

THE CIA IG REPORT AND THE BRADBURY MEMOS

In May 2004, CIA's Inspector General, John Helgerson, completed a report that found that the CIA's interrogation program violated the Convention Against Torture. By understanding the role of that report in the May 2005 Bradbury memos, we see just how weak Bradbury's memos are.

As Jane Mayer described, the report strongly influenced Jack Goldsmith shortly before he withdrew the August 1, 2002 Bybee memo in June 2004.

The 2004 Inspector General's report, known as a "special review," was tens of thousands of pages long and as thick as two Manhattan phone books. It contained information, according to one source, that was simply "sickening." The behavior it described, another knowledgeable source said, raised concerns not just about the detainees but also about the Americans who had inflicted the abuse, one of whom seemed to have become frighteningly dehumanized. The source said, "You couldn't read the documents without wondering, "Why didn't someone say, 'Stop!'"

Goldsmith was required to review the report in order to settle a sharp dispute that its findings had provoked between the Inspector General, Helgerson, who was not a lawyer, and the CIA's General Counsel, Scott Muller, who was. After spending months investigating the Agency's interrogation practices, the special review had concluded that the CIA's techniques constituted cruel, inhuman, and degrading treatment, in violation of the international Convention Against Torture. But Muller

insisted that every single action taken by the CIA toward its detainees had been declared legal by John Yoo. With Yoo gone, it fell to Goldsmith to figure out exactly what the OLC had given the CIA a green light to do and what, in fact, the CIA had done.

As Goldsmith absorbed the details, the report transformed the antiseptic list of authorized interrogation techniques, which he had previously seen, into a Technicolor horror show. Goldsmith declined to be interviewed about the classified report for legal reasons, but according to those who dealt with him, the report caused him to question the whole program. The CIA interrogations seemed very different when described by participants than they had when approved on a simple menu of options. Goldsmith had been comfortable with the military's approach, but he wasn't at all sure whether the CIA's tactics were legal. Waterboarding, in particular, sounded quick and relatively harmless in theory. But according to someone familiar with the report, the way it had been actually used was "horrible."

After Goldsmith withdrew the Bybee memoranda, Dan Levin wrote a new more restrictive memo in December 2004. But by spring 2005, the CIA wanted to use torture with some more high value detainees (including Hassan Ghul). So they had Steven Bradbury (in what was basically an audition to head OLC) write new torture memos—not only to reauthorize waterboarding (though it was not used on Ghul, according to reports), but also to dismiss all the concerns about the CAT raised by CIA's IG.

Though we are not allowed to read that in the memos, the response to the IG Report appears to have been at least implicitly acknowledged in both. ~~The two May 10, 2005 memos were were faxed with a two page cover sheet, and the first memo~~

~~refers to the IG Report as if it has already been cited, so it may have been mentioned in the cover sheet or in earlier correspondence on the memo.~~ [Correction: Footnote 7 cites the IG Report directly.] And the May 30 memo includes at least one long redacted passage (on page 4) that may contextualize the entire memo in reference to the IG Report's conclusion that the CIA's interrogation program violated the CAT. (The passage in question appears to refer to descriptions of the interrogation program, which the IG Report did in detail; yet, as Mary notes, Bradbury does not use the actual descriptions from the IG report when he describes and declares legal the techniques. This allows him to ignore several inconvenient facts revealed in the IG Report.)

More importantly, the entire point of both memos is basically to respond to the IG Report's conclusion that CIA's interrogation program violated CAT. The May 10 memo, for example, explains that the US complies with the CAT with USC 2340-2340A, and then proceeds to argue that the techniques used do not violate USC 2340-2340A, therefore those techniques do not violate the CAT. The May 30 memo basically uses a technicality—that none of the torture is conducted on US soil and therefore none of it is subject to Article 16. It goes on, then, to redefine the requirements of CAT to prohibit anything that "shocks the conscience." By making a thoroughly unconvincing claim that none of the techniques shock the conscience, Bradbury then claims that even if they were seen to be subject to Article 16, they would still comply. In both cases, however, the purpose is the same: to insist that—contrary to what the IG Report concluded—the CIA interrogation program **did** comply with the CAT.

