

TORTURE TAPE DESTRUCTION, THE OGC REVIEW, AND THE IG REPORT

One of the most fascinating aspects to the torture tape Vaughn Index is the way it hints at a tension between the torturers in the field growing increasingly panicked about the torture tapes and the CIA's Office of General Counsel's decision to review the tapes and, subsequently, not to destroy them (yet). The tension grew worse as the Inspector General decided to review the torture program (and ultimately, the tapes) and as Jane Harman challenged the CIA's careful excuse allowing them to destroy the tapes. This post will trace what we can see of that tension.

Early in the Abu Zubaydah interrogation, there were two communications pertaining to how to retain the torture tapes. (Note, I've indicated: the classification of the documents as question, whether John Durham asserted they were protected under his investigation, and some indication of attorney involvement, though the latter deserves closer attention, as there is significant variation in the way CIA claimed exemption under attorney work product.)

April 17, 2002: Someone (the Vaughn provides no sender or recipient information) sends cable providing guidance on the retention of the video tapes (TS; atty doc)

April 27, 2002: One CIA officer sends another CIA officer cable, copied to several additional officers and attorneys, regarding the interrogation of Abu Zubaydah (S; Durham document)

From the period of August (around the time the waterboarding occurred) until November, 2002 the Index shows recurrent and (as far as we can tell

from a Vaughn Index) increasingly urgent communications from the Field, asking to change the protocol regarding interrogation tapes and ultimately, asking to destroy them.

August 20, 2002: Field write to HQ discussing "policy for the security risks of videotape retention and suggests new procedures for videotape retention and disposal" (S)

September 6, 2002: Email between CIA attorneys, titled, "Destruction proposal on disposition of videotapes at field" (S; atty doc)

September 6, 2002: Email between CIA attorneys on revisions of a draft cable regarding the disposition of the video tapes (S; atty doc)

October 25, 2002: Field writes to HQ "discussing the security risks if videotapes are retained" (S; Durham document; atty doc)

November 6, 2002: CIA officer sends CIA officers and attorneys email, titled, "Tapes issue," following up with the proper procedures for destruction of the interrogation video tapes (S; atty doc)

In mid-November (note, the dates on these emails may be confusing if sent from different sides of the date line), an officer in the Field expresses "personnel concerns" with the disposition of the videotapes. In what appears to be a response, HQ asks to have a "random independent review of the video tapes, before they are destroyed." This seems to be the genesis of what became the OGC review of the tapes.

November 15, 2002: HQ sends email to Field titled, "Videotapes-response" requesting "to have a random independent review of the video tapes, before they are destroyed" (TS; atty doc)

November 15, 2002: HQ sends email to Field titled, "Video tapes" requesting "to have a random independent review of the video tapes, before they are destroyed, to ensure accuracy" (TS; atty doc)

November 15, 2002: Email chain "including an email from a CIA officer in the field to CIA officers at headquarters expressing personnel concerns with the disposition of the video tapes and headquarters request to have a random independent review of the video tapes, before they are destroyed, discussed in a two-page email from a CIA attorney at headquarters to the field that is also part of the email chain (TS; atty doc)

November 16, 2002: Someone (the Vaughn provides no sender or recipient information) sends email, forwarding two additional emails, between CIA attorneys, discussing draft language on the logistics of destroying the tapes" (TS; atty doc)

November 16, 2002: Field officer sends CIA attorneys and officers at HQ email informing HQ of "personnel concerns regarding the videotapes" (TS; atty doc)

Here's how the 2004 CIA IG Report described the OGC review.

An OGC attorney reviewed the videotapes in November and December 2002 to ascertain compliance with the August 2002 DoJ opinion and compare what actually happened with what was reported to Headquarters.

Here's how CIA described the review in a FOIA declaration description of it.

The CIA OGC also conducted a legal

review of the interrogation of Abu Zubaydah to ensure compliance with the relevant legal and policy guidance. This review was implemented not only to ensure that the interrogation of Abu Zubaydah was consistent with the law and United States policy, but also to improve the CIA's program going forward. Document 60 contains the analysis and impressions of a CIA Attorney shortly after the Attorney's review of subsequently destroyed videotapes, as well as the relevant cable traffic. The document reflects the CIA attorney's view on what facts were relevant to determine whether the interrogation of Abu Zubaydah was compliant with law and policy, as well as what information would be informative to CIA management in improving the program going forward.

She went on to suggest the review may have been designed to provide interrogators with a defense in the future.

