

# BRIEFING CONGRESS AND DESTROYING TORTURE TAPES

As I mentioned in this post, I've been weeding through the documents released under FOIA to Judicial Watch last week. I think they suggest there's a much closer relationship between the CIA misrepresentations on Congressional Briefings and the destruction of the torture tapes than we've known before.

## Nancy Pelosi Was Proved Fucking Right

As you might recall, Judicial Watch pursued this FOIA because they thought they were going to catch Nancy Pelosi in a lie.

After the torture memos were released, the torture apologists tried to claim that Congress had been briefed on—and had approved—of torture. But Pelosi pointed out that when CIA briefed her in September 2002, they did not tell her and Goss that CIA had already gotten into the torture business. In spite of the fact that that was completely consistent with Porter Goss' tales of Congressional briefing, the press took Pelosi's story as an accusation that the CIA had lied. So the right wing transparency group Judicial Watch FOIAed the records of Congressional briefings, with a focus on proving that Pelosi had lied about having been briefed about the torture that had already happened.

Perhaps in response to this hullabaloo, the CIA's Inspector General started a review of Congressional—particularly Pelosi—briefings on June 2, 2009. After about six weeks of reviewing their documentation, they came to the following conclusion (starting on PDF 27):

- Pelosi was briefed on April 2002, before CIA started torturing Abu Zubaydah, and in September 2002, in the

briefing under discussion.

- CIA's own records regarding the September 4, 2002 briefing are so erroneous they show Jane Harman, not Pelosi, received the briefing.
- The only CIA record on the content of the September 4, 2002 briefing is the set of cables between Jose Rodriguez, (probably) Jonathan Fredman, and one other CTC person; this is the cable altered after the fact.
- People from the Directorate of Operations, and James Pavitt personally, repeatedly made claims about the content of the Pelosi briefing over the years, yet none of that sourced any first-hand knowledge or documentation.

That is, as is the case with CIA's other briefings on torture, they have no fucking clue what they briefed to Pelosi.

Which leaves Pelosi and Goss' consistent claim that CIA didn't even tell them they had already waterboarded Abu Zubaydah 83 times by the time they briefed them.

Creating the Illusion of Congressional Oversight

But the bigger news, as I pointed out earlier, is that the CIA appears to have been crafting a record of Congressional Briefing in conjunction with their efforts to destroy the torture tapes.

As my earlier post laid out, Jose Rodriguez briefed Pelosi and Goss on September 4, 2002. That was the the day before—according to an October 25, 2002 cable (see PDF 3)—folks at CIA HQ started talking in earnest about the danger of the torture tapes. The following day, the briefers altered their record of the meeting (see PDF 84 and PDF 11-12), though we don't know what the change entailed. No official Memorandum for the Record was ever made of the briefing and there is no record of Stan Moskowitz weighing in on the accuracy of CTC's version of the meeting (though he did receive a BCC of it). In other words, CTC made a record of the briefing at the same time as they were laying a plan to destroy the torture tapes, and CIA deviated from standard policy by not making any other record of the briefing (though not completing MFRs of torture briefings appears to have become a habit).

As a side note, I'm not certain, but I believe Jonathan Fredman is one of the other two people involved—along with Jose Rodriguez—in this. On PDF 7 of this set, the IG investigation into Pelosi's briefings describe the last set of documents in its possession as one that someone turned over to DNI leadership on March 23, 2009. On that date, Jonathan Fredman worked at DNI, making him a likely person to have been asked for his documentation on briefing Congress. The description notes that "he, Director (D)/CTC [Jose Rodriguez]" and someone else did the briefing. PDF 11 of the same set quotes from that email: "On 4 September, D/CTC, C/CTC/LGL, and [redacted] provided notification..." which I believe means Fredman—C/CTC/LGL—was the second of three people in the briefing. PDF 84 of this set shows the actual email. This notes that the third person at the briefing was a CTC/Reports person. If I'm right and Fredman had to turn over his documentation, the notice of the "BCC" to Stan Moskowitz would mean that he wrote the email (because otherwise the BCC wouldn't show up). A later description says someone—whom I believe to be Fredman, given the CTC/LGL return address—showed it to Rodriguez who determined it

to be "short and sweet." In other words, Fredman, one guy on the hook for translating (or mistranslating) DOJ's limits to the torturers in the field, may have been the guy helping Rodriguez to tweak that record of the briefing.

