

WHY WERE THE TORTURE TAPES DESTROYED?

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

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

[snip]

I haven't been able to clear up the mystery either, beyond the fact that a former CIA officer aware of the details of the 2002 interrogation of the two al-Qaeda suspects told me that the tapes' images were "horrific." He believes that although the interrogations fell within the guidelines provided by the Department of Justice, if the public ever saw them, it would conclude that "enhanced interrogation" is just another name for torture.

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

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

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

And in any case, that only describes the evidence on the torture tapes as they existed in 2003 when the IG reviewed them and presumably in 2005 when CIA destroyed them.

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

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

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

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

But what's really too bad is that Durham hasn't been tasked with explaining the broader mystery of why, in the first place, the CIA is even interrogating prisoners of war. The 1947 National Security Act established the CIA as a civilian spy agency, not as some Pentagon backroom where you get to do things you don't want the American people to find out about. But more to the point, the military is much better equipped to interrogate prisoners. It has its own interrogation school at Fort Huachuca, not to mention hundreds of language-qualified and experienced interrogators. It also has the Uniform Code of Military Justice to deal with interrogations that have gone bad. (Some almost inevitably do.) Unlike the CIA, military interrogators have immediate access to legal counsel. It's not an accident that military misdeeds such as those at Abu Ghraib go right to trial, while CIA investigations drag on for years – and drag down morale.

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

The torturers appear to have been more interested in testing the limits of Abu Zubaydah's human endurance than they were in getting usable intelligence from him. And one of the things those tapes may well have shown was

up to 21 hours of human experimentation—potentially pushing techniques like waterboarding and sleep deprivation beyond all limits, potentially using techniques like mock burial the torturers asked for but didn't get approved, and potentially using other techniques entirely.

THE TIMELINE OF TORTURE TAPE DESTRUCTION IN JOHN DURHAM'S DOCUMENTS

As I said the other day, most of the documents we received the other day are the 13 or so documents that CIA had cleared for FOIA release, but over which John Durham had declared a law enforcement privilege. This chart compares what we got with what had been declared in Vaughn Indices in November (this showed the hard copy documents explaining the destruction of the torture tapes) and January (this showed the electronic documents discussing the destruction of the torture tapes; there are 6 files total to this index). While this doesn't show us everything John Durham is looking at (presumably, there are a number of documents that are too sensitive to release), looking at the documents from this perspective gives us a sense of what Durham is investigating.

As you'll see from the chart, I have numbered the documents from 1 to 27. I just assigned them in the order the documents appear in the complete PDF file. I'll also refer to the PDF number for each document.

The Documents Not on Durham's List

First, assuming I matched the documents up to the Vaughn descriptions properly, there are four

documents that were not on Durham's list:

- Document 9, January 9, 2003, Review of Interrogation Videotapes (PDF 24-28)
- Document 11, June 18, 2003, Interview Report (PDF 33-37)
- Document 22, December 3, 2007, Potential Statement (PDF 86-93)
- Document 23, December 10, 2007, Trip Report (PDF 95-99)

I believe these documents all did appear elsewhere in the earlier FOIAs on this (I'm going to try to find the Vaughn descriptions later), but presumably CIA had earlier said it could not release them, which meant it was that decision, rather than Durham's determination, that had prevented their earlier release.

Most of these documents (except the questions) pertain to the CIA Office of General Counsel review of the torture tape, and the Inspector General's subsequent discovery that the original review had neglected to mention key details about blank tapes and discrepancies between what was portrayed in the video and what OLC authorized. Curiously, their release seems to be tied to the events reported by the WaPo, in which John McPherson, reportedly the lawyer who conducted that review, was given immunity to testify before the grand jury in the last month or so. In other words, now that McPherson has testified about this stuff, CIA has decided to release the details of his review publicly. I have included the documents in the timeline below.

Update: I've added in some of the dates reflected in the Vaughn Indices that I think flesh out this timeline. Those dates will not be bolded.

The Chronology on the Tapes

Many of the rest of these documents pertain to the correspondence regarding videotapes. The chronology they show is:

April 13, 2002: Interrogators start videotaping interrogations.

April 17, 2002: Two page Top Secret cable providing guidance on the retention of video tapes.

April 27, 2002: A letter directing the tapes "should all be catalogued and made into official record copies" and asking when they would "arrive here." (Document 1; PDF 1)

May 6, 2002: Someone sends a cable providing guidance to "please do not tape over or edit videos of Abu Zubaydah's interrogations" and "please preserve all videos." Note, we don't get the original copy of this, but it appears in an email forwarding the cable to Scott Muller and John Rizzo in January 2003. (Document 10; PDF)

September 5, 2002: According to October 25, 2002 cable (see below), "HQS elements discussed the disposition of the videotapes" and determined that "the continued retention of these tapes ... represents a serious security risk." (Documents 2 and 3; PDF 3-7)

September 6, 2002: Two emails: A five-page email between CIA attorneys regarding a draft of a cable discussing the disposition of the video tapes, and a one-page email between CIA attorneys on the revisions of a draft cable regarding the disposition of the video tapes.

