

# **CIA LAWYERS WERE DISCUSSING “ISSUE THAT AROSE” THREE DAYS BEFORE JULY 13 FAX**

My focus on the multiple versions of Abu Zubaydah's psychological assessment led me to review the CIA OIG Vaughn Declaration from last August, and one document that was withheld caught my eye.

The document strongly suggests that the July 13, 2002 John Yoo fax that appears to have been used as CIA's general authorization for torture was written in response to a specific issue that had already arisen with Abu Zubaydah.

The Vaughn Index was written in response to ACLU's FOIA for documents relating to what would have been shown on the 92 destroyed torture tapes. From the descriptions in the Vaughn, it's clear that most of the documents include things like plans for torture techniques written both before after after Abu Zubaaydah's torture, plans for black sites, communication about the investigation into detainee treatment (I presume that treatment of al-Nashiri would be included, since his interrogations were also on the destroyed tapes, but not the Salt Pit death of Gul Rahman, which wasn't taped), and interviews from the investigation.

And though there are a few documents that clearly are efforts to improve on the techniques used against AZ (including pictures), there are relatively few documents in CIA IG custody from the period of AZ's most intense interrogation. There are:

- “4-pages of handwritten notes, dated April 3, 2002, by a CIA officer regarding

the interrogation of Abu Zubaydah.”

- “A 1-page email,” dated April 5, 2002, “with an attached two page cable from a CIA attorney to a CIA officer regarding the interrogation of Abu Zubaydah.”
- A “four page cable from the field to CIA Headquarters,” dated April 11, 2002, containing “information relating to the CIA’s terrorist detention and interrogation program” (note, this was the day Yoo officially started on the Bybee Memo).
- A May 15, 2002 “two page memo from one CIA officer to another CIA officer discussing information, provided by Abu Zubaydah, relating to a classified counter-terrorism operation.”
- A “1-page of handwritten notes dated July 24, 2002 from a CIA officer describing proposed interrogation techniques that could be considered for use on detainees.”
- A “two page cable from the field to CIA Headquarters,” dated August 12, 2002, and

“a 6-page cable from the field to CIA Headquarters,” dated August 24, 2002, both containing “information relating to the interrogation of Abu Zubaydah.”

(There’s also a cable listed with the date July 26, 2006, which given its place in the Vaughn Index might actually have been dated July 26, 2002, discussing AZ’s status.) There are also a few documents that pertain to discussions in DC (for example, a Memorandum of Understanding recording CIA’s version of an early meeting on the Bybee Memo).

Then there’s the email that sparked my interest, labeled Email-591, dated July 10, 2002, and classified as Top Secret.

This document is a 2-page email chain between CIA attorneys. The document contains the attorneys’ legal analysis as it relates to a specific issue that arose in the context of the CIA’s counter-terrorism program, which was created in anticipation of litigation.

In other words, on July 10, 2002, two of CIA’s lawyers were discussing something that came up—almost certainly (given the scope of the FOIA response) during Abu Zubaydah’s interrogation—in **anticipation of litigation**. And three days later, CIA lawyer John Rizzo would attend a meeting at which DOJ Criminal Division head Michael Chertoff refused to give CIA an advance declination for any crimes committed during Abu Zubaydah’s interrogation and FBI Chief of Staff Daniel Levin announced that the FBI would no longer have anything to do with the CIA’s interrogation program. Ostensibly, those responses came partly in response to Rizzo’s description of purportedly **proposed** torture techniques. Yet after that meeting, Rizzo asked

John Yoo for a letter “setting forth the elements of the torture statute.” And the fax Yoo wrote in response—rather than the formal Bybee One opinion—would serve as CIA’s internal guide for the role of intent in the torture statute, particularly the way intent purportedly played into torture having to do with the infliction of severe mental suffering.

All of which suggests the torturers did something to inflict severe mental suffering on Abu Zubaydah—one the CIA’s own lawyers recognized might result in litigation—just before July 10, 2002.

Here’s how the plays into the context of the July 13 fax.

**July 10, 2002:** The first piece of intelligence from Abu Zubaydah—describing the relationship between Khaldan and Derunta training camps and al Qaeda—used in the 9/11 Report.

