RENDERING OPINIONS ON RENDERING DETAINEES OUT OF IRAQ

This is going to be a really weedy post trying to explore what was going on with just about the only named opinion that Jack Goldsmith wrote at OLC that has gotten focused attention—a March 19, 2004 one cataloging the protected status of different kinds of people captured in Iraq. I will return to the significance of it in a future post. But this post shows that the topic of Goldsmith's opinion appears to have been debated up until the time he left DOJ—and after he left, another opinion served to authorize the rendition of detainees from Iraq.

Addington objects to Goldsmith's decision that Iraqi terrorists have protection under Geneva Convention

As Goldsmith wrote in *Terror Presidency*, this issue is one of the first he dealt with after he became OLC head in October 2003.

> "Jack," Gonzales said after cursory congratulations on my new post, "we need you to decide whether the Fourth Geneva Convention protects terrorists in Iraq. We need the answer as soon as possible, no later than the end of the week," he added in his deadpan, nasally Texas drawl. (32)

After Goldsmith concluded in October 2003 that Iraqi members of al Qaeda were protected under the Geneva Convention, David Addington went apeshit.

> "They're going to be really mad," [Patrick] Philbin told me as he and I were driving from the Justice Department to the White House to explain to Gonzales and Addington why the department that Iraqi terrorists were

> protected. “They’re not going to understand our decision. They’ve never been told ‘no’.”
>
> Philbin was right.
>
> “Jack, I don’t see how terrorists who violate the laws of war can get the protections of the laws of war,” said Gonzales, calmly, from his customary wing chair in his West Wing office.
>
> [snip]
>
> “The President has already decided that terrorists do not receive Geneva Convention protections,” [Addington] barked. “You cannot question his decision.” (41)

Goldsmith went on to develop his oral advice into a formal opinion. And while he drafted that on March 19, 2004, he never finalized it.

Debate over detainee status between June and October

Now, as I’ll show below, the memo (or what was explained to be the memo) caused a bit of a firestorm in October 2004. But before that happened, the OLC Vaughn index shows, there appear to have been several rounds of discussion on the issue.

While the Vaughn index doesn’t list the March 19 version of this memo, it appears to show what might have been a June 29, 2004 version addressing the same topic.

> This is a ten-page draft, from OLC to CIA. It is confirming legal advice, which was initially given orally, on whether a detainee is considered a protected person if involved in counterterrorism acitivies and captured.

Only this June 29, 2004 memo is 10 pages, whereas the March 19 memo is 23 pages.

Then, the following day, there is what may be CIA's comments on that draft (with one additional page and hand-written notes), though this description doesn't mention protected status.

> This is an eleven-page document with handwriten comments, from the CIA to OLC, commenting on a draft letter regarding terrorism and interrogation of detainees.

On July 2, the same day Scott Muller wrote Jim Comey to tell him what had been approved after he and John Bellinger left a principals meeting discussing the interrogation of one particular detainee, CIA sent a second short memo describing the CIA securing custody of a detainee.

> This is a two-page memo with a fax coversheet, providing legal advice regarding the CIA securing custody of a detainee and use of interrogation methods.

On July 14, three days before Goldsmith's accelerated departure (remember, he originally intended to stay until August 6, but left on July 17 instead), there are **nine copies** (documents 50-58) of a one-page OLC memo **written to the record** (that is, not sent to the CIA per se) addressing whether a captured member of "a terrorist network" is legally protected.

> This is a one-page OLC memo on whether a captured member of a terrorist network is legally protected under international law.

The number of copies written to the record suggests there may have been a face-to-face meeting on the subject after which the copies of the draft discussion were retained by OLC.

On July 15 (two days before Goldsmith left),

there is a 5-page memo on the same subject.

> This is a five-page OLC memo on whether a captured member of a terrorist network is legally protected under international law.

On July 21 (four days after Goldsmith's departure), there is a 10 or 11-page document plus fax cover sheet from the White House to DOJ.

> This is a ten-page document with handwritten marginalia and a fax cover sheet, which contains pre-decisional communication regarding detainees, that was sent from the EOP to the DOJ.

This is the only document in this set written by the White House.

After the White House document (which may or may not relate to the protected status of detainees) the dated OLC communication in the Vaughn Index consists exclusively of advice about torture techniques for several months.

Then, on October 4, there are a 4-page and a 5-page OLC memo written to the record "from OLC regarding application of international law, as it relates to detainees."

Dueling stories about the status of detainees—and Goldsmith's March memo on detainees

On October 24, after what appears to have been a seven month debate on the status of some detainees, Dana Priest reported that Goldsmith's March memo served to authorize the rendition out of Iraq of a dozen detainees.