October 25, 2002: Cable directing field to tape over tapes each day and promising someone will deploy to assist in destroying the existing tapes. (Document 2, Document 3; PDF 3-7)

October 27, 2002: Some excerpts the October 25 cable and another one (which is entirely redacted) into a one-page summary. Note that both prior cables were classified Secret, but this summary is classified Top Secret. (Document

4; PDF 9)

November 28, 2002: It appears this cable was included among those collected in Document 12 some time after the tape destruction. But what we got in FOIA cuts off the cable (and entirely redacts what is there). (PDF 39-50) Note that the November 11, 2009 Vaughn Index described document 12 as a 13 page document, but we've only got 12 pages.

November 30, 2003: John McPherson reviews the torture tapes. This is noted in an undated timeline of the facts surrounding the torture tape destruction. (Document 25; PDF 103-104)

December 1, 2002: A two-page email that discusses the notes of a CIA attorney.

December 3, 2002: After McPherson reviewed the videotapes on November 30, someone sent out a cable stating that it was a mistake to move the videotapes, and ordering that "no tapes will be destroyed until specific authorization is sent." Documents 5, 6, and 7 all appear to be identical copies of this cable, save for routing information that is redacted; the routing on Document 6 is very long. (PDF 11-18)

December 3, 2002: A one-page email outlining the destruction plan for video tapes.

December 9, 2002: Someone sends a cable referring to McPherson's review of the videotapes, as well as an inventory conducted on December 3, 2002. The inventory matches this inventory, though Friday's version does not redact the description of Tape 88 as "no video but there is sound" nor the description "begin other materials." Also note the appearance of "H20" below number 75. We don't get the original of this cable, but it appears someone pulled it up from the files some time after the tape destruction in November 2005. (Document 12; PDF 39-50)

December 20, 2002: A two-page memo from the CIA General Counsel to the Director of Central Intelligence discussing the disposition of the

videotapes.

December 20, 2002: At a time when CIA is discussing what to do with the videotapes (there are emails between the Office of General Counsel and Tenet on December 20 and December 26 noted elsewhere in the Vaughn index), someone from Counterterrorism Center (probably their legal department) forwards the October 25 cable to someone else, perhaps to explain why the officers in the field had started taping over tapes on a daily basis. (Document 8; PDF 20-22)

December 20, 2002: Draft/outline of leaks memo, requesting formatting of an attached three page memo.

December 23, 2002: Two-page email with draft language for a memo on disposition of video tapes.

December 23, 2002: One page email described as "first cut at Memo on disposition of AZ videotapes," drafted by CIA OGC.

December 24, 2002: One-page email receipt of a copy of a memorandum and the writing of a cover memorandum regarding the interrogation video tapes.

December 24, 2002: Change to first draft memo on disposition of AZ videotapes.

December 26, 2002: A three-page memo and one-page cover sheet from the CIA General Counsel to the Director of Central Intelligence discussing proposed options for disposition of the tapes.

January 2, 2003: Someone requests HQS decision regarding videotapes. We don't get this cable, but it is noted in Document 12. (PDF-39-50)

January 9, 2003: John McPherson completes his memo on his review of the tapes. (Document 9; PDF 24-28)

January 10, 2003: A meeting to discuss the disposition of the torture tapes. For a variety of reasons, I believe this to be written by George Tenet's Chief of Staff, John Moseman. The

note requests CTC to write a paper explaining the reasons to destroy the tapes. (Document 24; PDF 101)

January 12, 2003: A one-page Top Secret email asking what actions will make the video tapes an official record. A one-page email proposing how to reference the video tape for a briefing. A two-page email informing and reminding CIA officers of the question, what actions make the video tapes an official record.

