing that sleep deprivation and waterboarding don't cause long-term mental suffering. He then reviews each of the techniques and for each finds a way to claim that they don't cause severe physical or mental pain or suffering. His efforts to do so with small box confinement, sleep deprivation, and waterboarding are particularly strained.

Mock burial

Yoo's challenges start with cramped confinement, given that we now know 1) CIA had threatened AZ with "mock burial" back in May, 2) CIA had asked for mock burial to be approved until just a few days before this memo was started, and 3) both AZ and others involved referred to the small box as a "coffin."

Not surprisingly, Yoo makes no mention of that "coffin" detail when he dismisses, with absolutely no analysis, the possibility that cramped confinement could be considered a threat of imminent death.

As with the other techniques discussed so far, cramped confinement is not a threat of imminent death.

Nor does he explain, later, why the threat of using the boxes might be particularly effective at inducing fear (remember that according to AZ, his torturers did keep the small box in sight as an implicit reminder of “what [his] interrogators were capable of”).

While additional time spent in the boxes may be threatened, their use is not accompanied by any express threats of severe physical pain or suffering.

Note, in particular, that Yoo here only considers the threat of using these boxes that look like coffins in terms of any physical suffering they might cause.

But then he inexplicably shifts his focus when discussing—and introducing an apparent contradiction—the limits on how long you could be put into the small box.

With respect to the small confinement box, you have informed us that he would spend at most two hours in this box. You have informed us that your purpose in using these boxes is not to interfere with his senses or his personality, but to cause him physical discomfort that will encourage him to disclose critical information. Moreover, your imposition of time limitations on the use of either of the boxes also indicates that the use of these boxes is not designed or calculated to disrupt profoundly the senses or personality. For the larger box, in which he can both stand and sit, he may be placed in this box for up to eighteen hours at a time, while you have informed us that he will never spend more than an hour at a time in the smaller box. These time limits further ensure that no profound disruption of the sense or personality, were it even possible, would result. As such, the use of the confinement boxes does not constitute a procedure calculated to

disrupt profoundly the senses or
personality. [my emphasis]

What's particularly interesting about this passage is that Yoo uses time limits to dismiss any possibility that the boxes would be used to profoundly disrupt the senses. But it would seem the time limits placed on use of the small box—so long as you don't admit that the box looked like a coffin—would only serve to limit physical suffering, because of the increased physical pain of being in what was in fact a fetal position, as compared to the fuller range of movement permitted by the large box. (Never mind that none of the stress positions came with time limits to them!) Yet Yoo uses the time limits to prove the boxes don't cause sensual deprivation, not physical suffering. The small box shouldn't cause any more dislocation of the senses than the large box. Yoo's focus suggests the primary reason why these time limits exist is because they do carry the risk of profound disruption of the senses, a risk heightened by the fact that the small box looks like a coffin.

Sleep deprivation

Then there's sleep deprivation, which Yoo had already admitted can cause hallucinations. Yoo attempts to dismiss this risk—and therefore the risk that it would satisfy the predicate of profoundly disrupting the senses—by claiming that CIA has informed him that they won't use sleep deprivation for that long.

Nor could sleep deprivation constitute a procedure calculated to disrupt profoundly the sense, so long as sleep deprivation (as you have informed us is your intent) is used for limited periods, before hallucinations or other profound disruptions of the sense would occur.

[snip]

As we explained above, a disruption within the meanings of the statute is an

extreme one, substantially interfering with an individual's cognitive abilities, for example, inducing hallucinations, or driving him to engage in uncharacteristic self-destructive behavior.

But note very carefully what Yoo has already said about the "limited periods" for which CIA will (again, purportedly in the future) use sleep deprivation.

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.

Eleven days, as it happens, is the top limit in the studies Yoo cited used to show that sleep deprivation caused no long-term mental harm, and in that case, the study said only that "no psychosis or permanent brain damaged [sic] occurred." I'll have a lot more to say on this point in my next post, because Yoo's claims about sleep deprivation are where this entire scheme falls apart most spectacularly. But even from what Yoo presents internally in his memo, it makes no sense. Yoo has told us the limit anyone can stand is 11 days, and then rewards the CIA for adopting this "limit" by judging that because of that limit, sleep deprivation can't amount to the kind of profound disruption of the senses that amounts to torture.

Waterboarding

Then, finally, comes Yoo's biggest challenge, finding a way to claim that the threat of death associated with waterboarding does not amount to the intentional infliction of prolonged mental suffering and therefore torture. Yoo admits right off that waterboarding is a threat of imminent death.

We find that the use of the waterboard

constitutes a threat of imminent death. As you have explained the waterboard procedure to us, it creates in the subject the uncontrollable physiological sensation that the subject is drowning.

[snip]

From the vantage point of any reasonable person undergoing this procedure in such circumstances, he would feel as if he is drowning at the very moment of the procedure due to the uncontrollable physiological sensation he is experiencing. Thus, this procedure cannot be viewed as too uncertain to satisfy the imminence requirement. Accordingly, it constitutes a threat of imminent death and fulfills the predicate act requirement under the statute.

This is where the July 13 memo becomes so important to the project. That's because, as I noted before, the July 13 memo states unreservedly that torture requires both the commission of one of the predicate acts (in this case, threatening imminent death) and infliction of prolonged mental harm. The Bybee One memo admitted that others might think committing one of the predicate acts, by itself, was enough to constitute torture (though Yoo ultimately dismissed that concern).

More importantly, the July 13 memo has offered the gimmick by which someone can refer to a bunch of studies to "negate" any intent to cause prolonged mental harm. And, having fulfilled the first part of that gimmick by laying out studies that find no prolonged mental harm from waterboarding, Yoo now invokes that gimmick repeatedly.

Based on your research into the use of these methods at the SERE school and consultation with others with expertise in the field of psychology and

interrogation, you do not anticipate that any prolonged mental harm would result from the use of the waterboard.

[snip]

Based on the information you have provided to us, indicating that no evidence exists that this course of conduct produces any prolonged mental harm, we conclude that a course of conduct using these procedures and culminating in the waterboard would not violate Section 2340A.

[snip]

Although an honest belief need not be reasonable, such a belief is easier to establish where there is a reasonable basis for it. Good faith may be established by, among other things, the reliance on the advice of experts.

[snip]

Prolonged mental harm is substantial mental harm of sustained duration, e.g., harm lasting months or even years after the acts were inflicting upon the prisoner. As we indicated above, a good faith belief can negate this element. Accordingly, if an individual conducting the interrogation has a good faith belief that the procedures he will apply, separately or together, would not result in prolonged mental harm, that individual lacks the requisite specific intent. This conclusion concerning specific intent is further bolstered by the due diligence that has been conducted concerning the effects of these interrogation procedures.

[snip]

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. Moreover, we think that this represents not only an honest belief but also a reasonable belief based on the information that you have supplied to us. Thus, we believe that the specific intent to inflict prolonged mental [sic] is not present, and consequently, there is no specific intent to inflict prolonged mental pain or suffering. Accordingly, we conclude that on the facts in this case the use of these methods separately or a course of conduct would not violate Section 2340A.

In other words, after having told CIA on July 13 that if they can come up with some studies showing that waterboarding (and sleep deprivation) don't cause prolonged mental harm, then they can use them as proof that they had no intent to cause AZ prolonged mental harm. Yoo basically says, "you've done what I told you to and therefore I judge that you don't intend to torture Abu Zubaydah." Very good job, CIA, Yoo seems to be saying, in reward for doing your homework I now give you permission to torture.