THE EVOLUTION OF PATRICK FITZGERALD'S INVESTIGATION INTO TORTURER DISCLOSURES

Back in the CIA Leak Investigation days, we learned some interesting things from the changes in Patrick Fitzgerald's authority to serve as Special Counsel. So when the Jon Kiriakou complaint the other day mentioned that Fitzgerald's authority for that investigation had been changed twice…

> By letter dated March 8, 2010, Patrick J. Fitzgerald, the United States Attorney for the Northern District of Illinois, was appointed Special Attorney to supervise the investigation pursuant to Title 28, United States Code, Section 515, subject to the supervision of the Deputy Attorney General.
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> The March 8, 2010 letter, as supplemented and amended on July 14, 2010 and clarified by letter dated May 27, 2011, delegates authority to conduct an investigation and any related prosecutions in connection with any matter arising out of the Department of Defense seizures of certain photographs from Guantanamo Bay detainees.

…It made me wonder whether those authorization letters would explain how this investigation moved from targeting detainee lawyers to targeting a former CIA officer, Jon Kiriakou. I also wondered whether it would tell us anything about whether Fitzgerald used the new DIOG guidelines to get reporter contacts with National Security Letters.

Alas, the letters—March 8, 2010; July 14, 2010;

May 27, 2011—don't answer the latter question. But they do show an interesting evolution over time.

As a reminder of where this all started, it's worth reading this March 15, 2010 Bill Gertz article which was, AFAIK, the first public report of the investigation into the John Adams Project. It describes a March 9, 2010 meeting between Fitzgerald and the CIA.

> The dispute prompted a meeting Tuesday at CIA headquarters between U.S. Attorney Patrick J. Fitzgerald and senior CIA counterintelligence officials. It is the latest battle between the agency and the department over detainees and interrogations of terrorists.
>
> [snip]
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> According to U.S. officials familiar with the issue, the current dispute involves Justice Department officials who support an effort led by the American Civil Liberties Union to provide legal aid to military lawyers for the Guantanamo inmates. CIA counterintelligence officials oppose the effort and say giving terrorists photographs of interrogators has exposed CIA personnel and their families to possible terrorist attacks.
>
> [snip]
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> According to the officials, the dispute centered on discussions for a interagency memorandum that was to be used in briefing President Obama and senior administration officials on the photographs found in Cuba.Justice officials did not share the CIA's security concerns about the risks posed to CIA interrogators and opposed language on the matter that was contained in the draft memorandum. The memo was being prepared for White House

> National Security Council aide John Brennan, who was to use it to brief the president.
>
> The CIA insisted on keeping its language describing the case and wanted the memorandum sent forward in that form.

That meeting, of course, would have taken place the day after Fitzgerald was appointed. So immediately after Fitzgerald got put in charge of this investigation, he presumably moderated a fight between DOJ, which didn't think detainee lawyers pursuing their clients' torturers via independent means threatened to expose the torturers' identity directly, and CIA, which apparently claimed to be worried.

At that point in the investigation, Fitzgerald's mandate was very preliminary.

> You are hereby appointed as a Special Attorney to the United States Attorney General pursuant to 28 U.S.C. § 515. In this capacity, you will investigate and determine whether criminal charges are appropriate in connection with any matter arising out of the Department of Defense seizures of certain photographs from Guantanamo Bay detainees.

By July 14, however, it appears that Fitzgerald determined there might be something worth prosecuting.

> This letter supplements and amends your appointment as Special Attorney to the United States Attorney General and specifically authorizes you to conduct in the District of Columbia or any other judicial district of the United States any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized to conduct.

This supplement, note, was issued slightly more than 18 months ago (some grand jury terms are 18 months long).

So Fitzgerald identified a potential crime 18 months ago and only now is charging (but not yet indicting) someone? That might suggest, by the way, that Fitzgerald got this authority to use a grand jury to force people—perhaps the detainee investigators—to cooperate.