January 13, 2003: Someone forwards Scott Muller and John Rizzo and others "early background on videotapes." The subject line says four cables are included, but only one appears here, the one sent on May 6, 2002 described above. (Document 10; PDF 30-31)

January 2003: Document 27 (PDF 110-122) appears to have been written before January 28, 2003 because it refers to the "Guidelines" that were finalized on January 28 as still being coordinated by CTC. The document summarizes Abu Zubaydah's treatment up to that point and speaks of his status in the present tense. I'll do a separate post on this, but the document may have been part of CIA efforts in January 2003 to justify destroying the torture tapes. It gives some background on him, lists the intelligence he has given, lists the techniques used on him (though, curiously, the description of the techniques is redacted), describes the videotapes and OGC's review of them, and describes the efforts to fix the torture program. In addition, there are two extensive redacted sections. Most curiously, there is a one-page passage, classified "Secret" (the rest of the document is classified "Top Secret") that summarizes who AZ was claimed to be, intelligence he provided, and his injuries. I suspect the entire document was used to brief Congress during their February 4 and 5 briefings, and the Secret summary was what the members of Congress were allowed to take away—though that's just a wild guess.

June 18, 2003: Someone from CIA Inspector

General's office interviewed John McPherson. The report makes clear that McPherson did not think the videotapes that had been taped over were "noteworthy." The report also suggests that McPherson had not compared the videotape content with guidance sent to the interrogators to see if it matched. McPherson appears to have said he was not under any pressure to ignore those aspects of the videotapes. (PDF 33-37)

July 13, 2003: A cable from the field asking for instructions for disposition of hard drives and magnetic media. Note, we don't have the original document, but it appears someone pulled it up from the files some time after the tape destruction in November 2005. (Document 12; PDF 39-50)

August 3, 2003: Someone sends a cable to the field directing someone to maintain control of all magnetic media (but not the videotapes in someone's possession), and forward the inventory document for it to someone. We don't get the original of this cable, but it appears someone pulled it up from the files some time after the tape destruction in November 2005. (Document 12; PDF 39-50)

August 4, 2003: Someone sends a cable asking for "a cable from the Inspector General authorizing ref action." We don't get the original of this cable, but it appears someone pulled it up from the files some time after the tape destruction in November 2005. (Document 12, PDF 39-50)

April 1, 2004: A completely redacted event that appears in the undated timeline summarizing the key events surrounding the torture tape destruction. (Document 25; PDF 103-104)

April 12, 2004: A two page email discussing what actions would make the tape an official record.

May 11, 2004: David Addington and Alberto Gonzales tell Scott Muller not to destroy the torture tapes. This is noted in an undated timeline of the torture tape destruction. (Document 25; PDF 103-104)

November 10, 2004: Two page email chain on the video tapes and OIG's open investigation, described as "Memo w/OIG comment on tape disposition."

July 28, 2005: A one-page email with a CIA attorney's opinion, conveyed to his client, regarding the DNI's position [on] the destruction of the videotapes.

November 4, 2005: The timeline event reads: "At ODDO request, [redacted]CTC[redacted] drafts language to be included in a cable from [redacted] requesting DD0 approval to destroy the tapes. [Redacted]CTC[redacted] sends the language to [redacted] and the ODDO front office, as well as OGC for approval. The plan was for [redacted] to cut and paste the text into a cable and send it to HQs for approval." (Document 25; PDF 103-104)

November 5, 2005: The timeline event reads: "[Redacted] sends cable requesting approval to destroy the tapes." (Document 25; PDF 103-104)

November 8, 2005: A cable claiming the IG no longer needed the videotapes and OGC had determined they "accurately documented [redacted] activities on video tape" requests approval to destroy the videotapes. Documents 13, 15, and 16 all appear to be identical copies of this cable though with different routing information and (for Document 15) a different typeface. (PDF 52, 57, 59) Note, the timeline suggests this cable was sent on November 5, not November 8. (Document 25; PDF 103-104)

November 8, 2005: A cable granting permission to destroy the tapes. (Document 14, PDF 54-55) The timeline makes it clear that DD0-Jose Rodriguez-authorized the tape destruction. (Document 25; PDF 103-104)

November 9, 2005: The field informs HQ that it has destroyed the videotapes and within a minute of receipt of that cable-at 5:19 AM-someone forwards the cable to someone else. Note, we have both the original cable (Document 18; PDF 64) and the forwarded cable (Document 17; PDF

61-62)

November 10, 2005: The timeline on the tape destruction shows the following three events (Document 25; PDF 103-104):

[Redacted]CTC[redacted] sends a note to [redacted] saying he has gotten [redacted] concurrence on the language for the cable. He also says that he understands [redacted] is going to call [redacted] with the language for the cable rather than email it to him.

[Redacted] receives the note and replies that the exchange with [redacted] has already taken place. He phoned the language to [redacted] sent the cable. He notes that DDO already approved the destruction of the tapes.

AGC learns that the tapes were destroyed and contacts DCIA Chief of Staff. AGC notes that DNI and Harriet Miers as recently as a few months ago opposed the idea of destroying the tapes. He states they need to be notified of the destruction as well as others.

