PULLING WEEDS FOR THINK TANK EMPLOYEES: MY RESPONSE TO WITTES' RESPONSE

Ben Wittes, an employee of the Brookings **think tank**, had this to say about my post showing how disingenuous his buddy Jonathan Fredman's defense of his statements at Gitmo in 2002 is.

> Responding to her in detail is difficult, because her account is so weedy;

His entire piece is worth reading, because in key ways it reinforces my argument (though Wittes, the think tank employee, appears not to understand that). His refutation consists of:

- 189 words effectively saying, "sure I wanted to debate interrogation [sic] history that is a decade old two days ago, but now that you're presenting facts about my buddy I find it boring."
- 444 words admitting that Fredman did not specifically disavow the quote that Wittes claims he did, and shifting the emphasis slightly on what he says Fredman's memo was disavowing.
- 1238 words that at times

> seems to miss the entire headline of my post—which is that Fredman's actions prove his memo is false—but ultimately seems to accept all the evidence that it is false, though he finds that uninteresting.

Wittes claims Fredman tried to refute his perception comment, not his dead detainee comment

Wittes deems it "bizarre" that I would expect a lawyer to deny a statement explicitly if he were really denying it, especially if he were going to spend 6 pages purportedly denying it. That, in spite of that fact that he admits that Carl Levin and other Senators at the hearing to which Fredman responded referenced a number of other things Fredman allegedly said at the meeting.

> Yes, Levin and other senators also quoted a few other alleged Fredman comments from the minutes.

As I noted in my post, several of the things Fredman allegedly said at the Gitmo meeting — claiming the CIA decided which torture techniques to use for most techniques and discussing the use of extreme weather in torture — would have been far more legally troubling in light of Gul Rahman's subsequent death, by freezing to death after CIA used unapproved water dousing on him, than the "if a detainee dies" comment.

And the "perception … detainee dies" wasn't even the first quote from Fredman that Levin mentioned at the hearing (which Ben obscures with an ellipsis). First, he raised Fredman's alleged support for exploiting phobias, including insects which — in 2008 we didn't know but we now do — appears in the list of techniques approved by DOJ. He also raised

Fredman's description of how waterboarding worked before the "detainee dies" comment.

Claire McCaskill (and Hillary Clinton) focused on Fredman's alleged comment about hiding detainees from ICRC. McCaskill also raised Fredman's alleged comment that videotaping interrogations would be ugly (the latter of which, considering someone in Fredman's immediate vicinity altered the record of a Congressional briefing just as CIA decided to destroy their tapes, might have been particularly damning given the then ongoing John Durham investigation into that destruction). So in fact, the focus on Fredman at the hearing wasn't at all exclusively on that detainee dies comment, nor was it the most legally dangerous one for him.

But Ben insists — and he may know this from talking to Fredman personally — that Fredman wrote the memo specifically in response to these comments from Levin, and therefore we shouldn't expect him to specify that directly:

> And Mr. Fredman presented the following disturbing perspective [on] our legal obligations under our anti-torture laws, saying, quote, "It is basically subject to perception. If the detainee dies, you're doing it wrong." "If the detainee dies, you're doing it wrong." How on earth did we get to the point where a senior U.S. Government lawyer would say that whether or not an interrogation technique is torture is, quote, "subject to perception," and that, if, quote, "the detainee dies, you're doing it wrong"?

Look, however, at how Wittes summarizes Fredman's response:

> In that memo, Fredman described the comments he provided at the Guantanamo meeting. And he described them in specific response to these alleged

> quotations. **Far from saying that torture is "subject to perception," as he described his remarks, he "emphasized that all interrogation practices and legal guidance must not be based on anyone's subjective perception; rather, they must be based upon definitive and binding legal analysis from the Department of Justice."** And he then went on to flatly deny the statements attributed to him: "I did not say the obscene things that were falsely attributed to me at the Senate hearing. . . . The so-called minutes misstate the substance, content, and meaning of my remarks." His denial could hardly be clearer. [my emphasis]

Note, first of all, that Wittes uses the plural, "quotations," in this passage. That's interesting, because at least some of the journalists Ben wants to shut up shut up shut up used the "if the detainee dies, you're doing it wrong" quotation without the "subject to perception" bit. The two sentences appear together in the notes and I agree they can be treated as one, but the truly shocking quote — the one Ben wants everyone to stop using — is the "if the detainee dies" one, which is utterly consistent with everything Fredman says in his disingenuous memo, which says repeatedly that detainee deaths are bad things.

More interesting though is that Wittes lays out very clearly what he says Fredman was refuting: that he said torture is subject to perception. And his response to that — Ben's evidence the memo should be accepted as refutation of that comment — is Fredman's claim that all torture must be based on definitive and binding legal analysis from DOJ.

Wittes seems to accept that Fredman did not base torture on definitive and binding legal analysis from DOJ

Here's where Ben's professed difficulty with

weeds seems to have utterly sunk his efforts to defend his buddy. Because if it can be proved that Fredman did not, in his actions, ensure that torture be limited by definitive and binding legal analysis from DOJ, then it is clear that his memo is false, a lie, issued to refute some very damning evidence made worse by subsequent events, but not in any way an honest reflection of what Fredman believed or how he acted.

