SHORTER DIFI: THE TORTURE REPORT STARTED IN RESPONSE TO MICHAEL HAYDEN'S LIE

I gotta hand it to Dianne Feinstein: the closest she comes to calling Michael Hayden a shriveled impotent old man in response to his suggestions she's a hysterical female is when (at 6 minutes) she says calling women emotional is "an old male fallback position."

Far more interesting, though, is the description she offers for the genesis of the report. It arose in response to Hayden's damage control after CIA's destruction of the torture tapes became public.

> In December [2007]—the 11th—Director Hayden appeared before our committee and said he would allow members and/or staff to review operational cables which he said were just as good.
>
> [snip]
>
> The genesis of the report was back with the videotape and back under then Chairman Rockefeller, who assigned staff, staff studied the operational cables, came back, reported to us, we took a look at that and said — both sides — we should move ahead and do a full study.

And while she doesn't say it, she makes clear that Hayden lied in this damage control, when he said the "operational cables were just as good" as the torture tapes.

He can't know that.

The backup to the CIA IG Report, after all, is

that the even by the time CIA's Office of General Counsel decided to destroy the tapes, they had been damaged.

> [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."

And at least one torture session, including waterboarding, was not captured on the tapes at all.

> 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.

That's important because the IG also found that the waterboarding depicted in the videos that remained undamaged didn't comply with the guidelines laid out by DOJ. In other words, there's very good reason to believe that the tapes got destroyed, in part, because they showed CIA exceeding the legal limits laid out by DOJ.

To make things worse, Rockefeller had requested the torture tapes in the weeks before they got destroyed.

So I can imagine how Hayden's bullshit line about the cables being just as good as the torture tapes withheld from Rockefeller might launch an investigation.

Michael Hayden has only himself to blame for this report.

CIA’S OWN RECORDS OF CIA’S LIES TO CONGRESS

Monday, WaPo made big news for reporting what Ron Wyden made clear 14 months ago: a key conclusion of the Senate Torture report is that CIA lied to Congress (and DOJ and the White House).

But much of this has been clear for even longer, having been exposed in some form in 2009-10.

Yet much of that got lost in CIA’s aggressive attack on Congress — one that anticipated what we’ve seen and will surely continue to see with the release of the Torture Report. At the time, CIA attempted to claim Congress had been fully briefed on torture, and therefore shouldn’t criticize the agency. Yet it gradually became clear how laughable CIA’s claims were. Along the way details of the lies CIA told in briefings came out.

The lies CIA told Congress in its first several years of the torture program include that it,

- Refused, at first, to reveal that the CIA relied on the September 17, 2001 Finding and therefore hid that the President had personally authorized the torture.
- Briefed on torture techniques that had happened months in the past, but claimed they had never yet been used.

- Falsely claimed CIA had not tortured before the August 1 memos purportedly authorizing it.
- Claimed Abd al Rahim al-Nashiri and Abu Zubaydah were not yet compliant as late as February 2003, even though they had been found compliant, after which CIA continued to use torture anyway.
- Claimed the torture tapes were a perfect match with what had been recorded in the torture log when a CIA OGC lawyer reviewed them in December 2002.
- Did not disclose the tapes had already been altered by the time CIA OGC reviewed them.
- Claimed the torture tapes had shown the torturers followed DOJ's guidance when in fact they showed the torturers exceeded DOJ guidance.
- Misled regarding whether the detainees who had been killed had been tortured.
- Oversold the value of information provided by Abu Zubaydah.
- Lied about importance of torture in getting Abu Zubaydah to talk.

There are a number of claims CIA made that are almost certainly also false — most notably with regards to what intelligence came from torture — but most of that didn't get recorded in the CIA's records. I fully expect we'll find details of those in the Senate Intelligence Committee report.

September 17, 2001: Bush signs "Gloves Come Off" Memorandum of Notification that authorizes capture and detention of top al Qaeda leaders, but leaves CIA to decide the details of that detention

Before I focus on the briefings, some background is in order.

Torture started as a covert operation authorized by the September 17, 2001 Memorandum of Notification. Under the National Security Act, the Intelligence Committees had to be briefed on that Finding and they were. However, the Finding was structured such that it laid out general ideas — in this case, the capture and detention of senior al Qaeda figures — and left the implementation up to CIA. As a result, key members of Congress (notably, Jane Harman, who was Ranking Member of the House Intelligence Committee for much of the period during which the program operated) apparently had no idea that the Finding they had been briefed on in timely fashion actually served as the Presidential authorization for torture until years later. Also, since that September 17, 2001 Finding authorized both torture and the outsourcing of nasty jobs to foreign intelligence partners, the earliest torture, such as that of Ibn Sheikh al-Libi in Egyptian custody starting in February 2002 and Binyam Mohamed in Pakistani custody starting in April 2002, should be considered part of the same covert op.

April to July 2002: CIA tortures Abu Zubaydah based solely on Presidential authorization

By now there is no dispute: the CIA started torturing Abu Zubaydah well before the August 1,

2002 memo that purportedly prospectively authorized that treatment. CIA even exceeded early verbal guidance on things like sleep deprivation, after which CIA unilaterally authorized what CIA had done retrospectively. The CIA appears to have gotten in real trouble when they moved to conduct mock burial with Abu Zubaydah, to which Ali Soufan objected; his objections appear to be the reason why mock burial (and by extension, mock execution) was the only technique John Yoo ultimately rejected. On July 13, after Michael Chertoff refused to give advance declination of prosecution to CIA for things they were ostensibly talking about prospectively but which had in fact already occurred, Yoo wrote a short memo, almost certainly coached by David Addington but not overseen by Yoo's boss Jay Bybee, that actually served as the authorization CIA's CTC would rely on for Abu Zubaydah's torture, not the August 1 memos everyone talks about. As a result, CIA could point to a document that did not include limits on specific techniques and the precise implementation of those techniques as their authorization to torture.