Also on November 10, 2005, someone sends two cables with the subject line "Short backgrounder" to Dusty Foggo, first saying everything on the tape destruction made sense (though John Rizzo was upset), then noting that the approvals had not been as originally represented. (Document 20; PDF 81-82)

November 25, 2005: The November Vaughn (but not the January one) describes a 3 email chain with the subject line "short backgrounder" with a November 25 date. This suggests that the two emails sent on November 10 (Document 20) were actually part of a 3-email chain, the last email of which was written on November 25. Note that since the November Vaughn was hard copy documents and the January one electronic copy documents, there may not be an electronic copy of this email chain.

September 25, 2007: Someone sends another person the information for the email authorizing the tape destruction, as if asking for help doing a search. (Document 21; PDF 84)

October 5, 2007: Someone forwards the September 25 email, as if asking someone else for help searching for the email. (Document 21; PDF 84)

December 3, 2007: This appears to have been a request for a statement for the NYT, which broke the story of the torture tape destruction the following day. It begins by laying out the problem we've identified with the tapes—that they showed that interrogators had used waterboarding more times and differently than they had been directed to. 7 pages of this document remain totally redacted (suggesting that the problems with the tapes were not just what they portrayed). (Document 22; PDF 86-93)

December 10, 2007: This appears to be someone sending the IG, internally, the summary of a trip taken during the IG Review of the interrogation program. This may have been the May 2003 trip when IG reviewed the tapes themselves, though the report also seems to discuss interviews. Note, the forwarding email says the summary table—which appears to summarize all Abu Zubaydah's waterboard applications—"was subsequently refined. (Document 23; PDF 95-99)

December 20, 2007: Some pulls the three cable sequence on tape destruction (perhaps for the IG?), as well as a document dated August 19, 2003. The November Vaughn suggests the August 19, 2003 document discusses an "unrelated counter-terrorism operation." (Document 19; PDF 66-79)

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

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

I've long been interested in the role of the earlier destruction of the torture tapes in Durham's investigation. As you recall, in December 2002, when the interrogators were getting antsy to destroy the torture tape, a CIA Office of General Counsel lawyer, John McPherson, reviewed the torture tapes to make sure they matched the cables. He reportedly said the tapes matched the logbooks and the direction the interrogators received. But when CIA's Inspector General reviewed the tapes in May 2003, they discovered that 15 of the tapes were largely or completely blank and or damaged.

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

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

On January 9, 2003, McPherson did a report on his review of the tapes (PDF 24-28). Though it

is heavily redacted, it appears that he reviewed the log book and the video, claimed to have watched every minute of the video, and declared that the video accurately reflected what had been recorded in the logbook.

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

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

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

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

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

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

guidance before answering.

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

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

DURHAM GOING AFTER THE FIRST DESTRUCTION OF TORTURE TAPES?

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

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

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

Assistant U.S. Attorney John H. Durham, who is leading the investigation,

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

The agency lawyer, John McPherson, could appear before a grand jury later this month or in April, according to the sources, who spoke on the condition of anonymity because the investigation continues. CIA lawyers have been essential to understanding the episode because they offered advice to agency personnel about handling the tapes, and whether they should have been included when agency records were turned over in other court cases. McPherson is not thought to be under criminal jeopardy but had previously hesitated to testify, the sources said.

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

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

An OGC attorney reviewed the videotapes in November and December 2002 to ascertain compliance with the August 2002 DoJ opinion and compare what actually happened with what was reported to Headquarters. He reported that there was no deviation from the DoJ guidance or the written record.

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

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

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

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

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

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

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

waterboarding that violated the terms of the Bybee Two memo, but also destroyed evidence of the first round of destruction.

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

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

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

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

BULL DURHAM UPDATE:

TORTURE TAPE INVESTIGATION WINDING DOWN AGAIN

There is a report out in the Washington Post that John Durham may be winding up his torture tape investigation and that little, if anything, will come from it.

OLC IDENTIFIED 31 MISSING DOCUMENTS DURING PERIOD LEADING UP TO TORTURE TAPE INVESTIGATION

As I reported on Monday, DOJ lost not only John Yoo and Patrick Philbin's emails from the period when they were writing the Bybee Memos. It also lost at least 10 documents on torture, a number of them that went into the development of the torture memos.

We first learned these documents had disappeared from a declaration that David Barron, Acting head of OLC, submitted in response to an ACLU FOIA last September. In it, he described the six month effort OLC made last year to recreate the original Vaughn document first created in 2005. With a lot of searching last year, OLC was able to identify 171 documents that might be the documents referenced in the original Vaughn Index.

