

**Fact Sheet Regarding the Judiciary Committee's
May 26, 2010 Interview of Former Assistant Attorney General Bybee**

1. Bybee: Some Interrogation Techniques Were Not Authorized By the Justice Department

In August 2009, Attorney General Holder asked Acting United States Attorney John Durham to investigate whether federal crimes were committed in connection with overseas detainee interrogations. Holder cautioned, however, that the investigation would cover only interrogations that exceeded or violated Justice Department legal guidance and would not reach intelligence community personnel who adhered to the legal boundaries set by OLC: “The Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees.”

In the May 26 interview, Bybee confirmed that a number of techniques reportedly used on CIA detainees were not approved by OLC: These techniques include: Diapering a detainee or forcing a detainee to defecate on himself, forcing a detainee to wear blackout goggles, extended solitary confinement or isolation, hanging a detainee from ceiling hooks, daily beatings, spraying cold water on a detainee, and subjecting a detainee to high-volume music or noise. (Transcript of May 26, 2010, Interview of former Assistant Attorney General Jay Bybee at 78-95, 104-05.)

Bybee further confirmed that the OLC memos did not permit “substantial repetition” of any interrogation techniques, including waterboarding, and acknowledged that the CIA Inspector General had found that “the waterboard was used with greater frequency and it was used in a different manner” than OLC had approved. Documents released by the Justice Department reveal that one detainee was waterboarded 183 times and another was waterboarded 83 times. (Tr. at 102-112.)

Several times, Bybee stated that, if interrogators exceeded the exact boundaries of OLC opinions, they acted without OLC approval: “If the CIA departed from anything that it told us here, if it had any other information that it didn’t share with us or if it came into any information that would differ from what they told us here, then the CIA did not have an opinion from OLC ” and the interrogation was not “authorized.” (Tr. at 95, 104, 105, 111.)

2. Bybee “Worried” That John Yoo Was Too Close to the White House to Serve as OLC Head

When Bybee left OLC for the federal bench, a controversy arose regarding whether his Deputy John Yoo should be named to head the office. Former Attorney General Ashcroft previously testified to the Judiciary Committee that he had reservations regarding whether Yoo was sufficiently independent of the White House to hold this position.

Bybee strongly echoed these concerns during his interview, testifying that he “would be worried” that Yoo was too close to the White House to serve as OLC head. In particular, Bybee expressed “concern” that “John was involved with the White House in a number of apparently war-planning things” that Bybee “was not aware of” at the time. Bybee further complained that Yoo had failed to inform him about these activities: “John had not told me of a number of these meetings. And that would give me some concern”. (Tr. at 236-38.)

Bybee also described the close relationship between John Yoo and the White House, testifying that “Mr. Yoo was at the White House on a regular basis” and that, although Bybee was the head of the office, Yoo handled all discussions with the White House on the interrogation issue. (Tr. at 16, 38, 236-38.)

3. Bybee Does Not Recall Taking Any Steps To Ensure That Office E-mails Were Preserved

The Justice Department’s Office of Professional Responsibility recently revealed that John Yoo’s e-mails had not been preserved at the Justice Department and that the loss of these e-mails has “hampered” OPR’s ability to investigate the creation of the OLC memos on interrogation.

Bybee did not recall taking any steps to ensure that Yoo or any other OLC attorney preserved e-mails during the relevant time, as Department policies appeared to require. (Tr. at 41-42.)

Chairman Conyers has asked DOJ to determine what happened to these e-mails and report back to Congress (as has Senate Judiciary Committee Chairman Leahy). Chairman Conyers has also requested that the National Archives search the Bush White House files for relevant John Yoo e-mails.

4. Bybee Stands By Extreme Views on The President's Power to Order Torture

Despite the widespread, bipartisan criticism of the torture memos, Bybee continued to argue that the federal anti-torture statute would be unconstitutional if applied to interrogations ordered by the President as part of his “core” powers. (Tr. at 211-12.) More broadly, Bybee testified that he continues to stand by the legal analysis in the memoranda: “We might have been clearer in some places. But, in terms of the analysis, I am going to stand by the memo.” (Tr. at 200.)

Bybee was presented with sharp criticism of his work by such prominent Bush Administration attorneys as former Attorney General Michael Mukasey, former Deputy Attorney General Mark Filip, and Bybee's successor at OLC Jack Goldsmith. While he acknowledged that the memos might contain relatively minor flaws, Bybee rejected the criticism by these Bush Administration officials and asserted that all three misinterpreted or “misread” his analysis of presidential power. (Tr. at 166-67, 198, 210, 221-24, 240-42.)