But the alteration of the email on the Pelosi-Goss briefing is not the only temporal tie between the destruction of the tapes and the claims about Congressional briefings. As the exchange of emails from PDF 77-81 makes clear, it took almost a month for the CIA to get around to finalizing a cable describing what happened when they briefed Bob Graham and Richard Shelby on September 27. In an email exchange dated October 24, there was some discussion about what should be included, with one email asking "Why not include the names—we did in the HPSCI cable." It appears that this person wanted Graham, Shelby, and their staffers named by name in the CIA's records (the draft of the cable at that point referred to them only by title, whereas later versions of the cable—see PDF 88—include Graham and Shelby's names, and presumably those of their staffers). This exchange—the effort to tailor the record of Congressional notification—took place the day before CIA HQ tried to authorize the taping over of videotapes each day (see PDF 3).

The pattern of discussion about Congressional briefing continued as CTC kept up its efforts to destroy the torture tapes. Just two days before a meeting with George Tenet about destroying the torture tapes held on January 10, 2003, someone from CTC/LGL (perhaps Jonathan Fredman) forwarded the altered version of the cable recording CTC's version of the Pelosi briefing; the invite to the meeting with Tenet (see PDF 36) directs CTC to put together a report detailing, among other things, CTC's "plan to ensure that both the Hill and NSC will support the decision." (See PDF 104-105) And that email was forwarded again by CTC/LGL on June 27, 2003, between the time CIA's Inspector General had interviewed John McPherson about the contents of the torture tapes on June 18 and when, on July

18, 2003, operatives in the Field asked for instructions to destroy media again (recall that CIA had told Jane Harman they would destroy the torture tapes after the Inspector General concluded its review).

In other words, CTC kept pointing back to that cable—the one they had altered—purportedly recording the September 4, 2002 briefing as they made repeated attempts to destroy the torture tapes.

#### Crazy Pete's Timely Briefing

Which brings us back to Crazy Pete Hoekstra's role in all of this. As you might recall, Crazy Pete is the guy who set off the witch hunt against Pelosi last year when—in response to widespread horror about the torture memos—he wrote a WSJ op-ed insisting that Congress was briefed on and had approved the torture.

It was not necessary to release details of the enhanced interrogation techniques, because members of Congress from both parties have been fully aware of them since the program began in 2002. We believed it was something that had to be done in the aftermath of the 9/11 terrorist attacks to keep our nation safe. After many long and contentious debates, Congress repeatedly approved and funded this program on a bipartisan basis in both Republican and Democratic Congresses.

[snip]

Members of Congress calling for an investigation of the enhanced interrogation program should remember that such an investigation can't be a selective review of information, or solely focus on the lawyers who wrote the memos, or the low-level employees who carried out this program. I have asked Mr. Blair to provide me with a list of the dates, locations and names of all members of Congress who attended

briefings on enhanced interrogation techniques.

Any investigation must include this information as part of a review of those in Congress and the Bush administration who reviewed and supported this program.

Presumably, when he made this and subsequent claims about who had been briefed, he at least had some basis for the assertion that Democrats and Republicans in Congress had been briefed and had approved of the torture going back to 2002. He wasn't at those early briefings. So where did his (mistaken) certainty come from?

That leads me to a somewhat related question. What went on at Crazy Pete's briefing—a briefing for Crazy Pete alone, without his counterpart Jane Harman, who had long expressed opposition to destroying the torture tapes, or his own staff—on the very day CIA destroyed the torture tapes?

That's right. As I have noted in the past, Crazy Pete Hoekstra (and Duncan Hunter, in a separate briefing) got a "complete brief" on the torture program on November 8, 2005, the day the torture tapes were destroyed.

An MFR lacking real detail (see PDF 32) at least reveals that Office of Congressional Affairs head Joe Wippl and C/CTC/LGL (who I believe would still be Jonathan Fredman) gave the briefing. A number of chronologies on Member Briefings included in this FOIA set note that no staffers attended these two briefings (see, for example, page 100 of this PDF), and those appear to be the only briefings for which CIA noted that no staffers attended. And note, minimal as the MFR on this is, it is one of just five or six briefings in the years before the torture tapes were destroyed for which CIA actually did do an MFR (one of the others is the briefing at which Pat Roberts okayed the destruction of the torture tapes).

In other words, this was one of the few torture

briefings CIA's Office of Congressional Affairs saw fit to memorialize. They don't say what was briefed, really, but they've got proof that two men from the CIA briefed Crazy Pete and just Crazy Pete on something related to the torture program the day CIA destroyed the torture tapes.

It's not definitive they were talking about the torture tapes, mind you; after all, the torture apologists were in full court press trying to prevent McCain's Detainee Treatment Act from taking away all the torture toys.