CIA had, in internal documents, once claimed to have briefed the Gang of Four (then Porter Goss, Nancy Pelosi, Richard Shelby, and Bob Graham) in April 2002. But after being challenged, they agreed they did not conduct those briefings. This, then, created a problem, as CIA had not really briefed Congress — not even the Gang of Four — about this "covert op."

Septmber 4, 2002: CIA provides initial trial balloon briefing to Pelosi and Goss, then starts destroying evidence

On September 4, 2002, 7 months after Egypt started torturing Ibn Sheikh al-Libi at America's behest, almost 5 months after CIA started torturing Abu Zubaydah, and over a month after the OLC memo that purportedly started a month of torture for Abu Zubaydah, Jose Rodriguez, a CTC lawyer, and Office of Congressional Affairs head Stan Moskowitz first

briefed Congress on torture techniques.

The record supports a claim that CIA provided some kind of description of torture to Nancy Pelosi and Porter Goss. It supports a claim that neither objected to the techniques briefed. Both Pelosi and Goss refer to this briefing, however, as a prospective briefing. Goss referred to the torture techniques as "techniques [that] were to actually be employed," not that had already been employed, and when asked he did not claim they had been briefed on techniques that had been used. Pelosi claimed,

> I was informed then that Department of Justice opinions had concluded that the use of enhanced interrogation techniques was legal. The only mention of waterboarding at that briefing was that it was not being employed.
>
> Those conducting the briefing promised to inform the appropriate Members of Congress if that technique were to be used in the future.

Thus, at least as far as Goss and Pelosi are concerned, over a month after they first waterboarded Abu Zubaydah (and many more after Egypt had waterboarded al-Libi for us), CIA implied they had not yet done so with any detainee.

As striking as the evidence that CIA only briefed prospectively on torture that had been used for as many as 7 months, however, is what happened next. CIA moved to destroy evidence.

The day after that initial briefing in which CIA told Congress it might torture in the future, it "determined that the best alternative to eliminate those security and additional risks is to destroy these tapes." Then, the following day, CTC altered its own notes on the substance of the briefing, taking out a sentence (it's not clear what that sentence said). CIA's Office of Congressional Affairs never finalized a description for this, and at one time even

listed Jane Harman as the attendee rather than Pelosi. In fact, in a list of the briefings on torture compiled in July 2004, it did not treat this briefing as one covering torture at all.

In addition, for some reason a briefing for Bob Graham and Richard Shelby initially scheduled for September 9 got rescheduled for the end of the month, September 27. According to available records, Jose Rodriguez did not attend. According to Bob Graham's notoriously meticulous notes, the briefing was not conducted in a SCIF, but instead in Hart Office Building, meaning highly classified information could not have been discussed. Graham says it chiefly described the intelligence the CIA claimed to have gotten from their interrogation program. Graham insists waterboarding did not come up, but Shelby, working off memory, disputes that claim.

February 4 and 5, 2002: CIA gets Republican approval to destroy the torture tapes, kills SSCI's nascent investigation, and refuses to explain torture's Presidential authorization

By November 2002, Bob Graham had started to hear vague rumors about the torture program. He did not, he says, receive notice that CIA froze Gul Rahman to death after dousing him with water or even hear about it specifically. But because of those rumors, Graham moved to exercise more oversight over the torture program, asking to have another staffer read into the program, and asking that a staffer see a Black Site and observe interrogation. That effort was thwarted in the first full briefing CIA gave Congress on torture on February 4, 2002, when CIA told Pat Roberts (who had assumed Senate Intelligence Chair; newly Ranking Member Jay Rockefeller was not present at this briefing, though a staffer was) they would not meet Graham's requests. CIA claims — but Roberts disputes — that he said he could think of "ten reasons right off why it is a terrible idea" to exercise such oversight.

In addition to getting Roberts to quash that nascent assessment, CIA gave Roberts the following false information:

- CIA described Abu Zubaydah and Abd al Rahim al-Nashiri "as founts of useful information" about "on-going terrorist operations, information that might well have saved American lives." While Abu Zubaydah provided some useful information, the "ongoing operations" were often invented. Moreover, of all the information Abu Zubaydah gave up under torture, just 10 bits of it were deemed important enough to appear in the 9/11 Report.
- CIA told Roberts about the "difficulty of getting that information from [Nashiri and Zubaydah], and the importance of enhanced techniques in getting that information." Public records show CIA repeatedly attributed to Abu Zubaydah either things FBI had elicited without torture or things CIA learned via other means.
- CIA claimed Nashiri and Abu Zubaydah were not yet compliant. "[T]hey have not, even under enhanced techniques, revealed everything they know of importance." Subsequent

reports made clear that in both cases, they were fully compliant but people within CIA demanded more torture believing they were withholding information.

- To get Roberts to buy off on the destruction of the torture tapes, CIA told Roberts "the match" between what appeared in the torture tapes and what got recorded in CIA logs "was perfect" and that the CIA OGC lawyer who had reviewed the tapes "was satisfied that the interrogations were carried out in full accordance with the guidance." While it is in fact true that CIA OGC claimed the tapes were an exact match, in fact the tapes had already been significantly altered (and the taping system had been shut down for some torture sessions), and the tapes showed that the torturers had not followed DOJ's guidelines on torture. CIA also appears to have neglected to tell Roberts that 2 of the tapes showed interrogations involved Nashiri.

The Memorandum of Understanding of this briefing

appears to be one of only two that got finalized (it actually included a reference that Goss and Harman had been briefed on the torture tape, but not that Harman warned against destroying it).

