

# ZELIKOW'S DISSENT AND ROCKEFELLER'S QUESTION

Dalybean made an important point in EPU-land of the Gestation of Bradbury's Torture Memos thread. As I pointed out in that thread, the May 30 Bradbury memo was a response—at least in part—to Congress' demand that the Administration assess whether their torture program complied with the Fifth, Eighth, and Fourteenth Amendments as they fulfilled the US obligation under the Convention Against Torture.

Well, that was one of the biggest points Phillip Zelikow made in his dissent to the May 30, 2005 torture memo.

At the time, in 2005, I circulated an opposing view of the legal reasoning. My bureaucratic position, as counselor to the secretary of state, didn't entitle me to offer a legal opinion. But I felt obliged to put an alternative view in front of my colleagues at other agencies, warning them that other lawyers (and judges) might find the OLC views unsustainable. My colleagues were entitled to ignore my views. They did more than that: The White House attempted to collect and destroy all copies of my memo. I expect that one or two are still at least in the State Department's archives.

Stated in a shorthand way, mainly for the benefit of other specialists who work these issues, my main concerns were:

- *the case law on the "shocks the conscience" standard for interrogations would*

*proscribe the CIA's methods;*

- *the OLC memo basically ignored standard 8th Amendment "conditions of confinement" analysis (long incorporated into the 5th amendment as a matter of substantive due process and thus applicable to detentions like these). That case law would regard the conditions of confinement in the CIA facilities as unlawful.*
- *the use of a balancing test to measure constitutional validity (national security gain vs. harm to individuals) is lawful for some techniques, but other kinds of cruel treatment should be barred categorically under U.S. law – whatever the alleged gain. [my emphasis]*

Zelikow, with a background in this area of law, wrote a dissent to the torture memo ripping its legal analysis. Significantly, Zelikow hit on one point that Congress was hitting on too: the

importance of the Eighth Amendment in our compliance with the Convention Against Torture. As Zelikow apparently pointed out, the case law surrounding the Eighth Amendment said that even these detainees were entitled to protection from cruel and unusual punishment.

As a reminder, here's all that Bradbury had to say about the Eighth Amendment in his memo:

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.

Zelikow describes the logic of Bradbury's stance this way:

The underlying absurdity of the administration's position can be summarized this way. Once you get to a substantive compliance analysis for "cruel, inhuman, and degrading" you get the position that the substantive standard is the same as it is in analogous U.S. constitutional law. So the OLC must argue, in effect, that the methods and the conditions of confinement in the CIA program could constitutionally be inflicted on American citizens in a county jail.

In other words, Americans in any town of this country could constitutionally be hung from the ceiling naked, sleep deprived, water-boarded, and all the rest – if the alleged national security justification was compelling. I did not believe our federal courts could reasonably be expected to agree with such a reading of the Constitution.

Now, scribe hit on just these issues in a long

comment in the thread, which helped me, at least, see the absurdity of Bradbury's position.

But put in the context of Jello Jay's ten month quest to force the Administration to assess whether or not its torture program violated (among other things) the prohibition on cruel and unusual punishment, the behavior of the Administration makes much more sense.

Jello Jay demanded they review whether we were complying with CAT—and he insisted that they deal with not just the Fifth, but also the Eighth and Fourteenth Amendments. Bradbury came up with a very clever response, if you don't mind the idea of US citizens in a county jail hanging "from the ceiling naked, sleep deprived, water-boarded, and all the rest." And then Zelikow called him on it.

Zelikow demonstrated to the Administration that they had not solved the problem Jello Jay had given them ten months earlier.

So David Addington or some other enforcer did the only thing he could do to do to maintain the fiction that the Administration had answered Congress' questions: rip up Zelikow's dissent.

Remember how we said that destroying the memo was evidence of criminal intent—an attempt to preserve the appearance of good faith reliance on Steven Bradbury's memos? All the more so when Zelikow was making the same point Congress was making.