SOME TORTURE FACTS

At the request of some on Twitter, I'm bringing together a Twitter rant of some facts on torture here.

1) Contrary to popular belief, torture was not authorized primarily by the OLC memos John Yoo wrote. It was first authorized by the September 17, 2001 Memorandum of Notification (that is, a Presidential Finding) crafted by Cofer Black. See details on the structure and intent of that Finding here. While the Intelligence Committees were briefed on that Finding, even Gang of Four members were not told that the Finding authorized torture or that the torture had been authorized by that Finding until 2004.

2) That means torture was authorized by the same Finding that authorized drone killing, heavily subsidizing the intelligence services of countries like Jordan and Egypt, cooperating with Syria and Libya, and the training of Afghan special forces (the last detail is part of why David Passaro wanted the Finding for his defense against abuse charges — because he had been directly authorized to kill terror suspects by the President as part of his role in training Afghan special forces).

3) Torture started by proxy (though with Americans present) at least as early as February 2002 and first-hand by April 2002, months before the August 2002 memos. During this period, the torturers were operating with close White House involvement.

4) Something happened — probably Ali Soufan's concerns about seeing a coffin to be used with Abu Zubaydah — that led CIA to ask for more formal legal protection, which is why they got the OLC memos. CIA asked for, but never got approved, the mock burial that may have elicited their concern.

5) According to the OPR report, when CIA wrote up its own internal guidance, it did not rely on the August 1, 2002 techniques memo, but rather a

July 13, 2002 fax that John Yoo had written that was more vague, which also happened to be written on the day Michael Chertoff refused to give advance declination on torture prosecutions.

6) Even after CIA got the August 1, 2002 memo, they did not adhere to it. When they got into trouble — such as when they froze Gul Rahman to death after hosing him down — they went to John Yoo and had him freelance another document, the Legal Principles, which pretend-authorized these techniques. Jack Goldsmith would later deem those Principles not an OLC product.

7) During both the August 1, 2002 and May 2005 OLC memo writing processes, CIA lied to DOJ (or provided false documentation) about what they had done and when they had done it. This was done, in part, to authorize the things Yoo had pretend-authorized in the Legal Principles.

8) In late 2002, then SSCI Chair Bob Graham made initial efforts to conduct oversight over torture (asking, for example, to send a staffer to observe interrogations). CIA got Pat Roberts, who became Chair in 2003, to quash these efforts, though even he claims CIA lied about how he did so.

9) CIA also lied, for years, to Congress. Here are some details of the lies told before 2004. Even after CIA briefed Congress in 2006, they kept lying. Here is Michael Hayden lying to Congress in 2007

10) We do know that some people in the White House were not fully briefed (and probably provided misleading information, particularly as to what CIA got from torture). But we also know that CIA withheld and/or stole back documents implicating the White House. So while it is true that CIA lied to the White House, it is also true that SSCI will not present the full extent of White House (read, David Addington's) personal, sometimes daily, involvement in the torture.

11) The torturers are absolutely right to be

pissed that these documents were withheld, basically hanging them out to dry while protecting Bush, Cheney, and Addington (and people like Tim Flanigan).

12) Obama's role in covering up the Bush White House's role in torture has received far too little attention. But Obama's White House actually successfully intervened to reverse Judge Alvin Hellerstein's attempt to release to ACLU a short phrase making it clear torture was done pursuant to a Presidential Finding. So while Obama was happy to have CIA's role in torture exposed, he went to great lengths, both with that FOIA, with criminal discovery, and with the Torture Report, to hide how deeply implicated the Office of the President was in torture.

Bonus 13) John Brennan has admitted to using information from the torture program in declarations he wrote for the FISA Court. This means that information derived from torture was used to scare Colleen Kollar-Kotelly into approving the Internet dragnet in 2004.

TORTURE IS NOT A CHRISTMAS TREE AND JOHN BRENNAN IS NOT A JESUIT POPE

I would have thought by this point journalists would cease comparing John Brennan with Jesuits, unless it's a coded reference to the corrupt spookish reputation the sect had in past centuries.

> Such a Jesuitical response will do absolutely nothing to satisfy critics of the program or its supporters—some of whom still go work at Langley every

> day.

And I find it downright disgusting for a *journalist* to use an extended Christmas present metaphor to discuss basic transparency in a democracy, as if democracy were just a gleeful romp on Santa's lap.

> There may have been bourbon punch and festive lights at the CIA's holiday party Friday night, but a frosty gloom hung in the air. As everyone in the agency's Langley, Va., headquarters knew, the long-awaited "torture report" from the Senate Intelligence Committee's Democrats was set to drop early the next week, perhaps as soon as Monday morning. It seemed a rather awkward time for a party.
>
> [snip]
>
> For pro-release activists, the dissemination of the report would be a holiday present, years in the making.
>
> [snip]
>
> As of Friday, just how the final publication would play out remained a mystery, like so many Christmas presents under the tree.
>
> [snip]
>
> So as CIA brass passed the punch and mini-pecan pies Friday evening, they wondered: would next week would bring sugarplum fairies, or lumps of coal?

Since when are journalists not among those who want official reports to be released?

Like it or not we will learn what primary sources from the CIA document they did over a 5 year period.

Which means no credible journalist should parrot this claim …

> Chief among the agency's complaints will be that Senate investigators failed to interview anyone who worked on the program, leaving them to base their findings solely on classified documents that, officials argue, couldn't be fully understood without some elaboration and context.

… without noting the implication of it: that the primary thing the CIA does, which is generate cables and reports, is so flawed that literally millions of cables are inaccurate or so misleadingly written they don't present a fair record of what we paid the CIA to do.

