

THE DOD TECHNIQUES FROM SPRING 2004

Yesterday when I raised the question of what techniques DOD wanted to use in spring 2004, I said there was some ambiguity about what DOD was trying to get approved. In this post I'm going to lay out the conflicting sources of information. Given the totality of information, though, it appears that what DOD asked to use in spring 2004 was extended isolation.

As you'll recall, Jack Goldsmith originally told Jim Haynes not to rely on the March 2003 Yoo memo in late December 2003. But the OPR report describes a request to use some technique in early March 2004 that set off the more active withdrawal and replacement for the memo.

Here's how Goldsmith describes his conversation with Haynes in December 2003 in *Terror Presidency*:

"Jim, I've got bad news," I began.
"We've discovered some errors in the March 2003 opinion that John wrote you on interrogation. The opinion is under review and should not be relied upon for any reason. The twenty-four techniques you approved are legal, but please come back for additional legal guidance before approving any other technique, and do not rely on the March 2003 opinion for any reason."

Of those 24 techniques Goldsmith said he told Haynes were legal, Rummy had listed four (incentive/removal of incentive, pride and ego down, mutt and jeff, and isolation) that required advance notification (though not approval) from the Secretary of Defense.

The OPR Report described that conversation slightly differently.

Accordingly, Goldsmith telephoned Haynes

in late December 2003 and told him that the Pentagon could no longer rely on the Yoo Memo, that no new interrogation techniques should be adopted without consulting OLC, and that the military could continue to use the noncontroversial techniques set forth in the Working Group Report, but that they should not use any of the techniques requiring Secretary of Defense approval without first consulting OLC.

The Working Group Report approved 26 techniques generally and another 9 in exceptional circumstances. The 26 included three not among those techniques Rummy approved (hooding, mild physical contact, and threat of transfer), and one of the techniques Rummy did approve—~~isolation~~—was among those requiring exceptional circumstances in the Working Group.

The working group recommends that techniques 1-26 on the attached chart be approved for use with unlawful combatants outside the United States, subject to the general limitations set forth in this Legal and Policy Analysis; and that techniques 27-35 be approved for use with unlawful combatants outside the United States subject to the general limitations as well as the specific limitations regarding “exceptional” techniques as follows: conducted at strategic interrogation facilities; where there is a good basis to believe that the detainee possesses critical intelligence; the detainee is medically and operationally evaluated as suitable (considering all techniques to be used in combination); interrogators are specifically trained for the technique(s); a specific interrogation plan (including reasonable safeguards, limits on duration, intervals between applications, termination criteria and the presence or availability of

qualified medical personnel) is developed; appropriate supervision is provided; and, appropriate specified senior level approval is given for use with any specific detainee (after considering the foregoing and receiving legal advice).

And while the Working Group did place limits on those exceptional techniques, it did not require SecDef approval. Here's what they say about Secretary of Defense approval.

That a procedure be established for requesting approval of additional interrogation techniques similar to that for requesting "supplementals" for ROEs; the process should require the requestor to describe the technique in detail, justify its utility, describe the potential effects on subjects, known hazards and proposed safeguards, provide a legal analysis, and recommend an appropriate decision level regarding use on specific subjects, This procedure should ensure that SECDEF is the approval authority for the addition of any technique that could be considered equivalent in degree to any of the "exceptional techniques" addressed in this report (in the chart numbers 27-35, labeled with an "E"), and that he establish the specific decision level required for application of such techniques.

The SASC Report has a third version of the Goldsmith-Haynes conversation.

Mr. Goldsmith told the Committee that he called Jim Haynes in December 2003 and told him the March 14, 2003 OLC opinion was under review and could not be relied on by the Department. 1140 That opinion had been presented to the Working Group as the controlling authority for all

questions of domestic and international law and was the legal foundation for the Secretary's April 2003 authorization of techniques for GTMO. Mr. Goldsmith told the Committee that he informed Mr. Haynes in December 2003 that he had determined that only 20 of the 24 techniques authorized by Secretary Rumsfeld were lawful, and that the remaining four techniques were under review. 114 Mr. Goldsmith also advised Mr. Haynes in December that the Department should come back to OLC for additional legal guidance before approving any technique not among those 24 specifically identified in the Secretary's April 2003 memo. 1142 Mr. Goldsmith told the Committee that Mr. Haynes did not inquire about the use of additional techniques during his tenure at OLC, which ended in June 2004. 1143

1141 In his interview with Committee staff, Mr. Goldsmith said he eventually determined that all 24 were lawful. That account differs slightly from Goldsmith's account in his book, in which he said that he told Mr. Haynes in December that all 24 techniques were lawful.

I agree with SASC: Goldsmith's version in his book conflicts with what he told the committee, which are both somewhat different from what OPR Reports. But a May 11, 2004 memo from Goldsmith may shed some light on this issue. It memorializes Goldsmith's prior approval, on April 23, 2004, of the four techniques approved by Rummy in April 2003 but which required advance notification before using.

On April 23, 2004, OLC advised the Department of Defense that four techniques for interrogation of a prisoner at Guantanamo would be lawful, if justified by military necessity and

if conducted in accordance with the Secretary of Defense's memorandum of April 15, 2003,

At the very least, this supports Goldsmith's explanation to the SASC that he went on to approve these four techniques.

Curiously, to justify approving isolation, Goldsmith cites the March 2003 Yoo memo!

The fourth technique was isolation for a limited period. We had earlier advised the Department of Defense that "[a] brief stay in solitary confinement alone is insufficient to state a deprivation" of basic human needs and thus would not constitute "cruel, inhuman, or degrading" treatment under the Convention Against Torture, let alone meet the higher standard for "torture" under that Convention and the United States criminal law implementing it, 18 U.S.C. 2340-2340A. See Memorandum for William J. Haynes, General Counsel of the Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States at 64 (Mar. 14, 2003).

While Goldsmith is not here relying on the more problematic aspects of the memo, according to the OPR Report, he and Bradbury started drafting replacements for the Yoo memo by this point.

Finally, this memo may reveal what the conflict was about: DOD appears to have been requesting 60-day isolation for this detainee.

The Department of Defense proposed that the solitary confinement might continue as long as 60 days, with an internal review after 30. We stated, however, that our advice was limited to the legality of the 30-day period and that

we ought to be consulted again if the Department of Defense wished to extend that time.

The description of isolation in Rummy's April memo only permitted 30 days of isolation. So it appears the request may not have been for a new technique, but for an extended use of isolation.

Just one caveat to that point: SASC also includes a largely redacted paragraph just below the discussion of Goldsmith's withdrawal of the memo that suggests DOD insitutionalized its "Frequent Flyer" program, in which detainees were moved every few hours to prevent them from sleeping, on March 26, 2004.