

DOJ SITS ON ITS THUMBS A YEAR AFTER MACONDO'S MOUTH OF HELL ROARED

A year after Macondo the Mouth of Hell roared in the Gulf of Mexico, forever altering the ecology and lives of those who depend on the Gulf for their existence, it is business as usual for BP and a complicit Department of Justice.

DEAR JUDGE HELLERSTEIN: ASK ABOUT THE OLC TORTURE DOCUMENTS, TOO

On Friday, Judge Alvin Hellerstein had a hearing to figure out how to end the contempt suit the ACLU brought against the CIA for destroying the torture tapes. The ACLU asked that he hold the CIA in contempt. Hellerstein said that wouldn't serve much purpose. The ACLU suggested that he could hold individuals—presumably meaning Jose Rodriguez—in contempt. In the end, Hellerstein asked the two sides to brief him with suggestions. He seems likely, however, to do two things:

- Require the CIA to do a report for him to explain how they'll prevent such a thing from happening in the future

- Meet with John Durham to hear what he learned in his investigation and make as much of that public as possible

Now, I'm all in favor of getting a very complete report very public report of how the CIA destroyed evidence of torture. The citizens of this country deserve—at the very least—an overview of the investigation and a clear explanation of the roles of the public figures like Porter Goss and John Rizzo. We deserve to know what John McPherson said about the earlier damage done to the torture tapes after John Durham immunized him—and whether Jose Rodriguez and George Tenet pressured him to lie about it. We deserve to know how this relates to all the lies CIA told Congress. We deserve to know each point when the White House got involved in this process.

But I bet you a quarter that Durham will say he can't make any of this public, because of that mythic ongoing investigation into torture.

It's what they do.

But as for the homework assignment Hellerstein plans on giving the CIA, to provide him with a report that will convince them they will prevent this kind of evidence disappearing in the future?

It has to go further than the torture tapes themselves.

As I cataloged last year, a great deal of evidence pertaining to torture disappeared over the years:

- 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

While we have no idea what, if anything, got destroyed in Cheney’s fire, we do know that CIA, DOD, DOJ, and the State Department (along with whoever owned the server on which John Yoo sent his most classified emails about torture) all somehow “lost” evidence pertaining to torture. It’s not just CIA’s problem, it’s the entire executive branch, seemingly losing torture evidence left and right.

And at the very least, Hellerstein ought to demand the very same kind of report from DOJ as he’s asking for from CIA. I mean, **has** DOJ done anything to make sure the drafts that go into our secret legal opinions authorizing the executive branch to ignore the law don’t disappear, as they did here?? **Has** DOJ done even the presumably minimal things CIA has done to make sure such documents don’t keep disappearing when they become inconvenient or dangerous? And what about John Yoo’s emails? What has DOJ done, Judge Hellerstein should ask, to find John Yoo’s missing emails and make sure similar emails

don't go missing in the future?

It's not just the CIA that treated Judge Hellerstein's order with contempt. So did DOJ. And yet our Justice Department is not even being held to the very low standard that our nation's spooks are.

THE MISPLACED US DETERMINATION TO INDICT ASSANGE

The US determination to prosecute Julian Assange is not just a destructive and myopic scheme to effect prior restraint in a digital world, it is laughable from the point of legal foundation.

TORTURE? CHECK. COVERING UP TORTURE? CHECK. RULE OF LAW? NOPE.

I think it was the timing of the end of the torture investigation that hurts most of all. Just days ago, Harold Koh was boasting of the Durham investigation to the UN. Then Bush started his dog and pony show, including his proud admission to have ordered up torture. All of which made today's announcement, that no one will be charged for covering up evidence of torture, almost anti-climactic.

Of course no one will be charged for destroying the evidence of torture! Our country has spun so far beyond holding the criminals who run our

country accountable that even the notion of accountability for torture was becoming quaint and musty while we waited and screamed for some kind of acknowledgment that Durham had let the statute of limitations on the torture tape destruction expire. I doubt they would have even marked the moment—yet another criminal investigation of the Bush Administration ending in nothing—it if weren't for the big stink bmaz has been making. Well, maybe that's not right—after all, Bob Bennett was bound to do a very public victory lap, because that's what he's paid for.