Seriously: if you have multiple sources you consider credible repeating this claim, your job should immediately be to chase down how it is that so much of the CIA's work is fraudulent, which would be a truly epic scandal. But no one is doing that, somehow, which suggests even those who are pitching the story know that their own emails and other documents show that they conspired to (among other things) lie to Congress.

That is what the record — even that which is already public — clearly shows. If the CIA did not, along the way, cover its ass sufficiently to make it clear that David Addington was cheering the torture at every step, welp, I hope they develop better self-preservation skills in the future (though it's quite clear the CIA only documented those aspects of congressional briefings that helped their case, and suppressed or altered those that did not, so it's not likely they weren't involved in any CYA).

Finally, the main jist of the complaint Harris documents here is that Brennan made a deal with the White House: to protect that office (by protecting the aforementioned David Addington) in exchange for protecting the CIA officers who got promoted for being good torturers. Brennan succeeded in delivering some version of that deal, though it's unclear just how far he went.

If that's the case, the CIA officers have already gotten what they signed up for: continued career advancement for remaining silent about who instigated the torture, even as critics of torture were ousted from the agency and even, in John Kiriakou's case, prosecuted. That was the deal, and they fared better than the critics did.

If they sold their soul too cheaply, perhaps they won't sell it so cheaply in the future. That's the entire point of this report, no?

MY YEARLY DECEMBER POST ON JOHN BRENNAN ROLLING DIFI ON TORTURE REPORT

Approximately 358 days ago, I wrote a post titled,

> ***Yup, John Brennan Rolled DiFi on the Torture Report***

In it, I predicted,

> Since I was right about John Brennan being completely untrustworthy about bringing an open mind to the evidence presented in the Torture Report, let me

> make another prediction based on this detail.
>
> > Committee aides said the panel hoped to finish work on an updated version of the report, taking note of CIA comments, by the end of the year. The committee could then vote to request declassification, which would allow the public to see the report, or at least parts of it.
>
> What's going to happen is the SSCI will water down the report, ignoring the clear implications of the evidence, in hopes of getting support for declassification. The Republicans on the committee, at least, still won't vote to declassify it. Some section of the watered-down report will be released. And the historical record on torture will not reflect the clear evidence in the documentary record.
>
> Dianne Feinstein could, of course, move to declassify the report in its current state.
>
> But she won't do that, and John Brennan knows it. You see, he knows DiFi wants to be loved by the spooks she oversees, and they could care less what she thinks of them, so long as they continue to hide the true nature of their organizations. And her desire to be loved by those she oversees makes her an easy mark.

When that post said, "by the end of the year"? That meant last year. 2013.

Didn't happen.

Meanwhile, in recent days, we've learned that Brennan prevailed on one of the key fights

between CIA and SSCI, succeeding in having the pseudonyms of pseudonyms redacted so we can't track all the things Alfreda Bikowsky did, beyond the torture tourism we know she engaged in and the torture she subjected an innocent Khalid el-Masri to, before she got several more promotions at CIA.

And while I think today's report, confirming that "Yup, John Brennan Rolled DiFi on the Torture Report," adds another dynamic — that of CIA and the President and State publicly making clear that Dianne Feinstein will bear responsibility for any backlash over the revelations in the Torture Report, I think Brennan is still doing a victory lap.

> Secretary of State John Kerry personally phoned Dianne Feinstein, chairman of the Senate Select Committee on Intelligence, Friday morning to ask her to delay the imminent release of her committee's report on CIA torture and rendition during the George W. Bush administration, according to administration and Congressional officials.
>
> [snip]
>
> "What he raised was timing of report release, because a lot is going on in the world — including parts of the world particularly implicated — and wanting to make sure foreign policy implications were being appropriately factored into timing," an administration official told me. "He had a responsibility to do so because this isn't just an intel issue — it's a foreign policy issue."

"That's a nice Torture Report you've got there, Dianne," these men seem to be saying, "and we'll happily take credit for your work. Unless something bad happens in which case expect us to throw you to the wolves."

CIA (and NSA) always get Congress to back off

oversight with threats like this — kudos to Senator Feinstein for remaining committed to releasing the report.

It's just really really frustrating that we are here, a year later, with the men in charge still levying these kinds of threats. If the torture CIA did will cause blowback, then that's CIA's fault, George Bush's fault. Dick Cheney's fault.

UN LISTS FOUR WAYS US HAS IMPEDED JUSTICE FOR VICTIMS OF TORTURE

The UN just released its report on US compliance with the Convention Against Torture. It is scathing, in may respects (including with respect to cops shooting black men).

In addition, it includes four different criticisms about our failure to provide justice for torture.

It criticizes the Durham investigation, especially the failure to interview torture victims.

> The Committee expresses concern over the ongoing failure to fully investigate allegations of torture and ill-treatment of suspects held in U.S. custody abroad, evidenced by the limited number of criminal prosecutions and convictions. In this respect, the Committee notes that during the period under review, the Department of Justice (DoJ) successfully prosecuted two instances of extrajudicial killings of detainees by Department of Defense and CIA contractors in Afghanistan. It also

> notes the additional information provided by the State party's delegation regarding the criminal investigation undertaken by Assistant U.S. Attorney John Durham into allegations of detainee mistreatment while in U.S. custody at overseas locations. The Committee regrets, however, that the delegation was not in a position to describe the investigative methods employed by Mr. Durham or the identities of any witnesses his team may have interviewed. Thus, the Committee remains concerned about information before it that some former CIA detainees, who had been held in U.S. custody abroad, were never interviewed during the investigations, casting doubts as to whether this high-profile inquiry was properly conducted. The Committee also notes that the DoJ announced on 30 June 2011 the opening of a full investigation into the deaths of two individuals while in U.S. custody at overseas locations. However, Mr. Durham's review concluded that the admissible evidence would not be sufficient to obtain and sustain convictions beyond a reasonable doubt. The Committee shares the concerns expressed at the time by the UN Special Rapporteur on Torture over the decision not to prosecute and punish the alleged authors of these deaths. It further expresses concern about the absence of criminal prosecutions for the alleged destruction of torture evidence by CIA personnel, such as the destruction of the 92 videotapes of interrogations of Abu Zubaydah and 'Abd al-Nashiri that triggered Mr. Durham's initial mandate. The Committee notes that in November 2011 the DoJ determined, based on the Mr. Durham's review, not to initiate prosecutions of those cases (arts. 2, 12, 13 and 16).

