

# THOSE UNDATED “LEGAL PRINCIPLES”

As I noted in an update to my post asking for the unsigned, undated document authorizing the expansion of the torture program from one applying just to Abu Zubaydah to one that could be exported around the world, I have found the document. Or rather the documents—they appear to have been revised over time. Here are three that were included in last night's document dump.

April 28, 2003: *Hand-carried* from Scott Muller to John Yoo

June 16, 2003: Faxed from CTC to Patrick Philbin

March 2, 2004: Faxed from Scott Muller to Jack Goldsmith

The three are worth reading in sequence to see how the CIA's gross rationalizations of patently illegal behavior evolved over time. The April document appears to be a draft developed with John Yoo. The second is a "final" version, apparently written by CIA, sent to Philbin for his files. And the last is a request from Scott Muller to get Jack Goldsmith to reaffirm the three August 1, 2002 memos, as well as the June 16, 2003 version of the legal principles, and add water flicking and water dousing to the approved techniques (which would not be done, ultimately, until the May 2005 memos).

The first copy includes one claim that was removed from the document entirely.

The United States is at war with al-Qa'ida. Accordingly, US criminal statutes do not apply to official government actions directed against al-Qa'ida detainees except where those statutes are specifically applicable in the conduct of war or to official actions.

I guess we know where the culture that seemed to allow the raping of prisoners came from.

The June 16 document, in addition to shifting language about the US reservations on the Convention Against Torture and on whether international law imposes "no limitation" (April 28) or "no obligations" regarding the treatment of detainees, also had four paragraphs pertaining to the application of the Federal War Crimes statute, the torture statute, and the Fifth, Eighth, and Fourteenth amendments (note, those paragraphs appear in a second file included with the April 28 document, but must not have been part of it originally, because the fax cover sheet to Yoo noted only 3 pages).

In other words, sometime between April and June of 2003, some decided to replace Yoo's broad "US criminal statutes do not apply" with a discussion of specific statutes that, for some pretty bogus reasons, they claimed did not apply. Notably, Yoo was replaced on this issue with Pat Philbin in the interim period.

One detail of note on these documents: consider how they used this paragraph to exempt CIA interrogations from US law (and note, the paragraph below is from the June 16 version, which has several lines added from the April 28 version).

CIA interrogations of foreign nationals are not within the "special maritime and territorial jurisdiction" of the United States where the interrogation occurs on foreign territory in buildings that are not owned or leased by or under the legal jurisdiction of the U.S. government. The criminal laws applicable to the special maritime and territorial jurisdiction therefore do not apply to such interrogations. The only two federal criminal statutes that might apply to these interrogations are the War Crimes statute, 18 USC S2441, and the prohibition against torture, 18 USC S2340-2340A.

Of course, some time around 2003, the CIA moved some of its HVDs to Gitmo, which I imagine would qualify as a building that the US leased. The whole jurisdictional issue was one that continued to be a weak chink in their rationalizations.

Finally, some points about authorizations. The first review appears to have involved Muller and Yoo. The second **came from CTC**, not OGC, with the comment, "For your records—copy of final legal summary." Which suggests the final approval for that document came from CIA, and possibly from CTC instead of OGC (I'm reminded that Jonathan Fredman was the Counsel over there—who was very involved in carving out legal space for torture). But when Muller asked Goldsmith to reaffirm his support for this document in 2004, he claimed, the Legal Principles document,

was prepared with OLC's assistance and received the concurrence of your office in June 2003.

I'd sure like to see what that "concurrence" consisted of. Because from the fax traffic, it appears that Philbin was faxed a finalized version of the document in June 2003, which seems to fall far short of "concurrence."

Finally, correct me if I'm wrong. But the Goldsmith fax shows 13 pages—but we've only got 8 of those 13 pages. Also note the timing—it was sent after the capture of Hassan Ghul (for whom Bradbury would have to write a retroactive authorization of water dousing in May 2005) and just days before Taguba submitted his report on the torture at Abu Ghraib.

Update: Goldsmith sent a response on June 10:

I have further inquired into the circumstances surrounding the creation of the bullet points in the spring of 2003. These inquiries have reconfirmed what I have conveyed to you before, namely, that the bullet points did not and do not represent an opinion or a

█ statement of the views of this Office.