

WHITEHOUSE: LAYING THE GROUNDWORK FOR THE TORTURE CASE

Keith0 had Sheldon Whitehouse on this evening to set up his torture hearing tomorrow (10 AM, and yes, I'm liveblogging it). Here's what Whitehouse said he hopes to accomplish tomorrow.

I hope what America will learn is that the facts that were alleged in the torture memos are very likely not true, the legal theories were contested even by Bush Administration lawyers who weren't in on the fix, and a little bit about what the consequences are for lawyers who commit professional malfeasance.

I explained how Ali Soufan has (and will) shown that "the facts that were alleged in the torture memos" are not true here:

Ali Soufan, the FBI interrogator described in the DOJ IG report on interrogation as the interrogator (whom they call "Thomas") who called CIA's tactics on AZ, "borderline torture," has an important op-ed in the NYT. He writes,

One of the most striking parts of the memos is the false premises on which they are based.

I pointed this out myself, in a post on why the debate over whether these techniques were necessary and effective is so heated.

Check out what the second paragraph of the Bybee Memo says:

Our advice is based upon the following facts, which you have provided to us. We also understand that you do not have any facts in your possession contrary to the facts outlined here, and this opinion is limited to these facts. If these facts were to change, this advice would not necessarily apply. Zubaydah is currently being held by the United States. **The interrogation team is certain that he has additional information that he refuses to divulge. Specifically, he is withholding information regarding terrorist networks in the United States or in Saudi Arabia and information regarding plans to conduct attacks within the United States or against our interests overseas.** Zubaydah has become accustomed to a certain level of treatment and displays no signs of willingness to disclose further information. Moreover, your intelligence indicates that there is currently level of "chatter" equal to that which preceded the September 11 attacks. In light of the information you believe Zubaydah has

and the high level of threat you believe now exists, you wish to move the interrogations into what you have described as an "increased pressure phase." [my emphasis]

Here's what Ali Soufan says:

It is inaccurate, however, to say that Abu Zubaydah had been uncooperative. Along with another F.B.I. agent, and **with several C.I.A. officers present**, I questioned him from March to June 2002, before the harsh techniques were introduced later in August. Under traditional interrogation methods, he provided us with important actionable intelligence.

And here's how Philip Zelikow contested the legal theories in the memos.

Zelikow, with a background in this area of law, wrote a dissent to the torture memo ripping its legal analysis. Significantly, Zelikow hit on one point that Congress was hitting on too: the importance of the Eighth Amendment in our compliance with the Convention Against Torture. As Zelikow apparently pointed out, the case law surrounding the Eighth Amendment said that even these detainees were entitled to protection from cruel and unusual punishment.

As a reminder, here's all that Bradbury had to say about the Eighth Amendment in his memo:

Because the high value detainees on whom the CIA might use enhanced interrogation

techniques have not been convicted of any crime, the substantive requirements of the Eighth Amendment would not be relevant here, even if we assume that Article 16 has application to the CIA's interrogation program.

Zelikow describes the logic of Bradbury's stance this way:

The underlying absurdity of the administration's position can be summarized this way. Once you get to a substantive compliance analysis for "cruel, inhuman, and degrading" you get the position that the substantive standard is the same as it is in analogous U.S. constitutional law. So the OLC must argue, in effect, that the methods and the conditions of confinement in the CIA program could constitutionally be inflicted on American citizens in a county jail.

In other words, Americans in any town of this country could constitutionally be hung from the ceiling naked, sleep deprived, water-boarded, and all the rest – if the alleged national security justification was compelling. I did not believe our federal courts could reasonably be expected to agree with such a reading of the Constitution.

I'll leave the "consequences ... for lawyers who commit professional malfeasance" to the former US Attorney and AG of Rhode Island. (Actually,

Whitehouse has three law professors showing to talk about this last bit.)

But keep in mind, as you're following along tomorrow, that this is all just a preface to the OPR report.