

THE "LEGAL PRINCIPLES" TIMELINE

I wanted to do a "Legal Principles" timeline to better understand why the document was developed and what more we might learn from it.

As a reminder, the "Legal Principles" document is a set of bullet points CIA's Counterterrorism Center developed with the participation of John Yoo. Though the document was undated and unsigned, CIA tried to claim it counted as "DOJ agreement" ~~an official OLC opinion~~ authorizing key parts of their torture program.

It appears the "Legal Principles" document claimed to do three things:

- Authorize the use of torture with other "al Qaeda" detainees, even those not described as "High Value"
- Legally excuse crimes, potentially up to and including murder
- Dismiss CAT's Article 16 prohibition on cruel and inhuman treatment

As such, the document formed a critical legal fig leaf leading up to the release of the IG Report (at which point OLC clarified in writing that it was not a valid OLC opinion). I suspect the need to replace this explains some of the urgency surrounding the May 2005 OLC opinions.

John Yoo's Original Approvals

The early approvals for torture focus largely on the torture statute to the detriment of other laws. Furthermore, the specific approval for torture—the Bybee Two memo—only covered Abu Zubaydah.

July 13, 2002: John Yoo writes Rizzo a letter

outlining "what is necessary to establish the crime of torture."

August 1, 2002: Bybee memos establish organ failure standard and support necessity defense, state that interrogation would not be subject to ICC, and approve ten techniques for use with Abu Zubaydah.

Crimes Create the Need for New Approvals

It appears that the deaths in custody in November and December 2002 may have been the impetus for the "Legal Principles," in which case they can be understood as a way to dismiss crimes—including murder—committed on detainees.

November, December 2002: Deaths in CIA custody, (probably) abuse of al-Nashiri.

December 2002: Scott Muller meets with OLC (and Criminal Division) and briefed them on scope and breadth of program.

April 28, 2003: Muller has draft of Legal Principles hand-carried to John Yoo. It states:

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.

CIA Delivers "Legal Principles" to Philbin as Final Document after Yoo Leaves

In 2003, John Yoo left the OLC, which appears to have created legal exposure for CIA because they had the understanding that his authorizations were carte blanche authorizations. CIA tried to deal with this by presenting Yoo's carte blanche to his replacement, Pat Philbin, as a fait accompli.

June 16, 2003: On June 16, CIA sends two drafts of the document internally. One (Other-25) is

described this way:

This is an 8-page document, including two routing slips and a classification cover sheet. The document summarizes the law applicable to the CIA's detention and interrogation program of captured detainees. The document contains confidential communications between a CIA attorney and CIA officers relating to a matter for which the officers sought legal advice. It was prepared by the CIA attorney or employee with the joint expectation of the attorney and employee that it would be held in confidence, and it has been held in confidence. These privileged attorney-client communications are thus protected from disclosure by Exemption b(5).

One (Other-23) is described this way:

This is a 4-page document, including a router page, that summarizes the applicable law to the CIA's detention and interrogation program. This document contains pre-decisional deliberative process information and confidential communications between a CIA attorney and CIA officers relating to a matter for which the officers sought legal advice. It was prepared by the CIA attorney or employee with the joint expectation of the attorney and employee that it would be held in confidence, and it has been held in confidence. In addition, the information was produced by a CIA attorney in anticipation of litigation.

Now, I've placed these documents in this order because the Vaughn Index that describes them seems to present the documents in descending order, from most recent to older. While both appear to be drafts of the "Legal Principles" document from the description and the timing,

there are some differences:

- Other-25 appears to have been forwarded to a second recipient; Other-23 appears to have been sent just once
- Other-25 appears to have five pages of content; Other-23 (and the version sent to Philbin that day) have just three
- The Vaughn Index claims Other-23 was produced "in anticipation of litigation;" it makes no such claim for Other-25
- The Vaughn Index claims Other-23 contains deliberative discussions; it makes no such claim for Other-25

There's not all that much that we can conclude from these differences, except that the document may have been trimmed from five pages to four on June 16 and that one of these is more closely tied to "anticipated litigation" than the other.

Presumably after those two versions were exchanged at CIA, someone at CTC sent a copy (of the three-page document, plus router and classification sheet) to Pat Philbin, who had taken over many of John Yoo's duties at OLC. The document was sent with the message,

█ For your records—copy of final legal summary.

The existence of two versions (of different length) of this document on the same day the "final" was sent to Philbin suggests CIA may

have quickly finalized the document so as to present Philbin with a purportedly final document.

The Legal Principles Limits the Law, Dismisses CAT's Inhuman Prohibition, and Adds Techniques

While this version does not have the "criminal statutes do not apply" language from the April 28 draft, it does have this passage limiting the applicability of the law to the Torture and the War Crimes statutes.

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.

With that language, it seems, the "Legal Principles" document excused things like murder. As such—particularly with the language about "anticipation of litigation"—the document may partly serve to "legalize" the crimes committed against detainees in November and December 2002.

The document also dismisses the application of the Convention Against Torture's prohibition on cruel and inhuman treatment, first of all, by simply making shit up.

Because of US reservations to the Convention, the US obligation to undertake to prevent such treatment or punishment extends only to conduct that would constitute cruel and inhuman

treatment under the Eighth Amendment or would "shock the conscience" under the Fifth and Fourteenth Amendments. Additionally, the Convention permits the use of such treatment or punishment in exigent circumstances, such as a national emergency or war.

