

# THE BYBEE MEMO CAN'T BE USED FOR GOOD FAITH DEFENSE ON WATER-BOARDING

The May 10, 2005 "Techniques" memo makes it clear that the torturers who claim the Bybee memo legalized their water-boarding of Khalid Sheikh Mohammed and Abu Zubaydah are wrong.

That's because the torturers didn't do what the memo authorized. In a footnote on page 41, it says:

The IG Report noted that in some cases the waterboard was used with far greater frequency than initially indicated, see IG Report at 5, 44, 46, 103-04, and also that it was used in a different manner. See *id.* at 37 ("[T]he waterboard technique ... was different from the technique described in the DoJ opinion and used in the SERE training. The difference was the manner in which the detainee's breathing was obstructed. At the SERE school and in the DoJ opinion, the subject's airflow is disrupted by the firm application of a damp cloth over the air passages; the interrogator applies a small amount of water to the cloth in a controlled manner. By contrast, the Agency Interrogator ... applied large volumes of water to a cloth that covered the detainee's mouth and nose. One of the psychologists/interrogators acknowledged that the Agency's use of the technique is different from that used in SERE training because it is "for real—and is more poignant and convincing.") see also *id.* at 14 n14. The Inspector General further reported that "OMS contends that the expertise of the SERE waterboard experience is so different from the

subsequent Agency usage as to make it almost irrelevant. Consequently, according to OMS, there was no a priori reason to believe that applying the waterboard with the frequency and intensity with which it was used by the psychologist/interrogators was either efficacious or medically safe." Id at 21 n26. We have carefully considered the IG Report and discussed it with OMS personnel. As noted, OMS input has resulted in a number of changes in the application of the waterboard, including limits on frequency and cumulative use of the technique. Moreover, OMS personnel are carefully instructed in monitoring this technique and are personally present whenever it is used. See OMS Guidelines at 17-20. Indeed, although physician assistants can be present when other enhanced techniques are applied, "use of the waterboard requires the presence of the physician." Id. at 9n2. [my emphasis]

In other words, the interrogators were dumping water on AZ's and KSM's faces and repeating that treatment over and over and over.

Without any legal authorization to do so, no matter how bogus.

It's time this torturer faced some "poignant and convincing" consequences for his actions.

And note, this is precisely why the torture tapes were destroyed. CIA has admitted that the guys waterboarding Abu Zubaydah broke the law. That tape was the irrefutable evidence of who did what.

Update: Fixed my dates.