

DANIEL LEVIN TELLS JIM HAYNES, AGAIN, NOT TO TORTURE

We've long known that in February 2005, then-acting head of OLC Daniel Levin contacted DOD General Counsel to remind him that the March 14, 2003 Yoo memo on torture had been withdrawn. But I, for one, had never seen a copy of that letter. It turns out the government included it with their Appeals brief in the David Passaro case (see pages 99-100).

The memo is important for several reasons.

First, note the date: February 4, 2005. The memo was written on Levin's last day as acting OLC head, the day Alberto Gonzales was confirmed Attorney General. Particularly given questions about what authority DOD had for detainee interrogations after Jack Goldsmith purportedly withdrew the memo, the fact that Levin saw the need to formally remind Haynes the memo had been withdrawn on his last day is telling. Remember, too that Levin had real concerns about whether Steven Bradbury—who would take over as acting head of OLC the following day and would go on to write a crazy opinion authorizing DOD's Appendix M the following year—should be appointed OLC head.

Only, it's not entirely clear Goldsmith ever did withdraw the memo.

Here is the text of the memo:

In December 2003, then-Assistant Attorney General **Jack Goldsmith advised you that the March 2003 Memorandum was under review by his Office and should not be relied upon for any purpose.** Assistant Attorney General Goldsmith specifically advised, however, that the 24 interrogation techniques approved by the Secretary of Defense for use with al Qaeda and Taliban detainees at

Guantanamo Bay Naval Base were authorized for continued use as noted below. I understand that, since that time, the Department of Defense has not relied on the March 2003 Memorandum for any purpose. I also understand that, to the extent that the March 2003 Memorandum was relied on from March 2003 to December 2003, policies based on the substance of that Memorandum have been reviewed and, as appropriate, modified to exclude such reliance. **This letter will confirm that this Office has formally withdrawn the March 2003 Memorandum.**

The March 2003 Memorandum has been superseded by subsequent legal analyses. The attached Testimony of Patrick F. Philbin before the House Permanent Select Committee on Intelligence, July 14, 2004, reflects a determination by the Department of Justice that the 24 interrogation techniques approved by the Secretary of Defense mentioned above are lawful when used in accordance with the limitations and safeguards specified by the Secretary. **This also accurately reflects Assistant Attorney General Goldsmith's oral advice in December 2003.** In addition, as I have previously informed you, this Office has recently issued a revised interpretation of the federal criminal prohibition against torture, codified at 18 USC 2340-2340A, which constitutes the authoritative opinion as to the requirements of that statute. [citation omitted; my emphasis]

Note that Levin makes it clear that Goldsmith did not withdraw the memo in December 2003, he just advised Haynes not to rely on it (we knew this). But Levin also makes no mention of Goldsmith formally withdrawing the memo, as the OPR Report suggests happened, in spring of 2004. And while Levin makes it clear—as he did in his

September 2004 memo summarizing the advice OLC had given on torture—that Pat Philbin’s testimony to HPSCI was understood to serve as OLC advice to DOD, Levin’s statement that he was “confirming” that OLC had withdrawn the memo suggests DOD had not yet received such a written notice before then.