But OLC appears to have first discovered the problem before last year. Barron's declaration

describes one OLC lawyer attempting—but failing—to identify all the documents in the Vaughn index during late December 2007 or early January 2008. At that time, the OLC lawyer was only able to identify 150 of the 181 documents listed in the Vaughn index.

On at least one occasion in late 2007 or early 2008, when the documents were recalled by OLC from OPR for purposes of another matter, an OLC attorney made significant efforts to recompile the 181 documents listed on the original Vaughn index based on the descriptions of the documents in that index. The attorney made tentative identifications of approximately 150 of the 181 documents and marked the original documents with pencil numbers corresponding to the Vaughn index in the lower left-hand corner of each of those 150 documents.

It's likely, but not certain, that these documents were recalled as part of DOJ's review of whether it should criminally investigate the torture tape destruction (news of the tape destruction broke December 6 and Mukasey announced the investigation on January 2). And whether or not that's why they recalled these documents, the OLC lawyer who tried to recreate the Vaughn index had to have been aware that CIA had destroyed evidence of its torture program.

And yet, according to Barron's declaration, no one made any attempt to look for the 31 documents that OLC lawyer had not been able to find for more than another year.

That's a remarkably lax attitude regarding documents potentially disappearing from a SCIF.

TORTURE TAPE DESTRUCTION, THE OGC REVIEW, AND THE IG REPORT

One of the most fascinating aspects to the torture tape Vaughn Index is the way it hints at a tension between the torturers in the field growing increasingly panicked about the torture tapes and the CIA's Office of General Counsel's decision to review the tapes and, subsequently, not to destroy them (yet). The tension grew worse as the Inspector General decided to review the torture program (and ultimately, the tapes) and as Jane Harman challenged the CIA's careful excuse allowing them to destroy the tapes. This post will trace what we can see of that tension.

Early in the Abu Zubaydah interrogation, there were two communications pertaining to how to retain the torture tapes. (Note, I've indicated: the classification of the documents as question, whether John Durham asserted they were protected under his investigation, and some indication of attorney involvement, though the latter deserves closer attention, as there is significant variation in the way CIA claimed exemption under attorney work product.)

April 17, 2002: Someone (the Vaughn provides no sender or recipient information) sends cable providing guidance on the retention of the video tapes (TS; atty doc)

April 27, 2002: One CIA officer sends another CIA officer cable, copied to several additional officers and attorneys, regarding the interrogation of Abu Zubaydah (S; Durham document)

From the period of August (around the time the waterboarding occurred) until November, 2002 the Index shows recurrent and (as far as we can tell

from a Vaughn Index) increasingly urgent communications from the Field, asking to change the protocol regarding interrogation tapes and ultimately, asking to destroy them.

August 20, 2002: Field write to HQ discussing "policy for the security risks of videotape retention and suggests new procedures for videotape retention and disposal" (S)

September 6, 2002: Email between CIA attorneys, titled, "Destruction proposal on disposition of videotapes at field" (S; atty doc)

September 6, 2002: Email between CIA attorneys on revisions of a draft cable regarding the disposition of the video tapes (S; atty doc)

October 25, 2002: Field writes to HQ "discussing the security risks if videotapes are retained" (S; Durham document; atty doc)

November 6, 2002: CIA officer sends CIA officers and attorneys email, titled, "Tapes issue," following up with the proper procedures for destruction of the interrogation video tapes (S; atty doc)

In mid-November (note, the dates on these emails may be confusing if sent from different sides of the date line), an officer in the Field expresses "personnel concerns" with the disposition of the videotapes. In what appears to be a response, HQ asks to have a "random independent review of the video tapes, before they are destroyed." This seems to be the genesis of what became the OGC review of the tapes.

November 15, 2002: HQ sends email to Field titled, "Videotapes-response" requesting "to have a random independent review of the video tapes, before they are destroyed" (TS; atty doc)

November 15, 2002: HQ sends email to Field titled, "Video tapes" requesting "to have a random independent review of the video tapes, before they are destroyed, to ensure accuracy" (TS; atty doc)

November 15, 2002: Email chain "including an email from a CIA officer in the field to CIA officers at headquarters expressing personnel concerns with the disposition of the video tapes and headquarters request to have a random independent review of the video tapes, before they are destroyed, discussed in a two-page email from a CIA attorney at headquarters to the field that is also part of the email chain (TS; atty doc)

November 16, 2002: Someone (the Vaughn provides no sender or recipient information) sends email, forwarding two additional emails, between CIA attorneys, discussing draft language on the logistics of destroying the tapes" (TS; atty doc)

November 16, 2002: Field officer sends CIA attorneys and officers at HQ email informing HQ of "personnel concerns regarding the videotapes" (TS; atty doc)

Here's how the 2004 CIA IG Report described the OGC review.