The February 5, 2003 briefing involving Porter Goss and Jane Harman is just as interesting, though CIA has refused to release their notes from it.

Five days after the briefing, Harman wrote a letter questioning whether torture had been reviewed from a policy perspective and advising against destroying Abu Zubaydah's torture tape. In addition, she asked if the President had signed off, revealing that she didn't know that the Finding she had been briefed on included torture. The CIA and the White House met to decide how to respond. In the end, CIA General Counsel Scott Muller's response didn't really answer any of Harman's questions, nor note her warning against destroying the torture tape.

Also note: in the month before these briefings, the CIA prepared what appears to be a tear-line document on Abu Zubaydah. While it's not certain the document was prepared to brief the Gang of Four, it matches what we know to have been said to Roberts, especially as regards to the torture tapes. But it also reveals real discrepancies between the tear-line (Secret) claims and the Top Secret claims it was based on, notably inflating the value of Abu Zubaydah's intelligence below the tear-line.

September 4, 2003: An innocuous briefing left off some of the tracking

We don't really know what happened in the September 4, 2003 briefings of both Goss and Harman and Roberts and Rockfeller, which is a shame because it would have covered Khalid Sheikh Mohammed's treatment (and that of Ammar al-Baluchi, whom we now know may have been treated even worse than his uncle). In fact, it was left off lists of "sensitive" briefings at different times.

July 2004: CIA has to tell Congress even CIA('s

IG) thinks they lied

On May 7, 2004, CIA's IG John Helgerson completed his report finding that the torture had exceeded guidelines and questioning the value of the intelligence obtained using it. On June 23, the Roberts and Rockefeller got copies (it's not clear whether Goss and Harman got advance copies). On July 13, 2004, CIA briefed Goss and Harman again.

The briefing did include some details from CIA IG John Helgerson's report on the program — that it violated the Convention Against Torture and did not comply with the OLC memos. He also explained that both Abu Zubaydah and Khalid Sheikh Mohammed's waterboarding was problematic, the first in execution and the second in number.

As part of that briefing (or by reading the IG Report), Harman learned that the Finding authorized this torture; in the briefing she pointed out the Finding had only authorized detention and capture, not interrogation.

But CIA persisted in a narrow dodge and two false claims:

- CIA claimed that none of the at least 3 or 4 detainees who had died in CIA custody by that point were in the interrogation program; by that, it meant only that they weren't part of the RDI program, but CIA did in fact torture them before they died.
- CIA claimed we had not used any torture before the OLC memos, which is only true if you ignore that al-Libi and Mohamed's torture was carried out by proxies.

- CIA claimed it did not start torturing Abu Zubaydah until August 1; in reality, they had started torturing him earlier.

There are few details on the briefing CIA gave Roberts and Rockefeller on July 15.

These are just the details of the lies CIA itself has documented and released CIA telling Congress. There are other allegations of CIA lies in briefings, though those records were not released under FOIA. And things started getting really funky in 2005, as Dick Cheney started participating in CIA briefings to try to defeat the Detainee Treatment Act. In addition, CIA briefed Pete Hoekstra (who had become the Chair of the House Intelligence Committee) on the morning they destroyed the torture tapes; the content of that briefing has never been revealed.

None of this excuses Congress, of course: the knew enough to know this was problematic.

But it is clear that CIA lied to them both to boost the value of the torture they were doing and to diminish the problems and abuses.

DID CIA'S HANDSOMELY PAID CONTRACTORS DOCTOR ITS LOG BOOKS, AGAIN?

I wanted to return to one other detail of John Brennan's (designed to be made public, I believe) January 27 letter to Dianne Feinstein explaining the urgent need to continue the "investigative, protective, or intelligence

activity" targeted at CIA's overseers.

In the letter, Brennan describes the original basis for CIA's claimed suspicion into SSCI this way:

> CIA maintains a log of all materials provided to the Committee through established protocols, and these documents do not appear in that log, nor were they found in an audit of CIA's side of the system for all materials provided to SSCI through established protocols. Because we were concerned that there may be a breach or vulnerability in the system for housing highly classified documents, CIA conducted a limited review to determine whether these files were located on the SSCI side of the CIA network and review audit data to determine whether anyone had access the files. [my emphasis]

The original basis CIA used to justify investigating their overseers was a log purportedly recording which documents they had been given.

Recall that CIA worked with contractors — SAIC, as I understand it — to review and re-review each document before they turned it over to SSCI.

> CIA insisted that the Committee review documents at a government building in Virginia. Once the CIA produced relevant documents related to the CIA detention and interrogation program, the CIA then insisted that CIA personnel—and private contractors employed by the CIA—review each document multiple times to ensure unrelated documents were not provided to a small number of fully cleared Committee staff.

This process accounts for much of the $44 million cost of the report.

The log must have come out of this process: contractors, being paid handsomely by the CIA to slow the investigation, recording each document that they claimed to hand over to investigators.

So at the base of Brennan's claim is a log, made by self-interested contractors employed by CIA, about torture.

The CIA's contractors don't have a very reliable history recording issues relating to torture.

Recall that — contrary to much of the public reporting on the matter — the destruction of the torture tapes did not just destroy ugly images of torture inflicted on Abu Zubaydah.

In addition, by destroying the torture tapes, CIA destroyed evidence that:

- The CIA's contractors used torture on Abu Zubaydah that exceeded the guidelines provided by DOJ
- The CIA's contractors' descriptions of those torture techniques — in written cables and logs — did not match what they had actually done to Abu Zubaydah
- By the time CIA shut down the Thai black site and decided to stop taping their torture, someone (the CIA's contractors?) had already destroyed or sabotaged a number of the torture tapes, including ones depicting waterboarding

That is, one of the likely reasons why CIA destroyed the torture tapes is that their

handsomely paid self-interested contractors produced a substantively inaccurate log about torture.