The "Legal Principles" go on to further dismiss CAT's cruel and inhuman prohibition by claiming those same amendments don't apply.

The interrogation of members of al-Qa'ida, who are foreign nationals, does not violate the Fifth, Eighth, and Fourteenth Amendments because those amendments do not apply. The Due Process Clauses of the Fifth and Fourteenth Amendments, which would be the only clauses in those amendments that could arguably apply to the conduct of interrogations, do not apply extraterritorially to aliens. The Eighth Amendment has no application because it applies solely to those persons upon whom criminal sanctions have been imposed. The detention of enemy combatants is in no sense the imposition of a criminal sanction and thus the Eighth Amendment does not apply.

Having "authorized" murder and cruel and inhuman treatment, the "Legal Principles" proceeds to add new techniques to the torture regimen beyond those approved in the Bybee Two memo, including:

- Isolation
- Reduced caloric intake
- Deprivation of reading material
- Loud music or white noise
- Abdominal slap
- Wall standing
- Use of diapers

That is, this document claims to reflect OLC authorization for the confinement techniques CIA was already using and for the new coercive techniques that had already been put into place.

Pat Philbin and Jack Goldsmith Object to the "Legal Principles"

June 17, 2003: The day after Philbin received the document, he met with the CIA and—at least according to Jack Goldsmith—told them it did not count as an OLC opinion.

OLC also believes that the status of the bullet points was made clear at a meeting on June 17, 2003 soon after the Deputy Assistant Attorney General with whom OGC had consulted on the bullet points had departed from the Department of Justice.

March 2, 2004: That didn't stop CIA from trying again the following year with Goldsmith. In March 2004, the CIA included the "Legal Principles" document in a list of documents they asked Goldsmith to "reaffirm" (the other three were the August 1, 2002 memos). In that letter, Muller claimed,

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

Now, there's a reason Muller pretended the "Legal Principles" document was valid even after Philbin had told him it wasn't. As Muller explains,

We rely on the applicable law and OLC guidance to assess the lawfulness of detention and interrogation techniques. For example, using the applicable law and relying on OLC's guidance, we concluded that the abdominal slap previously discussed with OLC (and mentioned in the June 2003 summary

points) is a permissible interrogation technique. Similarly, in addition to the sitting and kneeling stress positions discussed earlier with OLC, the Agency has added to its list of approved interrogation techniques two standing stress positions involving the detainee leaning against a wall.

That is, CIA had relied on the document to introduce new torture techniques (and in the March 2004 letter was requesting authorization for two more—the water flick and water dousing). Of note, these are techniques that would later be authorized for Hassan Ghul, who was already in custody in March 2004, so it's possible they used those techniques with him even before they requested this authorization.

June 10, 2004: Jack Goldsmith, though, was having none of this. In a June letter that reflects an earlier rejection of the bullets, Goldsmith informs the CIA that the "Legal Principles" document does not constitute an official OLC opinion.

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.

Note the timing of this: Goldsmith doesn't indicate when he "conveyed [this message] before." But by this point, Goldsmith would have the IG Report in hand, which cited the "Legal Principles" document as a central authorization for torture and claimed (in spite of the Philbin meeting and an earlier Goldsmith message) that the document was an official OLC opinion.

OLC Withdraws Bybee as CIA Releases IG Report it Knows to be Inaccurate

Then, in a series of events that are probably related, OLC prepared to withdraw the Bybee One Memo (the "organ failure" document) as CIA rushed out the IG Report it knew to misrepresent DOJ's authorizations.

June 15, 2004: Goldsmith informs Ashcroft he will withdraw Bybee Memo and resigns.

June 17, 2004: Jack Goldsmith announces his resignation.

June 18, 2004: Goldsmith writes Tenet telling him the IG Report mis-represents Ashcroft's statements and falsely presents the "Legal Guidelines" document as official OLC opinion.

June 22, 2004: In an off-the-record briefing, Comey, Goldsmith, and Philbin renounce Bybee Memo. Rizzo sends Philbin copy of earlier approval from Yoo. Muller responds to Goldsmith saying he had forwarded the complaints to John Helgerson, but would release the IG Report that week.

The Exposure on Cruel and Unusual Treatment

All of which explains a number of things, not least the urgency behind the push for an opinion on whether the torture program complied with CAT's prohibition on cruel and unusual treatment.

July 15, 2004: CIA briefs Jello Jay and Pat Roberts on IG Report. At that point CIA claims to be seeking OLC's legal analysis on whether the program was consistent with the substantive provisions of Article 16 of the Convention Against Torture.

Later July, 2004: CIA briefs Principals; they agree to seek an OLC memo on CAT.

May 30, 2005: Bradbury writes a memo claiming the torture program does not violate CAT's Article 16.

The Bradbury memo—in which he replaces Yoo's claim that there is an exigent exception in CAT with a claim that because torture was necessary,

it can't shock the conscience—is legally not much better than the "Legal Principles." Jim Comey appears to have been objecting up to the day before the CAT memo was released (to say nothing of the Combined Techniques memo). But the CAT memo completes much of the work that the "Legal Principles" document was meant to do: to exempt treatment clearly designed to humiliate from prohibitions on cruel and inhuman treatment.