It expresses regret that DOD hasn't provided enough information to know whether that agency's investigations are adequate.

> The information provided by the State party's delegation indicates that the U.S. Department of Defense (DoD) has conducted "thousands of investigations since 2001 and prosecuted or disciplined hundreds of service members for mistreatment of detainees and other misconduct". However, the Committee regrets that in the course of the dialogue, the delegation provided minimal statistics on the number of investigations, prosecutions, disciplinary proceedings and corresponding reparations. It has also received insufficient information about the sentences and criminal or disciplinary sanctions imposed on offenders, or on whether the alleged perpetrators of these acts were suspended or expelled from the U.S. military pending the outcome of the investigation of the abuses. In the absence of this information, the Committee finds itself unable to assess whether the State party's actions are in conformity with the provisions of article 12 of the Convention (arts. 2, 12, 13, 14 and 16).

And it express serious concern over the way secret in military commissions is preventing any justice for torture.

> The Committee expresses its serious concern at the use of State secrecy provisions and immunities to evade liability. While noting the delegation's statement that the State party abides by its obligations under article 15 of the Convention in the administrative procedures established to review the status of law of war detainees in Guantanamo, the Committee is

> particularly disturbed at reports describing a draconian system of secrecy surrounding high-value detainees that keeps their torture claims out of the public domain. Furthermore, the regime applied to these detainees prevents access to an effective remedy and reparations, and hinders investigations into human rights violations by other States (arts. 9, 12, 13, 14 and 16).

It also complains that no one has been held accountable for the Chicago Police Department's torture under Jon Burge.

> With regard to the acts of torture committed by CPD Commander Jon Burge and others under his command between 1972 and 1991, the Committee notes the information provided by the State party that a federal rights investigation did not develop sufficient evidence to prove beyond a reasonable doubt that prosecutable constitutional violations occurred, However, it remains concerned that, despite the fact that Jon Burge was convicted for perjury and obstruction of justice, no Chicago police officer has been convicted for these acts of torture for reasons including the statute of limitations expiring. While noting that several victims were ultimately exonerated of the underlying crimes, the vast majority of those tortured –most of them African Americans–, have received no compensation for the extensive injuries suffered (arts. 11, 12, 13, 14 and 16).

Funny. Since last Monday, President Obama and Eric Holder keep talking about the rule of law. The UN doesn't think we abide by it, at least not as it pertains to torture.

UNCAT PROCESS EXPOSES FLAW IN US TORTURE COVERUP: DOJ NOT FINAL AUTHORITY

A combination of factors is forcing the issue of US torture back into the international spotlight and there are even hints that progress on some fronts is occurring. Consider, for instance, James Risen's report this morning that the American Pyschological Association, greatly embarrassed by the revelations in Risen's just-published book, has re-opened an investigation into the role the association played in giving cover to pyschologists who lent their credentials to the torture program in an effort to pronounce it medically ethical. We also have gotten the first official hint from Mark Udall himself that he has not ruled out using the Senate's speech and debate clause to enter the Senate Intelligence Committtee's report on torture into the record (the way that Mike Gravel disclosed the Pentagon Papers), bypassing the two year old debate about redactions.

We should pay special attention, though, to word filtering out of Geneva as the United Nations Committee Against Torture reviews the report submitted by the US. As a signatory to the Convention Against Torture, the US is required to make periodic reports to the committee. The process, however, is exceedingly slow. The current report from the US (pdf) is finally getting around to answering questions submitted to the US in 2006 and 2010. A New York Times story from Charlie Savage shows that the committee has been paying close attention both to what the US is saying and to what the US is doing. Consider this blockbuster:

> Alessio Bruni of Italy, a member of the

> United Nations committee, pressed the delegation to explain Appendix M of the manual, which contains special procedures for separating captives in order to prevent them from communicating. The appendix says that prisoners shall receive at least four hours of sleep a day — an amount Mr. Bruni said would be sleep deprivation over prolonged periods and unrelated to preventing communication.
>
> Brig. Gen. Richard C. Gross, the top legal adviser to the Joint Chiefs of Staff, said that reading the appendix as intended to permit sleep deprivation was a misinterpretation. Four hours is "a minimum standard; it's not the maximum they can get," he said, adding that the rule had to be read in the context of the rest of the manual, including a requirement for medical and legal monitoring of treatment "to ensure it is humane, legal and so forth."
>
> Mr. Bruni was not persuaded. He said that calling the provision a minimum standard still meant four hours a night for long periods was "permissible." He suggested that Appendix M "be simply deleted."

This exchange counts as a huge victory for the community of activists who have fought hard to abolish all forms of torture by the US. When it comes to the Appendix M battle, though, perhaps nobody has been more determined to expose the torture still embedded in Appendix M practices than Jeff Kaye, and he is to be congratulated for the support he provided in getting this question to the forefront.