And at the base of the CIA's witch hunt into SSCI staffers is a log about torture presumably made by handsomely paid self-interested contractors.

ROBERT EATINGER AND CIA'S COUNTERTERRORISM CENTER LAWYERS' LIES ABOUT TORTURE: A TIMELINE

The traditional media is catching up to my post the other day focusing on Robert Eatinger, the CIA lawyer who referred Senate Intelligence Committee staffers for criminal investigation. Welcome traditional media!!

Just to expand the discussion of how deeply involved CTC's lawyers — including, but not limited to, Eatinger — have been in torture, I thought I'd expand on my post from the other day with a timeline of CTC documents and consultation, most from its legal team, that might be among the 1,600 mentions of Eatinger in the Senate Torture Report that Dianne Feinstein referred to the other day.

> I should note that for most, if not all, of the CIA's Detention and Interrogation Program, the now acting general counsel was a lawyer in the CIA's Counterterrorism Center—the unit within which the CIA managed and carried out

> this program. From mid-2004 until the official termination of the detention and interrogation program in January 2009, he was the unit's chief lawyer. He is mentioned by name more than 1,600 times in our study.

Note, some of this information relies on the OPR report; at least three of CTC's lawyers refused to cooperate with that report, two based on advice of counsel. Remember too that, just as happened with the SCIF CIA made the Senate Intelligence Committee use, between 10 and 61 torture documents disappeared from DOJ's OLC SCIF during the period when OPR was working on its report.

April 2002: Months before the first torture memo, CTC's lawyers, in consultation with NSC and DOJ, approved 24-48 hours of sleep deprivation for use with Abu Zubaydah (who, remember, was still recovering from life-threatening bullet wounds). The torturers promptly exceeded those limits. So CTC, on its own, approved the new amounts because, they claimed, Abu Zubaydah hadn't suffered any adverse consequences. (See PDF 113-114)

> After consulting with the NSC and DOJ, CTC[redacted] originally approved 24-48 hours of sleep deprivation.
>
> In April 2002 CTC[redacted] learned that due to a misunderstanding, that time frame had been exceeded.
>
> However, CTC[redacted] advised that since the process did not have adverse medical effects or result in hallucinations (thereby disrupting profoundly Abu Zubaydah's senses or personality) it was within legal parameters.

After August 1, 2002: After the Bybee Memos laid out which torture techniques were permitted, then, CTC chief lawyer Jonathan Fredman sent out

legal guidance to the torturers in Thailand. Rather than relying on the Bybee Memos, he relied on a July 13, 2002 John Yoo memo, purportedly prepared without the knowledge of Bybee (but, given the timing, probably written in response to Chertoff's refusal to provide pre-declination andwith coaching from David Addington). The earlier memo lacked some of the key caveats of the later ones.

September 6, 2002: On September 4, 2002, Jose Rodriguez and a lawyer from CTC briefed Nancy Pelosi and Porter Goss on torture. The following day, CIA started discussing destroying the torture tapes. Then, on September 6, a lawyer from CTC altered the record of the briefing to Pelosi and Goss. (see PDF 84 and PDF 11-12)

October 2, 2002: CTC top lawyer Jonathan Fredman briefs Gitmo about torture and says a number of inflammatory things about detainee treatment.

December 24, 2002: CTC completes memo advocating for destruction of torture tapes.

Early 2003: After DOJ told CIA's Inspector General to develop its own set of facts for review of any criminal liability in torture, John Yoo and Jennifer Koester start freelancing with CTC's lawyers to develop the "Legal Principles" or "Bullet Points" document which expanded on the analysis officially approved by OLC. Koester told DOJ's Office of Professional Responsibility the document would be used to assess the legality of the torture.

> She understood that the Bullet Points were drafted to give the CIA OIG a summary of OLC's advice to the CIA about the legality of the detention and interrogation program. [Koester] understood that the CIA OIG had indicated to CTC[redacted] that it might evaluate the legality of the program in connection with its investigation, and that the Bullet Points were intended to demonstrate that OLC had already weighed in on the subject.

June 16, 2003: In her review, Koester took out language CIA had included saying that "comparable, approved techniques" to those approved in the Bybee Memo did not violate law or the Constitution. But when CTC's lawyers sent the "Bullet Points" back to OLC in 2003 as an attempted *fait accompl*i, that language had been inserted back into the memo.

April 2004: Eatinger takes over as top CTC lawyer.

Unknown date: CTC's lawyers write a declination memo recommending against charges for Salt Pit manager Matt Zirbel in the murder of Gul Rahman based on (according to Jay Bybee's characterization) an entirely intent-based exoneration. (see footnote 28)

> Notably, the declination memorandum prepared by the CIA's Counterterrorism Section regarding the death of Gul Rahman provides a correct explanation of the specific intent element and did not rely on any motivation to acquire information. Report at 92. If [redacted], as manager of the Saltpit site, did not intend for Rahman to suffer severe pain from low temperatures in his cell, he would lack specific intent under the anti-torture statute. And it is also telling that the declination did not even discuss the possibility that the prosecution was barred by the Commander-in-Chief section of the Bybee memo.

May 11, 2004: White House meeting, possibly attended by Eatinger, at which White House lawyers tell CIA not to destroy torture tapes.

June 2004: According to John Rizzo, Eatinger attends White House meeting at which White House lawyers instruct not to destroy torture tapes.

August 4-5, 2004: CTC lawyers provide Daniel Levin additional information on waterboarding; the Torture Report found this information to be

inaccurate.

