

# ACLU'S LATEST LAWSUIT: SUING TO GET THE 2002 CONVENTION AGAINST TORTURE OPINION

The ACLU sued the CIA and other government agencies today for still more documents relating to torture. They're basically suing to enforce a FOIA request they submitted last year that amounts to ... everything they haven't already gotten.

1. "Any indices, tables, or logs that list or otherwise identify legal memoranda produced by the Office of Legal Counsel ('OLC') after September 11, 2001, relating to the detention, interrogation, treatment, or prosecution of suspected terrorists, or the transfer of suspected terrorists to foreign countries, including any indices, tables, or logs produced in response to the subpoena issued by the Senate Judiciary Committee to Attorney General Michael Mukasey on October 21, 2008.

2. "All legal memoranda produced by the OLC after September 11, 2001, relating to the detention, interrogation, treatment, or prosecution of suspected terrorists, or the transfer of suspected terrorists to foreign countries.

3. "All records issued after September 11, 2001 by the Defense Department, Justice Department, State Department, or CIA, in which any of those agencies, or personnel at those agencies, sought guidance, advice, or analysis from the White House with respect to the detention, interrogation, treatment, or prosecution of suspected terrorists, or

the transfer of suspected terrorists to foreign countries.

4. "All records, including directives and memoranda, that were issued after September 11, 2001 by the White House to the Defense Department, Justice Department, State Department, or CIA, or to specific personnel at those agencies, and that relate to the detention, interrogation, treatment, or prosecution of suspected terrorists, or the transfer of suspected terrorists to foreign countries.

But in their press release announcing the suit, the ACLU describes three documents in particular they're seeking.

1. Documents between the White House and CIA concerning the use of the CIA's so-called "enhanced interrogation techniques"
2. A legal memorandum or letter dated July 22, 2002 from Yoo to Alberto R. Gonzales regarding the applicability of the Convention Against Torture
3. A 2007 opinion by Bradbury analyzing the legality of the interrogation techniques authorized for use in the CIA program under Common Article 3, the Detainee Treatment Act and the War Crimes Act

Item one would include the discussions about approval for individual techniques (and might catch David Addington chatting up John Rizzo).

Item three is one of the two remaining torture memos we're missing, where Bradbury tried to authorize things SCOTUS had already ruled were illegal. This is the memo, remember, that justified Bush's July 2007 Executive Order on torture.

I'm particularly interested in item two, though. I noted yesterday that I think we're going to learn that the Bush Administration claimed to have exempted CIA from complying with the Convention Against Torture's prohibition on cruel and inhuman treatment. This opinion—which was mentioned in John Yoo's 2003 torture memo for DOD—apparently claims to exempt everyone from complying with Article 16 of CAT.

Here's how Yoo's memo referred to this earlier memo (which he also wrote):

Article 16, like the other first 15 articles in the treaty, is non-self executing. The United States took a reservation to this section, as with the other first fifteen articles, that this section was non-self executing. As explained in text, therefore they not only "are not federal law cognizable in federal court, they also place no obligations on the Executive Branch." Letter for Alberto R. Gonzales, Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, at 1 (July 22, 2002).

Keep in mind the implications of this opinion. As reviewed in the SSCI narrative, the Bush Administration told Congress over and over and over that they fully intended to comply with CAT's Article 16.

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.”

[snip]

Before the passage of the Detainee Treatment Act, in October of 2005, the Principal Deputy Assistant Attorney General for OLC noted in response to questions for the record: “[I]t is our policy to abide by the substantive constitutional standard incorporated into Article 16 even if such compliance is not legally required, regardless of whether the detainee in question is held in the United States or overseas.” Similarly, in December of 2005, both the Secretary of State and the National Security Adviser stated publicly that U.S. policy was to treat detainees abroad in accordance with the prohibition on cruel, inhuman and degrading treatment contained in Article 16.

And in fact, this claim—that the Administration intended to comply with CAT’s Article 16—is one of the things that Mary McCarthy has alleged a senior CIA official lied to Congress about in a briefing in June 2005 (a briefing, incidentally, that the CIA didn’t list in its torture briefing list).

A senior CIA official, meeting with Senate staff in a secure room of the Capitol last June, promised repeatedly that the agency did not violate or seek to violate an international treaty that bars cruel, inhumane or degrading treatment of detainees, during interrogations it conducted in the Middle East and elsewhere.

But another CIA officer – the agency’s

deputy inspector general, who for the previous year had been probing allegations of criminal mistreatment by the CIA and its contractors in Iraq and Afghanistan – was startled to hear what she considered an outright falsehood, according to people familiar with her account. It came during the discussion of legislation that would constrain the CIA's interrogations.

You see, we're eventually going to find out that, in fact, the Administration had—based on Yoo's 2002 memo—made a policy decision to blow off complying with CAT's Article 16 altogether. And lied about that policy to Congress repeatedly.

I wonder whether we'll get this opinion before the SSCI completes its investigation into all the times the Administration lied about this to the SSCI?