PHILIP ZELIKOW SAVES CONDI RICE'S HINEY (AGAIN)

Back in April 2009, former State Department Counselor and all-around Condi Rice fixer Philip Zelikow revealed that "in 2005," he had written a dissent to Steven Bradbury's 2005 Memo finding the torture program complied with the Convention against Torture, but that most copies of it had been destroyed by the Administration.

> 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.

It turns out that David Addington didn't succeed in destroying all the copies. The National Security Archive just liberated a copy.

Now, the memo (which was actually dated February 15, 2006) reveals Zelikow's very sane legal argument that our torture program had to comply with the 8th Amendment. But it also reveals some subtleties about the bureaucratic maneuvering around torture. Notably, that Zelikow was trying to save Condi Rice's arse again.

To understand why, go back to this post (see also this post), explaining what Bradbury was trying to do with his 2005 CAT Memo: respond to explicit concerns raised by Congress (probably

Jay Rockefeller) about whether our torture program complied with the CAT. It shows how (as documented in the narrative on the process that Rockefeller released), the Senate Intelligence Committee had forced the Bush Administration to agree to consider whether our torture program violated CAT. The Administration agreed to do so only after the National Security Council—then chaired by Condi Rice—agreed.

> 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.

DOJ stalled for 10 months. Daniel Levin, as acting head of OLC, approved more individual torture techniques. Levin wrote an unclassified memo ignoring CAT. Congress continued to pressure. The Administration laterally transferred Levin because he wasn't writing the memos they wanted, authorizing combined techniques and waterboarding and, somehow, finding that torture program complied with CAT. Bradbury got the job to write those memos. And then, finally, 10 months after SSCI demanded that DOJ consider CAT, Bradbury wrote his memo finding that the torture program did not violate CAT's prohibition against cruel, inhuman, or degrading treatment.

I lay out in the post the specious tricks Bradbury pulled to make that claim, and scribe laid out the legal reasons the arguments were so specious. But in specific regard to SSCI's demand that OLC review whether the program

complied with the Fifth, Eighth, and Fourteenth Amendment, Bradbury punted by saying it didn't have to, and certainly didn't have to comply with the Eighth.

> 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.
>
> [snip]
>
> 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.

After reading drafts of such bullshit, Jim Comey tried to convince Bradbury to fix it—to no avail.

Of note, however, here's what then Attorney General Alberto Gonzales said Condi—who had become Secretary of State in the interim—had to say about the importance of complying with our treaty obligations.

> The AG began by saying that Dr. Rice was not interested in discussing details and that her attitude was that if DOJ said it was legal and CIA said it was effective, then that ended it, without a need for detailed policy discussion.

And so, with the Secretary of State dismissing treaty obligations by saying "that ended it," torture got approved for use by the Executive Branch again.

Zelikow's memo admits that State didn't object to Bradbury's memo.

> The State Department agreed with the Justice Department May 2005 conclusion that [Article 16] did not apply to CIA interrogations in foreign countries.

Now, Zelikow claims that passage of the McCain amendment—which was signed on December 30, 2005—is what changed the State Department's interpretation. But in his statement to SJC from 2009, he says they started addressing these issues in June 2005—almost immediately after the memo was approved.

> In 2005, I became Counselor of the Department of State. This should not be confused with the duties of the State Department's Legal Adviser. The "Counselor" is an old office at State, a place where the Secretary puts someone who serves as a kind of deputy on miscellaneous issues. Among my duties, I was to be the subcabinet "deputy" for the Department on issues of intelligence policy or counterterrorism. By June 2005, President Bush wanted to reconsider the current approach. He asked his advisers to develop real options for the future of the Guantanamo facility, for the eventual disposition of detainees held by CIA, and to look at the standards governing the treatment of enemy captives.
>
> Secretary of State Condoleezza Rice was in favor of change.
>
> [snip]
>
> Subcabinet deputies began meeting regularly in highly sensitive meetings to consider these issues. I represented the Department at these meetings, along with Mr. Bellinger. I was thus 'read in' to the details of this particular CIA program for the first time.