Yet in arguing against the IG Report, Bradbury reveals much of what the IG Report finds so problematic. It reveals:

- CIA interrogators were not performing waterboarding as

it had been approved in the August 2002 Bybee Memo; in particular, they were repeating the process more frequently (83 times for AZ and 183 for KSM) and using much more water than described in the Bybee Memo

- By CIA's own admission, they used waterboarding with Abu Zubaydah at a time when he was already completely compliant with interrogators
- No "objective" doctors had been involved in the interrogation sessions (the CIA subsequently added them to its program)
- It appears that after the CIA integrated doctors into the program, they lowered, by three and a half days, the length of time a detainee could be kept awake

In other words, the Bradbury memos basically prove that waterboarding, *as practiced by the CIA* (as distinct from how they were describing it), was out of control in several ways (and therefore probably illegal even according to Yoo's descriptions). They also suggest that the CIA recognized they were using sleep deprivation far more than was safe, even according to their own complicit doctors. Both of the most problematic aspects of the CIA program, the Bradbury memos suggest, had been deemed unsafe as practiced.

Yet even while presenting this proof, Bradbury concludes that the interrogation programs were legal. More troubling even than Bradbury's

crappy legal writing, then, is the way his own memos prove the program was unsafe even while declaring it legal.

Here's a summary of what appears in each of the two memos (I didn't find any obvious references to the IG Report in the second May 10, 2005 memo).

References in the May 10 "Techniques" memo

Two references to the participation of doctors and psychologists in interrogations (5)

"Medical and, as appropriate, psychological personnel shall be physically present at, or reasonably available to, each Detention Facility. Medical personnel shall check the physical condition of each detainee at intervals appropriate to the circumstances and shall keep appropriate records."

Medical and psychological personnel are on-scene throughout (and, as detailed below, physically present or otherwise observing during the application of many techniques, including all techniques involving physical contact with detainees) and "[d]aily physical and psychological evaluations are continued through the period of [enhanced interrogation technique] use. [brackets Bradbury's]

A reference to the application of SERE techniques to torture (6)

A footnoted description of how waterboarding as used in torture differs from the way it is used in SERE training (13)

A footnote admitting that the IG report criticized the reference to SERE training as a basis for justifying waterboarding, given the differences between the way it was used (13)

A reference to an IG complaint that medical personnel were not involved in the interrogations (29)

We note that this involvement of medical personnel in designing safeguards for, and in monitoring implementation of, the procedures is a significant difference from earlier uses of the techniques catalogued in the Inspector General's Report. See IG Report at 21 n26 ("OMS was neither consulted nor involved in the analysis of the risk and benefits of [enhanced interrogation techniques], nor provided with the OTS report cited in the OLC opinion [the Interrogation Memorandum]."). Since that time, based on comments from OMS, additional constraints have been imposed on the use of the techniques.

A footnote describing the IG report's description of sleep deprivation (35)

The IG Report described the maximum allowable period of sleep deprivation at that time as 264 hours or 11 days. See IG Report at 15. You have informed us that you have since established a limit of 180 hours, that in fact no detainee has been subjected to more than 180 hours of sleep deprivation, and that sleep deprivation will rarely exceed 120 hours. To date, only three detainees have been subjected to sleep deprivation for more than 96 hours.

A long footnote describing the difference between how Yoo/Bybee described waterboarding (and how it was used in SERE) and how it was implemented in practice (41)

