

# DID CIA MISREPRESENT INTERROGATION POLICY TO COURT IN PASSARO CASE?

I wrote in my last post on David Passaro that he knew precisely how to defend himself (go [here](#) for general background on Passaro and his case). Even before he was indicted, Passaro asked for discovery on CIA's rules of engagement for detainee interrogations, which he tied to SERE techniques well before the connection had been made publicly.

Which is why Passaro's requests—and CIA's refusals—for interrogation guidelines are so interesting. While much of those early discovery requests remain redacted, on November 18, 2004 Passaro requested:

- All memoranda from OLC on the capture, detention, and interrogation of members of the Taliban, al Qaeda, or other terrorist organizations operating in Afghanistan
- All memoranda from CIA's Office of General Counsel on the capture, detention, and interrogation of members of the Taliban, al Qaeda, or other terrorist organizations operating in Afghanistan
- "[C]omplete contents of the rules of engagement for the CIA that address the capture, detention, and/or

interrogation of the Taliban, al Qaeda, or other terrorist organizations or combatants operating in Afghanistan" including those categorized as "force protection targets"

- "[A]ll written documents, photographs, video, and sound recordings that contain the methods employed in Afghanistan by members of CIA, DOD, or OGA for the capture, detention, and/or interrogation of members of the Taliban, al Qaeda, or other terrorist organizations, or other combatants operating in Afghanistan, **including policies and guidelines developed in early 2003 for use by Special Operations forces**"
- "[A]ll orders, directives, and/or authorizations by President George W. Bush; **ex-CIA Director George J. Tenet**; the CIA Director of Operations; and the head of CIA's Counterterrorist Center, Office of Military Affairs, or any other CIA component, that address the capture, detention, and/or interrogation of members of the Taliban, al Qaeda or

other terrorist  
organizations or combatants  
operating in Afghanistan”

- All information on Passaro’s  
training [my emphasis]

At some point (the document appears to have been sent on January 23, 2006), the government handed over the only such description it gave to Passaro’s team (see PDF 21), what they claim was a December 3, 2002 cable sent in support of operations in Afghanistan and along the Pakistan border.

When CIA officers are involved in interrogation of a detainee, the conduct of such interrogation should not encompass any significant physiological aspects (e.g., direct physical contacts, unusual mental distress, unusual physical restraints, or deliberate environmental deprivations)—beyond those reasonably required to ensure the safety and security of the detainee—without prior and specific headquarters guidance.

Now, the cable is interesting on its own right. It has not, to the best of my knowledge, appeared in any FOIA document dump or even Vaughn Declaration. Though we know that Langley sent a long cable to the Thai black site on November 30, 2002. And in the beginning of December there was cable traffic back and forth about closing that black site and destroying the torture tapes. The date certainly suggests the cable to Afghanistan might have been a response to Gul Rahman’s November 20, 2002 death at the Salt Pit, particularly with its prohibition on any “deliberate environmental deprivations.”

Note, too, the language the CIA used: “in support of ongoing CIA operations in Afghanistan and along the Pakistan border.” The reference to Pakistan sure sounds like a tacit admission that CIA was working in Pakistan already by that

point.

But the really disturbing part of this document is CIA's claim that this policy governed the interrogation of Abdul Wali in June 2003. After all, the month after they sent this cable, George Tenet issued Guidelines to cover the CIA interrogation of detainees, guidelines that "control" over guidelines previously sent by the Directorate of Operations. That is, Tenet's Guidelines, not the December 3, 2002 cable, would seem to have been the operative guidelines in June 2003.

And these guidelines, addition to approving, as "standard" two of the three initial techniques used with Abdul Wali (sleep and food deprivation), also describe a set of Enhanced Techniques for use with approval by Headquarters. At least three of these Enhanced Techniques—walling, abdominal slap, wall standing, and stress positions—were also, arguably, the treatment used with Wali. He was repeatedly slammed against a wall, hit in the stomach, and forced to do the "iron chair" for at least an hour at a time.

While the document, by itself, doesn't say anything about whether or not the techniques would have been approved for use with Wali (I'll look at that closer in a follow-up post), it does seem that the CIA deliberately refused to turn over to the defense a document that would have shown some of the treatment used with Wali was not only (with approval) acceptable, but for some techniques, "standard."

Mind you, there are at least two ex parte filings that might include this document (or the other documents Passaro requested), one in November 2005 and one in January 2006. So the only question here is whether the government turned over the Tenet document to the Court, but not the defense.

But in any case, they certainly avoided admitting to the jury that CIA considered some of the techniques used with Wali standard.

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# **CIA LAWYERS WERE DISCUSSING “ISSUE THAT AROSE” THREE DAYS BEFORE JULY 13 FAX**

My focus on the multiple versions of Abu Zubaydah's psychological assessment led me to review the CIA OIG Vaughn Declaration from last August, and one document that was withheld caught my eye.

