

CIA INSPECTOR GENERAL: WE NEVER HAD ANY TORTURE TAPES!

The CIA has responded to ACLU's motion to hold the CIA in contempt for destroying the terror tapes. They argue they shouldn't be held in contempt for destroying the torture tapes for three reasons:

The videotapes were held in operational files. The Court ruled that the CIA's obligation to search for records responsive to Plaintiffs' FOIA requests did not extend to its operational files. Rather, the Court ordered the CIA to search investigative files of the CIA's Office of Inspector General ("CIA OIG") for operational records produced to or collected by CIA OIG during the course of CIA OIG's investigation into allegations of impropriety in Iraq. The tapes were not produced to or collected by CIA OIG. Thus, the CIA's destruction of the videotapes did not violate the Court's orders.

Moreover, **the videotapes were not responsive to Plaintiffs' FOIA requests because the activities depicted on the videotapes were not the subject of a CIA OIG investigation of allegations of impropriety in Iraq, or any other investigation conducted by CIA OIG.**

Under the Central Intelligence Agency Information Act ("CIA Information Act"), the CIA's operational records are exempt from search or review in response to FOIA requests unless an exception to the Act applies. One exception is where the records requested are the specific subject matter of an investigation by CIA OIG into allegations of impropriety

or illegality in the conduct of an intelligence activity. 50 U.S.C. § 431(c)(3). Here, CIA OIG did not conduct an investigation into allegations of impropriety or illegality relating to the interrogations on the videotapes prior to their destruction. Therefore, the tapes were exempt from search and review in response to Plaintiffs' FOIA requests up to the time of their destruction.

Further, the Department of Justice ("DOJ") has initiated a criminal investigation into the destruction of the tapes. That investigation is considering, inter alia, whether the destruction of the tapes was inconsistent with or violated any legal obligations, including those arising out of civil matters such as this Court's orders. Accordingly, **if the Court does not deny the contempt application outright, it should stay these proceedings pending completion of DOJ's criminal investigation.** [my emphasis]

In other words, their reasoning depends entirely on the technical status of the CIA IG investigation into detainee interrogation. The CIA submitted a declaration describing that investigation; here's what they said.

Although OIG reviewed the videotapes that were destroyed in 2005 in connection with a special review of the CIA terrorist detention and interrogation program, OIG did not initiate an investigation of the activities depicted on the videotapes as a result of the special review. Moreover, OIG never had the videotapes or copies of the videotapes in their files.

OIG is making a distinction here between

"investigation" and "special review," going on at some length to distinguish between them. It includes a copy of a document referring to "special assessment report," as if that's proof that this distinction is meaningful—though the document refers to the treatment of reports, not to the treatment of investigation. In other words—it seems like a stretch to provide this as evidence that an investigation and a special review are different, since it doesn't reflect OIG's claims about the distinctions between the two.

General Assertions Standing in for Specifics about this Case

OIG then goes on to make very vague assertions about OIG's practices regarding record-keeping.

8. Depending on the nature of the audit, inspection, investigation, or special review, **OIG often sends a notice** to those CIA components that OIG deems likely to have relevant information. Such notices describe the subject of the review and the categories of information sought and provide instructions to make potentially relevant records available to OIG to review. **The instructions regarding records vary from case to case**, depending on the nature and scope of the review. **Depending on the volume and sensitivity of the records** and the nature of the OIG inquiry, OIG may instruct the components to produce all records to OIG, produce certain categories of records to OIG, maintain certain categories of records on-site for OIG inspection, maintain all records on-site for OIG inspection, await further instructions, or some combination of the above. In addition, OIG may independently collect records without the assistance of other CIA components.