August 19, 2004: Another CIA letter, from a lawyer other than John Rizzo, the Torture Report found to be inaccurate.

September 5, 2004: Another CIA letter, from a lawyer other than John Rizzo, the Torture Report found to be inaccurate.

September 19, 2004: Another CIA letter, from a lawyer other than John Rizzo, the Torture report found to be inaccurate.

February 2, 2005: A CTC lawyer worked closely with Daniel Levin to try to finish the Combined Memo before Levin moved to NSC. At that point, the Memo did not include waterboarding. Nevertheless, Levin did not complete it, and Steve Bradbury would add waterboarding back in when he completed the memo that April.

Febraury 14, 2005: CTC panics because Congress might hold hearings into detainee treatment.

March 1, 2005: Steven Bradbury's main contact for Combined and other torture memos is a CTC attorney. The Torture Report found information used in these memos to be inaccurate.

March 2, 2005: CTC sends *Re: Effectiveness of the CIA Counterintelligence Interrogation Techniques* to Steven Bradbury for use in Special Needs argument in torture memos. Similar memos that have been released have made demonstrably false claims. John Rizzo says CTC lawyers were involved in drafting this document.

April 15, 2005: CTC sends *Briefing Notes on the Value of Detainee Reporting* to Steven Bradbury for use in Special Needs argument in torture memos. Similar memos that have been released have made demonstrably false claims. Rizzo says CTC lawyers were involved in drafting this document.

May 10, 2005: Steven Bradbury completes two OLC memos — the Techniques Memo and Combined Memo — that the Torture Report found are based on inaccurate information.

May 30, 2005: Bradbury completes a third OLC memo — the CAT Memo — that the Torture Report found is based on inaccurate information.

November 8, 2005: The day CIA destroyed the torture tapes, someone from CTC/LGL gave HPSCI Chair Pete Hoekstra a briefing with no staffers present. (see page 32) The briefing was included in a summary of all Congressional briefings completed that day.

November 8, 2005: Eatinger and another CTC lawyer claim there is no legal reason to retain the torture tapes, in spite of several pending legal requests covering the videos. Jose Rodriguez orders their destruction.

January 25, 2006: Another letter from a lawyer other than John Rizzo that Torture Report may have found to be inaccurate.

April 19, 2006: Fax from a lawyer other than Rizzo that Torture Report may have found to be inaccurate.

May 18, 2006: Letter from a lawyer other than Rizzo, claiming torture techniques would be used for safety reasons, the Torture Report may have found to be inaccurate.

Update: h/t to DocEx blog for some additions to this timeline.

OPERATION STALL

McClatchy has now posted an update to the tale of the CIA-SSCI spat.

It appears the following happened: Sometime around August, SSCI staffers working on a database at CIA discovered the internal CIA report, started under Leon Panetta, that corroborated the SSCI report. It also contradicted CIA's official response to the SSCI Report.

> Several months after the CIA submitted its official response to the committee report, aides discovered in the database of top-secret documents at CIA headquarters a draft of an internal review ordered by former CIA Director Leon Panetta of the materials released to the panel, said the knowledgeable person.

So having discovered even the CIA disagreed with the CIA's response, the SSCI staffers took a copy with them.

> They determined that it showed that the CIA leadership disputed report findings which they knew were corroborated by the so-called Panetta review, said the knowledgeable person.
>
> The aides printed the material, walked out of CIA headquarters with it and took it to Capitol Hill, said the knowledgeable person.

Mark Udall raised the report in a December hearing. In January, CIA accused SSCI of absconding with the document.

> After the CIA confronted the panel in January about the removal of the material last fall, panel staff concluded that the agency had monitored computers that they'd been given to use in a high-security research room at the CIA campus in Langley, Va., a McClatchy investigation found.

In response, the CIA asked DOJ to start an investigation.

Then there's this weird question about the document. I'm not sure whether the issue is how the document first got included in the database at CIA, or whether it's how it migrated to SSCI.

> White House officials have held at least

> one closed-door meeting with committee members about the monitoring and the removal of the documents, said the first knowledgeable person.
>
> The White House officials were trying to determine how the materials that were taken from CIA headquarters found their way into a data base into which millions of pages of top-secret reports, emails and other documents were made available to panel staff after being vetted by CIA officials and contractors, said the knowledgeable person.

My favorite part of this passage, though, is that contractors are helping choose with documents CIA's overseers are allowed to see.

Because contractors should surely have more visibility into what the CIA does than CIA's overseers, right?

All of which is to say the SSCI busted the CIA for lying in their official response to the Committee. And as a result, CIA decided to start accusing the Committee of breaking the law. And now everyone is being called into the Principal's office for spankings.

This reminds me of what happened when Gitmo defense lawyers tried to independently identify the identities of their clients torturers. The lawyers got too close to the torturers, which set off a process that ultimately led to John Kiriakou, as the sacrificial lamb, going to jail.

But it seems that this is part of a larger CIA effort to stall. As McClatchy notes, CIA took 3 extra months to provide their initial response to SSCI. Then this erupted 2 months later. It has now been almost 3 months since Udall first revealed the existence of the Panetta report. Which brings us just 8 months away from an election in which the Democrats stand a good chance of losing the Senate, and with it, the majority on the Committee that might vote to

declassify the report in defiance of CIA's wishes. Which may be why Saxby Chambliss is fanning the CiA's flames for them.

> "I have no comment. You should talk to those folks that are giving away classified information and get their opinion," Intelligence Committee Vice Chairman Saxby Chambliss (R-Ga.) said when asked about the alleged intrusions.

Stall, stall, stall. It's what CIA did with the OPR report, it's what they did with the torture tape investigation, and now this.