The document strongly suggests that the July 13, 2002 John Yoo fax that appears to have been used as CIA's general authorization for torture was written in response to a specific issue that had already arisen with Abu Zubaydah.

The Vaughn Index was written in response to ACLU's FOIA for documents relating to what would have been shown on the 92 destroyed torture tapes. From the descriptions in the Vaughn, it's clear that most of the documents include things like plans for torture techniques written both before after after Abu Zubaaydah's torture, plans for black sites, communication about the investigation into detainee treatment (I presume that treatment of al-Nashiri would be included, since his interrogations were also on the destroyed tapes, but not the Salt Pit death of Gul Rahman, which wasn't taped), and interviews from the investigation.

And though there are a few documents that clearly are efforts to improve on the techniques used against AZ (including pictures), there are relatively few documents in CIA IG custody from the period of AZ's most intense interrogation. There are:

- “4-pages of handwritten

notes, dated April 3, 2002, by a CIA officer regarding the interrogation of Abu Zubaydah."

- "A 1-page email," dated April 5, 2002, "with an attached two page cable from a CIA attorney to a CIA officer regarding the interrogation of Abu Zubaydah."
- A "four page cable from the field to CIA Headquarters," dated April 11, 2002, containing "information relating to the CIA's terrorist detention and interrogation program" (note, this was the day Yoo officially started on the Bybee Memo).
- A May 15, 2002 "two page memo from one CIA officer to another CIA officer discussing information, provided by Abu Zubaydah, relating to a classified counter-terrorism operation."
- A "1-page of handwritten notes dated July 24, 2002 from a CIA officer describing proposed interrogation techniques that could be considered for use on detainees."
- A "two page cable from the

field to CIA Headquarters," dated August 12, 2002, and "a 6-page cable from the field to CIA Headquarters," dated August 24, 2002, both containing "information relating to the interrogation of Abu Zubaydah."

(There's also a cable listed with the date July 26, 2006, which given its place in the Vaughn Index might actually have been dated July 26, 2002, discussing AZ's status.) There are also a few documents that pertain to discussions in DC (for example, a Memorandum of Understanding recording CIA's version of an early meeting on the Bybee Memo).

Then there's the email that sparked my interest, labeled Email-591, dated July 10, 2002, and classified as Top Secret.

This document is a 2-page email chain between CIA attorneys. The document contains the attorneys' legal analysis as it relates to a specific issue that arose in the context of the CIA's counter-terrorism program, which was created in anticipation of litigation.

In other words, on July 10, 2002, two of CIA's lawyers were discussing something that came up—almost certainly (given the scope of the FOIA response) during Abu Zubaydah's interrogation—in **anticipation of litigation**. And three days later, CIA lawyer John Rizzo would attend a meeting at which DOJ Criminal Division head Michael Chertoff refused to give CIA an advance declination for any crimes committed during Abu Zubaydah's interrogation and FBI Chief of Staff Daniel Levin announced that the FBI would no longer have anything to do with the CIA's interrogation program. Ostensibly, those responses came partly in response to Rizzo's

description of purportedly **proposed** torture techniques. Yet after that meeting, Rizzo asked John Yoo for a letter “setting forth the elements of the torture statute.” And the fax Yoo wrote in response—rather than the formal Bybee One opinion—would serve as CIA’s internal guide for the role of intent in the torture statute, particularly the way intent purportedly played into torture having to do with the infliction of severe mental suffering.

All of which suggests the torturers did something to inflict severe mental suffering on Abu Zubaydah—one the CIA’s own lawyers recognized might result in litigation—just before July 10, 2002.

Here’s how the plays into the context of the July 13 fax.

**July 10, 2002:** The first piece of intelligence from Abu Zubaydah—describing the relationship between Khaldan and Derunta training camps and al Qaeda—used in the 9/11 Report.

**July 10, 2002:** Two CIA attorneys conduct legal analysis via email—in anticipation of litigation—on a specific issue that arose in the context of the CIA’s counter-terrorism program.

**July 10, 2002:** John Yoo tells Jennifer Koester that they will present the Bybee memo to NSC at 10:45 on July 12 (and names the Bybee Memo the “bad things opinion”!).

**July 11, 2002:** John Yoo and Jennifer Koester have briefing session with Michael Chertoff on Bybee Memo.

**July 11, 2002:** An OLC paralegal cite-checks the draft, and someone schedules a July 12 meeting with Alberto Gonzales and a July 13 meeting with (effectively) NSC.