An OGC attorney reviewed the videotapes in November and December 2002 to ascertain compliance with the August 2002 DoJ opinion and compare what actually happened with what was reported to Headquarters.

Here's how CIA described the review in a FOIA declaration description of it.

The CIA OGC also conducted a legal

review of the interrogation of Abu Zubaydah to ensure compliance with the relevant legal and policy guidance. This review was implemented not only to ensure that the interrogation of Abu Zubaydah was consistent with the law and United States policy, but also to improve the CIA's program going forward. Document 60 contains the analysis and impressions of a CIA Attorney shortly after the Attorney's review of subsequently destroyed videotapes, as well as the relevant cable traffic. The document reflects the CIA attorney's view on what facts were relevant to determine whether the interrogation of Abu Zubaydah was compliant with law and policy, as well as what information would be informative to CIA management in improving the program going forward.

She went on to suggest the review may have been designed to provide interrogators with a defense in the future.

Throughout the CIA's terrorist interrogation program the CIA was concerned that its officers could face civil and criminal liability for their actions. The CIA directed its attorneys to review the record of the first interrogations to ensure that they were conducted consistent with the Department of Justice's guidance, which could arguably provide a defense to possible domestic and international criminal and civil liability. Therefore, while the CIA attorneys may have performed their analysis to determine legal and policy compliance, that analysis was in the context of evaluating possible defenses for anticipated civil and criminal litigation.

Of course, both of these descriptions are retrospective descriptions, written years later

and after much more legal discussion occurred. In any case, within days of what is apparently the first mention of the review, it appears the OGC review is planned, even while discussion of the destruction of the videotapes continues.

November 19, 2002: HQ writes to Field "discussing the disposition of the videotapes, and the duties of the CIA attorney who is visiting the field to review the tapes" (S; atty doc)

November 20, 2002: Field writes to HQ "discussing the OGC review of the tapes" and also (per subject line) their disposition (S)

November 27, 2002: Field writes to HQ "requesting approval for destruction of the interrogation videotapes" (S; OGC doc)

November 27, 2002: HQ writes to Field "regarding disposition of tapes and discussion action for base compliance according to policy guidance" (S; atty-client privilege)

November 28, 2002: Someone (the Vaughn provides no sender or recipient information) sends a cable discussing "a CIA attorney's travel to a field station to survey video tapes and review pertinent logs, and cable traffic" (TS; OGC doc)

November 30, 2002: Field writes to HQ discussing the disposition of "classified media" in the field (S)

December 1, 2002: Someone (the Vaughn provides no sender or recipient information) sends email discussing "the notes of a CIA attorney" (S; atty)

The discussion of "notes" of a CIA attorney as well as discussion surrounding travel suggests the review may have occurred in the late November time frame. When the OGC attorney

reviewed the tapes, he presumably found the same thing the IG Report did:

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

Note that that 21-hour period may well have been from the same period—around August 20—when the second email pertaining to torture tape destruction was written.

December 3, 2002: Someone (the Vaughn provides no sender or recipient information) sends email “outlining the destruction plan for video tapes” (TS; atty doc)

December 3, 2002: CIA HQ writes to Field to discuss “the destruction of videotapes” and other issues relating to the “closing of facility” (S; Durham document; OGC doc)

In mid to late December, the discussion of the tape disposition heats up again.

December 19, 2002: Someone (the Vaughn provides no sender or recipient information) sends email titled “Cable in coordination—destruction of tapes current held at field” (S; atty doc)

December 19, 2002: Someone (the Vaughn provides no sender or recipient information) sends email “requesting a draft of a short note decision response to groups of interest on the disposition of the video tapes” (TS; atty doc)

December 20, 2002: HQ writes Field about “source material on videotapes ...

regarding the policies on tape usage and destruction" (S; atty doc)

December 20, 2002: Someone (the Vaughn provides no sender or recipient information) sends email titled "Companion email-short decision note on tapes issue" ... "providing guidance on a short note decision response to groups of interest on the disposition of the video tapes" (TS; atty doc)

Given the length of this "leaks memo" email, it may be an early draft of the OGC review, rather than a draft of the shorter memo on tapes destruction following it.