The IG Report noted that in some cases the waterboard was used with far greater frequency than initially indicated, see IG Report at 5, 44, 46, 103-04, and also

that it was used in a different manner. See *id.* at 37 ("[T]he waterboard technique ... was different from the technique described in the DoJ opinion and used in the SERE training. The difference was the manner in which the detainee's breathing was obstructed. At the SERE school and in the DoJ opinion, the subject's airflow is disrupted by the firm application of a damp cloth over the air passages; the interrogator applies a small amount of water to the cloth in a controlled manner. By contrast, the Agency Interrogator ... applied large volumes of water to a cloth that covered the detainee's mouth and nose. One of the psychologists/interrogators acknowledged that the Agency's use of the technique is different from that used in SERE training because it is "for real—and is more poignant and convincing.") see also *id.* at 14 n14. The Inspector General further reported that "OMS contends that the expertise of the SERE waterboard experience is so different from the subsequent Agency usage as to make it almost irrelevant. Consequently, according to OMS, there was no a priori reason to believe that applying the waterboard with the frequency and intensity with which it was used by the psychologist/interrogators was either efficacious or medically safe." *Id.* at 21 n26. We have carefully considered the IG Report and discussed it with OMS personnel. As noted, OMS input has resulted in a number of changes in the application of the waterboard, including limits on frequency and cumulative use of the technique. Moreover, OMS personnel are carefully instructed in monitoring this technique and are personally present whenever it is used. See OMS Guidelines at 17-20. Indeed, although physician assistants can be

present when other enhanced techniques are applied, "use of the waterboard requires the presence of the physician." Id. at 9n2.

Another long footnote discussing why SERE has discontinued the use of waterboarding in all except Navy SERE training. (42)

References in the May 30 memo

A reference to Abu Zubaydah's seniority in Al Qaeda upon capture (6)

A discussion of the use of waterboarding with (at least) al-Nashiri. (8)

The CIA used the waterboard extensively in the interrogations of KSM and Zubaydah, but did so only after it became clear that standard interrogation techniques were not working. Interrogators used enhanced techniques in the interrogation of al-Nashiri with notable results as early as the first day. See IG Report at 35-36. Twelve days into the interrogation, the CIA subjected al-Nashiri to one session of the waterboard during which water was applied two times. See id. at 36. (Note this section immediately precedes the discussion of videotapes.)

Use of the IG report to support a claim that torture provides information; "describing increase in intelligence reports attributable to use of enhanced techniques" (9)

A paragraph describing how information from lower-level detainees is used to "probe the high value detainees further" (the citation is misused to argue that the program cannot be judged based on the individual pieces of information elicited; 9)

Two references to the application of SERE techniques to torture (12, 37)

A long footnote admitting that CIA used torture when they didn't need to with Abu Zubaydah (31)

This is not to say that the interrogation program has worked perfectly. According to the *IG Report*, the CIA, at least initially, could not always distinguish detainees who had information but were successfully resisting interrogation from those who did not actually have the information. See *IG report* at 83-85. On at least one occasion, this may have resulted in what might be deemed in retrospect to have been the unnecessary use of enhanced techniques. On that occasion, although the on-scene interrogation team judged Zubaydah to be compliant, elements with CIA Headquarters still believed he was withholding information. [Redaction of more than one full line] See *id*, at 84. At the direction of CIA Headquarters interrogators, therefore used the waterboard one more time on Zubaydah. [Redaction of ~3/4 of a line] See *id*, at 84-85.

This example, however, does not show CIA "conduct [that is] intended to injure in some way unjustifiable by any government interest," or "deliberate indifference" to the possibility of such unjustifiable injure. *Lewis*, 523 U.S. at 849. As long as the CIA reasonably believed that Zubaydah continued to withhold sufficiently important information, use of the waterboard was supported by the Government's interest in protecting the Nation from subsequent terrorist attacks. The existence of a reasonable, good faith belief is not negated because the factual predicates for that belief are subsequently determined to be false. Moreover, in the Zubaydah example, CIA Headquarters dispatched officials to observe the last waterboard session. These officials reported that enhanced

techniques were no longer needed. See IG Report at 85. Thus the CIA did not simply rely on what appeared to be credible intelligence but rather ceased using enhanced techniques despite this intelligence.

A footnote describing a discussion about the CIA's intermittent involvement in interrogation (32)

The number of times Abu Zubaydah (83) and Khalid Sheikh Mohammed (183) were water boarded (37)

Update: Fixed my dates. Update: Fixed the waterboard numbers for AZ.

Update, 6/22/09: Added some missing references to mentions of the IG report.