But one more thing suggests there may be a connection. On the evening of the same day Crazy Pete got this briefing, the same day CIA destroyed the torture tapes, someone sent an email with a list of *all* Congressional briefings related to the torture program (see page 90-92 of the second PDF). It says only, "Per your request please find attached List of Members who have been briefed and a couple of other categories." The list is interesting for two reasons. First, because the email forwarded a list with some key errors, in that it listed Harman, not Pelosi, as having been briefed at the first torture briefing in September 2002 (with a handwritten note, "error, it is Pelosi per 145166"). It also includes an error that remained in the CIA's own records until last year, showing Goss, not Crazy Pete, as the Chair in a meeting in March 2005 (it's unclear the meeting with Harman happened; what appears to have happened instead is an extra briefing with Dick Cheney for Pat Roberts and Jay Rockefeller).

More interestingly, the Crazy Pete and Hunter briefings—which had taken place that very day—were already in the Excel spreadsheet showing all the briefings. It's as if they briefed Crazy Pete and Hunter just so they could print this out as part of a CYA attempt to say that Congress had approved the torture tape destruction. And maybe Crazy Pete and Hunter did just that.

The Briefings and John Durham's Investigation

All of which leads me to wonder whether the false claims about CIA's briefing of Congress plays into the investigation of the torture tape destruction.

One thing that suggests there might be a connection between these Congressional briefing issues and the torture tape destruction is the release of documents—for the first time—points to Jose Rodriguez directly. In the same way the last major document dump appears to have been tied to John McPherson's testimony before the grand jury (and therefore seemed to be triggered by events in Durham's investigation), this one seems to be triggered, at least partly, from a willingness on the part of CIA or DOJ to release documents on Jose Rodriguez.

And they name Rodriguez directly, not just by title. I find that particularly odd, because his role in briefing Pelosi has been religiously guarded over the last year, even from reporters with great ties to CIA.

Then there's this other detail. The email and briefing list from November 8, 2005—recording Crazy Pete and Duncan Hunter's briefings—has a Bates stamp in a form that several of the last big torture FOIA documents did, reading 5/12/08 TCG 145226-145228. The Bates number is stamped roughly 12,000 numbers—and 11 days—after the "Timeline Regarding Destruction of Abu Zubaydah Videotapes" (see PDF 38-39). Mind you, I've just guessed that those TCG numbers are a Durham-related Bates, but the date shows an interest from someone in 2008. And it must be an interest in one original copy, since all show the correction regarding Pelosi's briefing (though, curiously, at least three copies of this very document appear in the FOIA set, suggesting it was circulated after the stamp was attached).

None of that is definitive, of course. But the picture of alterations and errors in Congressional briefing, along with the way in which some of those events coincided with others known events in the torture tape destruction, suggests there may be a connection.

---

# CIA CHANGED THE PELOSI BRIEFING DESCRIPTION AFTER DECIDING TO DESTROY TORTURE TAPES

I'm working on some deep weeds for a post later on Monday (hopefully).

But as a preliminary to them, I wanted to point out a minor—but very critical—bit of timing.

As I pointed out in the comments to this thread, someone (I'll show in my new weedy post why it might be then-Counterterrorism Center Legal Counsel Jonathan Fredman) changed the initial description of the briefing that Jose Rodriguez and two others (I believe Fredman was one of the two) gave to Porter Goss and Nancy Pelosi on September 4, 2002. To see the documents showing discussing the alteration (but not the content of it), see PDF 84 of this set and PDF 11-12 of this set.

That's suspicious enough. But as the email discussions of destroying the torture tape show (see PDF 3), the briefing and the alteration to the briefing record happened the day before and the day after—respectively—the day “HQ elements” started talking seriously about destroying the torture tapes.

On 05 September 2002, HQS elements discussed the disposition of the videotapes documenting interrogation sessions with ((Abu Zubaydah)) that are currently being stored at [redacted] with particular consideration to the matters described in Ref A Paras 2 and 3 and Ref B para 4. As reflected in Refs, the retention of these tapes, which is

not/not required by law, represents a serious security risk for [redacted] officers recorded on them, and for all [redacted] officers present and participating in [redacted] operations.

[snip]

Accordingly, the participants determined that the best alternative to eliminate those security and additional risks is to destroy these tapes [redacted]

So here's what this looks like in timeline form:

September 4, 2002: Jose Rodriguez, C/CTC/LGL (probably Fredman) and a CTC Records officer brief Porter Goss and Nancy Pelosi on Abu Zubaydah's treatment. According to both Goss and Pelosi, CIA briefs them on torture techniques, but implies they are hypothetical techniques that might be used in the future, not the past.

September 5, 2002: Unnamed people at CIA HQ discuss destroying the torture tapes, ostensibly because of danger to CIA officers conducting the torture.

September 6, 2002: Someone (possibly Jonathan Fredman or someone else in CTC's Legal department) alters the initial description of the Goss-Pelosi briefing, eliminating one sentence of it. "Short and sweet" Rodriguez responded to the proposed change.