The investigation continues, DOJ tells us, into obstruction of the Durham investigation itself. Maybe they think they've caught someone like Porter Goss in a lie. But at this point, that almost seems like a nice story the prosecutors are telling themselves so they can believe they're still prosecutors, so they can believe we still have rule of law in this country.

This inquiry started long before Obama started looking forward, not backward. It started before the White House allowed the Chief of Staff to override the Attorney General on Gitmo and torture. It started before we found out that someone had destroyed many of the torture documents at DOJ—only to find no one at DOJ cared. It started before the Obama DOJ made up silly reasons why Americans couldn't see what the Vice President had to say about ordering the leak of a CIA officer's identity. It started before the Obama White House kept invoking State Secrets to cover up Bush's crimes, from illegal wiretapping, to kidnapping, to torture. It started at a time when we naively believed that Change might include putting the legal abuses of the past behind us.

This inquiry started before the Obama Administration assumed the right to kill American citizens with no due process—all the while invoking State Secrets to hide that, too.

This inquiry started before Bush and then Obama let BP get away with serial violations of the

laws that protect our workers and environment, and then acted surprised when BP ruined our Gulf.

This inquiry started before Obama helped to cover up the massive fraud committed by our banks, even while it continued to find ways to print money for those same banks. It started, too, before the Obama Administration ignored mounting evidence that banks—the banks employed by taxpayer owned Fannie and Freddie—were foreclosing on homes they didn't have the legal right to foreclose on, going so far as to counterfeit documents to justify it. This inquiry started when we still believed in the old-fashioned principle of property rights.

This inquiry started before banksters got excused when they mowed down cyclists and left the scene of the crime, because a felony would mean the banker would lose his job.

The ACLU's Anthony Romero reacted to this news saying, in part, "We cannot say that we live under the rule of law unless we are clear that no one is above the law."

I think it's clear. We cannot say we live under the rule of law.

GOVERNMENT TRYING TO FUDGE ON ITS CLAIM TO ABSOLUTE POWER

I'm working on a post on the news that DOJ will not charge Jose Rodriguez for destroying the torture tapes. But that's going to take a while (read the NYT on the news in the meantime).

In the meantime, though, I wanted to point to Adam Serwer's summary of yesterday's hearing on the Anwar al-Awlaki suit. The most amusing

detail in Adam's story is that the government only wants to rely on its invocation of State Secrets as a fallback position.

Letter explicitly asked Bates to dismiss the lawsuit on state-secrets grounds only as a last resort.

See?!? They have some shame about their abuse of executive power, even if they're going to rely on it anyway.

The most important issue, IMO, pertains to standing—I have already suggested that Judge Bates might reject the suit for lack of standing, not least because it's the easiest way to punt. Adam suggests that Bates was thoroughly uninterested in one of two potential ways to establish standing.

The ACLU/CCR contends they have standing under two criteria, "Next Friend" and "Third Party." Meeting the standard under "Next Friend" requires the ACLU/CCR to show that the younger al-Awlaki would want to sue but can't, while "Third Party" demands that the elder al-Awlaki show that he would "suffer a concrete, redressable injury" from the government's actions. Although **Ben Wittes**, who was also there, would disagree with me, I think Bates was more sympathetic to "Next Friend" than he was to the "Third Party" question, as he warned the latter could lead to a flood of lawsuits based on government action, and an "unprincipled landscape" in which judges arbitrarily decide standing based on the plaintiffs they're sympathetic to.

But perhaps the most dramatic part of the hearing appears to have been when Jameel Jaffer stood up and stated that this suit was about whether or not the President can order the assassination of a citizen with no review. I

actually differ with Adam's take on some of this.