And while Zelikow signed memos in 2005 that sustained OLC's claim that the detainees were outside the jurisdiction of CAT, his 2006 memo amounts to a sustained critique of Bradbury's CAT memo, in particularly its dismissal of the Eighth Amendment.

> OLC did not cite Eighth Amendment precedents in its 2005 opinion because the Eighth Amendment would not apply to people who had not been judged guilty of a crime. (1) This argument confuses two kinds of references. The Senate commanded that the "cruel and unusual" standard be used for substantive definition of conduct prevented by the treaty, not for a definition of the categories of people who could claim the treaty's protections. (2) The distinction is also substantively immaterial. No constitutional protections formally apply to these prisoners. The protections, including the Fifth Amendment ones that OLC acknowledges, are all being artificially imported to them by the operation of CAT and the Senate reservation. The Eighth Amendment carries over just as well, both directly and through its inclusion as an aspect of the substantive due process protected under the Fifth and Fourteenth. (3) The Eighth Amendment is a minimum standard. If we reject this standard because the people have not been convicted of a crime the government must find a standard of treatment even higher, and more restrictive, that would apply in situations like pretrial detention or civil commitment.

(Note, kudos to scribe, whose comment on these issues hits on the same issues Zelikow's memo did, including its applicability to all of us in county jails.)

There are several other long passages that make it clear that Zelikow's memo is a rebuttal to

the weakest parts of Bradbury's memo—which Condi, as Secretary of State, reportedly approved by saying, "if DOJ said it was legal and CIA said it was effective, then that ended it," but which Zelikow appears to have started fighting within weeks after she gave that approval.

All of which brings me to one of the most interesting revelations with the publication of this memo. When Zelikow revealed its existence, he downplayed his bureaucratic authority for objecting to OLC's analysis.

> My bureaucratic position, as counselor to the secretary of state, didn't entitle me to offer a legal opinion.

When Zelikow testified to the Senate, he affirmed OLC's unquestioned authority on matters of legal analysis (even while explicitly criticizing the OLC language addressed with his memo).

> The Justice Department's view was authoritative for the executive branch and was immovable.
>
> [snip]
>
> Therefore, to challenge OLC's interpretation, it was necessary to challenge the Justice Department's interpretation of U.S. constitutional law. This was not easy, since OLC is the authoritative interpreter of such law for the executive branch of the government.

But in the memo itself, he made a bid for greater authority than that.

> The prohibitions of Article 16 of the CAT now do apply to the enhanced interrogation techniques authorized for employment by CIA. In this case, given the relationship of domestic law to the question of treaty interpretation, the

> responsibility of advising on interpretation is shared by both the Department of State and the Department of Justice.

Philip Zelikow asserted, in writing, that the State Department **shared authority** with OLC on how to interpret our treaty obligations. He stated, in writing, that the State Department held that detainee treatment had to comply with the Eighth Amendment. As soon as he did so, the torturers tried (but failed) to disappear that memo.

I don't want to minimize Zelikow's efforts here. His legal analysis certainly puts Bradbury's to shame. He clearly fought, for over a year, to force the Bush Administration to adopt humane treatment, and he was clearly a key player in having won that fight. I hope—but doubt—there are people within the Obama Administration waging similar fights.

But at least according to Gonzales' admittedly biased interpretation, Condi Rice bought off on Bradbury's shitty analysis back in May 2005, when she had some opportunity to back Comey's efforts to defeat it. Almost immediately, Zelikow started trying to reverse that damage (note, his July 2005 memo on these issues at least appears to suggest he had not yet read the CAT memo yet). But it took Zelikow 7 months until—with Condi's announcement in December 2005 that the government would adopt the "Cruel, inhuman, and degrading treatment"—State began to make headway on these issues, and it is clear he was still fighitng a losing battle in February 2006.

Philip Zelikow did really important work fighting the Bush Administration's efforts to defy international obligations on torture. But the written record, at least, shows that he was fighting, in part, against the negligence of his boss, Condi Rice.