

OLC + CIA = CYA

I wanted to make two points about Spencer's important story at the Windy, identifying a previously unknown 2007 Bradbury torture memo.

A former senior intelligence official, who would not speak for the record, said that in 2007, the head of the Justice Department's Office of Legal Counsel, Steven Bradbury, issued a still-secret memorandum authorizing an updated CIA interrogation regimen. The Justice Department issued the document after months of internal Bush administration debate, a Supreme Court decision in 2006 that extended protections from Common Article 3 of the Geneva Conventions to enemy combatants in U.S. custody, a piece of new legislation responding to the Court's decision and a presidential executive order on interrogations.

[snip]

The still-unreleased Office of Legal Counsel memo spelled out for the CIA what interrogation practices were considered lawful after President Bush issued an executive order on July 20, 2007 that sought to reconcile the CIA's interrogation program with the Geneva Conventions' Common Article 3, which prohibits inflicting "outrages upon personal dignity, in particular humiliating and degrading treatment" upon wartime detainees." The Supreme Court, in 2006's *Hamdan v. Rumsfeld* decision, ruled that Common Article 3 protections applied to enemy combatants in U.S. custody, a determination that the Bush administration had resisted since creating its post-9/11 detention and interrogation policies. Congress in 2006 responded by passing the Military Commissions Act, which reserved for the president the right to define the

applicability of Common Article 3 protections for detainees in the war on terrorism. Bush's order, known as Executive Order 13440, determined that the the CIA's interrogation program fit within Common Article 3, provided that it met certain criteria, such as the exclusion of practices like "murder, torture, cruel or inhuman treatment, mutilation or maiming."

But the order did not define which interrogation techniques it now considered legal. Anonymous Bush administration officials told reporters on the day of the order's release, "it would be very wrong to assume that the program of the past would move into the future unchanged." As a result, according to the former senior intelligence official, **after Bush issued the order, the CIA again asked the Justice Department's Office of Legal Counsel to review the techniques listed in the revised interrogation program in order to determine their legality**, just as the Office of Legal Counsel had done in 2002 and 2005, after previous periods of challenge to the post-9/11 interrogation program. [my emphasis]

Note the timing. Spencer understands that Bush wrote his Executive Order, and then CIA got a new OLC memo (though Spencer reminds me that he doesn't have the memo in hand to confirm that).

I find that particularly interesting considering our discussion the other day about the 2003 OLC memo CIA got. As the WaPo reported last year, the CIA under Tenet twice pushed the White House to give it memos saying, "the torture program is formal policy, not just CIA going wacko."

The Bush administration issued a pair of secret memos to the CIA in 2003 and 2004 that explicitly endorsed the agency's use of interrogation techniques such as

waterboarding against al-Qaeda suspects – documents prompted by worries among intelligence officials about a possible backlash if details of the program became public.

The classified memos, which have not been previously disclosed, were requested by then-CIA Director George J. Tenet more than a year after the start of the secret interrogations, according to four administration and intelligence officials familiar with the documents. Although Justice Department lawyers, beginning in 2002, had signed off on the agency's interrogation methods, senior CIA officials were troubled that White House policymakers had never endorsed the program in writing.

[snip]

Tenet first pressed the White House for written approval in June 2003, during a meeting with members of the National Security Council, including Rice, the officials said. Days later, he got what he wanted: a brief memo conveying the administration's approval for the CIA's interrogation methods, the officials said.

Administration officials confirmed the existence of the memos, but neither they nor former intelligence officers would describe their contents in detail because they remain classified. The sources all spoke on the condition of anonymity because they were not cleared to discuss the events.

The second request from Tenet, in June 2004, reflected growing worries among agency officials who had just witnessed the public outcry over the Abu Ghraib scandal. Officials who held senior posts at the time also spoke of deteriorating relations between the CIA and the White

House over the war in Iraq – a rift that prompted some to believe that the agency needed even more explicit proof of the administration's support.

You'll note an undoubtedly related sign of anxieties over the difference between legal opinion and policy on the 2005 Bradbury torture memos, which all say in a footnote, "The legal advice provided in this memorandum does not represent the policy views of the Department of Justice concerning the use of any interrogation methods." Though Bradbury may have had to include those footnotes since then Deputy Attorney General Jim Comey objected to the memos.

Now, the chronology Spencer describes is the reverse of what appears to have happened with the 2003 and 2004 policy memos: Bush made a formal statement of policy, the executive order, and only then, at the urging of CIA, got an OLC memo analyzing that policy to certify its legality. But it seems to reflect a similar tension between CIA and the White House over ensuring the White House remained as exposed by the torture policy as did CIA.

Note, too, top CIA officers surely already knew what we only discovered later that year: that Bush had a different OLC memo telling him he could change the meaning of Executive Orders willy nilly without changing the actual text of the order. (In fact, since the one prior known example of Executive Order pixie dust related to Iran-Contra, in the aftermath of which John Rizzo, then fairly early in his career in the Office of General Counsel at CIA, was deeply involved, the possibility that Bush's EO on torture was just more pixie dust had to have been in the mind of lawyers at the CIA.) So it's no surprise that CIA insisted on getting legal cover in addition to the apparent statement of policy represented by the EO.

And one more interesting timing note: All this was happening in the months (presumably) before

Steven Bradbury's long-simmering nomination to head OLC came back up before the Senate Judiciary Committee in October. And at the time Bradbury wrote the memo, he had already been serving as Acting Head of OLC for more than 210 days after his second nomination was rejected, making his service in that role arguably illegal (though GAO later ruled it was not illegal).

In June 2005, Mr. Bradbury was nominated by the President to be the Assistant Attorney General for OLC. His nomination was returned by the Senate in December 2005. He was nominated for a second time in January 2006 and returned by the Senate in September 2006. He was nominated for a third time in November 2006 and returned by the Senate the following month. He was nominated for a fourth time in January 2007 and returned by the Senate at the end of that year. And he was nominated for a fifth time in January 2008; his nomination is pending.

Mr. Bradbury was appointed to be the Acting Assistant Attorney General of OLC in or about June 2005. The Vacancies Reform Act permits an official to serve in an acting capacity throughout the pendency of a first or second nomination, but "for no more than 210 days after the second nomination is rejected, withdrawn, or returned." 5 U.S.C. 3346(b). Mr. Bradbury's second nomination was returned on September 29, 2006, so his 210-day stint as Acting Assistant Attorney General expired on or about April 26, 2007.

Since that time, Mr. Bradbury has continued to perform the same duties and functions he had previously been performing – albeit with a different title: "Principal Deputy Assistant Attorney General." This appears to be an end run around and violation of the Vacancies Reform Act, which does not

permit an official to continue leading an office after the 210-day period has expired.

Mr. Bradbury has done exactly that. Just because the Justice Department has changed Mr. Bradbury's business cards and letterhead to say "Principal Deputy Assistant Attorney General" rather than "Acting Assistant Attorney General" does not change the fact that he has continued to serve as the top official at OLC long after the Vacancies Reform Act required his departure in April 2007.

The CIA, not surprisingly, wanted continued cover for its role in interrogations. But their claim to have it, either through EO or OLC Memo, may have given them only questionable legal cover.