

THE APRIL 22, 2005 FAX ON TORTURE

I'm working on a series of posts about the 2005 Bradbury Memos and Hassan Ghul. But first, I want to make a couple of points about a document that plays a key role in them—particularly in the Combined Memo: an April 22, 2005 fax from the CIA's Assistant General Counsel (the name is always redacted) to Steven Bradbury.

The Chronology

Before I get into the significance of the fax, here's the chronology of it:

December 30, 2004: Background Paper on CIA's Combined Use of Interrogation Techniques; Daniel Levin torture memo published

February 2005: Daniel Levin leaves DOJ

April 8, 2005: Draft "Techniques" and "Combined" OLC Memos (at that point, 57 pages in length) sent to CIA

"Several weeks" before April 27, 2005: Pat Philbin alerts Jim Comey to problems with "Combined" draft

April 20, 2005: DOJ announces Jim Comey's resignation

April 22, 2005: Meeting between Pat Philbin, Jim Comey, Steven Bradbury, Alberto Gonzales about May 10 torture memos

April 22, 2005: Fax to Steven Bradbury from Assistant General Counsel, CIA

April 26, 2005: Comey gets latest draft of Combined memo (no mention of Techniques draft), meets with Gonzales to express concerns, concurs with Techniques memo

April 27, 2005: White House tells

Gonzales memos must be finalized by
Friday, April 29

April 28, 2005: Gonzales' Chief of
Staff, Ted Ulyot, tells Comey the memo
will have to be "sent over" tomorrow

May 10, 2005: Techniques and Combined
memos (totaling 67 pages in length)
finalized and sent to CIA

Note a few points. The May 10, 2005 memos were drafted by April 8, 2005. Apparently not long after CIA received that draft, Pat Philbin notified Jim Comey of problems with the "Combined" memo and (though there's no reason to believe they're related events) Comey resigned.

And then, on Friday April 22, two things happened. Comey and Philbin tried to talk Gonzales and Bradbury into fixing the "Combined" memo. And Bradbury received the April 22 fax from the Assistant General Counsel of the CIA. Also note, while it's clear Comey saw a draft of the "Combined" memo after April 22 (the one he describes as being worse than the previous draft he had seen), it's not clear he saw another draft of the "Techniques" memo before he concurs with it on April 26—though we know the memo would have changed in the interim, since it cites the April 22 fax.

We don't know what happened after that point. Ulyot told Comey the memos would be sent to the White House (and perhaps the CIA) on Friday April 28, 2005. But we know the memos weren't finalized until May 10, 2005—almost two weeks later.

The April 22 Fax Reintroduces Waterboarding into Combined Techniques

There are a number of things the April 22 Fax appears to have done, which I'll get into below. But the really critical detail is this one, from the Combined memo:

The Background Paper does not include
any discussion of the waterboard;

however, you have separately provided to us a description of how the waterboard may be used in combination with other techniques, particularly dietary manipulation and sleep deprivation. See Fax for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from [redacted], Assistant General Counsel, CIA, at 3-4 (April 22, 2005)

[snip]

You have advised us that in those limited cases where the waterboard would be used, it would be used only in direct combination with two other techniques, dietary manipulation and sleep deprivation. [my emphasis]

In other words, the *Background Paper* that was tied to the December 2004 Levin memo, didn't mention waterboarding at all (but that didn't stop the NYT from declaring that Levin had found waterboarding to be legal). Then Levin left and Bradbury picked up the memos. Even in that form, Philbin apparently had concerns about the memo.

But then, after Comey resigned on or before April 20, and on the same day Comey and Philbin tried to fix the memo on April 22, the CIA sent over a fax with in-depth details of using diet manipulation and sleep deprivation with waterboarding, just in time for Bradbury to finish up the memo. The April 22 fax, then, was the primary background for discussion of using waterboarding in conjunction with sleep deprivation, but Bradbury didn't even get it until at least halfway through the process. And for some reason, that late in the process, they felt they needed such a document.

The Other Uses of the April 22 Fax

That's not the only thing cited from the April 22 fax in these memos. The Techniques memo uses the memo to ally fears of edema in sleep deprivation.

Specifically, you have informed us that on three occasions early in the program, the interrogation team and the attendant medical officers identified the potential for unacceptable edema in the lower limbs of detainees undergoing standing sleep deprivation, and in order to permit the limbs to recover without impairing interrogation requirements, the subjects underwent horizontal sleep deprivation.

The Combination memo also appears to cite the fax for its number—at least 25—of detainees who had been subjected to sleep deprivation.

The Combined memo also appears to borrow the analysis of the *Background Paper*—which didn't mention the waterboard—to apply it to interrogations including the waterboarding described in the April 22 fax. Most troubling, the Combined memo appears to use the Background paper analysis on interrogators telling detainees they would "do what it takes" to get information. Of course, the statement means one thing in isolation from waterboarding (as it was treated in the Background paper), but quite another when subjecting someone to controlled drowning. Yet by using the *Background Paper* (which didn't consider the waterboard) for a memo treating the waterboard, the Combined memo can say all of the following in the section on severe mental pain or suffering:

A detainee subjected to the waterboard experiences a sensation of drowning, which arguably qualifies as a "threat of imminent death."

[snip]

The Background Paper raises one other issue about "severe mental pain or suffering." According to the Background Paper, the interrogators may tell detainees that they "will do what it takes to get important information." ...

Conceivably, a detainee might understand such a statement as a threat ... We doubt this statement is sufficiently specific to qualify as a predicate act under section 2340(2).

[snip]

Although it may raise a question, we do not believe that, under the careful limitations and monitoring in place, the combined use outlined in the Background Paper, together with a statement of this kind, would violate the statute.

The memo gives the appearance of having analyzed whether saying "we will do what it takes to get the information" in conjunction with controlled drowning could be considered a threat. But the memo in fact falls far short of that.

What We Know from This

Mind you, we don't know what this means—aside from the fact that a key document for the Combined memo's treatment of waterboarding was not even written until well into the process. That doesn't tell us anything about when the discussion about waterboarding itself was introduced into the process—or the memos. For that we'd need drafts of the memos themselves (maybe Gonzales would be willing to share his?)

There's something screwy with the timeline of these memos—we just don't know what it means yet. Though I suspect it will feature in the OPR report—if and when they ever release it.