**July 12, 2002:** First draft of Bybee Memo distributed outside of OLC.

**July 12, 2002:** John Yoo meets with Alberto Gonzales (and either David Addington or Tim Flanigan) on Bybee Memo.

**July 13, 2002:** John Yoo and Jennifer Koester present July 12 draft to John Rizzo, John Bellinger, Michael Chertoff, Daniel Levin, and Alberto Gonzales. Rizzo provides overview of interrogation plan. Chertoff refuses to give CIA advance declination of prosecution. Levin states that FBI would not participate in any interrogation using torture techniques, nor would it participate in discussions on the subject.

**July 13, 2002:** Rizzo asks Yoo for letter "setting forth the elements of the torture statute."

**July 15, 2002:** John Yoo faxes John Rizzo July 13 letter on the torture statute.

**July 15, 2002:** John Yoo sends Jennifer Koester an email telling her to include a footnote in the opinion stating that they had not been asked about affirmative defenses like necessity, self-defense, or commander-in-chief powers.

**July 16, 2002:** John Yoo and Jennifer Koester meet with Alberto Gonzales and (probably) David Addington and Tim Flanigan. **Yoo shared the July 13 fax with them.** At the meeting, it is decided that Yoo will include Commander-in-Chief and other affirmative defenses in Bybee Memo.

**July 16, 2002:** In response to earlier request from Michael Chertoff (perhaps as early as July 13), John Yoo has Jennifer Koester draft, but not send, a

letter to CIA refusing a letter of advance declination of prosecution.

**July 17, 2002:** George Tenet meets with Condi Rice, who advised CIA could proceed with torture, subject to a determination of legality by OLC.

In other words, this entire discussion—including the meeting at which David Addington appears to have told John Yoo to put in affirmative defenses—happened in the wake of this issue that arose, almost certainly in Abu Zubaydah's torture.

There's one more item of interest, particularly considering the torturers' boast that they had inflicted "hard dislocation" on him during his 63rd session which "was one of the few [things] led to him providing significant actionable intelligence."

The first piece of intelligence based on Abu Zubaydah interrogation cited by the 9/11 Commission (albeit a fairly innocuous piece of intelligence about the Khaldan camp), was dated July 10, 2002. The same day the CIA lawyers were worried about litigation.

It would all make so much sense (though this is a wildarsed guess). They do something that causes AZ severe mental suffering—something amounting to a threat of imminent death, like waterboarding or mock burial. In response to that treatment AZ gives his torturers the first piece of intelligence that actually involves al Qaeda (because, of course, he wasn't a member of al Qaeda). But the treatment is serious enough that CIA's lawyers (probably including John Rizzo) start worrying whether it can get the torturers charged with torture. That probably weighed heavily on John Rizzo when, after he presented the "proposed" torture program on July 13, the country's top prosecutors reacted badly. And so, panicked, he asked John Yoo for a fax laying out how to avoid being charged under the torture statute. And while CIA and OLC danced

around for two more weeks preparing a document that made the torture program look palatable enough to sign off on, that wasn't what CIA would rely on.

There's just one problem with the timing of this. If you look at the pattern of cables reporting on interrogations, the entire month of July (actually, everything after June 19) consists of a single 2-3 page cable every day (the single exception is July 20, when a 5-page cable is sent). At least judging from the cable traffic, there appears to be no turbulence or extraordinary events during this entire period.

But whether the issue that arose actually happened close to July 10 or happened earlier, it does appear that that issue lay behind the July 13 fax.

Update: Headline changed.

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## ABU ZUBAYDAH'S DRAWINGS

Jason Leopold has a long article on Abu Zubaydah out that you should read in detail. It provides an update on AZ's torture diaries (which his lawyer now has, though in untranslated form). And the tidbit that one reason officials are so worried about information on AZ coming out is that it'll show the massive intelligence failure that resulted in the conclusion that he was a top al Qaeda officer.

These officials claim that while there is some concern within the Justice Department about the details of Zubaydah's interrogations prior to August 2002 being revealed and leading to renewed calls for an investigation, there is greater unease with the fact that if the case moved forward it would

expose the massive intelligence failure that took place in the last months of the Clinton administration and during George W. Bush's first term that resulted in Zubaydah at one point being named the No. 3 official in al-Qaeda and one of the planners of the 9/11 attacks.

There's also further confirmation that Mitchell and Jessen were conducting a human experiment on AZ, including testing how long a human could go without sleep.

For example, one current and three former CIA officials said some videotapes showed Zubaydah being sleep deprived for more than two weeks. Contractors hired by the CIA studied how he responded psychologically and physically to being kept awake for that amount of time. By looking at videotapes, they concluded that after the 11th consecutive day of being kept awake Zubaydah started to "severely break down." So, the torture memo concluded that 11 days of sleep deprivation was legal and did not meet the definition of torture.

But I'm particularly interested in the degree to which AZ's lawyer, Brent Mickum, seems to believe that John Durham is interested in AZ's drawings of the torture done to him.