**July 10, 2002:** Two CIA attorneys conduct legal analysis via email—in anticipation of litigation—on a specific issue that arose in the context of the CIA’s counter-terrorism program.

**July 10, 2002:** John Yoo tells Jennifer Koester that they will present the Bybee memo to NSC at 10:45 on July 12 (and names the Bybee Memo the “bad things opinion”).

**July 11, 2002:** John Yoo and Jennifer Koester have briefing session with Michael Chertoff on Bybee Memo.

**July 11, 2002:** An OLC paralegal cite-checks the draft, and someone schedules a July 12 meeting with Alberto Gonzales and a July 13 meeting with (effectively) NSC.

**July 12, 2002:** First draft of Bybee Memo distributed outside of OLC.

**July 12, 2002:** John Yoo meets with Alberto Gonzales (and either David Addington or Tim Flanigan) on Bybee Memo.

**July 13, 2002:** John Yoo and Jennifer Koester present July 12 draft to John Rizzo, John Bellinger, Michael Chertoff, Daniel Levin, and Alberto Gonzales. Rizzo provides overview of interrogation plan. Chertoff refuses to give CIA advance declination of prosecution. Levin states that FBI would not participate in any interrogation using torture techniques, nor would it participate in discussions on the subject.

**July 13, 2002:** Rizzo asks Yoo for letter "setting forth the elements of the torture statute."

**July 15, 2002:** John Yoo faxes John Rizzo July 13 letter on the torture statute.

**July 15, 2002:** John Yoo sends Jennifer Koester an email telling her to include a footnote in the opinion stating that they had not been asked about affirmative defenses like necessity, self-defense, or commander-in-chief powers.

**July 16, 2002:** John Yoo and Jennifer Koester meet with Alberto Gonzales and (probably) David Addington and Tim Flanigan. **Yoo shared the July 13 fax with them.** At the meeting, it is decided that Yoo will include Commander-in-Chief and other affirmative defenses in Bybee Memo.

**July 16, 2002:** In response to earlier request from Michael Chertoff (perhaps as early as July 13), John Yoo has Jennifer Koester draft, but not send, a letter to CIA refusing a letter of advance declination of prosecution.

**July 17, 2002:** George Tenet meets with Condi Rice, who advised CIA could proceed with torture, subject to a determination of legality by OLC.

In other words, this entire discussion—including the meeting at which David Addington appears to have told John Yoo to put in affirmative defenses—happened in the wake of this issue that arose, almost certainly in Abu Zubaydah’s torture.

There’s one more item of interest, particularly considering the torturers’ boast that they had inflicted “hard dislocation” on him during his 63rd session which “was one of the few [things] led to him providing significant actionable intelligence.”

The first piece of intelligence based on Abu Zubaydah interrogation cited by the 9/11 Commission (albeit a fairly innocuous piece of intelligence about the Khaldan camp), was dated July 10, 2002. The same day the CIA lawyers were worried about litigation.

It would all make so much sense (though this is a wild guess). They do something that causes AZ severe mental suffering—something amounting to a threat of imminent death, like waterboarding or mock burial. In response to that treatment AZ gives his torturers the first piece of intelligence that actually involves al Qaeda (because, of course, he wasn’t a member of al Qaeda). But the treatment is serious enough that CIA’s lawyers (probably including John Rizzo) start worrying whether it can get the torturers charged with torture. That probably weighed heavily on John Rizzo when, after he presented the “proposed” torture program on July 13, the country’s top prosecutors reacted badly. And so, panicked, he asked John Yoo for a fax laying out how to avoid being charged under the torture statute. And while CIA and OLC danced around for two more weeks preparing a document that made the torture program look palatable enough to sign off on, that wasn’t what CIA

would rely on.

There's just one problem with the timing of this. If you look at the pattern of cables reporting on interrogations, the entire month of July (actually, everything after June 19) consists of a single 2-3 page cable every day (the single exception is July 20, when a 5-page cable is sent). At least judging from the cable traffic, there appears to be no turbulence or extraordinary events during this entire period.

But whether the issue that arose actually happened close to July 10 or happened earlier, it does appear that that issue lay behind the July 13 fax.

Update: Headline changed.