September 9, 2002: CIA records show a scheduled briefing for Bob Graham and Richard Shelby to cover the same materials as briefed in the Goss-Pelosi briefing. The September 9 briefing never happened; Graham and Shelby were eventually briefed on September 27, 2002 (though not by Rodriguez personally).

September 10, 2002: The altered description of the briefing is sent

internally for CTC records. This briefing is never finalized by Office of Congressional Affairs head Stan Moskowitz into a formal Memorandum for the Record.

Or, to put it more plainly, they briefed Pelosi, decided they wanted to destroy the torture tapes (there's no record Pelosi was told about the tapes), and then tweaked the record about what they had said to Pelosi.

---

## WHY WERE THE TORTURE TAPES DESTROYED?

Bob Baer has a column out stating that he can't figure out why the torture tapes were destroyed—and repeating CIA spin claiming the torture depicted in the tapes should not, itself, be a legal problem, since it was approved by DOJ. (h/t cs)

Did the CIA want to destroy graphic evidence of sleep-deprivation or waterboarding? They were interrogation methods approved by the Department of Justice in memos sent to the CIA, and therefore shouldn't have been deemed a legal problem. The closest thing we come to answer is an internal CIA e-mail released last Thursday, in which an unidentified CIA officer writes that Rodriguez decided to destroy the tapes because they made the CIA "look horrible; it would be devastating to us."

[snip]

I haven't been able to clear up the

mystery either, beyond the fact that a former CIA officer aware of the details of the 2002 interrogation of the two al-Qaeda suspects told me that the tapes' images were "horrific." He believes that although the interrogations fell within the guidelines provided by the Department of Justice, if the public ever saw them, it would conclude that "enhanced interrogation" is just another name for torture.

Those of you who have been following along already know this, but I thought I ought to sum up what we do know—but what Baer's CIA sources aren't telling him.

First, Baer's source who "believes ... the interrogations fell within the guidelines provided by the Department of Justice" is wrong—at least so long as we're talking DOJ's written guidelines. As CIA's Inspector General made clear, the waterboarding that was depicted on the tapes in 2003 did not fall within the limits of the Bybee Two memo, both because the torturers used far more water, forced it down Abu Zubaydah's throat, and used it with far more repetition than allowed by the memo. Furthermore, the torturers exceeded even the guidelines the Counterterrorism Center set on sleep deprivation—though Yoo may (or may not have) have set the limit in the Bybee Two memo high enough to cover what had already been done to Abu Zubaydah. Folks in the IG's office had about seven more pages of concerns about what was depicted on the torture tapes (PDF 86-93)—but that all remains redacted.

So the tapes did not, in fact, match the written guidelines DOJ gave them. The torturers claim to have kept John Yoo and others up-to-date on their variances, but John Yoo's statements thus far challenge that claim.

And in any case, that only describes the evidence on the torture tapes as they existed in 2003 when the IG reviewed them and presumably in

2005 when CIA destroyed them.

The other, potentially bigger problem for those depicted in the torture tapes has to do with what once appeared on the 15 tapes that the torturers altered before November 30, 2002, when CIA lawyer John McPherson reviewed them. Before that point, the torturers had altered 21 hours of the torture tapes, which covered at least two of the harshest torture sessions. Had someone done forensics on the tapes before they were destroyed, we might have learned what happened during those 21 hours. But by destroying the tapes completely, the CIA prevented that from happening.

**I'm guessing—though it's only a guess—that was the point.**

None of that helps to explain Baer's other questions, such as whether Jose Rodriguez get approval from anyone senior to him before he ordered the tapes destroyed (though we do have further evidence that David Addington and Alberto Gonzales both opposed destroying the tapes)?

I am, however, interested in the question he ends his piece with: why was CIA—and not DOD—tasked with these interrogations?

But what's really too bad is that Durham hasn't been tasked with explaining the broader mystery of why, in the first place, the CIA is even interrogating prisoners of war. The 1947 National Security Act established the CIA as a civilian spy agency, not as some Pentagon backroom where you get to do things you don't want the American people to find out about. But more to the point, the military is much better equipped to interrogate prisoners. It has its own interrogation school at Fort Huachuca, not to mention hundreds of language-qualified and experienced interrogators. It also has the Uniform Code of Military Justice to deal with interrogations that have gone bad. (Some

almost inevitably do.) Unlike the CIA, military interrogators have immediate access to legal counsel. It's not an accident that military misdeeds such as those at Abu Ghraib go right to trial, while CIA investigations drag on for years – and drag down morale.

Because that may well have been the point, you know? And it may well have been why the torture tapes were destroyed.