During a recent meeting with Durham, Mickum said he learned that the special prosecutor had obtained drawings during the course of his probe that Mickum believed were Zubaydah's. In addition to the diaries, Mickum had previously sought from the Justice Department drawings Zubaydah made while in CIA custody. But the Justice Department told Mickum they could not locate the drawings.

"When I met with John Durham I discovered he had drawings, which, based on my review I believed were my client's," Mickum said. "The drawings were ultimately produced to us in late 2009."

The Justice Department would not discuss the drawings, diaries, or other issues related to Zubaydah's case.

Mickum said in lieu of the torture tapes, the drawings Zubaydah made contain the best description of the torture techniques CIA interrogators used against Zubaydah while he was being held at the agency's black site prison facilities. Mickum said he could not disclose how many drawings Zubaydah made nor could he discuss the content.

"These are a good group of drawings and he is a pretty good artist," Mickum said. "The depictions would be of interest. [Zubaydah] can draw and with great detail."

This suggests two things. First, that until some time last year, DOJ claimed not to be able to locate drawings that had already been turned over to Durham for his investigation. And that those drawings may be detailed enough to clarify precisely what the torturers did to him when.

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## JOHN ADAMS AND PATRICK FITZGERALD

About a million of you, seeing Isikoff and Hosenball's and Justin Elliott's coverage of a story about Fitzgerald getting involved in an investigation of how photos of torturers ended up at Gitmo have emailed me the story in alarm.

(This is a story I first covered 8 days ago.)

I'm going to attribute the alarm to the fact that neither Newsweek nor Elliott mention Bill Gertz's much more detailed and informative story that first broke this. And to the use of phrases like "most feared," "paparazzi," "national controversy," "star prosecutor," which sensationalize the story more than it appears to merit, at least thus far.

Here's what I think is going on:

1) DOJ has been investigating the John Adams Project since last August to find out how photographs of torturers got into the hands of detainees at Gitmo. The JAP has employed a Private Investigator to track down likely interrogators of detainees, to take pictures, get a positive ID, and once done, call those interrogators as witnesses in legal proceedings. DOJ appears concerned that JAP may have made info-learned confidentially in the course of defending these detainees-available to those detainees, and therefore violated the protective order that all defense attorneys work under. Yet JAP says they collected all the info independently, which basically means the contractors in question just got caught using bad tradecraft.

2) DOJ appears to believe no crime was committed and was preparing a report to say as much for John Brennan, who will then brief Obama on it.

3) But CIA cried foul at DOJ's determination, claiming that because one of the lawyers involved, Donald Vieira, is a former Democratic House Intelligence staffer, he is biased. They seem to be suggesting that Vieira got briefed on something while at HPSCI that has biased him in this case, yet according to the CIA's own records, he was not involved in any of the more explosive briefings on torture (so the claim is probably bullshit in any case). After CIA accused Vieira of bias, he recused himself from the investigation.

4) So apparently to replace Vieira and attempt

to retain some hold on DOJ's disintegrating prosecutorial discretion, DOJ brought in Patrick Fitzgerald to pick up with the investigation. Fitz, of course, a) has impeccable national security credentials, and b) has the most experience in the country investigating the Intelligence Identities Protection Act, having investigated the Torturer-in-Chief and his Chief of Staff for outing CIA spy Valerie Plame. In other words, DOJ brought in a guy whom CIA can't bitch about, presumably to shut down this controversy, not inflame it.

Now, it appears that the CIA's concerns were included in the memo to Brennan over DOJ's wishes. Or perhaps Fitz is just going to review the case. And if the JAP people did, as they say, use only external information to ID these torturers, then they are likely legally safe and the involvement of Fitz is simply going to quiet down the controversy.

But all that's obviously NOT what this is about, notwithstanding efforts to turn this into a big scandal.

It's about three things:

First, whether detainees at Gitmo will be able to call witnesses in legal proceedings. The government has protected the identities of the torturers at every step of the way, thereby preventing any detainee from holding a torturer responsible for their torture or, just as importantly, getting the torturer to testify to exonerating information (remember, for example, that some of the torturers have conceded that the confessions the detainees made were false). What JAP is trying to do is simply collect the information they need to litigate their cases.

CIA scandal-mongering again to avoid any liability for torture. It's worth noting, CIA is using exactly the same excuse to explain their concern here as they used to explain why they destroyed the torture tapes:

CIA counterintelligence officials oppose the effort and say giving terrorists

photographs of interrogators has exposed CIA personnel and their families to possible terrorist attacks.

Now aside from how hollow this cry rings from a bunch of people who themselves threatened detainee family members, I really do wonder how they think a bunch of al Qaeda detainees imprisoned for life will be able to wreak revenge on their torturers? And I wonder how Mitchell and Jessen appear to wander freely with no care of such things?

