

STEVEN BRADBURY: BREAKING HIS OWN RULES EVEN AS HE WRITES THEM

I'm working on a big post on the May 2005 Bradbury Memos. But I wanted to point out this tidbit about them in the interim.

As you might recall, the Jim Comey emails (probably leaked by the torture apologists last summer) provide a few clues about why Comey objected to the May 10, 2005 Combined memo. Significantly, he thought the memo was too general because it did not stick to the facts regarding one detainee who had already been tortured.

I also suggested a possible way to narrow the focus of the second opinion to be more responsible.

[snip]

[Alberto Gonzales' Chief of Staff Ted Ulliot] said Pat had shared my concerns, which he understood as concerns about the prospective nature of the opinion and its focus on "prototypical" interrogation.

[snip]

He mentioned at one point that OLC didn't feel like it could accede to my request to make the opinion focused on one person because they don't give retrospective advice. I said I understood that, but that the treatment of that person had been the subject of oral advice, which OLC would simply be confirming in writing, something they do quite often.

As it happens, just six days after the Combined

memo was published, Steven Bradbury issued a set of "Best Practices" for OLC. On at least two counts, his "Best Practices" violated the entire set of the May 2005 memos. In particular, though, he warned against writing memos that were either retrospective or overly general.

The legal question presented should be focused and concrete; OLC generally avoids undertaking a general survey of an area of law or a broad, abstract legal opinion.

[snip]

Finally, the opinions of the Office should address legal questions prospectively; OLC avoids opining on the legality of past conduct (though from time to time we may issue prospective opinions that confirm or memorialize past advice or that necessarily bear on past conduct).

And yet, the Combined memo suffered from the fault of being both retrospective to that one detainee and overly general.

I wonder if that's one of the reasons why Michael Mukasey spiked Office of Professional Responsibility's proposed review of these memos.