ASHCROFT ON WATERBOARDING PROSECUTIONS

I wanted to compare John Ashcroft's testimony last year before the House Judiciary Committee to information that has come out in the IG Report to see how his veracity held up over time. The testimony is worth reading for his claims about what he did or did not know and/or meetings he did or did not attend (which are largely couched in claims that such information would be classified anyway so he couldn't really tell us) and for his denial of knowing how the torture that took place before August 1, 2002 was authorized (again, couched behind claims to it being classified). One of the few admissions he made about problems with OLC is his limited confirmation that he opposed John Yoo's appointment to head OLC because he was too close to the White House.

Aside from that, the most interesting exchange is one that seems to reinforce CIA's claim in the IG Report regarding Ashcroft's approval of excessive uses of waterboarding on July 29, 2003 (though as I'll show, Ashcroft's specific statement would avoid being a lie, perhaps by design; also the terms Ashcroft uses here may explain the nature of Goldsmith's requested corrections).

First, Maxine Waters asks Ashcroft whether he learned any information that merited investigation. After nearly committing perjury—claiming he knew of no request for an investigation—he corrects himself and answers a different question—whether he learned anything that merited prosecution.

> Ms. WATERS. I want to ask about, were there ever allegations of torture or other misconduct by U.S. personnel involved in interrogations that you, Mr. Ashcroft, considered to rise to the

> level as to justify a criminal investigation?
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> I understand there has been some discussion, but I am not clear whether or not you feel that there was information that emerged in these interrogations that really did rise to that level of a criminal investigation.
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> Mr. ASHCROFT. I'm not aware of any interrogation process that resulted in a request or in a situation that would have given rise to a basis for prosecution for torture.

Then Waters asks about the extent of Ashcroft's knowledge of waterboarding (this exchange is characteristic of the way Ashcroft tried to both deny remembering how he learned this information and then couch it behind claims of classification).

> Ms. WATERS. Where you ever aware that U.S. personnel were indeed involved with waterboarding?
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> Mr. ASHCROFT. I have been aware of that.
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> Ms. WATERS. How did you become aware of this?
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> Mr. ASHCROFT. I'm not sure. I know that I have become aware of it as a result of this discussion in areas before this Committee and the like. But I'm not sure at what other points. And if I had received information, it probably would have been in classified settings that I couldn't discuss.

After Waters presses, Ashcroft asserts that the waterboarding he learned of did not exceed waterboarding as described by the CIA.

> Mr. ASHCROFT. I believe that a report of waterboarding would be serious, but I do not believe it would define torture. The

> Department of Justice has consistently—when I say the word ''waterboarding,'' I mean **waterboarding as defined and described by the CIA in its descriptions**. And the Department of Justice has, on a consistent basis over the last half-dozen years or so, over and over again in its evaluations, come to the conclusion that, under the law in existence during my time as Attorney General, waterboarding did not constitute torture, if you say waterboarding as the CIA interrogation methods were described.
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> So I could receive information about waterboarding. That's clear that that was a possibility. But if I received information about **waterboarding being conducted as the CIA had described it**, the experts at the Department, who very carefully went over this material uniformly over the last half-dozen years, under the law in effect at that time, indicated to me that it was not a violation of the law. [my emphasis]

Now, while we don't know what Ashcroft learned in the July 29, 2003 meeting at which he said the waterboarding as practiced did not exceed the guidelines of the Bybee Two memo (partly because CIA doesn't want us to see the PowerPoint used that day), here's how Goldsmith asked the CIA to refer to that briefing:

> In July 2003, the DCI and the General Counsel briefed senior Administration officials on the Agency's expanded use of EITs. Specifically, **the officials were briefed concerning the number of times the waterboard had been administered** to certain detainees and concerning the fact that the program had been expanded to detainees other than the individual (Abu Zubaydah) who had been the subject of specific DOJ advice in August 2002. At that time, the

> Attorney General expressed the view that the legal principles reflected in DOJ's specific original advice could appropriately be extended to allow use of the same approved techniques (under the same conditions and subject to the same safeguards) to other individuals besides the subject of DOJ's specific original advice. The Attorney General also expressed the view that, **while appropriate caution should be exercised in the number of times the waterboard was administered, the repetitions described did not contravene the principles underlying DOJ's August 2002 opinion**. [my emphasis]

That is, Goldsmith's requested correction strengthens the emphasis on the number of waterboardings, rather than the quality of them, and it emphasizes the August 2002 memo (though oddly, doesn't specify which one—the "organ failure" one or the Techniques one).

