

BYBEE'S LAWYER: BYBEE DISTRACTED FROM TORTURE MEMO BECAUSE PROTECTING CHENEY'S ENERGY TASK FORCE

I'll have more on Maureen Mahoney's first response on behalf of Jay Bybee to the OPR report later today. But I wanted to draw attention to a footnote she includes to—apparently—explain that Jay Bybee was a very busy man at the time when he was supposed to be overseeing John Yoo's attempts to legalize torture in the summer of 2002. (This is on PDF page 19)

Judge Bybee's role in reviewing the memo began in earnest around mid-July, roughly two weeks before he signed them.⁵

⁵ During the summer of 2002, in addition to his work on national security issues, Judge Bybee, as head of OLC, was also heavily involved in a number of other difficult and pressing legal matters. Of particular note, Judge Bybee was engaged in the district court litigation in *Walker v. Cheney*, No. 02-340 (DD.C.). The attorneys in that case were working closely with the Department's Civil Division and the Solicitor General's Office. The legal issues involved in the case were peculiarly within Judge Bybee's expertise because his scholarly research had been cited as authority by both sides. See Jay S. Bybee, *Advising the President: Separation a/Powers and the Federal Advisory Committee Act*, 104 *Yale L.J.* 51 (1994).

Walker v. Cheney, of course, is the suit the GAO took against Cheney's office to try to force it to turn over documents relating to his Energy Task Force. After District Court Judge John Bates ruled against GAO in December 2002, it ended one of the more important efforts to subject Cheney's office to Congressional oversight. Furthermore, this effort must be regarded as Cheney's first attempt to assert that his was a Fourth Branch, exempt from oversight but also executive regulation.

How interesting, then, that Mahoney highlighted Bybee's role in helping Cheney succeed in winning this suit to argue that Jay Bybee was doing what he should have been doing in summer 2002.