The most important part of the proceedings, though, pertains to the questions about US investigation of torture since it now openly admits torture took place. Returning to Savage's report:

> A provision of the treaty, the Convention Against Torture, requires parties to investigate and provide accountability for past instances of torture. The American delegation said that the United States had investigated the C.I.A. program, and that the coming publication of a Senate Intelligence Committee report would add to the public record.
>
> /snip/
>
> The American officials pointed to a criminal investigation by John H. Durham, an assistant United States attorney in Connecticut, whom Michael B. Mukasey, then attorney general, appointed in 2008 to look at whether the C.I.A. had broken the law by destroying videotapes of its interrogations of Qaeda suspects.
>
> In 2009, Attorney General Eric H. Holder Jr. expanded Mr. Durham's mandate to look at C.I.A. torture that went beyond what the Justice Department had said was legal. Mr. Durham eventually closed the investigation without indicting anyone.
>
> Another member of the United Nations panel, Jens Modvig of Denmark, pressed for details. He asked if Mr. Durham's team had interviewed any current or former detainees.

It is clear from Modvig's question that he feels the US investigation fell short of what is required. To get a good feel for that, we can look to this terrific "shadow report" (pdf) to the UNCAT prepared by "Advocates for US Torture Prosecutions" at Harvard Law School.

The report does an excellent job of framing the questions at hand, beginning with the observation that "The U.S. Government's criminal program of torture was authorized at the highest levels" (fitting nicely with Marcy's post

earlier today about it being authorized by the President). But when we get to inadequacy of Durham's investigation, we see this (footnotes removed):

> The United States seems not to have criminally investigated senior officials for involvement in torture and ill-treatment of detainees. The United States' Periodic Report was either vague or referred to investigations that, based on statements made by the government, would seem to exclude those in command. In particular, the investigation called by Attorney General Eric Holder in August 2009 and led by prosecutor John Durham, seemed to have an excessively limited mandate. According to Holder, Durham investigated only "possible CIA involvement" and focused primarily on CIA interrogators, and whether they used "unauthorized interrogation techniques." In 2009, the Attorney General said that officials who "*acted reasonably* and *relied in good faith on authoritative legal advice*" (emphasis added) from the Justice Department, and conformed their conduct to that advice, would not face federal prosecutions for that conduct. For reasons that are unclear, the Attorney General's stated rationales for declining to prosecute have been a moving target. By 2011, the Attorney General's view of what merited prosecution had narrowed even further. He began to refer to his prior statements regarding the OLC's legal memos as promises of protection to those who "*acted in good faith* ***and*** *within the scope of the legal guidance given by the Office of Legal Counsel*" (emphasis added). In dropping the references to reliance and reasonableness, Holder may have been suggesting that any behavior falling within the OLC's outlier definition of legality (whether done

> with knowledge of this legal guidance or not) would be protected, irrespective of whether an individual relied upon, reasonably believed in, or even knew of or had access to the contents of the memos.

But the shadow knows. It knows that the sophistry engaged in by Holder and the Obama administration is in direct violation of the CAT. After noting that "Reliance on severely flawed legal advice cannot be invoked as a defense to torture", the report goes on to describe how the prohibition against torture is absolute:

> The United States' shielding of senior military and civilian officials who authorized, acquiesced or consented to torture violates the principle of non-derogability as understood in the Committee's General Comment No. 258 and places the United States in continued breach of its obligations under the Convention. The Convention provides that neither exceptional circumstances nor an order from a superior officer may be invoked as a justification of torture. In elaborating on the absolute character of the prohibition in its General Comment, the Committee described it as "essential that the responsibility of any superior officials … be fully investigated through competent, independent and impartial prosecutorial and judicial authorities."

The process will be long. It will be slow. But make no mistake that in questioning just how the US carried out its investigation into the torture it readily admits took place, the committee is on a path that will lead it directly to a finding much like that in the paragraph above from the shadow report. Holder and Obama cannot simply brush the events under the rug and claim they were investigated. Under

the CAT, those responsible for torture must be held to account.

The process will get even longer and slower should the committee eventually come to the conclusion that the US has fallen short of its requirement to hold those responsible accountable, because the committee then would ask the UN Security Council to refer the issue to the International Criminal Court. Of course the US would not allow the referral to happen, but the mere activation of that pathway would stand as a ringing rebuke to the utter failure by the US to live up to the standards of a treaty to which it is a party. And there will forever be the threat that someday, somehow, the balance of power could shift and those who authorized these heinous acts will find themselves standing before a judge.

BIZARRE DEPLOYMENT OF MCDONOUGH TORTURE ROLE IN ARTICLE BITCHING ABOUT OBAMA NON-PANIC

The NYT has a long story claiming to show that Obama is “lurching from crisis to crisis” but

ultimately providing evidence to support this observation, which appears at the very end of the story.

> Yet he remains deliberative, methodical and not swayed by outside criticism of his style.

It seems DC has decided it is a Big Story that Obama doesn't show senseless panic, like the inept members of Congress do.

What the story also shows is that Obama — like all Presidents going back to Reagan — relies too much on his National Security Council and not enough on his agencies. There's a hint of an argument that that is what leads to Obama's apparent lack of strategy (which as I said earlier this week, may be an appearance or may be real, I'm not sure anyone knows).

And to support that, the story includes this incident (which is by far the most interesting part of the article aside from where it says Chuck Hagel doesn't speak up often in larger meetings for fear it will leak to the press, as his explanation for not speaking up got leaked to the press).