December 20, 2002: Someone (the Vaughn provides no sender or recipient information) sends email titled "Draft/outline of leaks memo turn into memo form" ... "requesting formatting of an attached three-page memorandum" (S; atty doc)

December 23, 2002: Someone sends (the Vaughn provides no sender or recipient information though series suggests CTC and/or OGC) email titled "First cut at Memo on disposition of AZ videotapes" ... "regarding a draft memo drafted by CIA OGC regarding the tapes" (U; atty doc)

December 23, 2002: Someone (the Vaughn provides no sender or recipient information) sends email titled "First cut at Memo on disposition of AZ videotapes" ... "with draft language on the disposition of the video tapes" (C; atty doc)

December 24, 2002: Someone (the Vaughn provides no sender or recipient information) sends email discussing changes to the first draft of memo regarding disposition of torture tapes (U; atty doc)

December 24, 2002: Someone (the Vaughn provides no sender or recipient information) sends email titled "Tapes-CTC memorandum re tapes" ... "confirming receipt of a copy of a memorandum and the writing of a cover letter regarding the interrogation video tapes" (U; atty doc)

The OGC review is completed, as a Memorandum for the Record, on January 9, 2003. Immediately thereafter, the discussion of the tape destruction continues, but only after what appears to be a discussion about how to make sure the videotapes do not qualify as official records. Note, too, this discussion about language is in anticipation of a briefing, possibly the briefings of Pat Roberts on February 4 and Porter Goss and Jane Harman on February 5.

January 9, 2003: MFR "summarizing the review of the interrogation videotapes" (TS; atty doc)

January 12, 2003: Someone (Vaughn provides no sender or recipient information) asks "what actions will make the video tapes an official record" (TS; atty doc)

January 12, 2003: Someone (Vaughn provides no sender or recipient information) sends email "proposing how to reference the video tapes for a briefing" (TS; atty doc)

January 12, 2003: Someone (Vaughn provides no sender or recipient information) sends email memo "informing and reminding CIA officers of the question, what actions make the video tapes an official record" (TS; atty doc)

January 13, 2003: HQ writes to Field "providing guidance on the procedures for retention of AZ videotapes" (TS; Durham document)

January 13, 2003: Field writes deliberative cable to HQ regarding “status response to the maintenance of video recordings” (TS)

[Not listed—probably January] 13, 2003: HQ writes to Field “providing instructions on how to retain the video tapes” (TS; atty doc)

Between the time CIA first starts talking about how to talk about the videotapes such that they do not become official records, George Tenet institutes a torture policy requiring record-keeping.

January 28, 2003: Tenet issues guidelines on enhanced interrogations, including mandating that records be kept

Then, on February 5, 2003, CIA briefs Jane Harman and Porter Goss. Jane Harman’s follow-up letter makes it clear that CIA revealed it had used waterboarding and told Goss and Harman that the torture tapes were not an official record and the CIA was planning on destroying them. The request for a review of the video tapes might be a response to a Congressional question—or it may be a request associated with the IG Review (which eventually reviewed the videotapes in May 2003). When Muller responds to Harman—after consulting with the White House—he makes no mention of her discussion about the videotapes.

February 5, 2003: CIA briefs Harman and Goss, informing them torture tapes were not official records

February 7, 2003: Email (the Vaughn provides no sender or recipient information) asking “how best to accommodate a request for review of video tapes, without complicating security issues) (U; atty doc)

February 10, 2003: In letter to Muller, Harman notes she has been told the

torture tapes will be destroyed after IG finishes inquiry but warns that “even if the videotape does not constitute an official record,” CIA should retain it (declassified in 2007)

February 19, 2003: Draft response to Harman (S; atty doc)

February 19, 2003: Interview report (participants not indicated) for review of the interrogations (TS; atty doc)

Undated [possibly February 2003]: One page email (the Vaughn provides no sender or recipient information) scheduling a meeting to discuss disposition of video tapes (S; Durham document)

February 22, 2003: Someone (the Vaughn provides no sender or recipient information) sends email titled, “Harmon letter” ... “discussing a meeting between CIA and White House regarding the CIA’s response to a congressional inquiry” (TS; atty doc)

February 28, 2003: Muller responds to Harman without acknowledging or responding to her point about videotapes

Harman noted in her letter that she had been told the videotapes would be destroyed after the IG finished his investigation. Shortly before the IG Report was released in 2004, there was another discussion of how to prevent the videotapes from becoming an official record.

April 12, 2004: Someone (the Vaughn provides no sender or recipient information) sends email “discussing what actions would make the tapes an official record” (TS; atty doc)

Note that there is probably some further discussion of the OGC review of the videotapes in the IG Report that is redacted, since Jay

Rockefeller requested it as a document in 2005, shortly before the torture tapes were destroyed.

Finally, there is a reference to the ongoing investigation into the OGC report later that fall.

November 11, 2004: Memo and email chain (the Vaughn provides no sender or recipient information) on OIG's open investigation (TS; atty-client doc)

I noted yesterday that Jose Rodriguez retired (announced September 14; effective September 30) and John Rizzo withdrew his nomination to be General Counsel (September 25) just as CIA was reviewing who approved the torture tape destruction in 2007. What I neglected to mention is that days later, on October 11, the NYT reported that Michael Hayden started an investigation into John Helgerson's purportedly unfair pursuit of those involved in the detention and torture program. Both Michael Hayden and John Helgerson would have to recuse themselves from the torture tape inquiry.