But the other thing this is about is eroding all DOJ's prosecutorial independence such that it cannot try any torture cases, because every single decision will have to be approved by former CIA bigwig John Brennan. The torturers know that the White House wants to ~~bury its head in the sand~~ look forward. DOJ wants to simply do its job and weigh decisions independently. But CIA knows if DOJ does that, it will face repercussions for the things it did.

And so it turns what should be a thoroughly uncontroversial effort to cater to CIA's concerns into a bigger scandal.

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## **KIRIAKOU: CIA IG REPORT CONFIRMED THEY WATERBOARDED BEFORE GETTING APPROVAL (?)**

I believe Jon Kiriakou is still engaging in disinformation, so while I suppose I'll read his book, I won't accept anything in it without corroboration.



Take this weird tidbit in his appearance on Tweety (just after 2:05). The statement is false on its face. But it does report an underlying truth.

We didn't know that he'd been waterboarded 83 times. Last year the CIA Inspector General's Report came out from 2004, heavily redacted, but it still confirmed that, ah, Abu Zubaydah had been waterboarded before the CIA actually received written permission to do it. So my view now, in retrospect, is that he had been waterboarded 83 times, but the people in the field actually carrying out the waterboarding did not report it. So those of us at headquarters, seeing the one report that finally did come in, believed he had been waterboarded once, and he had cracked.

See, that's not what the CIA IG Report says—certainly not the unredacted section. In fact, the CIA IG Report implies that all the waterboarding occurred in August 2002, so after the Bybee Memo was signed.

Interrogators applied the waterboard to Abu Zubaydah at least 83 times during August 2002.

So if waterboarding happened before the Bybee Two memo was signed, it was not entered into the log books (nor was it captured on the 77 torture tapes still functional by the time the IG review them) the IG based this claim on. Or, the IG Report doesn't mention it along with the other unredacted discussions of waterboarding. Or, the IG is lying about the timing of these 83 waterboardings.

And Kiriakou's statement makes no sense, anyway, because if those 83 waterboardings took place in August but the IG Report admitted to waterboarding before the Bybee Two memo was

signed, then the single waterboarding (the one that “cracked him”) would have been the one that happened before August.

That said, we do know Zubaydah was tortured before the Bybee Memos got signed—we’re just unclear on what happened (that is, how much torture happened), when.

All this confusion may simply stem from Kiriakou’s own attempt to excuse his own disinformation about waterboarding in the first place. Or he may well be confused himself, still reeling from cognitive dissonance of discovering the truth behind the torture regime. Or perhaps he is revealing something that is not otherwise documented in unredacted documents.

In any case, between Kiriakou and Thiessen and others spinning wildly, we’ll continue to hear details that don’t match the known details of the torture program.

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## **DID ADDINGTON OPPOSE 9/11 COMMISSION QUESTIONS TO AVOID INDEPENDENT EVALUATION OF TORTURE PROGRAM?**

Shortly after news broke that CIA destroyed the torture tapes, the 9/11 Commission issued a letter complaining that they had not been told of—much less been allowed to review—the torture tapes.

**I** The commission’s mandate was sweeping and it explicitly included the

intelligence agencies. But the recent revelations that the C.I.A. destroyed videotaped interrogations of Qaeda operatives leads us to conclude that the agency failed to respond to our lawful requests for information about the 9/11 plot. Those who knew about those videotapes – and did not tell us about them – obstructed our investigation.

They released a memo from Philip Zelikow describing how the Administration refused to allow the 9/11 Commission direct access to detainees in early 2004.

The full Commission considered this issue in a meeting on January 5, 2004 and decided the CIA responses were insufficient. It directed the staff to prepare a letter to administration officials that would make the dispute public. There were then discussions between Hamilton and White House counsel Alberto Gonzales and several meetings of CIA lawyers with Commission staff. The Commission offered various compromises to avoid disrupting the interrogation process, including direction or observation of questioning in real-time using one-way glass, adjoining rooms, or similar techniques. In a January 15, 2004 memo to Gonzales, Muller, and Undersecretary of Defense Steve Cambone, Zelikow wrote, "We remain ready to work creatively with you on any option that can allow us to aid the intelligence community in cross-examining the conspirators on many critical details, clarify for us what the conspirators are actually saying, and allow us to evaluate the credibility of these replies."

But these negotiations made little progress. Hamilton and commissioner Fred Fielding then met with Gonzales, Tenet, Secretary of Defense Rumsfeld, and Chris

Wray from the Department of Justice. The administration offered to take sets of written followup questions, pose them to detainees, relay answers back to the Commission, and take further questions. In a January 26, 2004 meeting the Commission accepted this proposal as the best information it could obtain to address its longstanding questions.

