“LEGAL”

When I first started bitching about this NYT story, I did so because it appeared someone had come to the NYT with three pieces of data—the news that Jim Comey concurred with the May 10, 2005 OLC "Techniques" memo, the previously known fact that Daniel Levin had authorized waterboarding under certain circumstances in August 2004, and the self-evident fact that Jack Goldsmith had not withdrawn the Bybee Two memo in 2004 when he had withdrawn the Bybee One memo (though not for lack of concern about the memo)—and turned it into an A1 story trumpeting that "US Lawyers Agreed on the Legality of Brutal Tactic."

The only real news from those three pieces of data is that Jim Comey, in an email to his Chief of Staff, described having said this to then Attorney General Alberto Gonzales:

> I told him the first opinion was ready to go out and I concurred.

Assuming the statement means what it appears to—that Comey endorsed the findings of the "Techniques" memo—it is news. It means that Comey concurred with the following propositions:

> With these considerations in mind, we turn to the particular question before us: whether certain specified interrogation techniques may be used by the Central Intelligence Agency ("CIA") on a high value al Qaeda detainee consistent with the federal statutory prohibition on torture, 18 USC 2340-2340A. For the reasons discussed below, and based on the representations we have received from you (or officials from your Agency), about the particular techniques in question, the circumstances in which they are authorized for use, and the physical and psychological assessments made of the

> detainee to be interrogated, we conclude that the separate authorized use of each of the specific techniques at issue, subject to the limitations and safeguards described therein, would not violate sections 2340-2340A. Our conclusion is straightforward with respect to all but two of the techniques discussed herein. As discussed below, use of sleep deprivation as an enhanced technique and use of the waterboard involve more substantial questions, with the waterboard presenting the most substantial question.
>
> [snip]
>
> Assuming adherence to the strict limitations discussed herein, including the careful medical monitoring and available intervention by the team as necessary, we conclude that although the question is substantial and difficult, the authorized use of the waterboard by adequately trained interrogators and other team members could not reasonably be considered specifically intended to cause severe physical or mental pain or suffering and thus would not violate sections 2340-2340A.

However carefully parsed, Comey's concurrence means he bought off on the claims that subjecting someone to controlled drowning did not amount to purposely subjecting them to severe mental pain. That is news–and pretty appalling news, at that.

But what really pissed me off was that the NYT packaged that news with data that was not news at all so as to be able to claim that three lawyers who challenged the Bush Administration's torture program nevertheless found the most controversial tactic in the program legal (and mind you, the NYT has not completely proved its case with either Goldsmith or Levin). Someone–and I'm assuming it's the NYT source

because otherwise the inclusion of two non-news pieces here would be even more ridiculous—decided the Comey news presented an opportunity to try to change the narrative about torture with a big Sunday A1 story. The NYT got played, badly. It wasn't so much in the factual presentation, I thought at first, as in the spin, that NYT failed.

But the more I think about it, the more I realize the NYT has a serious factual problem with their main piece of news, that Comey and others agreed "the methods themselves were legal."

As I noted above, if Comey's comment about concurring with the "Techniques" memo means what it appears to, it means he bought off on the proposition that waterboarding and sleep deprivation, used by themselves, did not violate 18 USC 2340-2340A. That does not mean he considered these techniques legal. As the "Techniques" memo itself notes,

> In the present memorandum, you have asked us to address only the requirements of 18 USC 2340-2340A. Nothing in this memorandum or in our prior advice to the CIA should be read to suggest that the use of these techniques would conform to the requirements of the Uniform Code of Military Justice that governs members of the Armed Forces or to United States obligations under the Geneva Conventions in circumstances where those Conventions would apply. We do not address the possible application of article 16 of the CAT, nor do we address any question relating to conditions of confinement or detention, as distinct from the interrogation of detainees.

That is, even within the memo in question, OLC was clear that the advice did not extend to the Geneva Conventions or the Convention Against Torture. The question at hand was, did

waterboarding and sleep deprivation comply with a law—2340-2340A, not whether it complied with all laws.

Which is why the last email included with the NYT story is so critical. The email is dated May 31, 2005, just one day after the May 30, 2005 memo on whether or not these techniques violate CAT—a memo that basically argues our torture is distinct from the torture our State Department condemns because it is useful, and therefore it cannot be said to shock the conscience. The memo also dismisses any concern with the Eighth Amendment because the detainees in CIA custody were not being punished for anything.

In the email, Comey describes trying to prepare Alberto Gonzales to argue against the use of torture at a White House Principals meeting. He writes,

> Pat [Philbin] and I urged the AG in the strongest possible terms to drive a full policy discussion of all techniques. I said I was not going to rehash my concerns about the legal opinion, but that it was simply not acceptable for Principles [sic] to say that everything that may be "legal" is also appropriate.

Now, we have no way of knowing just from the context of the email. But the timing of this email—over a month after Comey's complaints about the May 10 "Combined" memo, but just one day after the release of the "CAT" memo—suggests his reference to concerns about a legal opinion may refer to the CAT memo, not the "Combined" memo. That is, it is possible that Comey continued to object to the "Combined" memo but also objected to the "CAT" memo. And in any case, his use of scare quotes with the term "legal" suggests he's not all that convinced that the program under discussion had been determined to be "legal."

Again, from the evidence at hand, we don't know whether or not Comey objected to that second

memo that claimed waterboarding did not violate CAT, but if he did, then he would have believed the program violated our treaty obligations.

So when the NYT claims that Comey and others agreed the tactics were legal, they far overstate the evidence they present. To be fair, they describe the analysis as pertaining specifically to 2340-2340A in the sixteenth paragraph of the article.

> The lawyers had to interpret a 1994 antitorture law written largely with despotic foreign regimes in mind, but used starting in 2002, in effect, as a set of guidelines for American interrogators. The law defined torture as treatment “specifically intended to inflict severe physical or mental pain or suffering.” By that standard, a succession of Justice Department lawyers concluded that the C.I.A.’s methods did not constitute torture.

So that last sentence–that by the standard of 2340-2340A, the CIA’s methods, by themselves, did not constitute torture–is factually correct (assuming Comey’s concurrence means what it appears to). But the "Combined" memo itself is an assessment of whether the program complies with 2340-2340A, and Comey clearly did not agree that the memo, as written, made its case. And there is the possibility that Comey also doubted whether the program was legal under CAT. It is one thing to say that Comey agreed that waterboarding, by itself, did not violate 2340-2340A. But that is not the same as stating–as the NYT does elsewhere–that these lawyers had determined the tactics to be legal.

Their headline and lede (referring to "tactics" and not the program overall) might be factually correct–or it might be the unfortunate result of accepting their source’s spin that the only laws in question were US laws prohibiting the deliberate infliction of severe physical or mental pain. The point is, we don’t know. And it

appears the NYT doesn’t know, either.