There was an exchange at the end of arguments that, beyond the legalese, really crystallized what this case is about. Both sides had offered their final rebuttals, but ACLU attorney **Jameel Jaffer** stood again and stated that the lawsuit was really about whether the president possesses an "unreviewable authority to order the assassination of an American citizen." It moved Bates to ask Letter if he wanted to respond.

[DOJ Attorney Douglas] Letter rose and called Jaffer's statement "absurd" and "ridiculous" but what followed was less convincing. He pointed out that the AUMF limits the president to overseas operations, that al-Awlaki was part of an "officially designated" terrorist group who was "attempting to carry out operations" against Americans. The fact that al-Awlaki had just **released** a new video calling for Muslims to kill Americans probably weighed on reporters in the courtroom.

Only the first of Letter's statements is beyond dispute. The other two concern unproven – but not necessarily inaccurate – assumptions of fact that go to the heart of the case: whether or not al-Awlaki is actually an "operational leader" of al-Qaeda in the Arabian Peninsula or simply a vicious hater who justifies and exhorts terrorism against Americans. The government is actually saying that its unilateral determination that the latter two assumptions are accurate that allow the government to deprive al-Awlaki of life without due process.

First, note that Letter's claim that al-Awlaki

was part of an “officially designated” terrorist group is a bunch of baloney. He is now part of that group, at least according to the unproven allegations of the government. But the State Department didn’t get around to designating al Qaeda in the Arabian Peninsula as such until several weeks after they had put al-Awlaki on the JSOC kill list (though he was not yet on the CIA kill list), so the suggestion that the President would only target someone formally designated a terrorist for assassination is a lie.

But the other claim—that the AUMF only covers operations overseas—is even sillier.

Consider: the government has not yet withdrawn the White Paper retroactively authorizing the illegal wiretap program under the AUMF. Thus, DOJ still supports claims that the AUMF authorized the President—any President—to conduct operations (in that case, military operations in the form of NSA wiretapping) in the United States.

Mind you, Tom Daschle has made it clear that Congress specifically refused to grant the President authority to operate in the United States. But so long as DOJ supports that White Paper, they stand by a public claim that the AUMF authorized the President to operate within the US.

So Jaffer is right: there’s nothing about Douglas Letter’s claims that rebut Jaffer’s argument that this is about whether the President can unilaterally assassinate an American citizen. As Adam has shown, simply asserting someone is a member of a terrorist organization does not make the assertion any less unilateral. And Letter’s claims that the AUMF does not authorize operations in the United States seems to ignore DOJ policy that supports just such a claim.

CHENEY PISSED AT BUSH: DISTRACTION WITH THE WRONG COVER-UP

Today's news will be dominated with Bush's admission that Cheney was mad at him for not pardoning Libby.

Bush, in an interview aired Monday on TODAY, said Cheney was angry that Bush only commuted the sentence of I. Lewis "Scooter" Libby, convicted of lying during the leak investigation.

[snip]

'I can't believe you're going to leave a soldier on the battlefield,' former president says ex-VP told him.

Of course we already knew this. This was widely reported just after Obama's inauguration. And as I pointed out at the time, the underlying story to the non-pardon probably has everything to do with making sure that Libby won't ever reveal Bush's own role in exposing Valerie Plame's identity.

It would have been nice if Matt Lauer asked Bush about whether he refused to pardon Libby so as to keep him silent, but I suppose Lauer's job is to help Bush sell books, not to ask tough questions.

But an even better question would have been to ask Bush whether he believes, with the statute of limitations expiring on the torture tape destruction, his own role in approving torture is now safe. Bush allies have spun a nice story that the White House opposed the destruction of the torture tapes and was mad that Jose

Rodriguez did it anyway. If that's true (ha!), then Bush ought to be pissed that Rodriguez is, apparently, getting away with it. But again, I think Lauer's role is to help Bush sell books, not ask the difficult questions.

As the press is distracted with a rehashing of the successful cover-up of one of Bush's crimes, we ought to remember that today marks the successful cover-up of a more horrible crime.

