DOD'S EMPTY VESSEL FOR TORTURE AUTHORIZATION

When I asked whether DOD had any authorization for torture after 2004, Jeff Kaye reminded me we just recently saw one new aspect of authorization: an April 2006 Steven Bradbury Opinion authorizing Appendix M of the new version of the Army Field Manual released on September 6, 2006. (As Jeff and Matthew Alexander have shown, Appendix M, which remains in place, basically incorporates a number of techniques amounting to torture right into the AFM.) While the 2006 Bradbury memo doesn't explain what DOD was doing between 2004 and 2006, the memo basically serves to turn Appendix M into an empty vessel into which DOD can throw anything it wants and have it pre-approved.

Make sure the client never sees the caveats

Let's start with the structure of the memo: note to whom it is addressed?

Nobody.

Rather, this is a Memorandum for the Files. It serves as a document internal to OLC, rather than a document explaining factual assumptions, legal reasoning, and specific limits to the client. So how does the client know the result of the memo? The first paragraph of this memo explains,

> The Department of Defense ("DOD") has asked us to review for form and legality the revised drafts of the Army Field Manual 2-22.3 ("Human Intelligence Collector Operations"), Appendix M of FM 2-22.3 ("Restricted Interrogations Techniques"), and the Policy Directive regarding DOD's Detainee Program. By letter sent today to the General Counsel of DOD, we advised that these documents are consistent with the requirements of

> law, in particular with the requirements of the Detainee Treatment Act of 2005 [citation removed]. This memorandum explains that conclusion.

In other words, Bradbury did tell Jim Haynes the result of his review: that the Appendix passed legal muster. But it appears that Bradbury did not send this memo (the memo was finalized after the letter had already been sent). Indeed, Bradbury suggests that he did little more than send a letter saying, "The new Army Field Manual, Appendix M, and the associated Directive are legal under the Detainee Treatment Act."

Love, Stevie, kthxby.

Now, Bradbury does put limits on his judgment that Appendix M was legal. He spends what appears to be six paragraphs describing the techniques he says were part of Appendix M. Those paragraphs place limits on the techniques (for example, they prohibit an interrogator from leading a detainee to believe the interrogator was a member of the Red Cross). He references restrictive language in specific paragraphs of the AFM itself. He includes assumptions about whom DOD would use these techniques with.

But if DOD never saw this memo—and there's no indication they did—then his approval would be utterly divorced from any of the restrictions he had placed on that approval.

Approve a document and then make changes to it

Speaking of all those references to specific paragraphs of Appendix M, note that Bradbury wrote this memo on April 13, 2006. Appendix M was not finalized and released until September 6, 2006. And the contents of Appendix M changed significantly between the time Bradbury wrote his approval letter and the time the Appendix was put into effect five months latter. (See this article from Jeff for a review of the debates in the interim period.) Even the title changed—from the plural "Restricted Interrogation Techniques" to the singular

"Restricted Interrogation Technique—Separation" (what they basically did in the interim was lump all six techniques into one, as I'll explain below).

A comparison of the paragraphs Bradbury cites with what the Appendix now says shows why this is important.

- Bradbury cites paragraph M-3 for his definition of "unlawful enemy combatants" saying "persons not entitled to combatant immunity, who engaged in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict." But M-3 now addresses a completely different issue—the distinction between separation and segregation. The current Appendix does have a related caveat, though the wording is different:

> Separation will only be used during the interrogation of specific unlawful enemy combatants for whom proper approvals have been granted in accordance with this appendix. However, separation may not be employed on detainees covered by Geneva Convention Relative to the Treatment of Prisoners of War (GPW), primarily enemy prisoners of war (EPWs).

- Bradbury cites M-6 for the caveat that the detainee in

question must be believed to have *important* intelligence (his emphasis) and the requirement for "special approval, judicious execution, special control measures, and rigorous oversight"; that language is now in M-5.

