

OLC IDENTIFIED 31 MISSING DOCUMENTS DURING PERIOD LEADING UP TO TORTURE TAPE INVESTIGATION

As I reported on Monday, DOJ lost not only John Yoo and Patrick Philbin's emails from the period when they were writing the Bybee Memos. It also lost at least 10 documents on torture, a number of them that went into the development of the torture memos.

We first learned these documents had disappeared from a declaration that David Barron, Acting head of OLC, submitted in response to an ACLU FOIA last September. In it, he described the six month effort OLC made last year to recreate the original Vaughn document first created in 2005. With a lot of searching last year, OLC was able to identify 171 documents that might be the documents referenced in the original Vaughn Index.

But OLC appears to have first discovered the problem before last year. Barron's declaration describes one OLC lawyer attempting—but failing—to identify all the documents in the Vaughn index during late December 2007 or early January 2008. At that time, the OLC lawyer was only able to identify 150 of the 181 documents listed in the Vaughn index.

On at least one occasion in late 2007 or early 2008, when the documents were recalled by OLC from OPR for purposes of another matter, an OLC attorney made significant efforts to recompile the 181 documents listed on the original Vaughn index based on the descriptions of the documents in that index. The attorney made tentative identifications of

approximately 150 of the 181 documents and marked the original documents with pencil numbers corresponding to the Vaughn index in the lower left-hand corner of each of those 150 documents.

It's likely, but not certain, that these documents were recalled as part of DOJ's review of whether it should criminally investigate the torture tape destruction (news of the tape destruction broke December 6 and Mukasey announced the investigation on January 2). And whether or not that's why they recalled these documents, the OLC lawyer who tried to recreate the Vaughn index had to have been aware that CIA had destroyed evidence of its torture program.

And yet, according to Barron's declaration, no one made any attempt to look for the 31 documents that OLC lawyer had not been able to find for more than another year.

That's a remarkably lax attitude regarding documents potentially disappearing from a SCIF.