> Over the Columbus Day weekend, the White House chief of staff, Denis R. McDonough, traveled to the San Francisco home of Senator Dianne Feinstein, the chairwoman of the Senate Intelligence Committee, to negotiate personally over redactions in a Senate report on the C.I.A.'s detention and interrogation policies after the Sept. 11 terrorist attacks.
>
> That Mr. McDonough would get involved in such an arcane matter puzzles some legislative aides on Capitol Hill, given the other demands on his time.
>
> [snip]
>
> Some liberals have been deeply disappointed with Mr. Obama's slowness

> in embracing the Senate report, and have questioned Mr. McDonough's involvement in redacting it, noting his close ties to the C.I.A. director, John O. Brennan, with whom he served as a deputy national security adviser during the president's first term. Mr. McDonough said he traveled to Mrs. Feinstein's home because he views the role of Congress in foreign policy as sacrosanct.
>
> "This is an important case study of the role of Congress in foreign policy," he said, "and I want to get it right."

Forgive me if you spat up your drink, reading about McDonough's deep respect for Congress' "sacrosanct" role in foreign policy. What a load of baloney!

But of course McDonough needed to provide an alternate explanation for the real one — the one that explains why McDonough's investment in the torture report is no surprise.

President Obama's White House has been heavily involved in the torture declassification process for years, since when National Security Advisor James Jones intervened to keep a short phrase secret making it clear torture was authorized by a Presidential finding, not by OLC memos. This is more of the same (and probably arises out of precisely the same instincts). That's not in the least news, even if the NYT hasn't acknowledged what is going on.

The headline for this story should be, "BREAKING White House intervening to protect torture." Instead, the NYT has taken a No Drama Obama story and turned into a demand for MOAR PANIC.

CONNECTING THE DOTS ON THE CIA TORTURE REPORT

I want to pull several details of the HuffPo's last two pieces on the CIA torture report together (kudos to HuffPo for stealing Ali Watkins from McClatchy).

Tuesday's story presents conflicting claims about whether the CIA impersonated SSCI staffers to access the part of the server dedicated to their work.

One side — explicitly relying on the CIA Inspector General's own report — say the CIA impersonated staffers, and possibly worse.

> According to sources familiar with the CIA inspector general report that details the alleged abuses by agency officials, CIA agents impersonated Senate staffers in order to gain access to Senate communications and drafts of the Intelligence Committee investigation. These sources requested anonymity because the details of the agency's inspector general report remain classified.
>
> "If people knew the details of what they actually did to hack into the Senate computers to go search for the torture document, jaws would drop. It's straight out of a movie," said one Senate source familiar with the document.

The quote from the other side issued a non-denial denial (though perhaps there was a more direct denial not quoted): CIA did not use Administrator access (which is not what the other source claimed).

> A person familiar with the events surrounding the dispute between the CIA and Intelligence Committee said the

> suggestion that the agency posed as staff to access drafts of the study is untrue.
>
> "CIA simply attempted to determine if its side of the firewall could have been accessed through the Google search tool. CIA did not use administrator access to examine [Intelligence Committee] work product," the source said.

Now consider today's story, which describes the inconclusive result of the Senate Sergeant-at-Arms report. Here, the dispute is portrayed as a disagreement over whether the CIA has the original access logs, or only copies of them.

> Computer records may have provided evidence on how the CIA document made its way into the Intelligence Committee's hands. Those records, Senate sources said, were erased by the CIA.
>
> The claim is technically true. The computer audit logs that recorded activity on the CIA computers used for the committee's report were overridden from the machines' local drives at regular intervals throughout the five-year study, HuffPost has learned. The records, however, continued to be stored elsewhere, and were provided to the Sergeant-at-Arms office for its inquiry. The CIA said that the Senate office received the computer audit records earlier this year.
>
> "CIA cooperated fully with the Senate Sergeant-at-Arms review and provided all the relevant information that the [Sergeant-at-Arms] requested," said CIA spokesman Dean Boyd. "In fact, audit data was specifically provided to the [Sergeant-at-Arms] in July 2014. Furthermore, CIA continues to maintain copies of this audit data to this day. Claims alleging otherwise are patently

> false.”
>
> [snip]
>
> A source familiar with the Senate inquiry has since said that the CIA submitted copies of records to the Sergeant-at-Arms, rather than the records themselves, which the investigators considered unreliable.
>
> The Sergeant-at-Arms “can’t verify any of what CIA is saying,” said the source, who was briefed on the investigation.

In other words, the Sergeant-at-Arms got records that they can’t actually use to verify what happened on the servers. They would have gotten those logs after this issue had already blown up.

I’m reminded of the White House emails, where the content of the emails appears to have been doctored right as Patrick Fitzgerald was subpoenaing specific accounts.

If the CIA had doctored the access logs they stored, they would have been able to eliminate any trace of CIA using SSCI credentials to access the server.

So where does the claim that CIA impersonated the SSCI staffers come from? And what as the inaccurate information based on which the CIA IG referred Senate staffers for investigation?

> The CIA had asked the Department of Justice to pursue criminal charges against the Senate staff for removing the document, which the Justice Department declined in June to investigate. The CIA’s inspector general has since determined that the criminal referral was based on “inaccurate information.” The inspector general also publicly accused CIA staff of misleading the offices’ investigators during its inquiry.

That doesn't necessarily mean that the Inspector General was working with dodgy access logs. CIA has any number of ways to lie — it's what we pay them to do. By 2010, after all, the CIA had already altered or destroyed all this evidence of their torture:

> Since there are so many incidences of destroyed or disappearing torture evidence, I thought it time to start cataloging them, to keep them all straight.
>
> - *Before May 2003: 15 of 92 torture tapes erased or damaged*
> - *Early 2003: Gitmo commander Mike Dunlavey's paper trail documenting the torture discussions surrounding Mohammed al-Qahtani "lost"*
> - *Before August 2004: John Yoo and Patrick Philbin's torture memo emails deleted*
> - *June 2005: most copies of* ***Philip Zelikow's dissent*** *to the May 2005 CAT memo destroyed*
> - *November 8-9, 2005: 92 torture tapes destroyed*
> - *July 2007 (probably): 10 documents from OLC SCIF disappear*
> - *December 19, 2007: Fire breaks out in Cheney's office*

> (I put in the Cheney fire because it happened right after DOJ started investigating the torture tape destruction.)