Throughout the CIA's terrorist interrogation program the CIA was concerned that its officers could face civil and criminal liability for their actions. The CIA directed its attorneys to review the record of the first interrogations to ensure that they were conducted consistent with the Department of Justice's guidance, which could arguably provide a defense to possible domestic and international criminal and civil liability. Therefore, while the CIA attorneys may have performed their analysis to determine legal and policy compliance, that analysis was in the context of evaluating possible defenses for anticipated civil and criminal litigation.

Of course, both of these descriptions are retrospective descriptions, written years later

and after much more legal discussion occurred. In any case, within days of what is apparently the first mention of the review, it appears the OGC review is planned, even while discussion of the destruction of the videotapes continues.

November 19, 2002: HQ writes to Field "discussing the disposition of the videotapes, and the duties of the CIA attorney who is visiting the field to review the tapes" (S; atty doc)

November 20, 2002: Field writes to HQ "discussing the OGC review of the tapes" and also (per subject line) their disposition (S)

November 27, 2002: Field writes to HQ "requesting approval for destruction of the interrogation videotapes" (S; OGC doc)

November 27, 2002: HQ writes to Field "regarding disposition of tapes and discussion action for base compliance according to policy guidance" (S; atty-client privilege)

November 28, 2002: Someone (the Vaughn provides no sender or recipient information) sends a cable discussing "a CIA attorney's travel to a field station to survey video tapes and review pertinent logs, and cable traffic" (TS; OGC doc)

November 30, 2002: Field writes to HQ discussing the disposition of "classified media" in the field (S)

December 1, 2002: Someone (the Vaughn provides no sender or recipient information) sends email discussing "the notes of a CIA attorney" (S; atty)

The discussion of "notes" of a CIA attorney as well as discussion surrounding travel suggests the review may have occurred in the late November time frame. When the OGC attorney

reviewed the tapes, he presumably found the same thing the IG Report did:

OIG found 11 interrogation videotapes to be blank. Two others were blank except for one or two minutes of recording. Two others were broken and could not be reviewed. OIG compared the videotapes to [redacted] logs and cables and identified a 21-hour period of time, which included two waterboard sessions, that was not captured on the videotapes.

Note that that 21-hour period may well have been from the same period—around August 20—when the second email pertaining to torture tape destruction was written.

December 3, 2002: Someone (the Vaughn provides no sender or recipient information) sends email “outlining the destruction plan for video tapes” (TS; atty doc)

December 3, 2002: CIA HQ writes to Field to discuss “the destruction of videotapes” and other issues relating to the “closing of facility” (S; Durham document; OGC doc)

In mid to late December, the discussion of the tape disposition heats up again.

December 19, 2002: Someone (the Vaughn provides no sender or recipient information) sends email titled “Cable in coordination—destruction of tapes current held at field” (S; atty doc)

December 19, 2002: Someone (the Vaughn provides no sender or recipient information) sends email “requesting a draft of a short note decision response to groups of interest on the disposition of the video tapes” (TS; atty doc)

December 20, 2002: HQ writes Field about “source material on videotapes ...

regarding the policies on tape usage and destruction" (S; atty doc)

December 20, 2002: Someone (the Vaughn provides no sender or recipient information) sends email titled "Companion email—short decision note on tapes issue" ... "providing guidance on a short note decision response to groups of interest on the disposition of the video tapes" (TS; atty doc)

Given the length of this "leaks memo" email, it may be an early draft of the OGC review, rather than a draft of the shorter memo on tapes destruction following it.

December 20, 2002: Someone (the Vaughn provides no sender or recipient information) sends email titled "Draft/outline of leaks memo turn into memo form" ... "requesting formatting of an attached three-page memorandum" (S; atty doc)

December 23, 2002: Someone sends (the Vaughn provides no sender or recipient information though series suggests CTC and/or OGC) email titled "First cut at Memo on disposition of AZ videotapes" ... "regarding a draft memo drafted by CIA OGC regarding the tapes" (U; atty doc)

December 23, 2002: Someone (the Vaughn provides no sender or recipient information) sends email titled "First cut at Memo on disposition of AZ videotapes" ... "with draft language on the disposition of the video tapes" (C; atty doc)

December 24, 2002: Someone (the Vaughn provides no sender or recipient information) sends email discussing changes to the first draft of memo regarding disposition of torture tapes (U; atty doc)

December 24, 2002: Someone (the Vaughn provides no sender or recipient information) sends email titled "Tapes-CTC memorandum re tapes" ... "confirming receipt of a copy of a memorandum and the writing of a cover letter regarding the interrogation video tapes" (U; atty doc)

The OGC review is completed, as a Memorandum for the Record, on January 9, 2003. Immediately thereafter, the discussion of the tape destruction continues, but only after what appears to be a discussion about how to make sure the videotapes do not qualify as official records. Note, too, this discussion about language is in anticipation of a briefing, possibly the briefings of Pat Roberts on February 4 and Porter Goss and Jane Harman on February 5.