RUSSIA PRESSURES US TO INVESTIGATE OUR TORTURE-SOME OF IT

On Friday, Russia joined the growing list of country telling us to investigate our torture chambers. It may be more noteworthy coming from Russia given the turnabout: back in the day, of course, dissidents and the US pressured the Soviet Union to abide by the human rights treaties it had signed. Then there's this:

Russia called on the United States to conducted a thorough and objective investigation of the facts of torture of prisoners in U.S. secret prisons and detention centres at Bagram and Guantanamo, Russia's Permanent Representative to the United Nations Office and other International Organizations in Geneva, Valery Loshchinin, said while discussing the U.S. Universal Periodic Review at the UN Human Rights Council.

They want us to investigate Bagram. Great: that's probably where some of our worst abuse currently takes place (when we don't simply outsource it entirely). And I'm sure Russia enjoys pressuring us to be better overlords in

Afghanistan.

And Gitmo: well, sure. While we have investigated some of this torture, there's the outstanding question what we did at Camp No.

But notice what Loshchinin's statement doesn't mention? Our torture chambers in Eastern Europe, particularly Romania and Poland. I guess maybe they thought it'd be unseemly to say, "investigate what you've been doing at those prisons we used for so many years."

And on the subject of investigating torture, as we've been noting, the statute of limitations on the torture tape destruction expires today. Have we indicted anyone yet?

BUSH ADMITS TO APPROVING TORTURE-BUT WHICH USE OF IT?

The WaPo reports that Bush, in his book, admits to approving waterboarding.

In a memoir due out Tuesday, Bush makes clear that he personally approved the use of that coercive technique against alleged Sept. 11 plotter Khalid Sheikh Mohammed, an admission the human rights experts say could one day have legal consequences for him.

In his book, titled "Decision Points," Bush recounts being asked by the CIA whether it could proceed with waterboarding Mohammed, who Bush said was suspected of knowing about still-pending terrorist plots against the United States. Bush writes that his reply was "Damn right" and states that

he would make the same decision again to save lives, according to a someone close to Bush who has read the book.

At one level, this is thoroughly unsurprising. We know the Bush Administration very deliberately implemented torture, so it's unsurprising to hear that it was approved by the President.

But—at least as Jeffrey Smith relays the admission from Bush—it raises as many questions as it does answers.

It appears that Bush admits to approving torture for use with Khalid Sheikh Mohammed. That is, he approved torture sometime around March 1, 2003, when KSM was captured.

That date is itself very significant. After all, on February 5, 2003, the first Democrat (Jane Harman) was briefed that the CIA had used waterboarding. Her response was a letter, objecting not just to the destruction of the torture tapes, but also asking specifically whether Bush had signed off on torture.

I would like to know what kind of policy review took place and what questions were examined. In particular, I would like to know whether the most senior levels of the White House have determined that these practices are consistent with the principles and policies of the United States. Have enhanced techniques been authorized and approved by the President?

In response, CIA appears to have met with the White House around February 19, ostensibly to talk about an appropriate response. They also appear to have consulted with the White House on how they should record the results of the Gang of 4 briefings from that month; in the end, they only recorded the outcome of the Senate briefing—which Jay Rockefeller did not attend and at which Pat Roberts is recorded to have

signed off not just on torture, but on destroying the torture tapes depicting that torture. In other words, for much of February 2003, CIA was working closely with the White House to create a false appearance of Congressional approval for torture, even while they were specifically refusing to give Congress something akin to a Finding making it clear the President had signed off on that torture.

And now we come to find out that's precisely the period during which—at least according to Bush—he approved torture.

But note what that leaves out. At least from Smith's description, it appears that Bush says nothing about approving the waterboarding of Abu Zubaydah (nor the reported waterboarding of Ibn Sheikh al-Libi). Mind you, Ron Suskind has reported that Bush was intimately, almost gleefully, involved in ordering torture for Abu Zubaydah.

But Bush doesn't cop to that in his book.

Now, there may be good reason for that. After all, John Yoo had not yet written the memo claiming that waterboarding did not amount to torture at the time Abu Zubaydah was first tortured.