The torturers appear to have been more interested in testing the limits of Abu Zubaydah's human endurance than they were in getting usable intelligence from him. And one of the things those tapes may well have shown was up to 21 hours of human experimentation—potentially pushing techniques like waterboarding and sleep deprivation beyond all limits, potentially using techniques like mock burial the torturers asked for but didn't get approved, and potentially using other techniques entirely.

---

## **CIA'S LAWYER DID NOT FIND ALTERATION OF TORTURE TAPES "NOTEWORTHY"**

As I noted in my last thread, the latest ACLU document dump is here. And this is, indeed, the set of documents John Durham was withholding for his investigation.

I've long been interested in the role of the earlier destruction of the torture tapes in Durham's investigation. As you recall, in December 2002, when the interrogators were getting antsy to destroy the torture tape, a CIA

Office of General Counsel lawyer, John McPherson, reviewed the torture tapes to make sure they matched the cables. He reportedly said the tapes matched the logbooks and the direction the interrogators received. But when CIA's Inspector General reviewed the tapes in May 2003, they discovered that 15 of the tapes were largely or completely blank and or damaged.

0IG found 11 interrogation tapes to be blank. Two others were blank except for one or two minutes of recording. Two others were broken and could not be reviewed. 0IG compared the videotapes to logs and cables and identified a 21-hour period of time" which included two waterboard sessions" that was not captured on the videotapes.

I've long wondered whether one of the reasons the CIA destroyed the torture tapes is because a review of the tapes would have revealed that the torturers altered the tapes to avoid capturing certain activities on video. The latest dump appears to confirm this happened before December 2002.

On January 9, 2003, McPherson did a report on his review of the tapes (PDF 24-28). Though it is heavily redacted, it appears that he reviewed the log book and the video, claimed to have watched every minute of the video, and declared that the video accurately reflected what had been recorded in the logbook.

Note, it is not clear from the unredacted materials whether he reviewed the guidance to the interrogators as to what they were supposed to be doing—even though that was purportedly one of the reasons he conducted the review.

It appears that PDF 33-37 is the interview report the Inspector General did with McPherson on June 17, 2003, after they had reviewed the torture tapes themselves in May 2003. This report appears to show McPherson admitting that he saw some of the tapes were partially blank,

or had snow on them.

[Redacted] for many of the tapes one 1/2 or 3/4 of the tape "there was nothing." [Redacted] on some tapes it was apparent that the VCR had been turned off and then turned back on right away. [Redacted] on other tapes the video quality was poor and on others the tape had been reused (taped over) or not recorded at all. [Redacted] The label on some tapes read "interrogation session," but when viewed there was just snow. [Redaction] did not make note of this in [redaction] report. [Redaction] estimated that "half a dozen" videotapes had been taped over or were "snowy."

Though he claims not to have noticed that two of the tapes were broken (though perhaps they were broken later). When asked why he had not reported the blank tapes in his report, McPherson said he didn't find that "noteworthy."

Furthermore, it appears to indicate that McPherson had not reviewed the guidelines given to the interrogators when he did his review.

When asked if it was consistent with guidance [redacted] would have to check guidance before answering.

In other words, his review did not do what it was purported to do. It did not review whether the interrogators were following guidelines.

After the initial December 2002 review, CIA gave clear instructions to the interrogators not to destroy or edit the tapes. However, it appears that the review—inasmuch as it didn't reveal glaring concerns with the tapes and didn't actually review whether the interrogators were following instructions—was largely a whitewash of the original tapes in an effort to green light their destruction.

---

# DURHAM GOING AFTER THE FIRST DESTRUCTION OF TORTURE TAPES?

Bmaz had a post up this yesterday, based on this WaPo story, concluding that we're not going to have real accountability for the destruction of the torture tapes. (Thanks to bmaz for minding the shop while I feted mr. ew's birthday.)

While I agree with bmaz generally that we're not going to get real accountability out of this investigation, I'm not sure I agree with bmaz's other conclusions. Here's why.

As bmaz noted, the big piece of news in this story is that Durham just did or is about to give immunity to John McPherson, who appears to be the CIA Office of General Counsel lawyer who reviewed the torture tapes in November to December 2002, purportedly to make sure the tapes matched the descriptions of allowable torture in the Bybee Two memo.

Assistant U.S. Attorney John H. Durham, who is leading the investigation, recently bestowed immunity from prosecution on a CIA lawyer who reviewed the tapes years before they were destroyed to determine whether they diverged from written records about the interrogations, two sources familiar with the case said. That could signal that the case is reaching its final stages. Durham has been spotted at Justice Department headquarters in Washington over the past few weeks, in another signal that his work is intensifying.

