

THE LEGAL PRINCIPLES DOCUMENT AND OLC'S LEAKY SCIF

Sorry to get so deep in the weeds on the missing OLC documents, but I wanted to show why this matters, using the example of the Legal Principles (AKA the Bullet Points) documents. As I'll show below, one of the most sensitive documents involved in the controversy between CIA and OLC on the Legal Principles is one of the documents over which there are discrepancies between the Vaughn Indices and the actual document.

I explained the Legal Principles document in detail in this post, but here's the short version. When CIA started the Inspector General investigation, it had a meeting with DOJ people including Michael Chertoff and then a phone conversation with John Yoo. Both times, DOJ told CIA that it (DOJ) would hold off on any criminal investigations or prosecutions until CIA's IG first collected information and then presented that along with the legal guidelines CIA had been working under. DOJ basically told CIA, "**You** tell us if you broke the law." So CIA got together with John Yoo (though he denies being involved) and Jennifer Koester, who were both apparently free-lancing with no official OLC involvement, and developed a document—alternately called the Legal Principles or the Bullet Points document. The document interpreted the law and previously OLC opinions as the CIA would like them to be to make sure as much of the torture as possible was "legal."

When Koester and Yoo moved on in May 2003, CIA tried to dump the document as a finished *fait accompli* back onto OLC. Even though Patrick Philbin, picking up Yoo's duties, immediately refused to recognize the document as OLC work product, CIA kept insisting it counted as an OLC document. They did so in a high level meeting at the White House in June and then ultimately made

it into a slide for a meeting with the NSC Principals on July 29, 2003, at which the Principals bought off on the torture as it had been applied. Then, CIA submitted the document with a late draft of the IG Report in March 2004, which (Jack Goldsmith claims, though the CIA claims differently) was the first time Goldsmith saw the Legal Principles. A bit of a spat broke out which not only prevented CIA and OLC from submitting joint comments on the IG Report (and, presumably, the legality of the acts described therein) as they had intended to do, but also in Goldsmith writing grumpy follow-up letters to CIA on it. And all of this was right before Goldsmith withdrew the Bybee One memo.

As you can see, the Legal Principles document were not only a source of tension between CIA and OLC. But its lies at the core of interpretations of just how illegal the CIA program was.

Which is why I find it relevant that the various iterations of the Legal Principles document are some of the documents that seem to have been affected by OLC's leaky SCIF.

Here are the various incarnations of the document we've seen in either Vaughn Index mention or hard copy form (2005 Vaughn; 2007 Vaughn; 2009 Vaughn; Barron Declaration).

OLC 17: April 28, 2003 5-page copy of Legal Principles hand-carried (OPR report says faxed) to John Yoo; released with redactions

OLC 18: May 27, 2003 5- or 6- page copy of Legal Principles, that appears to send CIA's handwritten comments back to a DOJ lawyer; withheld in its entirety

CIA Other 25: June 16, 2003 8-page copy of Legal Principles sent internally (probably twice) within CIA; withheld in its entirety (Note, we know from the OPR Report that there is a CIA Memo for the Record written about this document, so the longer length might reflect that it includes the MFR)

CIA Other 23: June 16, 2003 4-page copy of Legal Principles sent internally within CIA; withheld in its entirety

OLC 19: June 16, 2003 5-page copy of Legal Principles faxed from CIA Counterterrorism Center to Patrick Philbin (and maybe someone else); released with redactions

OLC 22: March 2, 2004 8- or 13-page request faxed from CIA General Counsel Scott Muller to Jack Goldsmith asking for reaffirmation of several legal documents, including Legal Principles document; released with redactions

[Update: OLC 139, 140, and 151 may be notes related to the Legal Principles document.]

I'm sure I'll find several more copies of this in CIA Vaughn Indices, but what we've got are two versions that were held at CIA's OIG, which have been withheld (one with the anticipation of legal proceedings). Then we've got four copies that were at OLC, just one of which (the one including hand-written notations from someone at the CIA) we don't get.

Of the four versions of this document that were held in OLC's leaky SCIF, just one has no apparent problems. But it's the last one, OLC 22, that has significant issues.

OLC 17: All three Vaughn Declarations describe OLC 17 as a 5-page document—a 1 page cover sheet and four pages of text. In fact, it has 6 pages, but the earlier descriptions apparently don't count the Top Secret Routing sheet now included with the document. And while the OPR Report says this document was "faxed" from Muller, the cover sheet clearly says, "This document has not been sent via fax" and, indeed, the document lacks any fax timestamp. This document is particularly curious, since it includes two very similar, but not exact, versions of the Legal Principles. Note, this document includes the "17" penciled in on the lower left hand corner from when an OLC lawyer tried to reconstruct this Vaughn Index in 2007-2008 (there seems to be a second penciled number in the lower right corner,

perhaps for a different FOIA?).