For any think tank employees or others who have difficulty with weeds, here's what the evidence I laid out showed:

- The torturers started using sleep deprivation, with the approval of Fredman's office, months before DOJ got involved.
- When the torturers exceeded Fredman's office's original limits on sleep deprivation, his office just retroactively authorized what they had already done, apparently without any input from DOJ.
- When Fredman translated DOJ's guidance for the Abu Zubaydah torturers, he used not the definitive and binding legal analysis from DOJ, but instead a fax John Yoo had sent, one he purportedly wrote without the input or approval of Jay Bybee.
- After a detainee died after being subjected to a torture

> technique that had not been approved by DOJ, CIA's lawyers — including Fredman's office — tried to snooker OLC into accepting that another document crafted with Yoo outside official channels constituted "definitive and binding legal analysis." That effort failed.

There are at least four pieces of evidence in the public record that Fredman authorized torture in ways outside of DOJ's definitive and binding legal analysis. Now, Ben doesn't refute a single one of these points. Indeed, he actually uses the Yoo fax in his response (he doesn't, however, mention the retroactive effort to snooker OLC, perhaps because his blogmate was involved in refusing to be snookered).

From which I take it that Ben accepts that Fredman's office, and Fredman personally, repeatedly found ways around relying on the definitive and binding legal analysis DOJ developed. Ben's response accepts, it appears, that Fredman's actions belie his claim in his memo to have always relied on authoritative guidance from DOJ.

Which, as Ben himself lays out, is Fredman's central refutation to the perception comment. If that's proven false, his memo is false.

Wittes also apparently accepts that Fredman used an intent-based definition of torture

Ben apparently had some difficulty with the import of the Yoo fax, too. In addition to the fact that it may not be considered authoritative — the standard Ben claims Fredman was holding himself to — it also differs in key ways from the authoritative memo that go directly to the issue of perception and torture.

I noted in my post on this that the Bybee memo admits the possibility — one it doesn't agree with — that a torturer may only need the specific intent to commit the underlying actions, whereas the Yoo fax doesn't even admit that possibility. Ben was unimpressed with the difference between a caveated claim and a non-caveated one. But the actual, authoritative memo also provides other caveats, such as one warning that while good faith belief need not be reasonable, a jury might believe it does.

> Although a defendant theoretically could hold an unreasonable belief that his acts would not constitute the actions prohibited by the statue, even though they would as a certainty produce the prohibited effects, as a matter of practice in the federal criminal justice system it is highly unlikely that a jury would acquit in such a situation.

Now, these caveats actually go to the core question at hand, the degree to which Fredman's actions belie his claim not to have asserted that torture is a matter of perception.

When Fredman's office wrote a declination memo in the case of Gul Rahman's death (while the memo may have been written after Fredman's departure, the underlying guidance to the Salt Pit torturers clearly wasn't), it used a pretty radical good faith claim to argue that Matthew Zirbel should not be prosecuted. It did not, for example, rely on jurisdiction, which is what DOJ ultimately used (though the Fourth Circuit would now reject that). It instead suggested that it was possible for someone to have a good faith belief you could douse someone with water and then leave them in freezing temperatures without that amounting to the intention to cause severe pain.

> If [Matthew] Zirbel, as manager of the Saltpit site, did not intend for Rahman to suffer severe pain from low temperatures in his cell, he would lack

> specific intent under the anti-torture statute.

This extreme reliance on intent — pushed even farther than Yoo pushed it in the authoritative memo (though arguably not than the fax) — does precisely what Fredman disavows: it places the definition of torture solely within the perception and intent of the torturer, divorced even from the reasonable understanding that if you hose someone down and leave them in freezing temperatures, they will freeze. Whether or not Fredman is the one who wrote the declination memo, that extreme reliance on intent is what Fredman gave to the Zubaydah team (and, quite possibly, why he relied on a the non-authoritative fax).

It was precisely through the publicly disavowed but privately (in 2008) endorsed view that intent was all that mattered that CTC managed to claim Gul Rahman's death by torture did not amount to torture.

And in practice, that judgment was even worse than Fredman's "if a detainee dies, you're doing it wrong" comment. After all, ultimately CTC's lawyers decided that if a detainee dies, but you didn't have the good sense to know you were killing him, it was still all good.

How many of the 6000 pages documenting lies will Fredman be implicated in?

There's one other reason to suspect that Fredman's memo is just retroactive self-justification.

The Senate Intelligence Committee is currently sitting on a 6000-page report (No! More weeds! the Brookings employees will wail. It hurts!), one of the main conclusions of which is "the CIA repeatedly provided inaccurate information about its interrogation program to the White House, the Justice Department, and Congress."

I would imagine a number of the things I've laid out will be included in that report:

misrepresentations to DOJ about how much sleep deprivation had already occurred, the effort from Fredman's office to alter the record of a Congressional briefing after the fact, the effort to present to OLC a back-channel memo as official. Those are just the things that Fredman's office was demonstrably involved with; there are far more they likely were involved in.

In other words, back in 2008, when we didn't know all these facts, it might have been credible to accept Fredman's claims that he followed the rules. But six years of work from the Senate Intelligence Committee reportedly shows that the CIA — including people in the immediate vicinity of Fredman — were doing a good deal of lying. Lying to, among others, Congress.

But in spite of the fact that Fredman's known actions clearly belie his central claim in the memo, in spite of the fact that the people in his immediate vicinity have been found to have lied to Congress (including even before that Gitmo meeting), Wittes says we should trust his buddy's non-denial denial.

Ultimately, though, his actions prove that he believes — or at least told the torturers — that intent is the key to torture. Memo or no, that's what journalists should be looking at.