

FOUND: THE OGC REVIEW. STILL MISSING: LEGAL PLAUSIBILITY.

The other day, I pointed to an OGC review of the torture tapes conducted in December 2002.

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?

Ask and you shall receive! (Well, sort of.) In a declaration introduced earlier this week, CIA's Wendy Hilton explains that Document 60 from the June 8 Vaughn Index is that review. (h/t MadDog) Here's how she describes that document.

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 Zubadaydah 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.

I bet Khalid Sheikh Mohammed is glad they "improved" their torture program in the interim 3 months, such that they upped the number of times you should waterboard in one month from 83 to 183...

Seriously, though. Note how the description of this document has subtly changed. The IG Report described the report this way.

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.

Whereas Wendy Hilton, trying hard to make sure that this didn't amount to an investigation—which would mean both this document and the videotapes would have been required to be revealed to ACLU in this FOIA litigation—describes it this way.

The CIA OGC also conducted a legal review of the interrogation of Abu Zubaydah to ensure compliance with the relevant legal and policy guidance.

I guess Hilton is hoping we read "ensuring compliance" narrowly. And note—it's pretty clear that the OIG disagreed with the OGC conclusion, since they said the waterboarding did deviate from the waterboarding as described in Bybee Two memo.

And then there's Hilton's claim that,

This analysis was done in anticipation of both criminal and civil litigation.

Criminal and civil litigation?!?!?! But that would be an investigation?!?!?!

And here's her out for that conclusion:

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.

Wow. Where to start??

I'll leave it to the lawyers to consider the legal wisdom of having someone like John Rizzo review these videos so as to write a report that would serve as a defense in case the torturers ever got charged (yeah—Mary, I'm looking at you).

But remember: some of these videos were broken or blank!!! A CIA lawyer reviewed tapes that were inoperative but which had, originally, included several instances of torture. And that CIA lawyer wrote up a report saying, "Nope! Nothing to see here!!!"

And those same tapes have since been destroyed. By the CIA itself.

Yeah, the CIA sure doesn't want us (or Jay Rockefeller) to see that document, alright.