Add to that the 920 documents (potentially pertaining to White House involvement) stolen back from the server after they had originally been made available.

> After a series of meetings, I learned that on two occasions, CIA personnel electronically removed committee access to CIA documents after providing them to the committee. This included roughly 870 documents or pages of documents that were removed in February 2010, and secondly roughly another 50 were removed in mid-May 2010.

Again, we don't know that the CIA altered the access logs.

But if they didn't, it would almost constitute an exception to their rule of destroying evidence.

Update: As a reminder, here were the conclusions in the CIA IG Report summary that was publicly released.

> Agency Access to Files on the SSCI RDINet: Five Agency employees, two attorneys and three information technology (IT) staff members, improperly accessed or caused access to the SSCI Majority staff shared drives on the RDINet.
>
> Agency Crimes Report on Alleged Misconduct by SSCI Staff: The Agency filed a crimes report with the DOJ, as required by Executive Order 12333 and the 1995 Crimes Reporting Memorandum between the DOJ and the Intelligence Community, reporting that SSCI staff members may have improperly accessed

> Agency information on the RDINet. However, the factual basis for the referral was not supported, as the author of the referral had been provided inaccurate information on which the letter was based. After review, the DOJ declined to open a criminal investigation of the matter alleged in the crimes report.
>
> Office of Security Review of SSCI Staff Activity: Subsequent to directive by the D/CIA to halt the Agency review of SSCI staff access to the RDINet, and unaware of the D/CIA's direction, the Office of Security conducted a limited investigation of SSCI activities on the RDINet. That effort included a keyword search of all and a review of some of the emails of SSCI Majority staff members on the RDINet system.
>
> Lack of Candor: The three IT staff members demonstrated a lack of candor about their activities during interviews by the OIG.

Update: Katherine Hawkins reminds me that Manadel al-Jamadi's blood-stained hood disappeared.

THE OBAMA ADMINISTRATION DEBATE ON THE CONVENTION AGAINST TORTURE AND ANAS AL-

LIBI

For some reason, the NYT decided to bury this article from Charlie Savage on page A21. It explains that the Obama Administration is debating internally whether to overturn Obama's ban against cruelty (which is also mandated by the Detainee Treatment Act). Some intelligence lawyers, apparently, believe Obama's torture ban and the DTA are too limiting.

> It is considering reaffirming the Bush administration's position that the treaty imposes no legal obligation on the United States to bar cruelty outside its borders, according to officials who discussed the deliberations on the condition of anonymity.
>
> [snip]
>
> State Department lawyers are said to be pushing to officially abandon the Bush-era interpretation. Doing so would require no policy changes, since Mr. Obama issued an executive order in 2009 that forbade cruel interrogations anywhere and made it harder for a future administration to return to torture.
>
> But military and intelligence lawyers are said to oppose accepting that the treaty imposes legal obligations on the United States' actions abroad. They say they need more time to study whether it would have operational impacts. They have also raised concerns that current or future wartime detainees abroad might invoke the treaty to sue American officials with claims of torture, although courts have repeatedly thrown out lawsuits brought by detainees held as terrorism suspects.

There were remarkable amounts of denial in response to this, from people who seem totally

unaware of the kind of practices — that appear to include isolation, sleep deprivation, food manipulation, and other forms of coercion — currently used by High Value Interrogation Group (HIG), the inter-Agency group used to interrogate terrorist suspects. And this post from David Luban, which lays out some of the loopholes the government might be using to engage in abuse, misses a few.

We know, for example, that there are 2 OLC opinions that say Presidents don't have to change the text of Executive Orders they choose to ignore, meaning Obama could ignore his torture ban "legally." There's also the Appendix M OLC opinion that has approved whatever DOD wants to sneak into the sometimes classified appendix in advance.

All of these issues have been invoked in the case of Anas al-Libi, who recently testified in his challenge to the use of the statements he made to FBI's Clean Team in his trial, invoking the anxiety produced by the "CIA" interrogation al-Libi experienced on the USS San Antonio. (The interrogation was conducted by the HIG; note that while al-Libi has retained counsel, Bernard Kleinman, I believe he also still has public defenders, including Sabrina Shroff, who has represented HIG-interrogated defendants before, so she can attest to the continuity of the methods involved.)

> Al-Libi, a 50-year-old Libyan whose legal name is Nazi Abdul al-Ruqai, testified before U.S. District Judge Lewis Kaplan in an evidentiary hearing tightly focused on the moments following al-Libi's transfer on October 12, 2013, from military to civilian custody.
>
> Given the situation, "I couldn't concentrate on anything," al-Libi told the court through an Arabic translator. When asked by his attorney, Bernard Kleinman, why he signed the papers waving his *Miranda* rights and paving the way for an FBI interview, al-Libi said,

> “You have no choice but to sign it.”

And in a filing calling on the government to preserve videotapes and any other records of his shipboard interrogation, al-Libi’s Libyan-retained lawyer invoked precisely the law and Executive Order in question.

