THE GESTATION OF BRADBURY'S TORTURE MEMOS

I'm increasingly certain that Jello Jay put together the SSCI narrative as a way to demonstrate that the CIA did not inform Congress it had tortured Abu Zubaydah until well after (six months—and longer for Jello Jay himself) they had done so.

But I suspect one of the other things he tried to document with the narrative is the apparent resistance (or inability) on the part of OLC to write a memo arguing our torture program complied with Article 16 of the Convention Against Torture, which reads:

> 1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel,

inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

Or, to contextualize this even further, Jello Jay wants to document OLC's difficulties with refuting the conclusions of the CIA IG Report, which we know concluded that the interrogation program did violate Article 16.

> The report, by John L. Helgerson, the C.I.A.'s inspector general, did not conclude that the techniques constituted torture, which is also prohibited under American law, the officials said. But Mr. Helgerson did find, the officials said, that the techniques appeared to constitute cruel, inhuman and degrading treatment under the convention.

Let's look at how Jello Jay depicted OLC's attempt to refute this conclusion.

The 10-Month Gestation of the Bradbury Memos

In response to the CIA IG Report, the narrative explains, the CIA asked for an opinion that addressed this problem. As Jello Jay helpfully explained, that means they were asking for an assessment of whether the program violated the Fifth, Eighth, and Fourteenth Amendments.

> After the issuance of that review, the CIA requested that OLC prepare an updated legal opinion that incorporated actual CIA experiences and practice in

> the use of the techniques to date included in the Inspector General review, as well as legal analysis as to whether the interrogation techniques were consistent with the substantive standards contained in the Senate reservation to Article 16 of the Convention Against Torture.
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> Article 16 of the Convention Against Torture requires signatories to "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman and degrading treatment which do not amount to torture." The Senate reservation to that treaty defines the phrase "cruel, inhuman and degrading treatment" as the treatment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution. Thus, the CIA requested that OLC assess whether the interrogation techniques were consistent with the substantive provisions of the due process clause, as well as the constitutional requirement that the government not inflict cruel or unusual punishment.

As Jello Jay portrays it, CIA asked OLC for a new memo incorporating Article 16, but needed to be reminded by Congress that this should address the Constitutional issues as well. (Note, the narrative also shows that Addington went to DOJ and cracked some heads earlier than this, which may be relevant, but the narrative does not say that pertains directly to the problems under CAT.)

> In July 2004, the CIA briefed the Chairman and Vice Chairman of the Committee on the facts and conclusions of the Inspector General special review. The CIA indicated at that time that it was seeking OLC's legal analysis on whether the program was consistent with the substantive provisions of Article 16

> of the Convention Against Torture.
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> According to CIA records, subsequent to the meeting with the Committee Chairman and Vice Chairman in July 2004, the CIA met with the NSC Principals to discuss the CIA's program. At the conclusion of that meeting, it was agreed that the CIA would formally request that OLC prepare a written opinion addressing whether the CIA's proposed interrogation techniques would violate substantive constitutional standards, including those of the Fifth, Eighth and Fourteenth Amendments regardless of whether or not those standards were deemed applicable to aliens detained abroad.

Or more specifically, it looks like DOJ needed to be reminded that the Senate considered not just the Fifth Amendment (giving us the "shocks the conscience" clause), but also the Eighth and Fourteenth Amendments to comprise our compliance with CAT.

> On July 14, 2004, in unclassified written testimony before the House Permanent Select Committee on Intelligence, an Associate Deputy Attorney General explained the Department of Justice's understanding of the substantive constitutional standards embodied in the Senate reservation to Article 16 of the Convention Against Torture. The official's written testimony stated that under Supreme Court precedent, the substantive due process component of the Fifth Amendment protects against treatment that "shocks the conscience." In addition, his testimony stated that under Supreme Court precedent, the Eighth Amendment protection against Cruel and Unusual Punishment has no application to the treatment of detainees where there has been no formal adjudication of guilt.

So to review thus far: CIA's IG tells the Agency they're in violation of CAT. The Agency asks OLC to do a memo assessing the torture program's compliance with CAT. DOJ goes to Congress and say, "we think we only need to worry about the Fifth Amendment." To which Jello Jay and Pat Roberts respond, "Nuh uh. You've got to address 'Cruel and unusual,' and—with the Fourteenth—due process, too." So the CIA slunks back to the NSC and—together—they concede they've got to address the Fifth, Eighth, and Fourteenth Amendment as part of that review.

So OLC—at that point, largely Dan Levin—got to work.

> Following the withdrawal of the unclassified August 1, 2002, opinion in June 2004, OLC began work on preparing an unclassified opinion concerning its interpretation of the anti-torture statute. At the same time, in accord with the request described above, OLC worked on classified opinions that would evaluate the specific techniques of the CIA program, individually and in combination, under its revised interpretation of the anti-torture statute, as well as an opinion that would evaluate whether the program was consistent with the substantive provisions of Article 16 of the Convention Against Torture.

During this time, however, the CIA continued to torture (though not to waterboard), based on okays but not formal analysis from Ashcroft and Levin.