January 9, 2003: MFR "summarizing the review of the interrogation videotapes" (TS; atty doc)

January 12, 2003: Someone (Vaughn provides no sender or recipient information) asks "what actions will make the video tapes an official record" (TS; atty doc)

January 12, 2003: Someone (Vaughn provides no sender or recipient information) sends email "proposing how to reference the video tapes for a briefing" (TS; atty doc)

January 12, 2003: Someone (Vaughn provides no sender or recipient information) sends email memo "informing and reminding CIA officers of the question, what actions make the video tapes an official record" (TS; atty doc)

January 13, 2003: HQ writes to Field "providing guidance on the procedures for retention of AZ videotapes" (TS; Durham document)

January 13, 2003: Field writes deliberative cable to HQ regarding "status response to the maintenance of video recordings" (TS)

[Not listed—probably January] 13, 2003: HQ writes to Field "providing instructions on how to retain the video tapes" (TS; atty doc)

Between the time CIA first starts talking about how to talk about the videotapes such that they do not become official records, George Tenet institutes a torture policy requiring record-keeping.

January 28, 2003: Tenet issues guidelines on enhanced interrogations, including mandating that records be kept

Then, on February 5, 2003, CIA briefs Jane Harman and Porter Goss. Jane Harman's follow-up letter makes it clear that CIA revealed it had used waterboarding and told Goss and Harman that the torture tapes were not an official record and the CIA was planning on destroying them. The request for a review of the video tapes might be a response to a Congressional question—or it may be a request associated with the IG Review (which eventually reviewed the videotapes in May 2003). When Muller responds to Harman—after consulting with the White House—he makes no mention of her discussion about the videotapes.

February 5, 2003: CIA briefs Harman and Goss, informing them torture tapes were not official records

February 7, 2003: Email (the Vaughn provides no sender or recipient information) asking "how best to accommodate a request for review of video tapes, without complicating security issues) (U; atty doc)

February 10, 2003: In letter to Muller, Harman notes she has been told the

torture tapes will be destroyed after IG finishes inquiry but warns that “even if the videotape does not constitute an official record,” CIA should retain it (declassified in 2007)

February 19, 2003: Draft response to Harman (S; atty doc)

February 19, 2003: Interview report (participants not indicated) for review of the interrogations (TS; atty doc)

Undated [possibly February 2003]: One page email (the Vaughn provides no sender or recipient information) scheduling a meeting to discuss disposition of video tapes (S; Durham document)

February 22, 2003: Someone (the Vaughn provides no sender or recipient information) sends email titled, “Harmon letter” ... “discussing a meeting between CIA and White House regarding the CIA’s response to a congressional inquiry” (TS; atty doc)

February 28, 2003: Muller responds to Harman without acknowledging or responding to her point about videotapes

Harman noted in her letter that she had been told the videotapes would be destroyed after the IG finished his investigation. Shortly before the IG Report was released in 2004, there was another discussion of how to prevent the videotapes from becoming an official record.

April 12, 2004: Someone (the Vaughn provides no sender or recipient information) sends email “discussing what actions would make the tapes an official record” (TS; atty doc)

Note that there is probably some further discussion of the OGC review of the videotapes in the IG Report that is redacted, since Jay

Rockefeller requested it as a document in 2005, shortly before the torture tapes were destroyed.

Finally, there is a reference to the ongoing investigation into the OGC report later that fall.

November 11, 2004: Memo and email chain (the Vaughn provides no sender or recipient information) on OIG's open investigation (TS; atty-client doc)

I noted yesterday that Jose Rodriguez retired (announced September 14; effective September 30) and John Rizzo withdrew his nomination to be General Counsel (September 25) just as CIA was reviewing who approved the torture tape destruction in 2007. What I neglected to mention is that days later, on October 11, the NYT reported that Michael Hayden started an investigation into John Helgerson's purportedly unfair pursuit of those involved in the detention and torture program. Both Michael Hayden and John Helgerson would have to recuse themselves from the torture tape inquiry.

This, obviously, is just a sketch of the way the desire to destroy the torture tapes led to the OGC review, which led to apparently delicate efforts to pretend the torture tapes were not official records, which intersected in some way with the IG Report(s).