Today's document dump includes an interesting snapshot of the Administration response to the Commission request. (PDF 25-30)

It appears that David Addington took the lead on refusing the 9/11 Commission's request. It appears Addington got the draft of the letter from 9/11 Commission—which was addressed to Rummy and George Tenet. Tenet and Addington clearly had a conversation about how to respond. But it seems that Addington drafted the response, got Condi, Andy Card, and Alberto Gonzales to review it, and then sent it to Tenet (and, presumably, Rummy) to okay and sign the letter.

In other words, OVP had the lead in refusing the 9/11 Commission's request for more information from the detainees.

The document is also interesting for the underlining on the letter from the Commission. While it's not clear who made the markings (though it seems likely to be Addington since that version of the letter clearly came from him), whoever made them appears to have reacted strongly against the Commission's intention to independently evaluate the detainees and their interrogations. Here are the passages underlined:

We are prepared to work with you on procedures which will not supplant the role of the familiar interrogators, but which will allow our staff members to observe questioning in real time and then to put forward to the interrogators

immediate, essential follow-up questioning, with the opportunity to independently evaluate the replies. We believe that one-way glass, adjoining rooms or similar techniques can accommodate our mutual concerns.

[snip]

The procedures we have proposed will enable the Commission to form its own independent evaluation of the credibility of the conspirators' statements.

In other words, it appears that whoever made these annotations appears to have been most worried that Commission staff members could make independent judgments about the detainees and the interrogations.

Addington—or whoever this was—didn't want anyone to independently evaluate the interrogations conducted in the torture program.

One more point: the Commission made it clear that they needed to view interrogations directly because they had identified gaps in the narrative as early as the previous October, but in several rounds of clarifying questions the Administration hadn't been able to close those gaps.

In October we provided two memoranda detailing many specific anomalies and gaps in the reports, and listing certain questions we asked to be posed to the conspirators. The intelligence community answered as best it could in November, but only a few of our submitted questions have been addressed. The various substantive problems remain after analyzing even the most recent information we have received. We cannot detail these problems in this unclassified letter.

Particularly given that the 9/11 Commission used only 10 pieces of intelligence from Abu Zubaydah (and just 16 from Rahim al-Nashiri) you can imagine what would have looked like gaping holes. Here were al Qaeda's number 3 and the purported mastermind of the Cole bombing, and yet they provided little information about those subjects (or at least, little that Commission staffers found credible). Indeed, by the time the Commission made their request, most of the information they had received had to do with the popularity of different al Qaeda figures (the accuracy of some of which the Commission doubted), another doubted claim about KSM's plan on 9/11, and about Osama bin Laden's response to the Cole bombing. They were probably wondering why some of the only credible information unique to AZ pertained to a training camp—Khalden—that wasn't even formally affiliated with al Qaeda.

They were probably wondering why it looked like Abu Zubaydah wasn't really part of al Qaeda at all.

At the very least, letting Commission staffers view the interrogations would have showed that the interrogators were incompetent at what they were doing (which, Zelikow has made clear, was already becoming apparent from the interrogation reports anyway).

But, too, there was another risk. If Commission staffers saw some of these detainees in person, it would become clear that they weren't who the Administration claimed them to be.

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## **CIA HAS NO IDEA WHAT IT BRIEFED CONGRESS ON TORTURE**

The CIA documents released in the latest FOIA batch prove that all the claims that CIA (and

Crazy Pete Hoekstra) have made about briefings Congress received on torture are, at best, reconstructions based on years old memories, if not outright fabrications.

The documents appear to have been a summary of torture briefings CIA Office of Congressional Affairs put together on July 11, 2004 in anticipation of CIA's Congressional briefing in July 2004.

The summary shows that:

CIA OCA had not written up the briefings it gave Porter Goss and Jane Harman in February 2003 or the Gang of Four in September 2003 before July 2004. At that time, Moskowitz explained that the "[Memoranda for the Record] for the remainder of the sessions are being finalized." In fact, the MFR for the February 2003 Goss-Harman briefing was ultimately closed in 2007, after Moskowitz had passed away. Thus, any claims they make about the content of those briefings cannot be said to be accurate.

Also, when putting together a list of briefings, OCA head Stan Moskowitz didn't even seem to consider the September 2002 briefings (at which Bob Graham said he was not told about torture at all and Nancy Pelosi was told it might be used in the future) to be relevant as a Gang of Four briefing regarding interrogation/detainee issues. Now, it's possible that Moskowitz was asked to summarize only the possible discussions of the torture tapes (page 11 seems to suggest this pertains to torture tape destruction and no one has ever claimed that CIA briefed on the torture tapes in 2002). Or, it may be that CIA just didn't consider those the truly sensitive briefings.

The only MFR that OCA seemed to have completed by July 2004 is the February 4, 2003 briefing, at which Pat Roberts apparently unequivocally approved of destroying the torture tapes (and at which he also agreed to end nascent Congressional attempts at oversight). As noted in several places in these documents, Jay

Rockefeller did not attend that briefing.