> While OLC worked on drafting new opinions with respect to the CIA program, the CIA continued its interrogation of high-value Al-Qa'ida detainees in U.S. custody. On July 22, 2004, the Attorney General confirmed in writing to the Acting Director of Central Intelligence that the use of the

> interrogation techniques addressed by the August 1, 2002, classified opinion, other than waterboarding, would not violate the U.S. Constitution or any statute or treaty obligation of the United States, including Article 16 of the Convention Against Torture. On August 6, 2004, the Acting Assistant Attorney General for OLC advised in writing that, subject to the CIA's proposed limitations, conditions and safeguards, the CIA's use of waterboarding would not violate any of those legal restrictions. The letter noted that a formal written opinion would follow explaining the basis for those conclusions.

On December 30, 2004—five months after Congress sent the CIA and DOJ back to work on CAT—DOJ released Dan Levin's opinion. Levin's opinion mentions CAT. But it discusses only Article 1 of CAT, not Article 16.

> Congress enacted sections 2340-2340A to carry out the United States' obligations under the CAT. *See* H.R. Conf. Rep. No. 103-482, at 229 (1994). The CAT, among other things, obligates state parties to take effective measures to prevent acts of torture in any territory under their jurisdiction, and requires the United States, as a state party, to ensure that acts of torture, along with attempts and complicity to commit such acts, are crimes under U.S. law. *See* CAT arts. 2, 4-5. Sections 2340-2340A satisfy that requirement with respect to acts committed outside the United States. [(12)] Conduct constituting "torture" occurring within the United States was—and remains—prohibited by various other federal and state criminal statutes that we do not discuss here.
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> The CAT defines "torture" so as to

> require the intentional infliction of "severe pain or suffering, whether physical or mental." Article 1(1) of the CAT provides:
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> > For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
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> The Senate attached the following understanding to its resolution of advice and consent to ratification of the CAT:
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> > The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or

> > threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.
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> S. Exec. Rep. No. 101-30, at 36 (1990). This understanding was deposited with the U.S. instrument of ratification, *see* 1830 U.N.T.S. 320 (Oct. 21, 1994), and thus defines the scope of the United States' obligations under the treaty. *See Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 32-33 (1987). The criminal prohibition against torture that Congress codified in 18 U.S.C. 2340-2340A generally tracks the prohibition in the CAT, subject to the U.S. understanding. [my emphasis]

Imagine how pissed Jello Jay must have been after specifically telling CIA and OLC to consider Article 16—and therefore the Fifth, Eighth, and Fourteenth Amendments—to see this unclassified opinion that asserted that 18 USC 2340-2340A "defines the scope of the United States' obligation under" CAT.

So they asked Alberto Gonzales about it at his confirmation hearing. And he said, "we're working on it."

> In January of 2005, in response to a question for the record following his confirmation hearing, Attorney General Gonzales indicated that "the Administration . . . wants to be in compliance with the relevant substantive constitutional standard incorporated in Article 16 [of the Convention Against Torture], even if such compliance is not legally required." Attorney General Gonzales further indicated that "the Administration has undertaken a comprehensive legal review of all interrogation practices. . . . The analysis of practices under the standards of Article 16 is still under way."

And they asked again when they got their next torture briefing, in March. And they were told, "we're working on it."

> The CIA briefed the Chairman and Vice Chairman of the Committee on the CIA's interrogation program again in March 2005. At that time, the CIA indicated that it was waiting for a revised opinion from OLC.

Which is how, ten months after Congress insisted that OLC analyze the torture program with an eye towards the Fifth, Eighth, and Fourteenth Amendments, we finally get to the Bradbury opinions.

After a 10-Month Wait, Bradbury *Still* Tells Congress Not to Worry about the Constitution

The May 10 opinions fulfill one part of what OLC had set out to do the previous June—to come up with an opinion that "incorporated actual CIA experiences and practice in the use of the techniques to date." Or, to put it another way, to come up with an opinion that could dismiss unsavory details like the 183 times Khalid Sheikh Mohammed had been waterboarded, yet still

declare the program itself legal. But those memos still address only 18 USC 2340-2340A. The Techniques memo, for example, includes a footnote acknowledging the existence of CAT, but it still uses the standards: severe physical pain or suffering, severe mental pain or suffering, and "specifically intended" as laid out in the Levin memo.

It's only with the May 30 memo—at least ten full months after Congress said, "we've got this thing called a Constitution"—did OLC get around to considering whether or not torture violates CAT.

Before I get to the May 30 memo, though, it might be relevant to point out that Jim Comey, who went on to predict we'd be "ashamed" when we got to see at least the May 10 opinions, but who didn't manage to convince Alberto Gonzales not to approve them, resigned on April 20. And, sometime in May, Jello Jay asked for a document dump of materials cited in the IG Report, which of course the CIA refused.