Also note the jurisdiction: the supplement authorizes Fitzgerald to conduct an investigation in DC or anywhere else. It seems Fitzgerald used DC's FBI officers, but is using Eastern District of Virginia's courts (CIA's home court).

The final change to Fitzgerald's authority was still quite some time ago—May 27, 2011.

> This letter is to clarify that the authority delegated to you by the appointment letter of March 8, 2010 (attached), includes, but is not limited to, bringing any criminal charges in connection with: (1) the improper disclosure of classified or national defense information that is related directly or indirectly to the taking of photographs of government employees, copies of which were seized from Guantanamo Bay detainees; (2) the improper disclosure of the names or other identifiers of government employees who participated in sensitive or classified government activities that led to the filing of a sealed defense document in January 2009 containing sensitive information about government employees and activities; and (3) any related improper disclosures made subsequent to January 2009. This authority also includes the authority to investigate and prosecute any efforts at obstruction of justice (including perjury or false statements) that may occur during the investigation.

I find this change particularly interesting. Bullet (1) maps closely to what they've charged Kiriakou with: leaking national defense information, including that which was indirectly related to photographs that ended up in detainee cells. The charges pertaining to Deuce Martinez' identity, for example, are indirect, tied more closely to Kiriakou's alleged leaks to Scott Shane than to Journalist A. And the "magic box" charge is even more indirect, though I suspect Fitzgerald's team may have used the magic box charge to establish probable cause to get a search warrant for Kiriakou's emails.

Bullet (2) is interesting given that the complaint actually claims that a defense filing is what started this investigation.

> On or about January 19, 2009, defense counsel for certain high value detainees held at the United States military detention facility at Guantanamo Bay, Cuba, filed a motion with the military commission then responsible for adjudicating charges brought against the detainees, seeking permission to obtain information that counsel contended was necessary to further the defense of the detainees. In support of this motion, defense counsel filed a classified document under seal (the "classified defense filing"), which, named or otherwise- identified multiple persons whom defense counsel believed to be United States government personnel involved in classified activities relevant to the legal defense of the detainees.
>
> [snip]
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> After reviewing the January 2009 classified defense filing (and prior to the discovery of the photographs), the CIA filed a crimes report on March 19, 2009, with the Department of Justice. The National Security Division of the Department of Justice, working with the

> FBI, commenced an investigation.

But Fitzgerald wasn't formally authorized to investigate that part of things until 28 months after the filing was submitted. Remember, too, that Covert Officer A's identity was never photographed by the defense team. Of course, once they got Kiriakou's emails, they would have had pretty solid evidence that Kiriakou had leaked Covert Officer A's identity, for which he has been charged with an IIPA violation.

And remember—that's what the CIA wanted in the first place, an IIPA charge (though it's not clear they suspected Kiriakou).

Finally, there's Bullet (3) regarding any subsequent disclosures. Now, there was a second batch of photographs found in February 2010, as noted in the Gertz story.

> The investigation has been under way for many months, but was given new urgency after the discovery last month of additional photographs of interrogators at Guantanamo showing CIA officers and contractors who have carried out interrogations of detainees, according to three officials familiar with the investigation.

So it's possible this bullet point serves simply to include those other photos?

Also, Kiriakou's book was published in 2010. He also wrote an email discussing Covert Officer A after January 2009.

> On April 8, 2009, KIRIAKOU again exchanged email communications with Journalist A concerning Covert Officer A. Specifically, at 2:14 p.m., Journalist A emailed KIRIAKOU and asked, "Ever know a [name] in [specific CIA office]?" At 3:09 p.m., KIRIAKOU responded to Journalist A and stated, "Sorry, [first name of Journalist A]. I

> didn’t know the [specific office] people by name except for [first name of Covert Officer A].” At the time of this additional disclosure, the association of Covert Officer A with the specific office remained classified at the Top Secret/SCI level because, as described above, it revealed both Covert Officer A’s identity and his association with the RDI Program.

But I also wonder if Fitzgerald found even more recent evidence of leaks?

Update: Publication date of Kiriakou’s book corrected per Jason.