9. After OIG reviews records, whether on-site or in OIG offices, **it determines**

what records are relevant to its review and what copies of records to retain in OIG offices. OIG does not use “markers” in its case files to designate records maintained in operational files. When OIG chooses to retain a record, it retains that record, or in most cases a copy of the record, in OIG files. **If OIG has a reasonable basis to believe a federal crime may have been committed, the IG reports the information to the Attorney General.** [my emphasis]

Notice all of this language speaks of general circumstances—it does not describe what happened in this particular case. It provides one motivation for seeking records with a particular entity. It provides two criteria (volume and sensitivity) OIG uses to determine how to use records. And it asserts that OIG decides whether or not to keep records—though, tellingly, it doesn’t describe the criteria by which it decides whether to keep its own records. And finally, it states that OIG will report information to the AG if it believes a federal crime has been committed.

But none of these details address the specifics of this case! Thus, we don’t know whether OIG informed the AG that the practices depicted in the videos that a federal crime had been committed **in this case**. That’s critically important, because we know the conclusion of the IG report was that, in fact, the CIA may well have been violating international treaties.

The report, by John L. Helgerson, the C.I.A.’s inspector general, did not conclude that the techniques constituted torture, which is also prohibited under American law, the officials said. But Mr. Helgerson did find, the officials said, that the techniques appeared to constitute cruel, inhuman and degrading treatment under the [Convention Against Torture].

[snip]

In his report, Mr. Helgerson also raised concern about whether the use of the techniques could expose agency officers to legal liability, the officials said. They said the report expressed skepticism about the Bush administration view that any ban on cruel, inhuman and degrading treatment under the treaty does not apply to C.I.A. interrogations because they take place overseas on people who are not citizens of the United States.

By making this general statement, the OIG declaration seems to suggest that if the "special review" had found legal violations, it would have reported them to the AG. But it doesn't admit that the central finding of the report is that the treatment may have been illegal (whether or not it violated "federal" law), nor does it explain what happened with that assertion **in this particular case**. Given that the CIA and the White House had high level meetings in the same month the report was completed, that seems like pretty important information!

Specific Description that Leaves Key Details Vague

Only after these general assertions does the OIG declaration describe its actual review of the tapes.

In January 2003, OIG initiated a special review of the CIA terrorist detention and interrogation program. This review was intended to evaluate CIA detention and interrogation activities, and **was not initiated in response to an allegation of wrongdoing**.

[snip]

During the course of the special review,

OIG was notified of the existence of videotapes of the interrogations of detainees. OIG arranged with the NCS to review the videotapes at the overseas location where they were stored.

OIG reviewed the videotapes at an overseas covert NCS facility in May 2003. After reviewing the videotapes, **OIG did not take custody of the videotapes and they remained in the custody of NCS. Nor did OIG make or retain a copy of the videotapes for its files.** At the conclusion of the special review in May 2004, ***OIG notified DOJ and other relevant oversight authorities of the review's findings.*** At no time prior to the destruction of the tapes in 2005 did OIG initiate a separate investigation into the interrogations depicted on the videotapes.

Because OIG did not take custody or make copies of the videotapes, they were not among the materials that OIG provided to the CIA components responsible for processing Plaintiff's Freedom of Information Act (FOIA) request—the Information Management Staff (IMS), the Office of General Counsel (OGC), and the NCS Information Review Officer.

Note the angst of this passage. First, it assures you that the "special review" was not, itself, a response to allegations of wrongdoing. This is surely an effort to insist on that distinction between "special review" and "investigation" on which CIA's claims it didn't need to turn over this tape rely.

Notice, too, the declaration's reversion into a passive construction—"OIG was notified of the existence of videotapes of the interrogations of detainees." Want to bet some money that that use of the passive deliberately hides the back-story to how and why OIG learned of the tapes? Particularly in light of the earlier "OIG often

sends a notice to those CIA components that OIG deems likely to have relevant information," this construction appears to be an attempt to avoid explaining how OIG learned they should contact Clandestine Services to arrange to see those tapes stored in some other country.

And then, after having made some effort to explain the criteria OIG uses to decide whether to get a copy of evidence for their own records in the more general section, the specific description of what happened in this case says only, "OIG did not take custody of the videotapes and they remained in the custody of NCS. Nor did OIG make or retain a copy of the videotapes for its files." Once again, the declaration avoids one of the key questions: why didn't they get a copy of the videotapes for their own records? Did they do so to avoid having custody of the tapes, and therefore exposing them to FOIA? Did DO refuse to give them a copy of the tapes? We don't know ... and I'd wager that's no accident.