> In May 2005, I wrote the CIA Inspector General requesting over a hundred documents referenced in or pertaining to his May 2004 report on the CIA's detention and interrogation activities. Included in my letter was a request for the CIA to provide to the Senate Intelligence Committee the CIA's Office of General Counsel report on the examination of the videotapes and whether they were in compliance with the August 2002 Department of Justice legal opinion concerning interrogation. The CIA refused to provide this and the other detention and interrogation documents to the committee as requested, despite a second written request to CIA Director Goss in September 2005.
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> It was during this 2005 period that I proposed without success, both in committee and on the Senate floor, that the committee undertake an investigation

> of the CIA's detention and interrogation activities.

(Yeah—right about now I'm wondering if I should make an exception to my use of the Jello Jay moniker in this post.)

So back to the May 30 memo, which was supposed to be directly responsive to directions from Congress given ten months before.

To manage the argument that torture complies with the Fifth, Eighth, and Fourteenth Amendments, Bradbury first tried to get out of the problem by arguing that since all the torture happened outside of US jurisdiction, it didn't violate Article 16.

> Based on CIA assurances, we understand that the interrogations do not take place in any … areas over which the United States exercises at least de facto authority as the government. … We therefore conclude that Article 16 is inapplicable to the CIA's interrogation practices and that those practices thus cannot violate Article 16.

Elsewhere, he admits that Article 10 of CAT requires all personnel—regardless of where they are—be trained not to torture, but then says that, since Article 16 incorporates Article 10 with regards to cruel and inhuman treatment only after having made jurisdictional limitations, then the prohibition on cruel and inhuman treatment, unlike torture, is understood to be restricted just to US territory. And in a footnote, Bradbury admits that Article 16 might extend to territory where we are an occupying power, but claims we're not (or rather weren't) an occupying power in any place in 2005 (the Iraqis will no doubt be glad to hear that news as will everyone then being tortured at Bagram Airforce Base).

Bradbury then states,

> Further, the United States undertook its obligations under Article 16 subject to a Senate reservation, which, as relevant here, explicitly limits those obligations to "the cruel, unusual and inhumane treatment … prohibited by the Fifth Amendment … to the Constitution of the United States."

See all those ellipses? In a footnote, Bradbury admits that the Senate reservation mentioned the Eighth and Fourteenth Amendments as well, but promises that he'll explain why the Eighth and Fourteenth are not applicable later. Ultimately (on page 26) he dismisses the Fourteenth Amendment because it applies only to states, not the federal government. And he dismisses the Eighth Amendment by saying,

> Because the high value detainees on whom the CIA might use enhanced interrogation techniques have not been convicted of any crime, the substantive requirements of the Eighth Amendment would not be relevant here, even if we assume that Article 16 has application to the CIA's interrogation program.

And that's how—10 months after Congress reminded the CIA about the Constitution—Bradbury finally whittled that Constitution down to "shocks the conscience."

I've discussed elsewhere how Bradbury distinguishes our torture from other countries' torture and distinguishes between SERE and torture by appealing to efficacy and necessity. But this where I should yield back to Jello Jay to explain:

> Under the "shocks the conscience" standard, OLC concluded that Supreme Court precedent requires consideration as to whether the conduct is "arbitrary in the constitutional sense" and whether it is objectively "egregious" or

> “outrageous” in light of traditional executive behavior and contemporary practices.
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> To assess whether the CIA’s interrogation program was “arbitrary in the constitutional sense,” OLC asked whether the CIA’s conduct of its interrogation program was proportionate to the governmental interests involved. Applying that test, OLC concluded that the CIA’s interrogation program was not “arbitrary in the constitutional sense” because of the CIA’s proposed use of measures that it deemed to be “safeguards” and because the techniques were to be used only as necessary to obtain information that the CIA reasonably viewed as vital to protecting the United States and its interests from further terrorist attacks.
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> OLC also concluded that the techniques in the CIA program were not objectively “egregious” or “outrageous” in light of traditional executive behavior and contemporary practice. In reaching that conclusion, OLC reviewed U.S. judicial precedent, public military doctrine, the use of stressful techniques in SERE training, public State Department reports on the practices of other countries, and public domestic criminal practices. OLC concluded that these sources demonstrated that, in some circumstances (such as domestic criminal investigations) there was a strong tradition against the use of coercive interrogation practices, while in others (such as with SERE training) stressful interrogation techniques were deemed constitutionally permissible. OLC therefore determined that use of such techniques was not categorically inconsistent with traditional executive behavior, and concluded that under the facts and circumstances concerning the

> program, the use of the techniques did not constitute government behavior so egregious or outrageous as to shock the conscience in violation of the Fifth Amendment.

I don't know what the proper term is when aristocrats like Rockefellers attempt snark, disdain, or disgust, but I do believe this is an example of the form.

So that's one thing Jello Jay is trying to expose with his narrative: in addition to neglecting to inform Congress when the CIA got into the torture business, the Bush Administration basically responded to Congressional reminders about our Constitution by—first—ignoring their request for 10 months, and then, after that wait, stacking ridiculous argument on top of ridiculous argument to argue that the US can engage in whatever cruelty it wants so long as it's not in US jurisdiction (narrowly defined) and so long as it can be claimed to be effective and necessary.