> 18. Upon information and belief he was subjected to daily interrogation by professsional interrogator[s] of the CIA in an unrelenting, hostile, and extraordinary manner.
>
> 19.Upon information and belief this interrogation was conducted in a manner in violation of the Defendant’s rights under the Fifth and Sixth Amendments to the federal Constitution, and under applicable treaties and conventions to which the United States is a signatory.2
>
> 20.Furthermore, this interrogation was conducted in a manner of inhumane treatment. Notwithstanding the changes effected by both Congress3 and the President4 after the revelations of physical abuse and torture as conducted by the CIA in the name of national security, such measures (even if actually observed by the participants and interrogators) could easily lead to harsh, improper and inhumane treatment that would taint any and all subsequent interrogations, even if preceded by a Miranda warning and waiver execution, and conducted by the FBI or some other federal law enforcement agents.
>
> 21. Upon information and belief, these interrogations were videotaped, and otherwise recorded by the CIA, among other U.S. Government agencies.
>
> 22.It is, furthermore, reasonable and logical to presume that the interrogator[s] produced hard copy notes of their actions, and provided reports

> to other representatives of the United States Government (both in the Executive and Legislative branches).
>
> 3 In 2005 Congress passed the Detainee Treatment Act, Pub. L. No. 109-148, codified at U.S.C. §§ 2000dd, 2000dd-0, and 2000dd-J, which applied the U.S. Army Field Manual to all military interrogations. It should be noted that the Act specifically provides that
>
> > No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.
>
> The degree and extent to which the United States Government violated this statute in the kidnapping, abduction, and interrogation of the Defendant are issues to be raised similarly in any subsequent motions made pursuant to Rule 12(b).
>
> 4 On January 22, 2009, President Obama issued Executive Order 13491, which directed the CIA to adopt the methods of interrogation as set forth in the U.S. Army Field Manual. See E.O. 13491,74 Fed. Reg. 4893 (Jan. 22, 2009).
>
> 5 Both the Detainee Treatment Act and E.O. 13491 refer to the U.S. ARMY FIELD MANUAL, HUMAN INTELLIGENCE COLLECTOR OPERATIONS, referenced as FM 2.22.3 (Sept. 2006 ed.).

I think there are probably a number of HIG-interrogated individuals — including some who were interrogated entirely within the US — who could claim they were subject to degrading treatment. But in this case, the person in

question has a privately-retained lawyer, which may present significant concerns for the interrogators in question.

Meanwhile, the government is not providing al-Libi cancer treatment doctors at Duke said during the summer he needs to address liver cancer. Maybe the government is just hoping al-Libi will succumb to cancer before he can press these issues?

Whatever the plan, the government is at least entertaining widening the loopholes that they used in the past to protect torturers.

THE FORGOTTEN OPR REPORT EXPOSING THE WHITE HOUSE ROLE IN TORTURE

McClatchy reports today that the Senate Intelligence Report will include no details on the White House role in torture.

> The Senate Intelligence Committee report also didn't examine the responsibility of top Bush administration lawyers in crafting the legal framework that permitted the CIA to use simulated drowning called waterboarding and other interrogation methods widely described as torture, McClatchy has learned.

> "It does not look at the Bush administration's lawyers to see if they were trying to literally do an end run around justice and the law," the person said.

McClatchy's story is interesting, in part, because I had heard that the report *was* going to admit what has been in the public domain for years: the torture program, contrary to almost all reporting, was authorized by Presidential finding, not primarily by the memos that garner all the attention.

If the Torture Report is no longer going to confirm that, it is far bigger news than McClatchy has conveyed. It would mean someone — presumably the White House! (though remember the Finding's author, Cofer Black, was involved in reviewing the document) — had won concessions in the declassification discussions to hide the role of President Bush in personally authorizing torture.

That would be consistent with President Obama's rather remarkable efforts to keep a short mention of the September 17, 2001 Gloves Come Off Memorandum of Notification suppressed in ACLU's torture FOIA (something that's in the public record, but which I have been the only one to report).

But if President Obama's White House has, a second time, intervened to prevent public confirmation that the President authorized torture, we really ought to start demanding to know why that's the case. Remember when the 2nd Circuit backed White House efforts to keep mention of the MON suppressed, the White House said it was still using the MON.

The other reason I find McClatchy's report curious is because it leaves something utterly central out of its narrative.

As Katherine Hawkins noted yesterday, McClatchy missed a key detail in the chronology of when and how Republicans backed out of the torture

review.

> Obama DOJ investigation into torture is not "prior" to SSCI report. Launched after SSCI, & is reason GOP withdraws

But there's one more part of that chronology — one McClatchy might actually review if it wants the things it says it wants: the Office of Public Responsibility report into OLC lawyers' role in the torture memos. Reporting in 2009 made it clear that Eric Holder launched the John Durham investigation in response to reading the OPR Report. So the chronology goes OPR Report, Durham investigation, GOP withdraws from SSCI Torture Report which (McClatchy argues) is when the Democrats could have turned and pushed to get documents implicating Bush White House figures.

While both David Addington and Tim Flanigan refused to be interviewed for the OPR report, it made it clear (especially Jay Bybee and John Yoo's rebuttals) that both had had a direct role in setting up the legal loopholes CIA used to conduct torture. Between that and other public (largely unreported by anyone but me) documents, it is fairly clear that in response to concerns raised around July 10, 2002, CIA tried to get DOJ to give "advance" declination of prosecution (though for conduct that surely had already occurred). On July 13, Michael Chertoff refused, probably because Ali Soufan had already raised concerns about the conduct (his concerns probably relate to the use of mock burial) to give advance declination for torture. This led John Yoo to freelance a July 13, 2002 fax laying out how CIA could avoid accountability; that appears to be what Jonathan Fredman relied on in his advice to the torturers, not the more famous Bybee Memos. Nevertheless, at a July 16, 2002 meeting at the White House, it was decided (Yoo and Addington differ, it appears, on who did the deciding, but it is a rock solid bet that Addington did) that the Bybee Memo would include Commander of Chief language on how to avoid prosecution.

There are a number of other moments in the history of the program where White House responsibility is clear. But at that moment on July 16, 2002, David Addington got John Yoo to provide legal cover for anything the President ordered CIA do; he did so, of course, after CIA had been torturing for months on Presidential orders.