CIA may well suck at doing their job — getting intelligence that is useful to the country. But they sure are experts at outlasting any oversight onto their real activities.

HUMAN RIGHTS GROUPS TO OBAMA: DON'T LET JOHN BRENNAN COVER UP THE TORTURE HE CONDONED

Eight human rights organizations just sent a letter to President Obama urging him to appoint a high level White House official to coordinate the Senate Intelligence Committee torture report out of the White House. Like the letter Mark Udall already sent, this one implies releasing the report is crucial to delivering on Obama's 2009 promise to end torture.

> As one of your very first acts as President, you signed an Executive Order that closed the CIA's "black sites" and restricted the agency to the techniques

> in the Army Field Manual.
>
> [snip]
>
> We believe the public release of the Senate Select Committee on Intelligence study is critical to upholding your 2009 Executive Order. Safeguarding your Executive Order from being overturned by a future administration or Congress will help ensure that the United States does not return to policies of torture and cruelty again.

But here's the key paragraph.

> Most importantly, your administration has a responsibility to ensure that the Executive Branch response to the study is not driven by individuals who might be implicated in the CIA's use of torture. While it is appropriate for individuals who have direct knowledge of the program to provide input, others with knowledge of the program should also be consulted. We urge you to ensure that a consolidated response representing the considered view of all parts of the Executive Branch is submitted to the Committee for review. [my emphasis]

Let's name names, shall we?

The person currently driving the Torture Report declassification process is a guy by the name of John Brennan (indeed, as Goldman and Apuzzo note in their coverage of the Clandestine Service decision, few other high ranking torturers are left).

At the time the torture program was instituted, he was CIA's Deputy Executive Director, in charge of things like logistics and personnel. He was, at a minimum, read into the torture techniques as they were being approved. Few people around at the time remember him

expressing any opposition to them — aside from wanting the politicians who approved torture to be held responsible for it. Brennan also admits to knowing the torture was taped, and his forgetfulness about whether he sought information on CIA lawyer John McPherson's review of the torture tape leads me to suspect he learned, at the time, that the torturers were destroying the record of them exceeding torture guidelines. Brennan also — after he had moved on to the Terrorist Threat Integration Center — relied on information derived from torture in sworn declarations submitted to the FISA court.

I'd say all that qualifies Brennan as an "individual who might be implicated in the CIA's use of torture." (It should also have disqualified him for the job, but you fight torture with the Senate you have, not the one that might be a functioning oversight body.)

That is, these human rights groups, though far more polite than I am, are basically saying that John Brennan shouldn't be entrusted with this declassification decision because he'd be covering up his own role in it (he is mentioned, though not badly implicated, in the report).

But that same line is also where the logic of this letter fails.

After all, as I have pointed out, torture was not CIA's baby. It was the White House's. And while Obama personally had no role in authorizing torture (except insofar as the government relies on Appendix M to use techniques that amount to torture, and outsources it to countries like Somalia), the President — President Bush — did. So while, unlike Brennan, Obama isn't personally implicated in what the report shows, his office — one whose authority he has jealously guarded — is. Every appeal to the White House to declassify this report should be clear about that fact.

Particularly given the one objection Brennan is reported to have expressed back in the early

days of torture:

> He expressed concern, according to these officials, that if details of the program became public, it would be CIA officers who would face criticism, rather than the politicians and lawyers who approved them.

The one objection Brennan had to torture, it seems, is that the CIA — not the White House — would be blamed for it.

I would imagine the White House knows that well.

THE MORAL RECTITUDE TORTURE COVER-UP PROMOTION CZAR

Oh hi! Are you folks still here? Missed you!

First off, thanks to bmaz and Jim and Rayne for holding down the fort while Mr EW, McCaffrey the MilleniaLab, and I explored Kentucky. There are many wonderful aspects of the state: the sandstone arches, the ham, and I think we're even finally beginning to get this Bourbon thing!

I'll be catching up for a few days, probably commenting on things that broke while I'm away. Such as this news, that John Brennan is showing his leadership at CIA by having three former CIA people weigh in on whether he should retain the woman who destroyed the torture tapes as the head of the clandestine service (she's the acting head now, Brennan is considering making her appointment permanent; Mark Mazzetti has more details on her career here).

> To help navigate the sensitive decision on the clandestine service chief,

> Brennan has taken the unusual step of assembling a group of three former CIA officials to evaluate the candidates. Brennan announced the move in a previously undisclosed notice sent to CIA employees last week, officials said.
>
> [snip]
>
> "Given the importance of the position of the director of the National Clandestine Service, Director Brennan has asked a few highly respected former senior agency officers to review the candidates he's considering for the job," said Preston Golson, a CIA spokesman.
>
> The group's members were identified as former senior officials John McLaughlin, Stephen Kappes and Mary Margaret Graham.

Note that at least two of these three were deeply implicated in the torture program, with McLaughlin involved in decisions and briefing of the program itself (and also vouching for Brennan's claimed opposition to torture back when it mattered, solely because he's "honest"), and Kappes involved in covering up the Salt Pit killing of Gul Rahman, among other things. So they're not exactly neutral on the contributions of people who cover up the CIA's torture program. While the selection of these three is being spun as expertise (I suspect they were also selected because Dianne Feinstein respects them, though that's a guess), it should be clear that they are not neutral on torture.

But I'm just as amused at how this process — Brennan's fairly transparent attempt to outsource the morally repugnant decision to promote someone involved in torture and its cover-up — undermines all the carefully cultivated claims about Brennan's role as the priest serving as a moral compass for others, at least on the drone program.