> At the request of the CIA, the Justice Department drafted a confidential memo that authorizes the agency to transfer detainees out of Iraq for interrogation — a practice that international legal specialists say contravenes the Geneva

> Conventions.
>
> One intelligence official familiar with the operation said the CIA has used the March draft memo as legal support for secretly transporting as many as a dozen detainees out of Iraq in the last six months. The agency has concealed the detainees from the International Committee of the Red Cross and other authorities, the official said.
>
> [snip]
>
> CIA officials have not disclosed the identities or locations of its Iraq detainees to congressional oversight committees, the Defense Department or CIA investigators who are reviewing detention policy, according to two informed U.S. government officials and a confidential e-mail on the subject shown to The Washington Post.
>
> [snip]
>
> The March 19 document obtained by The Post is stamped “draft” and was not finalized, said one U.S. official involved in the legal deliberations. However, the memo was sent to the general counsels at the National Security Council, the CIA and the departments of State and Defense.
>
> “The memo was a green light,” an intelligence official said. “The CIA used the memo to remove other people from Iraq.”

The very next day, Doug Jehl basically rebutted Priest’s story. He reported that there was a **new** opinion, one that the March opinion had not been incorporated into.

> A new legal opinion by the Bush administration has concluded for the first time that some non-Iraqi prisoners captured by American forces in Iraq are

> not entitled to the protections of the Geneva Conventions, administration officials said Monday.
>
> The opinion, reached in recent months, establishes an important exception to public assertions by the Bush administration since March 2003 that the Geneva Conventions applied comprehensively to prisoners taken in the conflict in Iraq, the officials said.
>
> They said the opinion would essentially allow the military and the C.I.A. to treat at least a small number of non-Iraqi prisoners captured in Iraq in the same way as members of Al Qaeda and the Taliban captured in Afghanistan, Pakistan or elsewhere, for whom the United States has maintained that the Geneva Conventions do not apply.
>
> The officials outlined the opinion on Monday in response to a report in The Washington Post over the weekend that the Central Intelligence Agency had secretly transferred a dozen non-Iraqi prisoners out of Iraq in the past 18 months, despite a provision in the conventions that bars civilians protected under the accords from being deported from occupied territories.

Jehl also repeated the Bush Administration claim that no detainees had been removed from Iraq in the previous six months (and/or since March, which is not the same thing).

> On Monday, government officials said the March 2004 document had not been incorporated into the new legal opinion. They also said all of the prisoners the C.I.A. had transferred out of Iraq had been moved between April 2003 and March 2004, with none transferred in the past six months.

All of which suggests that the entire 23-page Goldsmith draft was scrapped. But any "new" opinions on this subject in October 2004 were short—4 or 5 pages. Unless, of course, that EOP document addressed these issues…

Goldsmith's rebuttal to the Priest claims

Which brings us to the rebuttal Goldsmith includes in his book. Note what Goldsmith appears to be refuting.

> The Post reported that the CIA and White House pressured me into writing the draft, that Iraqis were taken out of Iraq in reliance on the draft, and that the draft was a part of the CIA's rendition policy of taking suspected terrorists from one country to another where they would have "no access to any recognized legal process or rights."
>
> Most of this was inaccurate. I was often pressured by many people to do many things in government. But for the draft opinion, which was not a high priority in my office, I was not.
>
> [snip]
>
> In any event, I never finalized the draft, it never became operational, and it was never relied on to take anyone outside of Iraq. I do not know whether the request for legal advice about relocating Iraqi prisoners outside Iraq for questioning was associated with a broader rendition program. But I do know that the draft opinion could not have been relied upon to abuse anyone, not only because it was never finalized, but more importantly because it stated that the suspect's Geneva Convention protections must travel with him outside Iraq.

First, there's Goldsmith's rebuttal to whether detainees taken from Iraq lose all legal rights.

Goldsmith claims their Geneva Convention protections "must travel with him outside Iraq." But this would seem to address only Iraqis rendered from Iraq, not third party insurgents (particularly those tied to an Al Qaeda affiliate), who would—according to George Bush's legal proclamations—not be covered by the Geneva Convention. In any case, Goldsmith says, the opinion was never finalized so it couldn't be relied upon in such a case. (And in fact, Jehl's article suggests the Bush Administration agreed that they did not rely on this opinion.)

Then there's the weird part. Do me a favor and review the WaPo story and check my work. But I don't see **any** assertion Priest makes to suggest the CIA and White House pressured Goldsmith.

Unless I'm missing something, **Goldsmith** introduces (by rebutting) the claim that he was pressured to write such an opinion, not Priest. Which I find particularly interesting, given that the Vaughn Index provides strong evidence to believe this issue was discussed repeatedly up until the time when Goldsmith decided to leave DOJ three weeks early.