The agency lawyer, John McPherson, could appear before a grand jury later this month or in April, according to the

sources, who spoke on the condition of anonymity because the investigation continues. CIA lawyers have been essential to understanding the episode because they offered advice to agency personnel about handling the tapes, and whether they should have been included when agency records were turned over in other court cases. McPherson is not thought to be under criminal jeopardy but had previously hesitated to testify, the sources said.

As you recall, the CIA IG Report gave us two critical pieces of information about this review:

The CIA OGC lawyer (presumably, McPherson) reported that the tapes did match the descriptions of allowable torture in the Bybee Two memos.

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.

But the CIA OGC's own review of the torture tapes revealed that the waterboarding shown on the tapes did not match the descriptions of allowable waterboarding.

OIG's review of the videotapes revealed that the waterboard technique employed at was different from the technique as described in the DoJ opinion and used in the SERE training.

The implication, then, is that McPherson was not entirely truthful when he claimed the torturers had not exceeded the allowable limits when he did his review.

Which explains why his lawyer worked to get him immunity before he testified, and explained why Durham hasn't given it before now: this McPherson appears to have lied in his review of the torture tapes.

And there's one more detail of importance. As you recall, when the CIA IG reviewed the torture tapes in May 2003 (that is, five months after McPherson's review), there were 15 tapes in some state of damage or erasure.

OIG found 11 interrogation tapes to be blank. Two others were blank except for one or two minutes of recording. Two others were broken and could not be reviewed. OIG compared the videotapes to logs and cables and identified a 21-hour period of time" which included two waterboard sessions" that was not captured on the videotapes.

You see, John Durham is investigating two incidents of torture tape destruction: the first, when in 2002 or 2003 someone removed evidence of two sessions of waterboarding (and potentially, the use of mock burial that would be declared torture by John Yoo) from the videotapes. And the second one, on November 8, 2005, when someone destroyed all the tapes, which not only destroyed evidence of waterboarding that violated the terms of the Bybee Two memo, but also destroyed evidence of the first round of destruction.

And John McPherson is likely the only person who can pinpoint when the first round of destruction occurred, before or after November-December 2002.

Now, all that doesn't tell us precisely what Durham is after or whom, though I'd suggest he's at least as interested in the people in the loop of the first round of destruction as the second.

Which means it is almost certainly premature to suggest that Jose Rodriguez is in the clear here. The WaPo focuses on Rodriguez' role, as

head of the Directorate of Operations in 2005, in ordering the 92 tapes to be entirely destroyed. But my analysis here suggests his role in 2002-3, when he was head of CIA Counterterrorism Center, is just as important. And if, as WaPo suggests, someone working closely with Rodriguez lied to the grand jury, then chances are good that Rodriguez was involved in the activities involved in the subject of lying. (Remember that Rodriguez' lawyer, Robert Bennett, has consistently refused to let Rodriguez testify under oath, preferring instead to produce fictions about Rodriguez' role for the WaPo to obligingly print.)

I agree with bmaz in concluding that this inquiry is likely not to charge anything beyond obstruction or false statements. But if the target is Rodriguez, which I'd bet money to be the case, he's not directly responsible for the torture in any case.

---

## **TORTURE TAPES AND CIA RETIREMENTS**

The NYT originally broke the news of the torture tape destruction on December 6, 2007. And on October 25, 2007, the government informed Leonie Brinkema that they had found three unrelated tapes of interrogations that should have been disclosed during the Moussaoui trial. Those two events were the first we had confirmation of the scandal surrounding the CIA's taping—and subsequent destruction—of torture tapes.

Those events followed—distantly—the retirement of Jose Rodriguez, who we know was in charge of CTC when the torture tapes were made and was later in charge of Clandestine Services when the torture tapes were destroyed. Rodriguez's replacement was reported publicly on September 14 and he left on September 30.

The torture tape revelations also followed—distantly—the September 25 withdrawal of the nomination of John Rizzo to be CIA General Counsel, a function had he filled on an interim basis for some years. We know Rizzo was involved in the authorization of torture, though he claimed to be mysteriously out of the loop of 2005 discussions about whether or not to destroy the torture tapes.

Given the lapse of time between the Rodriguez retirement and the Rizzo withdrawal, it was unclear whether there was a connection.

And while it's still unclear whether there's a connection, it turns out the timing of CIA internal discussions about the torture tape destruction and Rodriguez' retirement and Rizzo's withdrawal is much closer than we knew.

The torture tapes FOIA reveals that the CIA was discussing the torture tape destruction on September 25 and October 5, 2007. It describes a Top Secret September 25, 2007 email "discussing the review and disposition of the tapes" and must have attached these earlier discussions (that's why they were included in this Vaughn Index). And it describes a Secret October 5, 2007 email which appears to link to the earlier email approving of the destruction of the tapes. John Durham has claimed a law enforcement exemption over the latter of these two emails, suggesting that release of that email would interfere with whatever investigation of the torture tape destruction he is doing.

