

CIA OIG'S WILD PARSING ABOUT WHAT WAS "DEPICTED" ON THE TORTURE TAPES

I wanted to point out a somewhat weedy detail about how the CIA IG Report describes the torture investigation as compared to how the CIA's Office of Inspector General described that investigation in court filings last year.

As you'll recall, after the CIA admitted to the destruction of the torture tapes in 2007, the ACLU filed to hold the CIA in contempt for not having revealed the existence of the torture tapes earlier in their torture document FOIA. In response, the OIG submitted a filing and a declaration describing why they hadn't revealed the existence of the tapes.

The filing explained that CIA had no obligation to search its operational files in response to the ACLU's FOIA unless those files had been the subject of an investigation.

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. [my emphasis]

And the declaration went on to make certain claims about the relationship between the CIA IG investigation and the subject matter of the torture 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]

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.

[snip]

Stated another way, the activities depicted on the videotapes that were reviewed in 2003 were not the specific subject matter of the OIG investigation of allegations of impropriety in Iraq, or any other investigation conducted by OIG. [my emphasis]

Yet here's what the IG Report says about why it initiated an investigation.

In November 2002, the Deputy Director for Operations (DOD) informed the Office of Inspector General (OIG) that the Agency had established a program in the Counterterrorist Center to detain and

interrogate terrorists at sites abroad ("the CTC Program"). He also informed OIG that he had just learned of and had dispatched a team to investigate [redacted] **In January 2003, the DDO informed OIG that he had received allegations that Agency personnel had used unauthorized interrogation techniques with a detainee, 'Abd Al-Rahim Al-Nashiri, at another foreign site, and requested that OIG investigate.** Separately, OIG received information that some employees were concerned that certain covert Agency activities at an overseas detention and interrogation site might involve violations of human rights. In January 2003, **OIG initiated a review of Agency counterterrorism detention and interrogation activities [redacted] and the incident with Al-Nashiri.** [my emphasis]

In other words, the IG Report says that DDO James Pavitt requested OIG investigate "allegations [of] unauthorized interrogation techniques" used on Rahim al-Nashiri. But we know al-Nashiri's interrogations were taped.

So how in the hell was OIG claiming that the IG investigation was not "initiated in response to an allegation of wrongdoing," when the second paragraph of the report states that Pavitt asked OIG to launch the investigation because of an allegation of wrongdoing?

It sure sounds like a question ACLU might want to have OIG answer for Judge Hellerstein. But if I had to guess, I'd say the OIG was parsing wildly when it made this claim.

As the IG Report passage above makes clear, OIG set out to investigate two things: the abuse of al-Nashiri, and other abuses conducted (presumably) in Afghanistan. And I'm guessing they formulated their description of the investigation generally to shield these earlier

complaints. The IG's description of their investigation (included as Appendix A) seems to support that more general claim:

OIG tasked relevant components for **all information regarding the treatment and interrogation of all individuals** detained by or on behalf of CIA after 9/11. [my emphasis]

So in spite of the fact that the OIG says it was asked to investigate the al-Nashiri abuse and in response it launched this investigation, I'm guessing that the fact that they included all CIA interrogations in the scope of their review makes them think it's cool to now claim specific allegations had nothing to do with it.

And I suspect there's another layer of wild parsing going on here. Twice, the OIG claims that the "interrogations" and "activities depicted on the videotapes" were not the "specific subject" of their investigation and/or were not the subject of a "separate" investigation. As I pointed out in March, the inventory suggests the CIA used a different approach with taping al-Nashiri's torture sessions than they used with Abu Zubaydah. With Abu Zubaydah, they taped and kept everything (aside from the tapes that were blank or broken by the time OIG got them); with al-Nashiri, they appear to have just cycled two (or three) tapes, rewinding and taping over earlier sessions with each session.

In other words, the only al-Nashiri interrogations "depicted" on the torture tapes were of the last several, the ones that never got taped over.

So while the OIG did, in fact, initiate the investigation in response to allegations of abuse that were taped on those videotapes, those abusive interrogations probably were no longer depicted on the tapes by the time OIG reviewed the tapes in May 2003.

Frankly, I suspect there is still more parsing

going on. Given that OIG appears to have gotten Abu Zubaydah's psychological profile as early as January 31, 2003, I suspect that Abu Zubaydah was rather more central to the investigation than the IG Report itself lets on.

But for the purposes of this declaration, the OIG seems to be claiming that,

1. The torture tapes depict mostly Abu Zubaydah interrogations with just a few al-Nashiri interrogations
2. The investigation was not launched specifically in regards to the Abu Zubaydah (and few al-Nashiri) interrogation sessions depicted on the tapes
3. The investigation was launched in response to allegations of abuse of al-Nashiri that were no longer depicted on the tapes when the investigation was launched
4. But since the investigation was scoped much more broadly than focusing specifically on the abuses of al-Nashiri, even the fact that the abuse had been taped (but then taped over) doesn't mean that OIG should have revealed the existence of the torture tapes.

And using this logic, CIA is hoping to avoid being held in contempt.

There's one more thing, though.

CIA's OGC watched the video tapes in November and December 2002, before Pavitt asked OIG to investigate the abuse of al-Nashiri (one wonders if that's when 11-plus tapes mysteriously became blank and broken).

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. He reported that there was no deviation from the DoJ guidance or the written record.

It appears there was a formal report from this review—because Jello Jay requested it, twice, before they destroyed the torture tapes in 2005.

In May 2005, I wrote the CIA Inspector General requesting over a hundred documents referenced in or pertaining to his May 2004 report on the CIA's detention and interrogation activities. Included in my letter was a request for the CIA to provide to the Senate Intelligence Committee the CIA's Office of General Counsel report on the examination of the videotapes and whether they were in compliance with the August 2002 Department of Justice legal opinion concerning interrogation. The CIA refused to provide this and the other detention and interrogation documents to the committee as requested, despite a second written request to CIA Director Goss in September 2005.

So where is this report and why didn't CIA get that in a Vaughn Index?