That seems to contradict Ashcroft's testimony before HJC. But he has two outs. First, here's what the Bybee Two memo says about the frequency of waterboarding.

> The procedure may then be repeated. The water is usually applied from a canteen cup or small watering can with a spout. You have orally informed us that this procedure triggers an automatic physiological sensation of drowning that the individual cannot control even though he may be aware that he is in fact not drowning. You have also orally informed us that it is likely that this procedure would not last more than 20 minutes in anyone application.

That is, Bybee Two made no restrictions as to number of applications of waterboarding. And given the fluidity of the way "application" is used with waterboarding (in that it now has come

to mean "pours") it would darn near impossible to exceed 20 minutes in one "application" understood as a pour without killing a detainee, even though the sessions themselves exceeded 20 minutes.

Bybee Two does make the following representation (something the IG Report cited):

> Moreover, you have also orally informed us that although some of these teclmiques may be used with more than once, that repetition will not be substantial because the techniques generally lose their effectiveness after several repetitions.

But of course that ties frequency to efficacy, suggesting that the limit on frequency would be determined by efficacy, not law.

Then there's Ashcroft's reference to the definitive description of waterboarding. He doesn't refer to the OLC's description of waterboarding. Rather, he refers to the CIA's description of it.

As I have shown, there **was** a document that passed through John Rizzo's hands that appears to have described waterboarding as CIA practiced it, as distinct from how OLC described it—and this document may have been the basis for OLC's August 26, 2002 authorization of waterboarding. Furthermore, the OMS Guidelines for waterboarding in place before Ashcroft left office specifically **permitted** multiple uses of the waterboard and refused to put a ceiling on the number of applications (no doubt these guidelines were written to encompass what had been done to Abu Zubaydah and Khalid Sheikh Mohammed).

> A rigid guide to medically approved use of the waterboard in essentially healthy individuals is not possible, as safety will depend on how the water is applied and the specific response each time it is used.

> [snip]
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> A series (within a "session") of several relatively rapid waterboard applications is medically acceptable in all healthy subjects so long as there is no indication of some emerging vulnerability. [redacted] Several such sessions per 24 hours have been employed without apparent medical complication. The exact number of sessions cannot be prescribed, and will depend on the response to each. If more than 3 sessions of 5 or more applications are envisioned within a 24 hours period, a careful medical reassessment must be made before each later session.

So with regards to Ashcroft's approval of multiple sessions of waterboarding on July 29, 2003, and to the extent that he claims he was only informed of the numbers of times waterboarding was used, Ashcroft can claim he did not know CIA had violated its own guidelines on waterboarding.

But Ashcroft made this statement in 2008, not in 2003. And we have representations that he read the IG Report, which states that the waterboarding as practiced differed from the description in the OLC memo in quality, in addition to the sheer quantity of waterboardings.

> OIG's review of the videotapes revealed that the waterboard technique employed at was different from the technique as described in the Dol opinion and used in the SERE training. The difference was in 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 continuously applied large volumes of water to a cloth that covered the detainee's mouth and nose.

So presuming Ashcroft did, in fact, read the IG Report, then he did learn of waterboarding that deviated qualitatively from the description.

But of course, that's DOJ's description of waterboarding. Not—as Ashcroft stated in his testimony to HJC—the CIA's description of waterboarding. Ashcroft doesn't say which description he's using. So it's possible he's thinking of either the OMS Guidelines or the JPRA document that more closely match waterboarding as done or something else entirely.

Now, I don't know whether Ashcroft was crafty or just lucky in making this representation to Congress. It was clearly misleading. But in the tradition of Bush's Attorneys General misleading Congress but getting away without perjury charges, his description of whether he learned of waterboarding that exceeded CIA descriptions—as distinct from OLC's description—seems to narrowly skirt being an outright lie.

This is not to excuse Ashcroft—as I said, this was clearly misleading. But I suspect we're going to see more parsing like this as the review of torture goes forward.