

A PEEK INTO THE TORTURE TAPE INVESTIGATION

As the NYT and AP have reported, the CIA says none of its records were responsive to the Court order in the Hani Abdullah case.

A records search by the Central Intelligence Agency has found no evidence that the agency violated a judge's order when, in 2005, it destroyed videotapes that showed harsh interrogations, the C.I.A. said in a court declaration this week.

Since the CIA is still reviewing its records, though, that declaration may or may not be conclusive.

But the CIA's declaration is far more interesting for what it says about John Durham's Torture Tape investigation than what it says about Hani Abdullah's civil suit against George Bush. Comparing the two declarations submitted in response to Abdullah's suit with an earlier declaration the CIA submitted in response to the ACLU's FOIA suggests that John Durham may have reason to suspect that some records pertaining to the torture tapes were destroyed in the Office of Inspector General.

First of all, consider who wrote the two declarations submitted Wednesday by the CIA. First, there's Robert Dietz, who conducted a general search of the CIA's operational files. Here's how Dietz describes his expertise in this matter:

I am the senior councilor to the Director of the Central Intelligence Agency. I joined the CIA in Autumn of 2006. Although I am a lawyer by training, I am not serving in a legal capacity and I am not part of the Office

of General Counsel. In my position, I report to the Director of the CIA and receive assignments from him. For example, I have chaired an Agency Accountability Board, and I have recently concluded a management review of the Office of the Inspector General. In December 2007, in connection with the public disclosure that the CIA had destroyed certain videotapes, the Director asked me to chair the so-called Tapes Coordination Group ("TCG"). This Group's assignment is to respond to requests for information from Acting United States Attorney John Durham, specially appointed prosecutor investigating the destruction of the tapes, and similar requests by the House Permanent Select Committee on Intelligence and Senate Select Committee on Intelligence.

Dietz is not a lifetime CIA employee. Rather, he appears to have come in when Michael Hayden took over as Director. That means he had nothing to do with the destruction of the torture tapes. But it also likely means he's a Hayden loyalist, there to protect Hayden.

Most interesting, Dietz reveals he was in charge of the "management review of the Office of the Inspector General." I find that interesting, not least, because the spat between OIG and Hayden (or rather, and the rest of the CIA) relates to OIG's report finding CIA's interrogation methods constituted cruel and inhuman treatment.

As the NYT broke the other day, General Michael Hayden is conducting an investigation of the CIA's Inspector General, John Helgerson. Their first report on the story intimated the reason why Hayden was conducting such an unusual investigation.

A report by Mr. Helgerson's office completed in the spring

of 2004 warned that some C.I.A.-approved interrogation procedures appeared to constitute cruel, inhuman and degrading treatment, as defined by the international Convention Against Torture.

That investigation into OIG actually overlapped by several weeks with DOJ's preliminary investigation of the torture tapes. The destruction of the tapes was revealed on December 6, and the conclusion of the investigation into OIG was reported on December 23. (Mukasey announced Durham's criminal probe on January 2, 2008.) It's unclear whether the TCG was formed at the end of December in anticipation of Durham's appointment, or whether it was formed in response to the preliminary investigation earlier in December. In any case, though, Dietz appears to have been negotiating the establishment of a babysitter for CIA's OIG at the same time as he was beginning to help DOJ investigate the destruction of the torture tapes.

Which is why this comment from Dietz is all the more interesting:

I understand that at the request of specially appointed prosecutor John Durham, part of the additional search undertaken by the CIA in regard to the Court's February 14 order was conducted by the Office of Inspector General ("OIG"). And I am advised that the OIG is providing a declaration for the Court regarding the results of that search.

That is, John Durham—whose mandate is to investigate the CIA's destruction of the torture tapes—intervened into the CIA's response to a court's order in a civil case, and made sure that CIA's OIG, in addition to the CIA's operational division, undertake a search of the

relevant files. Now, that's not that surprising. One of the things Durham has to do, presumably, it take all of the umpteen cases in which judges issued orders to retain evidence, to see if the destroyed torture tapes pertained to the order. In other words, Durham's intervention here probably only represented a shift in the order in which he conducted the investigation, not an intervention in matters unrelated to his investigation. We can also presume that the CIA's response to this Court order probably parallels the activities being undertaken by Durham's investigation. That is, Durham is doing the same things to collect evidence in the Torture Tape investigation as he's having CIA employees do in response to Court orders pertaining to potentially destroyed evidence.

That interpretation seems to be supported by this part of Dietz' statement.

I must note that the TCG's search has been complicated for several reasons, and thus I cannot at this time confirm that we have exhausted all places we might look for information that may be material to the Court's February 14 order. The pendency of the investigation by specially-appointed prosecutor Durham, as well as its complexity, have affected our continued search for information relating to the Court's order. As an initial matter, the assignment of my office to this search was necessitated by considerations related to Mr. Durham's investigation, even though others in the CIA have far greater knowledge than do I or my staff in connection with this particular piece of litigation. For example, many of the individuals at CIA who would normally be involved in a search for any records evidencing destruction of spoilation are, as I understand it, potential witnesses in the matter under investigation by Mr. Durham. In

addition, because of the sensitivity and complexity of the investigation, the TCG must coordinate much of our effort with Mr. Durham's office, with the result that the search necessarily takes longer and is more difficult than it might otherwise be.