In other words, the claims that CIA had detailed records about what Nancy Pelosi or Jane Harman or Jay Rockefeller said about destroying the torture tapes? They appear to be completely fabricated.

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## MORE TORTURE DOCUMENTS

Anyone feel like they drowning under the weight of a really horrible bureaucracy yet.

DOJ IG Documents (1)

DOJ IG Documents (2)

CIA Documents

DOD Documents

OLC Documents

Consider this a working thread.

Jeff Kaye—see the first document in the OLC batch, which pertains to Appendix M.

In CIA Thread, PDF 3 is a document that has to have been written after September 4, 2003 (I suspect it was written sometime during the finalization of the CIA IG Report). It shows that the Memoranda for the Record memorializing the Congressional briefings in February and September 2003 **were not yet finalized**. This means that the MFR for the Goss and Harman briefing on February 5, 2003—at which Harman may have expressed concern about the torture and destruction of the torture tapes—was written at least seven months after the briefing. It also suggests that CIA may not have considered the September 2002 briefings to be briefings on torture (as they appear not to have been).



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# A CATALOG OF THE DESTROYED TORTURE EVIDENCE

I just re-read Philippe Sands' *Torture Team* and, given the news of disappearing emails and documents, this passage struck me anew:

[Mike Dunlavey, who was in charge of Gitmo as they put together the torture plan for Mohammed al-Qahtani] would have liked to have gone back to the daily diaries and schedules that were kept on the computer system, together with reports that were sent out on a daily basis, and details of the videoconferences that had taken place with the Pentagon. "I need to see that stuff," he mused, "how am I going to get it?" It seemed doubtful that he would. "They were backed up at SOUTHCOM," he explained, but "a couple of months after I left there was a SNAFU and all was lost."

Sands goes on to wonder whether there might be a connection to the destruction of the torture tapes. Dunlavey left Gitmo in November 2002, so those materials would have been lost in late 2002 or early 2003, when we now know people were panicking about what to do about the torture tapes. That was also between the time when—at the end of November 2002—a lawyer from CIA's Office of General Counsel reviewed the tapes and claimed they matched the torture logs exactly, and the time when—in May 2003—CIA's Inspector General discovered they weren't an exact match. More importantly, CIA IG discovered there were 11 blank tapes, 2 broken ones, and 2 more mostly blank ones, suggesting that a first round of efforts to hide evidence on the torture tapes

took place before CIA's IG reviewed them.

In other words, this "SNAFU" happened around the same time as the first round of destruction of the torture tapes took place.

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: Dunlavey's paper trail "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.)

There are two more evidence-related issues pertaining to the torture program.

First, recall that the government has refused to turn over all of Abu Zubaydah's diaries to him [update: here's a more updated description of the diaries status from Jason Leopold]. The

status of both the diaries and the legal argument over them remains largely sealed, so we can't know for sure whether all the diaries remain intact. I believe they are just being withheld and haven't been destroyed, but we don't know for sure.

Also, remember that Alberto Gonzales was wandering around DC with a briefcase full of CYA documents just after he became Attorney General. Among those documents were draft and final versions of OLC opinions relating to torture, and possibly memos describing some operational aspects of the program.

The classified materials that are the subject of this investigation consist of notes that Gonzales drafted to memorialize a classified briefing of congressional leaders about the NSA surveillance program when Gonzales was the White House Counsel; draft and final Office of Legal Counsel opinions about both the NSA surveillance program and a detainee interrogation program; correspondence from congressional leaders to the Director of Central Intelligence; and other memoranda describing legal and operational aspects of the two classified programs.

Since this briefcase appears to have been about CYA, it is unlikely Gonzales would have destroyed any of them. But we know only that they were not in secure custody for about two years.

In other words, at least five pieces of evidence on torture has disappeared or been destroyed. But it could well be more than that.

John Durham? For a guy investigating disappearing evidence, you've been awfully quiet...

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# PAT ROBERTS' "10 REASONS RIGHT OFF" NOT TO EXERCISE OVERSIGHT OVER TORTURE

Practically the first thing Pat Roberts did after he became Chair of the Senate Intelligence Committee was to back down off nascent efforts Bob Graham had made as SSCI Chair to exercise real oversight over the torture program. That's one of the most important details revealed in the Memo for the Record [big PDF] of the briefing Pat Roberts received on the torture program on February 4, 2003. (For more background on this FOIA dump see this post; for the evidence in it that Michael Hayden knowingly lied to Congress see this post.)

## **Roberts' "ten reasons right off" not to exercise oversight over torture program**

In addition to Roberts' accession to the destruction of the torture tapes, he appears to have spiked an effort, started by Bob Graham (who had been SSCI Chair), to exercise more oversight over the torture program.