> Among other descriptions offered of the guy in charge of drone assassinations,

> Harold Koh described him as a priest.
>
> > "If John Brennan is the last guy in the room with the president, I'm comfortable, because Brennan is a person of genuine moral rectitude," Mr. Koh said. "It's as though you had a priest with extremely strong moral values who was suddenly charged with leading a war."
>
> That same formulation—moral rectitude—shows up in Karen DeYoung's profile of John Brennan today.
>
> > Some White House aides describe him as a nearly priest-like presence in their midst, with a moral depth leavened by a dry, Irish wit.
> >
> > One CIA colleague, former general counsel John Rizzo, recalled his rectitude surfacing in unexpected ways. Brennan once questioned Rizzo's use of the "BCC" function in the agency's e-mail system to send a blind copy of a message to a third party without the primary recipient's knowledge.
> >
> > "He wasn't joking," Rizzo said. "He regarded that as underhanded."

Back when Brennan's boosters were promising he'd be a controlling figure at CIA, they suggested he'd make these decisions based on a priest-like moral compass.

Yet, just weeks into the job, he has instead asked those who benefitted from this woman's cover-up to bless her promotion, thereby dodging the responsibility himself.

I warned that this moral rectitude thing was just a myth when Brennan was nominated. It sure didn't take long to be proven right.

DID LOGISTICS GUY JOHN BRENNAN SET UP THE TORTURE TAPING SYSTEM? DID HE BUY THE TORTURE COFFIN?

[youtube]mRAHa_Po0Kg[/youtube]

This was one of the most interesting little-noticed exchanges at John Brennan's confirmation hearing last week.

> CHAMBLISS: In 2002 what was your knowledge of interrogation videotapes about Abu Zubaydah, and did you seek any information about an Office of General Counsel review of them in 2002?
>
> BRENNAN: I have — I don't have a recollection of that, Senator.
>
> CHAMBLISS: Of the tapes, or that request?
>
> BRENNAN: At the time, in 2002, I do not know what my involvement or knowledge was at the time of the tapes. I believe that they — I was aware of the Abu Zubaydah debriefings and interrogation sessions being taped.

John Brennan not only knew of the torture tapes but … well, he doesn't remember whether he asked about the OGC review of torture tapes or not.

As a threshold matter, remember that Brennan was in a logistical role at the time the torture sessions were first taped. He had nothing to do with the development of the techniques, he says. But thus far, I think no one has asked him if he procured any of a number of items the torturers used.

For example, did John Brennan help set up the torture taping system? That would explain how he knew they were taping the sessions.

But that's not all. Remember, the Office of General Counsel reviewed the torture tapes — originally as a preliminary to them being destroyed in 2002 — to make sure what the torturers did matched what DOJ's Office of Legal Counsel approved them to do.

We know they shouldn't have. We know the tapes should have shown the torturers exceeding the guidelines of waterboarding. We know the tapes should have shown the torture preceding the date when OLC actually approved it.

And we know the tapes should have shown the torturers putting Abu Zubaydah in a box as part of a mock burial, the only torture technique John Yoo ever labeled illegal.

In short, we know that the tapes should have shown that the torturers exceeded even the limited restrictions OLC put on them.

Instead, by the time OGC reviewed the torture tapes, 15 of the tapes were already partially or entirely destroyed. Some were taped over, some were broken, some showed the taping system had been shut off. 21 hours of Abu Zubaydah's torture somehow did not remain on the tapes at the time of the OGC review in November to December 2002. As it happened, when the Inspector General later reviewed the tapes and compared what John McPherson, the OGC lawyer who had reviewed the tapes, actually recorded, he discovered that McPherson had found it unremarkable that the torturers were deviating from the guidelines approved by OLC.

But it appears, given Saxby's comment, that Brennan was not so much interested in what the IG found, but in what McPherson found. Brennan appears to have been interested in what remained on the tapes after they had been partially destroyed, the first time, after the presumably most incriminating aspects of Abu Zubaydah's torture had been destroyed.

Here's another question. Did logistics guy John Brennan procure the waterboard the use of which exceeded the guidelines laid out by OLC? More importantly, did logistics guy John Brennan procure the box used to conduct an even-John-Yoo-said-it-was-illegal mock burial? And if so, did John Brennan know that the torturers considered the box a coffin?

Did John Brennan know, because he had done the logistics for the torture program, that the torturers had violated the only law Yoo ever put into place?

It would sure explain why the Obama Administration worked so hard to cover up the torture program.

USING PENSIONS TO "PUNISH" "LEAKS" WILL SUBJECT CLEARANCE HOLDERS TO ARBITRARY POWER

The Senate Intelligence Committee's new anti-leak laws are the part of the Intelligence Authorization that will generate the most attention. Greg Miller already got Dianne Feinstein to admit there's no reason to think one of the new provisions—permitting only the most senior intelligence officials to do

background briefings—will limit leaks.

> Feinstein acknowledged that she knew of no evidence tying those leaks or others to background sessions, which generally deal broadly with analysts' interpretations of developments overseas and avoid discussions of the operations of the CIA or other spy services.

Another of the provisions—requiring intelligence committee heads to ensure that every sanctioned leak be recorded—ought to be named the Judy Miller and Bob Woodward Insta-Leak Recording Act.

> (a) RECORD REQUIREMENT.—The head of each element of the intelligence community shall ensure that such element creates and maintains a record of all authorized disclosures of classified information to media personnel, including any person or entity under contract or other binding agreement with the media to provide analysis or commentary, or to any person or entity if the disclosure is made with the intent or knowledge that such information will be made publicly available.

I'm sure someone can think of some downside to this provision, but I can't think of it at the moment (which is why Obama will probably find some way to eliminate it). It will end some of the asymmetry and abuse of classification as it currently exists.