Moreover, there's the whole issue of the approval method for the torture that occurred before August 1, 2002.

The source says nearly every day, Mitchell would sit at his computer and write a top-secret cable to the CIA's counterterrorism center. Each day, Mitchell would request permission to use enhanced interrogation techniques on Zubaydah. The source says the CIA would then forward the request to the White House, where White House counsel Alberto Gonzales would sign off on the technique. That would provide the administration's legal blessing for Mitchell to increase the pressure on Zubaydah in the next interrogation.

According to multiple reports, the White House—Alberto Gonzales at least, if not his boss—approved the torture of Abu Zubaydah on a daily basis. And when you read the Bybee Memo and the OPR Report on it, it's very clear that the memo carved out legal authorization specifically for the torture directly authorized by the President. Indeed, the White House's prior approval for torture—potentially up to and including waterboarding—may explain the urgency behind the memo in the first place, to provide retroactive legal cover for Bush's unilateral disregard for US laws prohibiting torture.

In other words, Bush has admitted to approving torture in 2003. But that likely obfuscates his earlier approval for torture at a time when he had no legal cover for doing so.

In other news, the statute of limitations on the torture tape destruction expires in just three or four days. Yet we've got silence coming from John Durham.

POLISH PROSECUTOR LOOKS BACKWARD; US PROSECUTOR LETS STATUTE OF LIMITATIONS TICK AWAY

ACLU reports that Rahim al-Nashiri's lawyer's request to include their client's treatment at a black site in Poland in the country's investigation has been successful.

The Polish prosecutor will investigate the detention and torture of Abd al-Rahim al-Nashiri at a black site in Poland after he was kidnapped and transported there by the CIA.

[snip]

Al-Nashiri, who is accused in the 2000 U.S.S. Cole bombing, was granted the status of “injured party” in Poland’s ongoing investigation into torture in response to a September 21 petition from his lawyers.

Jameel Jaffer uses this event to focus on how little our own country has done to hold its torturers accountable.

Today’s announcement that Poland will investigate the torture of Mr. al-Nashiri serves as a stark reminder of how little has been done in the U.S. to hold top officials accountable for torture. Holding torturers accountable is essential to restoring American credibility at home and abroad – the U.S. can no longer remain silent as, one by one, other nations begin to reckon with their own agents’ complicity in the torture program through prosecutions and judicial inquiries.

Of course, at the rate we’re going, there will be no accountability. The statute of limitations on the destruction of the torture tapes will expire in just 11 days. At that point, the CIA will have officially gotten away with destroying the evidence of their torture, including evidence pertaining to al-Nashiri himself.

MORE TORTURERS COMING BACK TO CIA AS

CONTRACTORS

Adam Goldman has another in his series of articles fleshing out the details of the torture that John Durham is investigating. Today's story describes the former FBI-turned CIA guy, "Albert" threatened Rahim al-Nashiri with a drill—with the approval of Albert's boss, "Mike." (Though the AP story says this threat would be less than a felony assault, recall that John Yoo specifically forbade CIA to use death threats, so while it might not be assault it would—according even to John Yoo—constitute torture.)

I assume you'll go read that in its entirety.

While you're there, note this emerging pattern in Goldman's reporting on torture: the return of torturers as CIA contractors. He reports that "Albert" left the CIA then returned to train CIA officers as a contractor.

After leaving the CIA, Albert returned at some point as a contractor, training CIA officers at a facility in northern Virginia to handle different scenarios they might face in the field, according to former officials. Albert hasn't been involved in training CIA employees for at least two years, but a current U.S. official says he continues to work as an intelligence contractor.

A message left with Albert was not returned. It's not clear when he left the agency and became an intelligence contractor.

Recall that, in a story from a few weeks ago, Goldman reported that Jose Rodriguez (who gave the order to destroy the torture tapes, among other things) regularly lurks around CIA and ODNI as the head of Edge Consulting.

Rodriguez, now an executive with contractor Edge Consulting, a job that

regularly gives him access to the national intelligence director's office and CIA headquarters, still hasn't received an official retirement party.