The answers to many of the questions McClatchy says have gone unanswered are sitting right there in the OPR report. And those answers are crucial to understanding the dance over declassification going on right now.

Aside from whatever else the Torture Report is, it is also a report that dodges the underlying power structure, in which the President orders the CIA to break the law and later ensures CIA avoids any accountability for doing so. At some point in this Torture Report process — fairly recently too! — Democrats seemed interested in exposing that dynamic, a dynamic President Obama has benefitted from at least as much as Bush did, going so far as to permit him to have CIA kill a US citizen with no due process. (That's probably why Leon Panetta told some fibs in his memoir on this point.)

Ultimately, we're never going to rein in CIA until we expose the mutual embrace of complicity the White House and CIA repeatedly rely on. Now it looks like the Senate Intelligence Committee has — in bipartisan fashion — decided to back off doing so here.

IN TELLING OF BRENNAN FIT, PANETTA SOMEHOW FORGETS THE TORTURE

DOCUMENTS STOLEN BACK FOR THE WHITE HOUSE

As you likely know, I'm firmly of the belief that one should call DC memoirs — especially those written by National Security figures — autobiographical novels, because they tend to stray so far from the truth (that's true of all autobiographies, but in DC it seems far more motivated). Turbo-Tax Timmy Geithner is about the only DC figure whose memoir has ever been treated with any of the skepticism it deserves.

With that in mind, I wanted to look at this detail from Leon Panetta's book, which Katherine Hawkins alerted me to.

To illustrate how Obama's micromanagement hurt relations with Congress, Panetta describes the negotiations with Dianne Feinstein over the cables that went into the torture report.

> She requested access for her staff to every operational cable regarding the program, a database that had to be in the hundreds of thousands of documents. These were among the most sensitive documents the agency had. But Feinstein's staff had the requisite clearances and we had no basis to refuse her. Still, I wanted to have some control over this material, so I proposed a deal: Instead of turning over the documents en masse to her staff, we would set up a secure room in Virginia. Her staff could come out to the secure facility and review documents one by one, and though they could take notes, the documents themselves would stay with CIA.

When the White House found out, they went apeshit, calling Panetta into the Situation Room for a spanking.

> "The president wants to know who the fuck authorized this release to the committees," Rahm said, slamming his hand down on the table. "I have a president with his hair on fire, and I want to know what the fuck you did to fuck this up so bad."
>
> I'd known Rahm a long time, and I was no stranger to his language or his temper, so I knew when to worry about an outburst and when it was mostly for show. On this occasion, my hunch was that Rahm wasn't that perturbed but that Obama probably was and that others at the table, particularly Brennan and McDonough, were too. Rahm was sticking up for them by coming after me.
>
> [snip]
>
> It went back and forth like this for about fifteen minutes. Brennan and I even exchanged sharp words when I, unfairly, accused him of not sticking up for the agency in the debate over the interrogation memos. Finally, the White House team realized that whether they liked it or not, there was no way we could go back on our deal with the committee. And just like that, the whole matter was dropped.

Rahm and Brennan spanked Panetta, he claims, but then the whole thing blew over.

There are just three problems with this story.

First, according to the quotations Dianne Feinstein revealed from her agreement with Panetta, the CIA wasn't supposed to "have … control over this material."

> Per an exchange of letters in 2009, then-Vice Chairman Bond, then-Director Panetta, and I agreed in an exchange of letters that the CIA was to provide a "stand-alone computer system" with a

> “network drive” “segregated from CIA networks” for the committee that would only be accessed by information technology personnel at the CIA—who would “not be permitted to” “share information from the system with other [CIA] personnel, except as otherwise authorized by the committee.”

Far more significantly, Panetta doesn’t mention the documents that disappeared during Panetta’s tenure – ostensibly, on orders from the White House.

> In early 2010, the CIA was continuing to provide documents, and the committee staff was gaining familiarity with the information it had already received.
>
> In May of 2010, the committee staff noticed that [certain] documents that had been provided for the committee’s review were no longer accessible. Staff approached the CIA personnel at the offsite location, who initially denied that documents had been removed. CIA personnel then blamed information technology personnel, who were almost all contractors, for removing the documents themselves without direction or authority. And then the CIA stated that the removal of the documents was ordered by the White House. When the committee approached the White House, the White House denied giving the CIA any such order.
>
> After a series of meetings, I learned that on two occasions, CIA personnel electronically removed committee access to CIA documents after providing them to the committee. This included roughly 870 documents or pages of documents that were removed in February 2010, and secondly roughly another 50 were removed in mid-May 2010.

And Panetta also doesn't mention what may or may not be the same set of documents, those withheld by CIA on behalf of the White House, as described by Stephen Preston in response to Mark Udall.

> With specific reference to documents potentially subject to a claim of executive privilege, as noted in the question, a small percentage of the total number of documents produced was set aside for further review. The Agency has deferred to the White House and has not been substantively involved in subsequent discussions about the disposition of those documents.

In other words, CIA *didn't* live up to its deal with Feinstein, not with respect to this set of documents, anyway. After turning over all the cables it believed SSCI had a right to obtain, it then took some back. As far as we know, it never did provide them.

We know that one of the Torture Report's conclusions is that the CIA lied to the White House.

While there's good reason to believe CIA lied to Condi Rice, there's also abundant reason to believe that Dick Cheney and David Addington knew precisely what was going on. If I had to guess, the documents CIA stole back probably make that clear.

Panetta would have us believe that, after his spanking by John Brennan and others, the whole matter was dropped. Which is a convenient tale, except that it obscures that the White House succeeded in clawing back documents CIA originally believed SSCI was entitled to.