- Bradbury cites M-15 for the requirement that a General Office/Flag Officer approve each interrogation plan; that now appears in M-7, and the language appears to be slightly different.
- Bradbury cites M-23 for language limiting the use of Appendix M only to DOD interrogators specially trained and certified to use these techniques; that language now appears in M-22, but **the paragraph now authorizes properly trained contract interrogators and "non-DOD personnel" to use the techniques** as well.
- Bradbury cites M-21 for medical limits, including that "Detainees determined to be unfit for interrogation may not be interrogated" (note, this does not appear to be a direct citation from the appendix, but rather

Bradbury's summary of it); in the current Appendix, language on medical oversight appears in several places (M-16, M-20, M-23, M-24, M-30), but **never includes an explicit restriction against using the techniques on an unfit detainee**:

> Medical personnel will be available to respond in the event a medical emergency occurs.
>
> [snip]
>
> Commanders are responsible to ensure that detainees undergoing separation during interrogation receive adequate health care as described in greater detail in paragraph 5-91.
>
> [snip]
>
> A provision for detainees to be checked periodically in accordance with command health care directives, guidance, and SOPs applicable to all detainees.
>
> [snip]
>
> **Planning must consider the possible cumulative effect of using multiple techniques and take into account the age, sex, and health of detainees, as appropriate.**
>
> [snip, emphasis original]
>
> Medical: Detainees will be checked periodically in accordance with command health care directives, guidance, and SOPs applicable to all detainees.

Repackage 6 specific techniques into one Orwellian named technique

But by far the biggest change in Appendix M between the time Bradbury said it was legal and the time it was published was the replacement of 6 specific techniques—Mutt and Jeff, False Flag, Separation (Isolation), and three techniques on changes in environment (probably different location, change in existing location—as with heat or odor or noise, and change in sleep)—to one absolutely vague technique, separation, that incorporates those, but does so without actually describing them at all (much less limiting them in any meaningful way). The best hint of what "Separation" entails comes from the list of cautions presented in appalling passive language:

- Use of hoods (sacks) over the head, or of duct tape or adhesive tape over the eyes, as a separation method is prohibited.
- If separation has been approved, and the interrogator subsequently determines that there may be a problem, the interrogator should seek further guidance through the chain of command before applying the technique.
- Care should be taken to protect the detainee from exposure (in accordance with all appropriate standards addressing excessive or inadequate environmental conditions) to—

> – Excessive noise.
>
> – Excessive dampness.

> – Excessive or inadequate heat, light, or ventilation.
>
> – Inadequate bedding and blankets.
>
> – Interrogation activity leadership will periodically monitor the application of this technique.

- Use of separation must not preclude the detainee getting four hours of continuous sleep every 24 hours.
- Oversight should account for moving a detainee from one environment to another (thus a different location) or arrangements to modify the environment within the same location in accordance with the approved interrogation plan.

In other words, it's clear this Appendix envisions sensory deprivation (just without hoods or duct tape or excessively loud noise), temperature exposure, sleep deprivation, and isolation itself. But it never actually specifies what it means by those things.

And there's one more indication that these techniques changed in some significant way between the time Bradbury "approved" them and the time they were published. Note that the Mutt and Jeff description includes about five lines redacted. Those are exempted from FOIA under exemption (b)(2), which is kind of bizarre in any case, because it refers to internal personnel rules, but in any case seems to refer to something that exists in some tangible bureaucratic form. But the exemption invoked to redact the entire discussion of what Bradbury refers to "Adjustment" and "Separation"

techniques is (b)(5)—material that falls under some formal privilege, such as attorney-client or deliberative. It seems likely, then, that OLC and DOD redacted those sections under a deliberative privilege because the practices described in the redacted sections have changed since that time.

Approve any changes in the future

And if all that is not already outrageous enough, the Appendix itself is designed to be updated regularly.

> Will be reviewed annually and may be amended or updated from time to time to account for changes in doctrine, policy, or law, and to address lessons learned.

Yet, with Bradbury having already written a letter—divorced from any condition or detail—approving the Appendix, DOD can throw whatever they want in Appendix M in the future and they'd still have their DOJ seal of approval.

Now, we know that Appendix M is still in effect. It is unclear whether Bradbury's approval for it remains in effect (the memo is not included among those David Barron has explicitly withdrawn). But if it is, it basically serves to make Appendix M a privileged space into which DOD can put anything and have it carry DOJ sanction.