

JOHN RIZZO'S NOMINATION AND THE BYBEE TWO MEMO

On August 23, 2006, Jello Jay Rockefeller wrote to Michael Hayden requesting a number of documents in relation to John Rizzo's nomination to be CIA's General Counsel. In addition to a list of all OLC memos and access for the full committee to the 2004 CIA IG report on torture, Rockefeller asked for materials relating to the Bybee Two memo listing all the torture techniques CIA could use. As with the IG report, Jello Jay asked that all committee members be able to read the document (starting on page 15).

[For Bybee Two] the question is not whether it should be delivered [to the Committee], for it is here, but whether all Members of the Committee and their staff assisting them in preparing for the hearing may read it. The Senate has referred the nomination to the full Committee, not to the Chairman and Vice Chairman alone. Each Member must decide how to vote. In doing that, each should be able to ask those questions that he or she deems necessary for an informed vote. The memo was requested from OLC for the CIA by the nominee and he had responsibility for implementing it. Members may therefore wish to question him about it.

And in a section asking for more information about Rizzo's role in buying off on torture policy (and following a completely redacted paragraph), Jello Jay asked specifically about Rizzo's role in formulating Bybee Two.

The focus of the requests described above concerns matters relating to and following the August 2002 Second Bybee Memo. There were also important

decisions about U.S. legal policies related to counterterrorism, including on such matters as the application of the Geneva Conventions, that preceded the Bybee Memos, and my understanding is that the nominee had a role in that process, both within the CIA and outside of it. It will therefore be important to assess his participation in the formulation of those policies. Accordingly, in addition to documents relating directly to the Second Bybee Memo, please provide documents authored by the nominee, or prepared under his supervision, that set forth the nominee's contribution to the development of U.S. legal policy after the September 11 attacks.

The request is important for several reasons. First, it asks to what degree Rizzo was involved in the shredding of the Geneva Conventions, particularly repeated exemptions even from the flabby support of the GC applied to other agencies. Jello Jay's reference to Rizzo's activities "within the CIA and outside of it" address his role in the War Council-Addington's group of lawyers (which also included John Yoo, Jim Haynes, and Alberto Gonzales) that spearheaded these issues.

And, Jello Jay's request should have clarified where Rizzo got the representations that provide the foundation of Bybee Two: that Abu Zubaydah wouldn't cooperate except under torture and that he was mentally and physically fit to be waterboarded. As I have suggested, there is abundant evidence that those representations were false. By asking for this information, Jello Jay was asking for evidence that might have undermined the entire argument for torture.

But it appears that CIA refused to provide this material.

Michael Hayden did not respond to Jello Jay's request until the following January, after

Rockefeller had taken over the Chairmanship (and therefore the ability to control hearings and votes) of the Senate Intelligence Committee. In a letter dated January 16, 2007, Hayden pretty much told Jello Jay and the Committee to fuck off (starting on page 11).

Since your August 23, 2006 letter, which, among other things, requested information concerning the legal basis for the CIA's detention program, I have provided comprehensive briefings to the Senate Select Committee on Intelligence regarding the details of the CIA's detention program. In those briefings, I made it clear that the CIA's detention program had been, and would continue to be, in full compliance with the Constitution, U.S. law, and U.S. treaty obligations. I also informed the Committee that I would work with the Administration to provide you additional information about the program, to include its legal foundation.

After discussions with the Attorney General and others within the Administration, and in keeping with my previous statements to the Committee, I am offering your Committee a briefing by officials from the CIA's Office of General Counsel and the Department of Justice's Office of Legal Counsel on the legal bases for CIA's detention program. By doing so, we can address the Committee's outstanding concerns about the program, as well as address the issues in your August 23 letter.

Note who Hayden consulted on this decision: then Attorney General Alberto Gonzales and "others within the Administration." Sure, as AG, Gonzales oversaw OLC. But his own role in authorizing torture—as well as that of David Addington's—would likely be exposed by such documents. Any bets on whether Addington was consulted, too?

It doesn't appear that SSCI had a hearing addressing these issues in early 2007—certainly not before Rizzo's confirmation hearing on June 19, 2007. And the SSCI narrative notes that the committee finally received all the OLC opinions in May 2008, long after Bush withdrew Rizzo's nomination in September 2007.

On May 19, 2008, the Department of Justice and the Central Intelligence Agency (CIA) provided the Committee with access to all opinions and a number of other documents prepared by the Office of Legal Counsel of the Department of Justice (OLC) concerning the legality of the CIA's detention and interrogation program. Five of the documents provided addressed the use of waterboarding. Committee Members and staff reviewed these documents over the course of several weeks; however, the Committee was not allowed to retain copies of the OLC documents about the CIA's interrogation and detention program.

But it's not clear whether Rizzo's own documents would be included among the "other documents" provided to the committee (since those documents came from OLC). Indeed, given that the SSCI narrative focuses on the NSC, and not the "War Council," in its description of the genesis of the torture approvals, it appears that the Committee didn't have these documents before the narrative was finalized.

I wonder if anyone has asked for them since?