Again, not that there's a connection, but CIA was linking to discussions that Rodriguez was involved in and Rizzo may have been involved in at precisely the time they effectively ended their CIA careers.

---

# THE CIA ASKED TO DESTROY TORTURE TAPES ON SAME DAY THEY CLAIMED THEY DIDN'T TORTURE

As William Ockham has noted, there is a new—very informative—Vaughn Index and Declaration out. I'll have much more to say about these. But for now, look at what documents 3 and 4 from the Vaughn Index tell us about the timing of the torture tape destruction.

November 1, 2005: Bill Frist briefed on torture.

November 1, 2005: Dana Priest reveals the use of black sites in Europe. In response, CIA starts moving detainees from the countries in question.

November 3, 2005: Leonie Brinkema inquires whether govt has video or audio tapes of interrogations. CIA IG Report on Manadel al-Janabi's death completed.

November 4, 2005: Member of Congress writes four page letter to CIA IG.

November 8, 2005: CIA requests permission to destroy torture tapes. CIA reaffirms March 2005 statement that all interrogation methods are lawful. Duncan Hunter briefed on torture. Pete Hoekstra briefed on torture.

November 9, 2005: CIA confirms destruction of torture tapes. Doug Jehl article on spring 2004 CIA IG report on interrogation methods appears.

November 14, 2005: Govt tells Brinkema it has no audio or video tapes.

That is, the CIA requested to destroy the

torture tapes in email on November 8, 2005. They confirmed the destruction on November 9. Not surprisingly, after Leonie Brinkema had asked about videotapes. But also right in the middle of debates about McCain's Detainee Treatment Act. And note that briefing for Crazy Pete Hoekstra—but not the other Dems in Intelligence Committee leadership—on the same day that CIA started asking to destroy the torture tapes.

---

## **SURPRISE! MORE SUPPRESSED TORTURE TAPES**

Would it surprise you to know that the government just admitted to another torture tape, this one of Mohammed al-Qahtani's treatment? The Obama Administration has continued the Bush Administration's attempts to stonewall on release of this material.

The government never disclosed the existence of these tapes as exculpatory information in Mr. al Qahtani's habeas case. CCR had filed a motion in February 2009 to compel the government to turn over exculpatory evidence in their client's case and to hold the government in contempt for its "flagrant violation" of a judge's November 2008 order to do so. Judge Thomas F. Hogan issued an order in November 2008 (amended in December 2008) requiring the government to turn over promptly any exculpatory evidence it had on the men detained at Guantánamo to their attorneys. The government filed what was essentially a second motion for an extension of time on January 30, 2009. Since the original filing in June 2008, the government has twice delayed its

compliance with the court's orders, engaging in what CCR attorneys described as "improper self-help by granting itself an indefinite extension of time."

Finally, CCR and co-counsel, Sandra Babcock, filed a motion for discovery in March 2009 seeking any video tapes of Mr. al Qahtani's interrogation and numerous other records. After seven months of discovery disputes, the court issued the publicly-filed order today.

The videotapes the government is required to produce will reveal the time period at the end of three months of intensive solitary confinement and isolation that immediately preceded the implementation of the "First Special Interrogation Plan," a regime of systematic torture techniques approved by former Secretary of Defense Donald Rumsfeld for use against Mr. al Qahtani. In a letter to his superiors reporting possible abuse of men in U.S. custody, T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, FBI described Mr. al Qahtani during this time as "evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reportedly hearing voices, crouching in a corner of the cell covered with a sheet for hours on end)."

Here's the order.

I'm wondering. Did Susan Crawford admit the government had tortured al-Qahtani because she knew these videotapes might come out?

---

# 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:

0IG 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?

---

# NYT NEGLECTS TO MENTION FOGGO AND THE TORTURE TAPES

There's a keystone to understanding the story from David Johnston (who frequently regurgitates highly motivated leaks) and Mark Mazzetti (CIA's guy at NYT) on Dusty Foggo's role in setting up the black sites run by the CIA: Foggo's testimony in the torture tape investigation. Early this year, remember, DOJ and CIA told the ACLU that they couldn't FOIA information pertaining to the disappearing torture tapes because John Durham's investigation of their destruction was ongoing and would be for perhaps two more months.

And then, just as Dusty Foggo was about to go to jail, John Durham said he needed to interview Foggo. And since then, as far as we know, Durham's investigation continues, now four months beyond when he thought he'd finish up. As recently as a month or so ago, Durham was flying people back from remote locations to appear before the grand jury. While we can't be sure, it does seem likely that Foggo's testimony provided new information that has sustained it.