This, obviously, is just a sketch of the way the desire to destroy the torture tapes led to the OGC review, which led to apparently delicate efforts to pretend the torture tapes were not official records, which intersected in some way with the IG Report(s).

TORTURE TAPES AND CIA RETIREMENTS

Jose Rodriguez retired and John Rizzo withdrew his nomination to be CIA General Counsel just as the CIA was becoming aware again of the torture tape destruction.

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

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

November 1, 2005: Bill Frist briefed on torture.

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

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

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

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


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

November 14, 2005: Govt tells Brinkema

it has no audio or video tapes.

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

TORTURE TAPE DESTRUCTION ACCOUNTABILITY: HOW IT IS DONE

 When the government possesses videotape evidence of the torture of subjects under its dominion and control, there is only one reason to destroy the tapes. That reason is not because they possess no evidentiary value; in fact it is the direct opposite, it is because they are smoking guns. Videotapes are definitive for one of the two sides; they either prove the subject was tortured, or they prove that he was not.

Either way, videotapes of detainee treatment are of paramount evidentiary value where there are allegations of torture. It would be insane to argue that such tapes have “no possible evidentiary value”; yet that is exactly what the United States government has officially claimed as their rationale with respect to the infamous destruction of the “torture tapes” depicting the treatment of detainees Abu Zubaydah and Abd al-Rahim al-Nashiri. The tapes were wantonly

destroyed by the CIA in 2005, news of the destruction became public via a December 6, 2007 article in the New York Times and the DOJ specially assigned a prosecutor, John Durham, at the end of December 2007.

In the nearly two years that have elapsed since the appointment of Durham, he and the crack US Department of Justice have apparently not been able to find anything wrong with the destruction of the torture tapes. But, once again, US Federal courts have demonstrated the dithering perfidy of the Executive Branch, whether it be that of George W. Bush or, in many key Constitutional respects, his clone, Barack Obama.

From the Kansas City Star:

A Missouri prison inmate claims he was restrained for 17 hours without breaks to get a drink of water or use the bathroom.

But videotape that could prove or disprove Darrin Scott Walker's allegations of abuse cannot be found.

And a federal judge this week concluded that prison officials intentionally destroyed the tape "in a manner indicating a desire to suppress the truth."

U.S. District Judge Richard Dorr made the ruling in a lawsuit Walker filed alleging that he was subjected to cruel and unusual punishment.

The case is Darrin Scott Walker v. Michael Bowersox, and is filed in the Western District of Missouri (WDMO) in Case No. 05-3001-CV-S-RED. Here is a copy of Judge Dorr's Order.

First off, it should be noted that as bad as the alleged torture of *Walker* is, it is nowhere near the the sadistic and egregious conduct performed upon Zubayduh and al-Nashiri. Secondly, in *Walker*, the court was confronted with a tape

that was “lost”, maybe taped over. In the cases of Zubayduh and al-Nashiri, the US government, with malice aforethought, wantonly and intentionally physically destroyed the evidence; light years worse conduct than that in *Walker*. Yet Judge Dorr blistered the state for its acts in destruction of evidence:

For all of the following reasons, this Court agrees with Walker that the videotape was intentionally destroyed in a manner indicating a desire to suppress the truth. The prison had adopted a policy that required episodes on the restraint bench be videotaped. The Defendants offered no explanation of what happened to the tape, other than the fact the tape could have been taped over, which indicates intentional destruction. The videotape was delivered to a responsible person for safekeeping by people who believed the videotape should have been kept in case of litigation. The Defendants were on notice to keep the videotape because prison officials knew Walker was considering a lawsuit the night of the incident. Lastly, the loss or taping over of the videotape was not a first time incident.

You have to wonder what Judge Dorr would think of the acts of Jose Rodriguez, the CIA and the highest levels of authority in the Executive Branch in destroying the “torture tapes” if this was his opinion in *Walker*. Dorr went on to hold that there should be a presumption that the destroyed tape was negative to the interests of the government in *Walker* and cited strong authority for said holding.

The *Walker v. Bowersox* case, and the strong foundation it is based on, just adds to the curiosity of the lack of ability of John Durham to find addressable conduct in the case of the torture tapes. Granted, one is a civil rights lawsuit, and one is a criminal investigation for

obstruction, but the theory of culpability is the same.

Hey John Durham, where are you and what say you?
Or are we just going to be peddled a bunch of
Bull by Durham?