Finally, here's the real doozy: "*OIG notified DOJ and other relevant oversight authorities of the review's findings.*" If OIG "notified DOJ," is that the same as reporting the information to the AG, as OIG would do if it had found a criminal violation of the law? If not, whom at DOJ did OIG inform? OLC? "Jack Goldsmith, you had better sit down and rewrite Yoo's trash opinion, because it's going to get some CIA officers arrested." It's relevant that Goldsmith was still in charge of OLC and was in the process of ditching precisely the opinion that legalized this torture.

And what about this description? "OIG notified ... other relevant oversight authorities of the review's findings." Would those "other relevant oversight authorities" include David Addington, (then White House Counsel) Alberto Gonzales, and John Bellinger, in a briefing at the White House at which they discussed destroying the torture tapes? Because if you told **the President's lawyer** that the treatment of detainees violated

international bans on torture, it sure seems that that treatment rises to the level of specific complaint which would then qualify it as an OIG file.

Who Writes the Declaration

As if all this vagueness wasn't enough to make you take notice, consider the author of the declaration: Constance Rea.

I am the Deputy Assistant Inspector General for Investigations of the Office of Inspector General (OIG) of the Central Intelligence Agency (CIA). As Deputy Assistant Inspector General for Investigations, I supervise the Investigations Staff. I have served as Deputy Assistant Inspector General for Investigations since March 2004.

A couple of details. First, Rea didn't start at this position until March 2004, when the report relying on the torture tapes was probably largely written (it was released in May). Add that to her description of who conducted this report,

The special review was led by the Deputy Inspector General and the team comprised personnel from across OIG, including the Assistant Inspector General for Investigations, the Counsel to the Inspector General, a senior Investigations Staff manager, three Investigators, two Inspectors, an Auditor, a Research Assistant, and a Secretary.

Unless Rea was one of those three Investigators she describes as having been involved in this review, she was not involved in the "special review," and she got involved after the decisions regarding whether to obtain a copy of the tapes were already made.

Even more interesting, Rea was not among those

who decided how to respond to the ACLU FOIA, whom she describes as,

the Information Management Staff (IMS), the Office of General Counsel (OGC), and the NCS Information Review Officer

So she may not have been involved in the actual review, and she apparently wasn't involved in the FOIA response. Interesting that the CIA had someone write the review who could be very vague about the key issues.

The Torture Tapes, CIA, and Congress

But this entire declaration appears particularly disingenuous given the chronology of the CIA's briefings to Congress on the torture tapes.

Here's a mini-timeline:

Fall 2002: Gang of Four briefed on the existence of the terror tapes—but no mention of destroying the tapes is made

January 2003: CIA's OIG begins "special review" of detainee interrogations

"During the course of the 'special review'": OIG learns of the torture tapes

February 5, 2003: Scott Muller briefs Jane Harman and Porter Goss on torture tapes, and tells them the

videotape of Abu Zubaydah following his capture ... will be destroyed after the Inspector General finishes his inquiry

May 2003: OIG reviewed the torture tapes

First of all, the notion that OIG learned of the torture tapes "during the course of the review" is ridiculous. CIA's Counsel was briefing Congress on the torture tapes in relation to the OIG investigation *within a month* of the beginning of the inquiry; OIG learned of those

tapes right at the beginning of its inquiry, and those tapes may well have been involved in its decision to conduct such a "special review."

Furthermore, Scott Muller presented those tapes as fundamentally connected to the OIG investigation even before OIG had seen the tapes.

The CIA is desperately trying to claim that those tapes were only incidental to the OIG inquiry. But in February 2003, Scott Muller was telling Congress a different story.

And do you find it even a little suspicious that in Fall, 2002, the CIA apparently had no intention of destroying the terror tapes, but one month into an IG investigation into detainee interrogation, they had decided the tapes would be destroyed?