And, thanks to Johnston and Mazzetti, we now know why Foggo would have something pertinent to say about the torture tapes—because he was the guy who set up the black sites.

In March 2003, two C.I.A. officials surprised Kyle D. Foggo, then the chief of the agency's main European supply base, with an unusual request. They wanted his help building secret prisons to hold some of the world's most threatening terrorists.

[snip]

"It was too sensitive to be handled by headquarters," he said in an interview. "I was proud to help my nation."

With that, Mr. Foggo went on to oversee construction of three detention centers, each built to house about a half-dozen detainees, according to former intelligence officials and others briefed on the matter.

[snip]

Early in the fight against Al Qaeda, agency officials relied heavily on American allies to help detain people suspected of terrorism in makeshift facilities in countries like Thailand. But by the time two C.I.A. officials met with Mr. Foggo in 2003, that arrangement was under threat, according to people briefed on the situation. In Thailand, for example, local officials were said to be growing uneasy about a black site outside Bangkok code-named Cat's Eye. (The agency would eventually change the code name for the Thai prison, fearing it would appear racially insensitive.) The C.I.A. wanted its own, more permanent detention centers.

So sometime after Abu Zubaydah and Rahim al-Nashiri were taped being tortured, after the taping was stopped, and almost precisely when Khalid Sheikh Mohammed was being waterboarded, "two CIA officials" (the detail is repeated twice in the story) came to Foggo and asked him to set up black sites around the world.

And, Foggo's helpfulness on this task appears to be one of the reasons why Foggo was promoted.

Mr. Foggo's success in Frankfurt, including his work on the prisons, won him a promotion back in Washington. In November 2004, he was named the C.I.A.'s executive director, in effect its day-to-day administrative chief.

Of note, Foggo was promoted at a time when Porter Goss was DCI and Jose Rodriguez (who was

head of counter-terrorism when Foggo took on the task of setting up the black sites and therefore a superb candidate to be one of the two people who asked him to do so) was Deputy Director of Operations.

And then, in 2005—the same year that Jose Rodriguez would have the torture tapes destroyed and Porter Goss would inexplicably fail to stop him from doing so—Foggo went to the black sites with John Rizzo and others.

In 2005, before he came under investigation, Mr. Foggo and other officials, including John Rizzo, the agency's top lawyer, paid a rare visit to some of the prison sites, assuring C.I.A. employees that their activities were legal, according to former intelligence officials.

John Rizzo, btw, was pressuring others at CIA to make sure that Foggo's mistress kept a job as a CIA lawyer she was not doing competently.

So let's see:

2002: Torture tapes made

2003: Foggo recruited to set up black sites

2004: Foggo promoted inexplicably after some politicized firings

2005: Foggo and Rizzo and others visit the black sites to calm the host countries

2005: Dana Priest does a story exposing the black sites and, within days, the torture tapes are destroyed

It's all beginning to make some sense now.

Oh, and one more thing. In an affidavit submitted in support of Foggo's sentencing that would otherwise serve no purpose in the severity of Foggo's sentencing, Porter Goss claimed he

didn't know that Foggo was an ethical and counterintelligence nightmare when he promoted him in 2004. But, Laura Rozen reported, that claim was an out and out lie.

A former US intelligence source thought that Brent "nine fingers" Bassett was the Goss staffer who recommended the hire of Foggo as ExDir.

He said that Goss lied in his testimony, that he was not aware about the problems with Foggo when he hired him for executive director. He said that a major fight had broken out between Goss staffer Patrick Murray and then associate deputy director of operations Michael Sulick about the Foggo hiring. "Murray told ADDO/Counterintelligence Mary Margaret that if Dusty's background got out to the press, they would know who to come looking for. Mary Margaret tried to warn them that Dusty Foggo had a problematic counterintelligence file. Sulick defended Mary Margaret. Goss told [deputy director of operations Steve] Kappes he had to fire Sulick." After that, Kappes and Sulick quit. "Goss bears major responsibility here," the former intelligence official says. It was finally the "White House that demanded that Goss fire Dusty and he refused." So they both got fired. [my emphasis]

Oh boy. Things are getting clearer and clearer.

So Goss—installed at CIA to be Cheney's mole—fired the people who were trying to prevent him from promoting Foggo. The next year, Foggo was traveling with other high level CIA people to calm the torture site hosts. That same year, the torture tapes were destroyed. Then the following year, Foggo became a problem in the Cunningham aftermath. And Foggo and Goss got fired as a result. And, at the one time Goss had an opportunity to make a statement about his

role in all this, he allegedly lied about knowing Foggo and all his problems (and, of course, all the skills that led people to ask him to set up the black sites in the first place).

Interesting. Very very interesting.