In addition, there are a bunch of provisions that are just dumb bureaucracy.

But it's this one that is deeply troubling. Among the other provisions making nondisclosure agreements more rigorous is a provision that would allow an intelligence community head to take away a person's pension if they "determine" that an individual violated her nondisclosure agreement.

> (3) specifies appropriate disciplinary actions, including the surrender of any current or future Federal Government pension benefit, to be taken against the individual if the Director of National Intelligence or the head of the appropriate element of the intelligence community determines that the individual has knowingly violated the prepublication review requirements contained in a nondisclosure agreement between the individual and an element of the intelligence community in a manner that disclosed classified information to an unauthorized person or entity;

Ron Wyden objects to this on the obvious due process grounds (and notes a big disparity between the treatment of intelligence agency employees and those in, say, the White House). He also describes a scenario in which a whistleblower might be targeted that gets awfully close to the plight of Thomas Drake, who was prosecuted for the documents he had—upon the instruction of the NSA Inspector General—kept in his basement to make a whistleblower complaint.

> It is unfortunately entirely plausible to me that a given intelligence agency could conclude that a written submission to the congressional intelligence committees or an agency Inspector General is an "unauthorized publication," and that the whistleblower who submitted it is thereby subject to punishment under section 511, especially since there is no explicit language in the bill that contradicts this conclusion.

But there's one thing Wyden left out: the proven arbitrariness of the existing prepublication review process. A slew of people have well-founded gripes with the prepublication review process: Valerie Plame, for CIA's unwillingness to let her publish things that Dick Cheney

already exposed; Peter Van Buren for State's stupid policy on WikiLeaks; Glenn Carle for the delay and arbitrariness. That list alone ought to make it clear how a provision giving agencies even more power to use the prepublication review process as a means to exact revenge for critics would be abused.

Now consider the most egregious case: the disparate treatment of Jose Rodriguez and Ali Soufan's books on torture. Rodriguez was able to make false claims, both about what intelligence torture produced and about legal facts of his destruction of the torture tapes. Yet Soufan was not permitted to publish the counterpart to those false claims. Thus, not only did prepublication review prevent Soufan from expressing legitimate criticism. But the process facilitated the production of propaganda about CIA actions.

What's truly bizarre is that the same people who want to leverage the already arbitrary power prepublication review exacts over government employees have also expressed concern about how arbitrary the prepublication review process is.

> U.S. officials familiar with the inquiry, who spoke on condition of anonymity, said that it reflects growing concern in the intelligence community that the review process is biased toward agency loyalists, particularly those from the executive ranks.
>
> Members of the Senate Intelligence Committee expressed such concerns in a recent letter to CIA Director David H. Petraeus, a document that has not been publicly released.

As it is, intelligence community officials will be subject to unreliable polygraph questions focusing on unauthorized (but not authorized) leaks. Those expanded polygraphs come at a time when at least one agency has already been accused of using them for fishing expeditions.

And now the Senate Intelligence Community want to allow agency heads to use a prepublication review process that they themselves have worried is politicized to punish alleged leakers?

THE FIRST TORTURE COVER-UP WAS COVERED UP BY THE FIRST TORTURE COVER-UP LAWYER

Document Exploitation blog has read Jose Rodriguez' book so I don't have to!

Seriously, I will eventually get around to reading Rodriguez' book, when I can get it cheaper than toilet paper. But until then, I'm glad a document wonk has done the work.

One of the more interesting observations from DocEx pertains to Judge Hellerstein's apparent misreading of CIA's promises to fix their contemptuous document responses. Click through for that. (Though now that I understand that Hellerstein was unsuccessfully trying to expose that the President had authorized all this torture, perhaps he believed he had achieved a just result.)

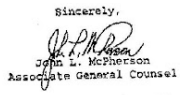
But the real "ah ha" for me was this—showing that the CIA lawyer that reviewed the already-damaged torture tapes and found evidence of that damage not noteworthy…

> 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.”

… Was also the lawyer who provided the original, contemptuous FOIA response.

> Rodriguez’s account also sheds new light on a crucial lynchpin in the ACLU FOIA case by identifing the CIA attorney from the Office of General Counsel (OGC) who viewed the videotapes in Nov. 2002 as “one of the assistant general counsels” whom Rodriguez calls “a very senior Agency officer.” The attorney was later interviewed by the CIA Office of Inspector General (OIG) about that review. Rodriguez’s small, but important details corroborate earlier reporting by the AP and WashPo that the OGC attorney was John L. McPherson, who based on unrelated court filings, was an Assistant General Counsel as of 2001 and later became an Associate General Counsel.

> Why is this significant? Hellerstein found the tapes subject to FOIA because they were "identified and produced to" the CIA's OIG "as part of its investigation into allegations" of unauthorized interrogations and human rights violations. Yet Hellerstein stopped short of finding the CIA in contempt in part because "the individuals responsible for processing and responding to plaintiffs' FOIA requests may not have been aware of the videotapes' existence before they were destroyed."
>
> Remarkably, however, the crucial FOIA response from the CIA regarding the records of the OIG in April 2005 (ergo, 7 months prior to the destruction of the tapes) was written by none other than John L. McPherson. That is, the most important FOIA response in the case was written by the very CIA attorney who, if reporting that Rodriguez's book tends to support is true, arguably knew more about the tapes than anyone else. See for yourself here.
>
> 
> Sincerely,
> John L. McPherson
> Associate General Counsel

In other words, the lawyer who chose not to mention the torture tapes in the original ACLU FOIA is the guy who first saw evidence the torturers were exceeding DOJ guidelines and covering that up on those torture tapes.

That's the guy, by the way, John Durham gave immunity to.