OLC 18: We don't get to see this document, but it has the same page number discrepancy: the earlier Vaughn Indices don't count the Routing Sheet (which presumably also labels the document as Top Secret), so the most recent Vaughn Index says this document is off by one page.

OLC 19: As with the other documents, there is some discrepancy on whether you count the Top Secret Routing sheet. But otherwise this appears to have no errors noted in the Vaughn Indices. As with OLC 17, this shows two separate series numbers on the bottom left and right corners of the front page.

OLC 22: This is the document that intrigues me. Just by way of observation, this document only has one series number on it—in the bottom left corner as documents in this series are marked—so it doesn't appear to have been included in whatever FOIA series the other two were included in. And unlike the other two documents, it bears a fax timestamp, making it clear that it was faxed from CIA. But the big discrepancy here is that it is unclear how many pages this document is supposed to have. Both earlier Vaughn descriptions say it has 8 pages, and describe the set as it currently exists (a cover sheet, the 4-page Muller letter, and the 3-page Legal Principles document). But the initial Vaughn description, and the cover sheet of the document we now have, says the document is 13 pages long—5 pages longer than its current form. The fax timestamp doesn't help us, because it matches the pagination of what pages we do have; if 5 pages have been removed from this document they've been removed from the back.

So even before we get to the content of OLC 22, we're stuck trying to guess whether Scott Muller just mislabeled the number of pages of this document before he sent it over to Goldsmith, whether Goldsmith lost the 5 pages, or whether they were lost from OLC's leaky SCIF over the years. We have no way of judging the integrity of the document before us. What we have **is** a

coherent document—the cover sheet, the letter that notes “enclosure” in the singular, and the Legal Principles bullet points. (There’s one weird spacing issue at the end of page 2 of the letter, with a sentence that breaks mid-line at the end of the page, which might reflect a change in the page size, but the rest of the spacing makes sense.) So the general coherence of the document and the singular use of “enclosure” would suggest that this really is an 8-page document and CIA just got it wrong (or maybe chose not to send something they originally intended to). We could ascribe it to sloppy lawyering at a sloppy agency.

There are just two things that make me wonder whether there wasn’t originally something more. First, in addition to noting “Enclosure”—singular—at the end of his letter, Scott Muller said this within it:

(Enclosed with this letter is a copy of the summary points along with a covering memorandum.)

Yet, best as I understand it, we’ve only got the bullet points themselves on this document, no covering memorandum. While it would be odd to include a memo introducing the bullet points after the bullet points themselves (remember, we’ve got consecutive pages per the fax timestamp), we do know there was a Memorandum for the Record written about this document on June 16, 2003, the same day this document was sent to, and rejected by, Patrick Philbin (I mentioned it in my discussion of CIA Other 25, but there’s a longer discussion of it in the OPR Report). Is it possible that Muller sent that to Goldsmith, to bolster his case that OLC really had had involvement in the Legal Principles document, but it has since disappeared? If he did send this memo or any “covering memorandum” with the bullet points, though, it is no longer included in the document.

The other possible thing that might have been included in this document would pertain to the

third issue Muller raises in his letter. Muller asks for reaffirmation of the Bybee Memos, then discusses the Legal Principles bullet points, then asks for authorization of three new torture techniques. The second two techniques, water PFT (flicking) and water dousing, appear almost unredacted. They also include long discussions within the body of the letter, a full paragraph dedicated to the description of each of those techniques. But the first new torture technique mentioned includes no such discussion—it is introduced in the same paragraph that introduces the two others with no follow up discussion. In the two to three lines of discussion dedicated to this technique, there is ample room to introduce some different enclosure describing the technique in more detail.

Now, this is particularly notable because the unredacted techniques included in this letter—water flicking, water dousing, and (in a previous paragraph), the abdominal slap—are the techniques Steven Bradbury would be under great pressure to approve for the first time in May 2005, approval which we know was meant to be retroactive to use that likely dates back to this period. The presence of a fourth technique here suggests they were at least contemplating using that technique with whatever detainee they'd be doing the retroactive approval for in 2005. Though we of course know that CIA has a habit of asking for legal cover after the fact, so perhaps this technique was already used? If there was a fourth technique used or even contemplated, I can see why CIA wouldn't want too many details of that floating around.

The point is, though, we don't know. We know we've got a coherent document, so it is quite possible that the pagination discrepancy is an error that goes back to when the document was sent. Or, it's possible there was a secondary Legal Principles memo or something related to the new torture techniques Muller was trying to approve. Either of these issues—the Legal Principles bullet points and the new techniques that would not be approved more than a year—were

issues of great sensitivity. So you could envision why one of the parties wouldn't want some of this documentation to remain available in its entirety and/or to be reviewed by OPR.

But we would have no way of knowing if this happened and DOJ would have almost no way of knowing, because documents have a way of going missing from OLC's SCIF.