Partly, this passage suggests that Durham is being careful to ensure no one from CIA—not even Dietz, who showed up long after the destruction of the tapes—fiddles with potential evidence without Durham's involvement. In addition, though, it seems to suggest that the librarians or archivists (you know, the torture tape librarian we've heard so much about), are considered potential witnesses in the investigation.

And speaking of archivists, here's the bit that will get MadDog salivating—the expertise of the person submitting the declaration from OIG: Robert Moritsugu.

I am a special agent with the Central Intelligence Agency (CIA) Office of Inspector General (OIG). I have been in the OIG for 23 years. Over the course of my work in OIG, I have acquired considerable familiarity with the case records of the OIG's investigation staff. **I am a seized computer evidence recovery specialist, responsible for computer forensics.** For a number of years, I held responsibilities within the OIG for various technical tasks, maintaining OIG's local area network, and working with the staffs that maintain the OIG's restricted servers.
[my emphasis]

Now, before I move on to the rest of Moritsugu's declaration, let me point out that Moritsugu is **not** the person who submitted a declaration regarding OIG files in the ACLU's FOIA suit. The person who submitted that declaration—on January

10, just after the Durham investigation got started—was Constance Rea, the Deputy Assistant Inspector General for Investigations, someone who was at least tangentially involved in the OIG investigation into interrogation methods and someone who apparently does not have the technical expertise of Moritsugu.

Here's what Constance Rea said about the record-keeping practices of OIG in her declaration:

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.

[snip]

During the course of the special review [of CIA interrogation methods], **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. [my emphasis]

So in January, Rea noted that sometimes OIG got originals of materials, sometimes it got copies, and sometimes it did not retain (that is, it destroyed) copies of those materials. OIG would

also have correspondence describing certain pieces of evidence (or at least identifying who it thought might have such evidence). And, in cases where OIG found potential legal issues, OIG would have correspondence with DOJ. Lots of stuff that might reveal where those torture tapes were and what happened to them.

So here's what Moritsugu, the computer forensics expert, says:

Attendant to the work of the OIG in [regards to Durham's investigation], I was assigned the task of searching the investigation staff's records to determine whether they contained any indication that any information relating to petitioner Abdullah covered by this Court's preservation order of July 18, 2005 was destroyed or otherwise spoiled. **The investigation records constitute the operational files of the investigation staff. They exist both in hard copy and electronic form. The electronic version contains what exists in hard copy, but also a broader universe of investigative records.**

3. To carry out that assignment, I **searched the electronic records system of the OIG records to determine whether it appeared that those records have, or did at one time have, material** relating to petitioner Abdullah. If the investigation staff had at one time any records related to Abdullah, I would expect to find some indication of the existence of such files in the electronic records system. In my search, I found no indication either that such records exist now or that such records ever existed in the past.

So let me review. The CIA gets an order from a judge to reveal whether it once had evidence pertaining to the interrogations of Hani Abdullah. Presumably because such an order

requires work that overlaps with the work of John Durham's own investigation, Durham plays a role in deciding how the CIA must respond. He has Robert Dietz conduct a general search of the CIA's files, presumably searching the records of the groups that were involved with the interrogations. And he directs the OIG to provide a declaration in response too. But Durham doesn't ask OIG to do what it did when it responded to the ACLU order in January—to just have someone involved in the OIG's interrogation investigation review their files and submit a declaration based on that physical review. No. Durham requires OIG to conduct a forensic review of the OIG's investigative files, to determine whether OIG has—or had—any responsive files.

The fact that Durham required a forensic review of OIG's files—but not the CIA's operational files—certainly suggests he has reason to believe that some of the files at OIG got destroyed.

Update: Okay, I got off my ass and looked up the actual preservation order in question to understand what Deitz's and Moritsugu's declarations would cover. The preservation order was requested by Rami bin Saad al-Oteibi and Hani Saleh Rashid Abdullah.

But because the government had already been put under a preservation order in two other cases, Judge Roberts treated such a request as moot for this request. So his order only covers information specifically pertaining to the named petitioners. Here's what his order states:

ORDERED that petitioners' motions, insofar as they seek preservation orders governing evidence, documents, and information regarding the torture, mistreatment and/or abuse of detainees held at the Guantanamo Bay detention facility be, and hereby are, DENIED without prejudice as moot. It is further ORDERED that petitioners' motions otherwise be, and hereby are, GRANTED. Respondents shall preserve and maintain

all evidence, documents and information, without limitation, now or ever in respondents' possession, custody or control, regarding the individual detained petitioners in these cases.

So that suggests that neither al-Oteibi nor Abdullah came up in the OIG investigation, and that whatever record they had of the Abu Zubaydah and al-Nashiri interrogations did not mention either of these detainees.