Roberts' [redacted; staffer?] asked me whether I had "taken up the line" the Committee's, actually Senator Graham's, late November request to undertake its own "assessment" of the enhanced interrogation. I [Stan Moskowitz, head of Congressional Affairs] explained to Senator Roberts the dialogue I had had with [redacted], and our response [sic] that we would not support reading another staffer into the program nor allow any staffer to review the

interrogations in real time or visit the clandestine site where the interrogations were taking place.

**Quickly, the Senator interjected that he saw no reason for the Committee to pursue such a request and could think of “ten reasons right off why it is a terrible idea” for the Committee to do any such thing as had been proposed.**

Turning to [redacted], he asked whether they thought otherwise and they indicated that they agreed with the Senator. [my emphasis]

And so it was that Pat Roberts, in one of his first actions as SSCI Chair, squelched an effort that might have prevented the torture program from metastasizing across our counter-terrorist (and Iraqi) efforts.

#### **Addington’s approval for torture**

Though we’ve long known that David Addington was intimately involved in planning the torture program, and though Maureen Mahoney said as much in her first response to the OPR report for Bybee, I know of no document that describes Addington as **approving** the torture techniques.

Except this one:

The enhanced techniques were described in considerable detail, including how the water board was used. The General Counsel [Scott Muller] described the process by which the techniques were approved by a bevy of lawyers from the NSC, the Vice President’s office and the Justice Department, including the Criminal Division and the Attorney General.

We know NSC legal advisor John Bellinger formally started off the process (though Yoo was already doing research). We know Chertoff and OLC and Ashcroft reviewed the torture memos.

And we also know that Addington has stopped short of saying he “approved” of the techniques, either claiming that he was simply satisfied with the subjects Yoo covered in his memos, or hedging as he did here in testimony to HJC:

Mr. ELLISON. Were you part of a group of folks who made legal decisions on a regular and routine basis that would include Alberto Gonzales, William Haynes, Jim Haynes, and yourself? Were you part of that?

Mr. ADDINGTON. I talked regularly in lots of different meetings with the counsel of the President and his deputy, with the department of defense general counsel, less frequently with the CIA general counsel or acting general counsel, but yes.

Mr. ELLISON. So did you and Messrs. Gonzales and Haynes have sort of an ongoing responsibility or authority to guide and make decisions about legal matters for the Administration with regard to torture of detainees, the conduct of the war on terror?

Mr. ADDINGTON. No. I think it is more monitoring what is going on, discussing it and if you need legal advice on the subject, you would ask a question to the Office of Legal Counsel, which typically would be done either by the counsel to the President, if it is the White House that wants the advice, which the law, by the way, that you all passed provides for.

It is 28 USC something like 511, 512, in that range. And also heads of agencies have the authority to go to OLC and get that legal advice. So they usually do that through their general counsels, either DOD or CIA.

Addington answers the question, “did you make

decisions about torture?," "No." But the CIA told Congress that OVP's lawyers—almost certainly Addington—did.

What does CIA know that David Addington trying to deny?

### **Zubaydah and al-Nashiri fully compliant ... but not**

We know from the CIA IG report that Abu Zubaydah was waterboarded an extra time even though his torturers already believed he was compliant. And we know from the OPR report that Nashiri was tortured after his interrogators already believed him to be compliant.

Why, then, did Jim Pavitt make this claim about them?

Both Zubayda and Nashiri were described as founts of useful information, even though it seems clear that they have not, even under enhanced techniques, revealed everything they know of importance.

Is this the CIA, once again, believing these two had more information than they had? Is this an admission that even fully compliant (per the CIA) detainees will still withhold informatoin? Or did Pavitt say this because, these two shared more after the torture stopped than they had under torture?

In either case, it seems to strike at the claimed logic to the torture program.

### **The perfect match torture tapes**

I find the description of what CIA told Roberts about the torture tapes fascinating.

Pavitt and Muller briefly described the circumstances surrounding the existence of tapes of the Zubayda debriefing, the inspection of those tapes by OGC lawyers, the comparison of the tapes with the cables describing the same

interrogations. According to Muller, the match was perfect and [redacted] who did the review was satisfied that the interrogations were carried out in full accordance with the guidance. Muller indicated that it was our intention to destroy these tapes, which were created in any case as but an aide to the interrogations, as soon as the Inspector General had completed his report. (In a subsequent briefing to Congressmen Goss and Harman, Muller said that the interrogators themselves were greatly concerned that the tapes might leak one day and put themselves and their families at risk.)

First, what CIA didn't say: that the tapes also included some of al-Nashiri's torture. And, that a number of the tapes were destroyed or dysfunctional.

Some perfect match.

And then there's the changing story. Was Muller's elaboration—his addition of the torturers' concerns for their own safety—a response to Harman's hesitation about destroying the tape?

One tiny note: the redaction of the name of the person who reviewed the tapes is one character too short to be John Rizzo.